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Emperor Vs. Mathuri and ors.

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Court : Allahabad

Decided On : Nov-26-1935

Reported in : AIR1936All337; 163Ind.Cas.253

Appellant : Emperor

Respondent : Mathuri and ors.

Judgement :

Harries, J.

1. The appellants, Mathuri, Ram Bharose, Mt. Sunder, and Bishnu were, together with Sri Kishan, Suraj Prasad and Pyare Lal, tried by the learned Sessions Judge of the Farrukhabad district upon a number of charges. Mathuri and Ram Bharose were each charged with offences under Sections 302 and 457, I.P.C. Sri Kishen was charged with an offence under Section 460, I.P.C., whilst Mt. Sunder, Bishnu, Suraj Prasad and Pyare Lal were each charged with an offence under Section 411, I.P.C. All the accused were tried together upon these charges and eventually Sri Kishen, Suraj Prasad and Pyare Lal were found not guilty of the respective charges brought against them and acquitted. Mathuri and Ram Bharose were found not guilty of murder under Section 302, I.P.C., and were acquitted upon that charge, but they were convicted under Section 460, I.P.C., though they were not specifically charged with an offence under that section, the charges against them being under Sections 302 and 457, I. P. C , only. Mt. Sunder and Bishnu were

each convicted under Section 411, I.P.C., Mathuri and Ram Bharose were each sentenced to transportation for life under Section 460, I.P.C., whereas Mt. Sunder and Bishnu were each sentenced to a term of two years' rigorous imprisonment under Section 411, I.P.C.

2. Against their respective convictions, each appellant has preferred an appeal to this Court and such is the subject-matter of Criminal Appeal No. 72 of 1935. On the other hand the Local Government being dissatisfied with the acquittal of Mathuri and Ram Bharose upon the charges under Section 302, I.P.C., and with the acquittal of Sri Kishen upon the charge under Section 460, I.P.C., have preferred an appeal to this Court alleging that these acquittals are against the weight of evidence and, therefore, illegal. Such is the subject-matter of Criminal Appeal No. 266 of 1935. Sri Kishen is not before the Court and is said to be absconding and consequently we are not concerned with his case in this judgment. However, it is convenient to dispose of the appeals of Mathuri, Ram Bharose, Mt. Sunder and Bishnu and of the Government appeal against the acquittal of Mathuri and Ram Bharose in one judgment and that is the course we propose to follow.

3. The charges against the appellants arose out of an occurrence which undoubtedly took place upon the night of 17th/18th May 1934 at the house of one Mt. Ram Devi in Mohalla Lohai in the city of Farrukhabad. On that night a burglary was committed at this house. during which ornaments and jewellery to the value of about Rs. 35,000 were stolen and the occupants of the house, viz., Mt. Ram Devi and a young boy Bhagwati Prasad were foully done to death. It is the case for the prosecution that Mathuri, Ram Bharose and Sri Kishen were concerned in this burglary and that eventually part of the stolen property was received by the appellants Mt. Sunder and Bishnu and others, hence the charge under Section 411 against them. The facts upon which the prosecution was based can be-shortly stated as follows; Mt. Ram Devi was a rich Marwari widow who lived in the second storey of a house in mohalla Lohai in Farrukahabad City. On the ground floor of this house were two shops, one occupied by a firm dealing in cloth and the other by a firm dealing in brass-ware and similar merchandise. Mt. Ram Devi was at this time disposing of her furniture and jewellery and it is said that on the day of this

murder there was jewellery in her house to the value of about Rs. 35,000. Persons came from time to time to see this jewellery and it is said that Mathuri who was a goldsmith had been to the house on a number of occasions either to see the jewellery with a view to purchasing some of it or to advise Mt. Ram Devi as to its sale. Some time previous to the murder Mt. Ram Devi's two daughters named Mt. Bhagirathi and Mt. Gomti had come from Calcutta to stay with their mother, but eventually both left. Mt. Gomti however left her young son Bhagwati Prasad with his grandmother Mt. Ram Devi had only one servant, Maiku by name, but it is said that a few days before the murder Maiku-had been taken ill and one Birja was performing his duties in his stead.

4. It is the case for the prosecution that Mathuri, Ram Bharose, Sri Kishen, Birja (who is said to be absconding) and Puttu Singh, who became an approver, were the persona concerned in this burglary and the murders which undoubtedly took place during the course of this occurrence. It is said that some weeks earlier Mathuri, Sri Kishen, Birja and Puttu Singh had contemplated breaking into this house, but that the attempt miscarried. However, on 17th May 1934, it is alleged that the miscreants met together and determined that that night was a favourable opportunity to ransack this house and deprive Mt. Ram Devi of her jewellery. It is said that arrangements were made by Birja who was temporarily acting as Mt. Ram Devi's servant to leave the house open, so that the burglars could get in without making any noise It is the case for the prosecution that that night Mathuri, Ram Bharose, Sri Kishen, Birja and Puttu Singh got into this house, remained there until the occupants were asleep and then began to break open the almirahs, boxes, etc., in which the ornaments and jewellery were stored. The noise, it is said, awoke Mt. Ram Devi and the little boy Bhagwati Prasad and the former recognised Mathuri and Birja who were well known to her. It is then said that the five men fearing that they would be exposed decided to kill both the widow and the little boy and this they did by strangling both of them with a rope. After the occupants of the house had been disposed of in this manner the burglars completed the work of ransacking the house and then made good their escape. It is said that all but Birja went out of the house through the main door which Birja locked from the inside. He then made good his escape by crossing the roofs of the houses adjoining, but before he did so he let down a rope from the balcony of an

adjoining house in order to create the impression that the burglars had got in or escaped by means of such rope. It is said by the prosecution that in making good his escape Birja left his shoes on one of the roofs, which shoes, were eventually identified as being his property.

5. On the morning of 18th May 1934 the occupants of the shops on the ground floor of this house noticed the rope which was dangling from a balcony near by and when they found the door of Mt. Ram Devi's house locked and no signs of the occupants moving about they became alarmed and made a report at the thana. As a result of this report Sub-Inspector Govind Prasad went to the house and on obtaining entry found Mt. Ram Devi and Bhagwati Prasad dead having obviously been murdered by some one. He at once sent a report to the kotwal of the city who came on to the scene and investigation began immediately. A sansi was found on the premises and Birja's shoes were found in premises nearby. These shoes were put up for identification and were identified as being, the property of Birja and in consequence on 20th May 1934 Birja's house was searched but nothing incriminating was found. In the house, however, was found a photograph of the appellant Mathuri and the females of his house and this convinced the police that Mathuri was a close friend of Birja Mathuri was consequently, on 23rd May 1934, arrested on suspicion and his house was searched the following day, but nothing incriminating was found therein. However, a photograph similar to that found in Birja's house was discovered in Mathuri's house and this strengthened the conviction of the police that Mathuri and Birja were on terms of the closest friendship. Investigation was vigorously pursued and from some information received Puttu Singh was arrested on 25th May 1934 in the village of Sirauli and upon being searched there was found upon his person eight golden soverigns, Rs. 8 and change amounting in all to Rs. 13-3-0 and a gold ring.

6. On the following day Puttu Singh made a statement to the police and later took the kotwal to his house where from under a bed of pudina plants he dug out jewellery and ornaments worth Rupees 3,000. These ornaments and jewellery have since been identified as being the property of Mt. Ram Devi which disappeared on the night of this burglary. On 30th May 1934 Puttu Singh was taken before Mr. M. W Abbasi, I.O.S., who recorded his confession. On 31st May

1934 Ram Bharose was arrested in the village of Ikauri and upon his person were found five golden sovereigns and Rs. 10 On 30th June 1934 Sri Kishen was arrested in Hazratganj in the district of Budaun but nothing incriminating was found upon him. Immediately the murder was discovered the daughters of Mt. Ram Devi. viz. Mt. Bhagirathi and Mt. Gomti, were sent for, and on 22nd May 1934 Mt. Bhagirathi discovered akatarni on the premises which obviously was not the property of the deceased woman. On the night of 9th June 1934 Mt. Bhagirathi on removing some broken boxes in one of the kothris of the house found two caps which, it is said, belonged to two of the persons concerned, viz. Mathuri and Birja. Birja could not be arrested and his whereabouts have remained unknown until this day. Birja, however, is a native of the village of Uberia in the district of Hardoi and a warrant to arrest him together with a search warrant of his house was sent to the thanadar in charge of the Pali Police Station and eventually Birja's house was searched but nothing incriminating was found. Later a second search was made of the house when it is said that certain property was recovered which has since been identified as the property of Mt. Ram Devi which disappeared on the night of her murder. Part of this property, it is said, was discovered upon the person of Bishnu who is Birja's brother and the remainder from a heap of bhusa in Mt. Sunder's house. Other property, it is said, was discovered upon a search of the house of Suraj Prasad and Pyare Lal and consequently all four were charged with receiving such property well knowing it to have been stolen.

7. The appellants together with the others who were charged with them were committed by the Magistrate to stand their trial in the Sessions Court and in due course such trial took place. The trial was a joint one of all the accused although the charges made against them were of a vastly different character. Three of the accused, viz., Mathuri, Ram Bharose and Shri Kishen were charged with offences which arose out of the actual occurrence during which Mt. Ram Devi and Bhagwati Prasad were murdered and the house ransacked. Mt. Sunder, Bishnu, Suraj Prasad and Pyare Lal were charged with entirely separate offences, that is, of receiving part of the jewellery stolen, at some date before 19th June 1934, when the property was discovered during the course of a search of their premises. It has been strenuously contended by counsel for the appellants that the joint trial of these accused was contrary to law and that the whole trial is in consequence a

nullity. It is said that there has been a misjoinder of persons and that such misjoinder is an illegality which vitiates the whole proceedings. Consequently it was urged upon us that we should, upon this ground, allow the appeal and quash the convictions and order a retrial. The point taken as to misjoinder of persons is a point of considerable importance and we must deal with it in some detail. Section 233, Criminal P.C., provides that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Sections 234, 235 and 239. It is clear from this section that the general rule is that an accused person is entitled to be tried separately in respect of each charge. Exceptions are made however in certain cases which are dealt with in the sections referred to in Section 233, Criminal P.C.

8. Sections 234, 235 and 236 deal with cases of joinder of charges against an accused person, whereas Section 239 deals with cases where persons can be jointly charged and tried together. What is urged in this case is that there has been a misjoinder of persons and that Section 239, Criminal P.C., does not permit persons charged with offences under Sections 302, 457 and 460, Penal Code, to be tried with persons charged with offences under Section 411, Penal Code. The joinder of all these persons in one trial is only possible if the case comes within Sub-section (e) of Section 239, Criminal P.C., and it is the contention of the prosecution that that subsection precisely covers this case. Sub-section (e) of Section 239, Criminal P.C., provides that persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of property, possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence can be charged and tried together. It is conceded by counsel for the Crown that it cannot be said that an offence under Section 302, Penal Code is an offence which includes theft, extortion or criminal misappropriation, but it is urged that offences under Sections 457 and 460, Penal Code, are clearly offences which do include theft. On the other hand it is contended by counsel for the appellants that as an offence under Section 302, Penal Code, does not include theft it is immaterial whether offences under

Sections 457 and 460 do or do not include theft. It is urged that as persons charged with receiving stolen property were charged jointly and tried together with persons accused of murder the case is clearly outside the purview of Sub-section (e) of Section 239, Criminal P.C.

9. Counsel for the Crown however contended that if offences under Section 457 and Section 460, I.P.C., were offences which included theft then the receivers of the stolen property could properly be joined with the persons charged under these sections. That being so it was contended that there was nothing to prevent the prosecution charging one or more of the persons who were being tried together with other offences provided that such a joinder of offences was permissible by other sections of the Code. Shortly put the case for the Crown was that Ma-thuri, Ram Bharose and Sri Kishen could properly be jointly charged with the receivers of the stolen property because they were charged with offences, viz. , under Sections 457 and 460, I.P.C., which included theft. That being so, there was nothing to prevent a charge of murder being added against Mathuri and Ram Bharose because that offence formed part of the transaction which gave rise to the charges under Sections 457 and 460, I.P.C., and such joinder of charges was clearly permissible under Sections 235, 236 and 239(d), Criminal P.C.

10. In the first place we have to consider whether or not offences under Sections 457 and 460, I.P.C., are offences which include theft. In Sultan Ahmad v. Emperor 1929 Lah 142, it was assumed that an offence under Section 4 57, I.P.C., was an offence which included theft. This is a Single Judge case and is of course not binding upon us and it would appear from the judgment that no argument was addressed to the Court that an offence under Section 457 did not include theft and that both parties proceeded upon the assumption that it did include theft. However, it has been strongly urged before us that an offence under Section 457, I.P.C., is not an offence which includes theft and that neither does an offence under Section 460, I.P.C., include theft The offence under Section 457, I.P.C., is described as lurking house-trespass or house-breaking by night in order to commit an offence punishable with imprisonment. The section reads as follows:

Whoever commits lurking house-trespass by night, or house-breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to 14 years.

11. Section 457 therefore contemplates two offences-one less serious than the other the less serious being lurking house trespass by night or house-breaking by night in order to commit an offence (other than theft) which is punishable with imprisonment and the more serious offence of committing lurking house-trespass by night or house-breaking by night in order to commit theft. It is urged that the more serious offence contemplated in this section is an offence which includes theft and such was the offence with which Mathuri and Ram Bharose were charged.

12. From the plain terms of this section it is clear that the offence is complete when the burglar has got into the house with the intention of committing theft and it is immaterial whether or not he actually succeeds in committing such theft. A burglar who has broken into a house may be discovered and surprised before he can steal anything, but clearly he would be guilty of an offence under Section 457, I P.C., though no theft had been committed. Theft frequently follows an offence under Section 457, but it cannot be said that it is an essential ingredient of that offence. All that is required to complete the offence under Section 457 is that the burglar or housebreaker by night should have an intention to commit theft. It matters not for the purposes of that offence whether a burglar or house- breaker by night does actually carry out his intention and commit theft. Section 460, I.P.C., reads as follows:

If, at the time of the committing of lurking house trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be

liable to fine.

13. A person may be guilty of committing lurking house-trespass by night or house-breaking by night without being guilty of theft or without having any intention to commit theft. Lurking house-trespass by night is defined in Section 444, I.P.C., and house-breaking by night in Section 446, I.P.C., and it is clear that theft or an intention to commit theft is in no way a necessary or essential ingredient in either of these offences. It frequently happens that lurking house trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. That being so, an offence under Section 460 is not an offence which includes theft though it may frequently form part of a transaction which also includes theft. Sri Kishen, as we have stated previously, was charged only with an offence under Section 460, I.P.C. In our judgment neither an offence under Section 457, I.P.C., nor an offence under Section 460, I.P.C., is an offence which includes theft, though, as we have stated, both the offences must frequently be followed by theft and often form part of a larger transaction which may involve or include theft. However Section 239(a), Criminal P.C., only permits persons to be charged and tried together when one set are charged with an offence which includes theft, whilst the others are charged with receiving or retaining or assisting in the disposal or concealment of property, possession of which is alleged to have been transferred by the offence with which the first set are charged. As theft is not an essential ingredient of an offence under either Section 457 or Section 460, I.P.C., possession of property cannot pass as a result of either of these offences.

14. Possession of property may pass as a result of theft following either of those offences, but it does not actually pass as a result of either of them. From the terms of Section 239(e), Criminal P.C., it is in our view clear that an offence which includes theft must mean an offence of which theft is a necessary and essential ingredient. Robbery as defined by Section 390, I.P.C., is clearly an offence which includes theft and so is theft in a dwelling house as defined by Section 380, I.P.C. An offence under Section 382, I.P.C., includes theft and all are clearly offences by which the possession of property is transferred from one person to another. Such offences are clearly within Section 239(e), Criminal P.C., and in our view only such

offences are covered by that section. An offence which may be the forerunner of a theft or which may form part of a larger transaction, which might involve or include theft, cannot in our judgment be said to be an offence which includes theft. That being so, persons charged under Sections 457 and 460, I.P.C., are not persons charged with offences which include theft, and consequently they cannot properly be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the] other offences.

15. For the reasons which we have given the joinder of Mt. Sundar, Bishnu, Suraj Prasad and Pyare Lal with Mathuri, Ram Bharose and Sri Kishen in one trial was not permissible and therefore contrary to law. As we have stated previously, it was further contended by counsel for the accused persons that even if offences under Sections 457 and 460, I.P.C., were offences which included theft, there was a misjoinder in this case, because Mathuri and Ram Bharose were also charged with murder and it was conceded by the Crown that an offence under Section 302, I.P.C., could never be described as an offence which included theft. In our view however if persons can properly be charged and tried together under Section 239, Criminal P.C., there is nothing to prevent other charges being added against one or more of such persons if the addition of such charges is permissible by the Code. On behalf of the accused persons reliance was placed on Sultan Ahmad v. Emperor 1929 Lah 142, previously cited where it was expressly held that receivers could not be jointly charged with persons charged with an offence under Section 436, I.P.C., and with an offence under Section 457, I.P.C. As we have stated previously, it was assumed in this case that an offence under Section 457, I.P.C., was an offence which included theft. At p. 142, Dalip Singh, J., observes:

As regards Section 239(e) the learned Counsel for the Crown wishes me to interpret that section as if it read 'Persons accused of offences one of which includes theft, extortion, etc., and persons accused of receiving or retaining, etc., may be charged and tried together.' I do not see any reason for varying the plain grammatical meaning of the section to this extent. In my opinion, the offences described in Section 457 and Section 436, I.P.C., with which a person is jointly charged, cannot be tried along with offences under Sections 411 and 414 of which other persons are charged, because Section 436 does not include theft or

extortion, though Section 457 does.

16. Counsel for the Crown however contends that if A and B can properly be tried together under Section 239(e) for theft and receiving respectively, other charges not involving theft can be added against A if he could be tried alone in one and the same trial upon such charges as well as the charge of theft. The case of Niranjan v. Emperor (1934) 32 ALJ 658, is a clear authority for this proposition. In that case three persons were charged under Section 411, I.P.C., with receiving stolen property and one of them was in addition charged under the same section with receiving other stolen properties within 12 months and the three accused were tried together. It was held by Bennet, J., that there was no illegality in the trial as there was nothing in Section 239, Criminal P.C., specifically stating that as regards one or more of the persons accused there should be no application to that person or persons of the previous sections of the Code, such as Section 234, Criminal P.C. In that case the three persons were jointly charged and tried together under Section 239(a), Criminal P.C., and the learned Judge held that there was nothing in that section or in the Criminal Procedure Code which prevented further charges being brought against one of the persons provided the joinder of such charges was permissible under Section 234, Criminal P.C. Another case which strongly supports the view of Bennet, J., is the case of Tota Meah v. Emperor 1929 56 Cal 1106. This case lays down that where several accused persons are tried together for the same offence, it is quite possible to have an alternative charge against one of such persons. At p. 1108, Rankin, C.J., states as follows:

The first objection is to the joinder of the parties in the present case. It is said that it was wrong in this case to charge the first accused alternatively under Section 155, I.P.C. It is not here disputed that if the man had been tried by himself the additional charge under Section 155 would have been within Section 236 Criminal P.C., but it is said that, if these persons were all being tried together, the section which has to be regarded is Section 239 and that under Section 239, there is no provision made by which accused 1, in addition to being charged with rioting and other charges arising out of the riot, could be charged in the alternative under Section 155, I.P.C. I cannot see that there is any necessity to read Sections 239 and 236 in such a way as to produce that result. In this particular case the first

accused has not been convicted under Section 155. The question therefore is a pure question whether the trial is vitiated by the joinder in the alternative charge under Section 155, and I. must flatly refuse to lay down that where accused persona are being tried together under Section 239, it is not possible to have an alternative charge against one of those accused persons. I see no necessity whatever to read this section in that manner. Section 236 deals with the question of what charges a single person may be made to meet and it says that, in certain cases, where it is doubtful which offence he has committed, you may charge him with all and you' may charge him also in the alternative. The object of Section 239 is not to say what charges a man may be called upon to meet but to say what persons may be charged and tried together. I see no difficulty at all in that matter.

17. This case is a clear authority for the proposition that where persons can properly be jointly charged and tried by reason of Section 239, other charges permissible by the Code may be added against one or more of such persons. A contrary view has been expressed in Ram Sahai v. Emperor 1921 19 ALJ 610 and in Ram Prasad v. Emperor 1921 19 ALJ 796 . These cases were discussed at length by Bennet, J., in Niranjan v. Emperor (1934) 32 ALJ 658, and it is unnecessary for us further to consider them. In our judgment the view of Bennet, J., in Niranjan v. Emperor (1934) 32 ALJ 658, supported as it is by the case of Tota Meah v. Emperor 1929 56 Cal 1106, is to be preferred to the view expressed in the earlier Allahabad cases. That being so, there is nothing in our view in the Code of Criminal Procedure to prevent charges being added against the thief or receiver in cases where the thief and the receiver are being jointly tried under the provisions of Section 239(e), Criminal P.C., provided that the addition of such charges against one or other of them is permitted by other sections of the Code. However, the point does not really arise in this case, because we have held that offences under Sections 457 and 460, I.P.C., are not offences which include theft and, therefore, the accused persons could never properly be charged and tried together. We have, however, considered the point at some length in deference to the exhaustive arguments which were addressed to us upon this point. To sum the matter up there was no justification for the joinder of Mathuri, Ram Bharose and Sri Kishen on the one hand with the persons accused of receiving stolen property as not one of the charges brought against Mathuri, Ram Bharose and Sri Kishen

involved or included theft.

18. What is therefore the effect of this misjoinder of persons in this case? It has been urged on behalf of the accused persons that the whole trial was vitiated by such misjoinder and that the convictions cannot, therefore, be sustained and must be quashed. In the past misjoinder of persons or charges has been held to be an illegality which vitiated the trial and which was a good ground for quashing convictions in such trials. Such was the course taken in Ram Sahai v. Emperor 1921 19 ALJ 610, Ram Prasad v. Emperor 1921 19 ALJ 796 and Ratan Singh v. Emperor 1921 19 ALJ 915 and numerous other cases in this and in other High Court. In all these cases misjoinder of persons or charges was held to be an illegality vitiating the trial and not a mere irregularity curable under the provisions of Section 537, Criminal P.C. Section 537, Criminal P.C., reads as follows:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch. 27 or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code...unless such error, omission, irregularity...has in fact occasioned a failure of justice.

19. To this section is appended an explanation which reads as follows:

In determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

20. It would appear from the record that this contention as to misjoinder of persons was never urged in the Sessions Court and, if such only amounts to an error or irregularity in the proceedings, it will be difficult for the accused at this late stage to establish that such has occasioned a failure of justice. Further upon the facts of this case it is quite impossible for us to hold that the misjoinder has in fact resulted in a failure of justice. The joinder of the receivers with Mathuri, Ram Bharose and

Sri Kishen could not possibly prejudice the latter's case, and it was not contended before us by counsel for Mathuri and Ram Bharose that such misjoinder had affected their case in any way. It was, however, urged before us that the case of the receivers had been prejudiced by reason of the fact that they were tried together with the persons charged with murder and offences under Sections 457 and 460, I.P.C. It was said that the introduction of the evidence concerning two brutal murders mast inevitably have made the case of the receivers appear far more serious than it really was. We are unable to agree with this view and we cannot assume that a learned Judge of experience would allow his mind to be influenced by the fact that the articles received by the receivers were stolen in circumstances of great brutality.

21. There is nothing upon the record which suggests in the slightest degree that the learned Sessions Judge allowed himself to be prejudiced in any way in dealing with the cases of the receivers by the evidence relating to the murders. In any event, it would be impossible to conducts the case against the receivers without proving that murder was committed during this burglary. To establish the case against the receivers it was necessary not only to prove that they were in possession of certain articles of jewellery but also to prove that such articles had recently been stolen, and the theft could not possibly in this case be proved without the fact being established that two murders were committed at the time of the theft. In fact the joint trial of all these accused persons was probably the most convenient if not a legal way of dealing with the matter. However, it is not necessary for us to consider this aspect of the case because we are not satisfied that the prosecution have established beyond all reasonable doubt the guilt of Mt. Sunder and Bishnu. We shall consider the evidence relating to these two accused persons at a later stage, and having regard to the view which we take it cannot be urged at this stage that they were prejudiced by this misjoinder. As we have stated previously, it has not been contended before us that the misjoinder occasioned a failure of justice in the case of Mathuri and Ram Bharose, but, even so, if the misjoinder is an illegality not curable under Section 537, Criminal P.C., the trial is vitiated and their convictions must be set aside and a re-trial ordered. It is, therefore, necessary to consider whether a misjoinder of persons is or is not an error or irregularity in a charge which is curable by reason of Section 537, Criminal

P.C. In Subramania Ayyar v. Emperor (1902) 25 Mad 61, their Lordships of the Privy Council held that where an accused person was wrongly charged with no less than 41 offences committed within the space of two years, such joinder of charges vitiated the trial as it was clearly contrary to Section 234(1), Criminal P.C., and in their judgment their Lordships remarked as follows:

The remedying of mere irregularities is familiar in most systems of jurisprudence but, it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity.

22. That case is a clear authority for the proposition that a joinder of a large number of charges against an accused person contrary to Section 234(1), Criminal P.C. is an illegality not curable by Section 537, Criminal P.C., and which vitiates the trial. In a later case, however, namely Abdur Rahman v. Emperor 1927 25 AL J 117, their Lordships of the Privy Council commented upon the earlier case of Subramania Ayyar v. Emperor (1902) 25 Mad 61, to which we have previously referred, and in discussing the effect of the misjoinder stated that 'it was possible that it might have worked actual injustice to the accused.' In short their Lordships in the later case appear to have thought that possibly the reason for holding that the trial of Subramania Ayyar was vitiated was not because the misjoinder of charges amounted to something more than an irregularity but because such had in fact occasioned a failure or denial of justice. The matter, however, does not rest there because the effect of these two cases has been considered by a Full Bench of this Court in Kapoor Chand v. Suraj Prasad (1933, 31 ALJ 188. In this case the cases of Subramania Ayyar v. Emperor (1902) 25 Mad 61 and Abdur Rahman v. Emperor 1927 25 ALJ 117 were discussed at length. Mukerji, A.C.J., who delivered the judgment of the Court, made these observations concerning the effect of the decision in Abdur Rahman v. Emperor 1927 25 ALJ 117, upon the earlier decision of Subramania Ayyar v. Emperor (1902) 25 Mad 61, see Kapoor Chand v. Suraj Prasad (1933) 31 ALJ 188 at p. 195:

It may be that their Lordships of the Privy Council, in the later case, wanted to point out that Section 537, Criminal P.C., could not cure the defect in the case of Subramania Ayyar (7), because the Code contained the provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinction between an 'illegality' and an 'irregularity' in the earlier case, which was decided in the year 1901, the legislature did not introduce the word 'illegality' in Section 537 or anywhere else in the Code, although it was amended after that year. this being the state of the law, we do not think that we should introduce a distinction between 'illegality' and 'irregularity'. The sole criterion given by Section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice but if in spite of even a total disregard of the rules of procedure, justice has been done there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong.

23. There can be no doubt that this case lays down that there is no difference between an illegality and an irregularity in procedural matters, and this at first sight appears to be somewhat startling and far reaching. In Parsotam Das v. Emperor 1935 ALJ 1065, Kendall, J., doubted whether the Full Bench in Kapoor Chand v. Suraj Prasad 1933 ALJ 188, really intended to lay down such a far reaching proposition as that stated in Mukerji, Ag. C.J.'s judgment. At. page 1066, Kendall, J., remarks:

It is to be noticed however that the Full Bench was discussing the interpretation of Section 537, Criminal P.C., under which an irregularity in procedure is not to occasion an alteration of an order passed by a Court, and the Full Bench did not really discuss those passages in the Privy Council decision of 1901 or in the later one to which they refer, namely the case of Abdur Rahman v. Emperor 1927 25 ALJ 117, in which it has-been held that a serious defect in the mode of conducting a criminal trial cannot be cured.

24. We are unable to agree with Kendall, J's view that the Full Bench were not discussing the effect of the decision in Abdur Rahman v. Emperor 1927 25 ALJ

117, upon the earlier decision in Subramania Ayyar v. Emperor (1902) 25 Mad 61. It is clear from the judgment of Mukerji, A. C.J., that it had been contended before the Full Bench that what had occurred in that case amounted to an illegality which could not be cured by Section 537, Criminal P.C., which it was urged, dealt only with irregularities and not with illegalities. This argument is stated in terms at p. 195 and after a statement of the argument a discussion of the two Privy Council cases immediately follows. Following that discussion comes the passage which we have already quoted where it is pointed out that no distinction should be drawn between an illegality and an irregularity and that the sole criterion given by Section 537, Criminal P.C., is whether the accused person has or has not been prejudiced. In our judgment this Full Bench case is an authoritative statement of the law and we are bound by it. It defines the scope of Section 537, Criminal P.C., and lays down that whether the defect in procedure amounts to a mere irregularity or to an illegality is immaterial. In the present case the mis-joinder of persons is contrary to Section 239(e) Criminal P.C. and therefore, prohibited by law. It is in our view an illegality and not a mere irregularity, but even so it is yet curable by Section 537, Criminal P.C., if it has not in fact occasioned injustice.

25. The dictum of Mukerji, A. C.J., previously referred to is not in our view so startling and far-reaching as it would at first sight appear. It is true that he states that, if in spite of even a total disregard of the rules of procedure justice has been done, there would exist no necessity for setting aside a final order. However, it is difficult to imagine a case where there had been a total disregard of the rules of procedure yet justice had been done. A total disregard of the rules of procedure would in almost every case, occasion a failure of justice. For example, if a Magistrate refused to record any evidence and yet convicted a person, it would be impossible for a Court to hold that such a disregard of the rules of procedure had not occasioned a failure of justice. The refusal of the Magistrate in such a case to record any evidence might be an irregularity within the meaning of Section 537, Criminal P.C., yet a superior Court would be bound to set aside the conviction on the ground that such irregularity must inevitably have occasioned a failure of justice. In our view we are clearly bound by the case of Kapoor Chand v. Suraj Prasad 1933 ALJ 188 and as we hold that the misjoinder has not in this case occasioned a failure of justice, the defect or illegality or whatever it may be called

is curable by reason of the provisions of Section 537, Criminal P.C. Having rejected the preliminary points taken by the appellants it is now necessary to consider the evidence adduced in this case and we shall first consider the evidence against the appellants Mathuri and Ram Bharose, who were charged under Sections 302 and 457, I.P.C., As we have stated previously Sri Kishen is not before the Court and it is therefore unnecessary to deal with his case.

26. The principal witness for the prosecution against these two appellants was the approver Puttu Singh. He, as we have stated, is alleged to have taken part in the burglary and his evidence is of vital importance in the case. If his evidence be accepted there can be no question that Mathuri, and Ram Bharose, were amongst the persons who broke into Mst. Ram Devi's house, upon the night upon which she and Bhagwati Prasad, were murdered and the house ransacked. Puttu Singh, stated that a short time before the murder a discussion had taken place at the house of one Raj Narain, alias Rajjan Babu concerning the possibility of breaking into the house of Mst. Ram Devi and stealing her ornaments and jewels. He stated that as a result of this discussion it was decided to break into the house and that he together with Sri Kishen, Birja, Mathuri and five strangers set off to do the deed One of the strangers had been given a pistol, but somehow or other this man disappeared and consequently the others decided not to carry out the attempt that night. A short time later it was agreed between the approver and the appellants Mathuri and Ram Bharose, Sri Kishen and Birja, that they should break into Mst. Ram Devi's house on the night of 17th May 1934. As we have stated Birja at this time was acting temporarily as Mt. Ram Devi's servant in the absence of Maiku and according to Puttu Singh it was he who suggested that the night of 17th May 1934 was a favourable one because Mt. Ram Devi and the little boy would be there alone. Puttu Singh says that Mathuri was sent to see if all was quiet at the house and was told to bring with him a 'sansi' and a 'katarni' in order more easily to break open the almirahs and boxes which they expected to find in the house. Puttu Singh describes the movements of the party on the evening in question and says that they saw one Buddan and later one Ram Pratap who wore called as prosecution witnesses. He states that Birja had left the doors unlocked and by this means they got into the house and concealed themselves. When they reached the upper storey they found that Mt Ram Devi and Bhagwati Prasad were awake, so

they lay concealed in a dalan until Mt. Ram Devi put out the light and fell asleep. He then states that the burglars began to search for the jewellery and ornaments, and in doing be awoke Mt. Ram Devi and Bhagwati Prasad. The former immediately recognised Mathuri and Birja whom she knew well and asked them what they were doing there.

27. The party realised that if the woman was left alive, they would he exposed and consequently it was decided to put her and the boy to death. According to Puttii Singh, this was done by means of a rope, Mathuri and Ram Bharose pulling the opposite ends of a loop which had been passed around Mt. Ram Devi's neck and Birja alone pulling the loop which had been passed around the neck of the small boy. After the occupants had been disposed of in this manner the safe, boxes and almirahs were thoroughly ransacked and the party left taking with them the whole of the valuables which were kept in the house. Puttu Singh describes how they left by the stairway leaving Birja behind to lock the door from inside. Birja, he says, then rejoined them having got away over the roofs of adjoining houses, but before doing so having left a rope dangling from a balcony of an adjoining house. Puttu Singh mentions that Birja stated that in making good his escape he had left a pair of shoes on the roofs as he was getting away. Puttu Singh states that when they had got away from the scene of the burglary the loot was distributed. A part of the loot consisted of golden sovereigns, and each of the burglars was given a number of these. This is very significant because upon the arrest of Puttu Singh and Ram Bharose each was found to be in possession of some golden sovereigns. Puttu Singh then describes how he buried his share under some pudina plants in his house. He states that he kept on his person eight golden sovereigns and eight rupees and a red stone ring which he wore on his finger. These sovereigns and ring he states were found upon him when he was arrested on 25th May 1934.

28. Puttu Singh admitted that he pointed out to the police where the stolen property had been concealed and admitted that he had made a confession before the committing Magistrate which had obtained for him a conditional pardon in the case. We must first consider whether or not there is any independent evidence which tends to show that Puttu Singh himself was a member of the gang which broke into Mt. Ram Devi's house on the night in question. In the first place golden

sovereigns were found in his clothing when he was arrested and this in our judgment is very strong corroboration of the truth of his statement that he himself took part in the burglary. Golden sovereigns are comparatively rare now a days, although they are still hoarded by ignorant people. However, it would be strange to find persons carrying in their clothing as many as eight sovereigns for no apparent reason, yet Puttu Singh was found in possession of this money when he was arrested. According to him, this part of the loot he had obtained only a few days previously, and that being so he might well have carried the sovereigns in his clothing in the hope of being able to dispose of them.

29. Further the ring and jewellery and ornaments, which were recovered from the pudina bed in Puttu Singh's house, were identified by Maiku Lal, Mt. Bhagirathi, Mt. Gomti and Jai Ram Das, husband of Mt. Gomti, as being the property of Mt. Ram Devi. The recovery of this property is admitted by Puttu Singh himself and is spoken to by police witnesses, and the identification of this property by persons who must have known most of it well is the very strongest corroboration of Puttu Singh's statement that he took part in the burglary. Puttu Singh's statement that Mathuri and Birja knew Mt. Ram Devi is also amply corroborated by other witnesses who speak to having seen them on the premises on a number of occasions shortly before the murder. The witnesses, who speak of this association of Mathuri and Birja with Mt. Ram Devi, shortly before the murder, appear to be quite independent and have no reason to depose falsely in this case. Further there is the evidence of a number of persons who saw Puttu Singh with the other accused persons on the night of the murder and shortly before Puttu Singh says they entered Mt. Ram Devi's house. We shall discuss this evidence more fully later, but we may state at this stage that we are satisfied that at least one of these witnesses, namely Ram Pratap, did see Puttu Singh and other accused persons near Mt. Ram Devi's house shortly before the time that Puttu Singh says they entered the house and concealed themselves in the upper storey.

30. Having considered all the evidence adduced in this case, we are abundantly satisfied that Puttu Singh's statement that he himself took part in the burglary is true. It is corroborated in the manner which we have stated previously, and further the postmortem report and medical evidence establish that Puttu Singh's

description of how the two unfortunate victims were murdered is true. There can be no doubt whatsoever that Bhagwati Prasad met his death by being strangled with a rope. His neck bore the outward signs of a rope having been pulled tightly around it, and further the underlying tissues and structures showed that great pressure had been exerted in the region of the neck which had resulted in strangulation. There were no outward signs of strangulation on the neck of Mt. Ram Devi, but the postmortem did establish that she undoubtedly died of suffocation caused by strangulation. The absence of a rope mark on her neck is probably explained by the well known fact that Hindu women frequently sleep with their saris over their heads and thus protecting the area of the neck.

31. In our judgment Puttu Singh could not possibly have given this detailed version of the whole occurrence unless he was present at it and took part in it. His confession gives a very full account of the incident, and whilst in the witness-box, though submitted to a searching cross examination, no real discrepancy was disclosed between his evidence and his previous statements. There were slight discrepancies, but nothing which suggests to us that the witness was telling anything but the truth. We are satisfied, therefore, that Puttu Singh did take part in this burglary during the course of which these two unfortunate persons met their death. However, before we can convict either Mathuri or Barn Bharose of any of the offences with which they were charged, we must be satisfied that the evidence of Puttu Singh implicating them is corroborated by other independent testimony.

32. In our view the evidence of Puttu Singh implicating these two persons in the burglary is amply corroborated, but we are not satisfied that there is sufficient corroboration of the approver's statement that Mathuri and Ram Bharose actually killed Mt. Ram Devi and therefore committed an offence under Section 302, I.P.C. We will first deal with the case against Mathuri. Puttu Singh states quite positively that Mathuri took part in the burglary and actively assisted in causing the death of Mt. Ram Devi, but he cannot be found guilty merely upon the approver's evidence. However the evidence of a number of persons was tendered with a view to showing that Mathuri was with Puttu Singh's gang on the night of the murder and shortly before it occurred. The witnesses who deposed to this fact were four in number, namely, Fazal Ahmad P.W. 12, Abdul Hamid P.W. 13, Buddan Khan

P.W. 18 and Ram Pratap P.W. 17.

33. Fazal Ahmad P.W. 12 says that on 'that' evening he saw Mathuri, Ram Bharose, Sri Kishen and Birja at Puttu Singh's house, but he does not state that 'that' evening was the evening of the murder or the evening before he heard that a murder had been committed. This witness's evidence is extremely vague, and if he had seen these persons on the evening of 17th May 1934 it is strange that he did not mention the fact that he had heard on the following morning, that Mt. Ram Devi and the boy had been murdered. It is impossible to hold that this witness's evidence is any corroboration of Puttu Singh's statement. Abdul Hamid P.W. 13 stated that on the night before the murder at about 8 p m , he saw Mathuri, Ram Bharose, Sri Kishen, Puttu Singh and Birja all sitting together at Birja's house. This witness cannot be described as a very respectable persont and even if his evidence be true, it is not very valuable corroboration of Puttu Singh's statement. It is true that the latter stated that the burglars collected at Birja's house between 8 and 9 p. m., but it is to be observed that Puttu Singh does not mention that Abdul Hamid ever called at Birja's house whilst they were there. In our judgment it would be unsafe to rely upon this witness's evidence.

34. Buddan Khan P.W. 18 saw Mathuri, Sri Kishen, Birja, Puttu Singh and a fifth man whom he did not know on the evening of the murder at a point about 200 to 300 paces from Mt. Ram Devi's house. The person whom he did not know he later identified in proceedings before a Magistrate as Ram Bharose. This witness was mentioned by Puttu Singh in his confession, but it is to be observed that he did not mention him whilst dealing with the incidents immediately preceding the murder but mentioned the fact that they had met him at the very end of his confession. The fact that Buddan Khan is mentioned at the very end of the confession suggests that his Introduction is an afterthought. Buddan Khan admitted to the Magistrate who conducted the identification proceedings that he had known Ram Bharose previously, yet he had earlier stated that the fifth man was unknown to him. This witness's evidence is far from satisfactory, and we cannot regard it as corroboration of Puttu Singh's statement. Ram Pratap P.W. 17, who kept a shop near Mt. Ram Devi's house, stated that at about 9 O'clock in the evening of the occurrence he saw Mathuri, Birja, Sri Kishen, Puttu Singh and a fifth person whom

he did not know going in the direction of Mt. Ram Devi's house. This witness was coming away from his shop which was situated about 15 or 20 paces from the deceased woman's house, and he appears to be a perfectly respectable witness. The fifth person whom he did not know he identified in proceedings held before a Magistrate as Ram Bharose, and there is no suggestion that Ram Pratap had ever seen the appellant previously. He was cross-examined thoroughly but his evidence was unshaken in any way, and we can see no reason why this witness's evidence should not be accepted as true. Puttu Singh mentions having seen this witness when they were on the way to Mt. Ram Devi's house and this he mentions in the body of the narrative in the natural place where the fact should be mentioned. In our judgment Ram Pratap was deposing truly when he stated that he had seen the five persons concerned in this burglary near Mt. Ram Devi's house shortly before Puttu Singh says they got into the house. His evidence is therefore valuable corroboration of Puttu Singh's statement.

35. There is a fifth witness, Kamle by name, who stated that at about 8 p. m. on the night upon which this murder took place he saw Mathuri with the deceased boy Bhagwati Prasad The small boy came into Kamle's shop to purchase milk and Mathuri actually paid for it. Puttu Singh does not mention this incident and, of course, it is unlikely that he knew anything about it, but he does say that at about that time Mathuri was sent to Mt. Ram Devi's house to see if all was clear. He came back and reported that all was well at the house and that the Mt. and the small boy were there alone. He might well have seen the small boy and obtained the information from him, and we see no reason to reject the evidence of Kamle when he says that he did see Mathuri with the small boy at his shop which was near Mt. Ram Devi's house at about 8 p. m. on the evening in question. This evidence is, therefore some corroboration of Puttu Singh's statement. As we have stated earlier in this judgment, a sansi and katarniwere discovered on the premises which had been ransacked. The sansi was discovered by the police when they first entered the premises and this sansi was subsequently identified as being the property of Mathuri by Ram Saran and Gomti Prasad. Ram Saran, however failed to identify the sansi in the Sessions Court, and it would be unsafe to rely upon his evidence. Gomti Prasad, however identified the sansi in identification proceedings held before a Magistrate and later in the Sessions Court.

This witness is a goldsmith and actually worked in a room adjoining Mathuri's and did from time to time borrow Mathuri's tools. It is true that he said that he had not borrowed any of Mathuri's tools for about six months, but the fact that he was able to identify this sansi on two occasions is most significant. We have seen the implement and there appears to be no distinguishing feature upon it, but on the other hand we can well understand that a craftsman, such as Gomti Prasad, might well be able to indentify the implement as being the property of a fellow goldsmith. This witness appears to be quite independent and we are satisfied upon his evidence that the sansi found in the premises did belong to Mathuri. The katarni was put up for identification, but no one was able to identify that implement as being the property of any of the accused persons. We mentioned earlier in this judgment that on 9th June 1934 Mt. Bhagirathi found two caps which she handed over to the police. These caps were subsequently identified by Maiku Lal and Puran Lal as being the property of Mathuri and Birja respectively, but we cannot place any reliance upon this evidence.

36. The caps were produced before us and we found them to be 'Gandhi caps' of a very ordinary pattern, and we are not satisfied that any witness, no matter how honest, could say with certainty that these caps belonged to any particular person. To sum up the evidence against Mathuri there is firstly the evidence of the approver who undoubtedly implicates him up to the hilt. There is then the evidence proving that he knew Mt. Ram Devi well and was visiting her in his capacity as a goldsmith before the occurrence took place. There is also the evidence of Ram Pratap and Kamle which tends to show that Puttu Singh's statement, that Mathuri was with the party on the night in question and had been sent to see if all was clear, is true. Again there is the evidence of the discovery of the sansi in the premises on the morning upon which the murders were discovered. This sansi we are satisfied was the property of Mathuri and had been brought by him as suggested by the approver. According to Puttu Singh, Mathuri was one of the murderers of Mt. Ram Devi, but there is no real corroboration of this part of his evidence and there appears to be some reason why Puttu Singh should desire to incriminate Mathuri in all the crimes. It is admitted by Puttu Singh and indeed deposed to by a police witness that Puttu Singh was told shortly after his arrest that Mathuri had endeavoured to implicate him in the affair, and that being so

Puttu Singh might well desire to paint things as black as possible for Mathuri. The post mortem report and the medical evidence showed in our judgment that Mt. Ram Devi was strangled in all probability by a rope, but there is, of course, nothing to suggest in that evidence who was the actual murderer. We cannot act upon the evidence of Puttu Singh and hold that Mathuri was one of the persons who actually committed the murder.

37. He might have done so or he might not, and in our judgment only one fact is proved satisfactorily and that is that one of these men murdered the unfortunate woman after they had broken into her house with intent to steal. Mathuri denied that the sansi was his, but for the reasons given we are satisfied that it was his property. His case was that he had been falsely implicated by Puttu Singh, because he had mentioned the fact that Puttu Singh might well be concerned in the affair because he was a big badmash whose father had been hanged. We are not satisfied that Mathuri has been implicated by Puttu Singh in the burglary because of enmity though it is just possible that ill-feeling may have something to do with the part assigned to Mathuri in the murders by the approver. In our judgment the evidence produced against Mathuri proves that he was one of Puttu Singh's gang who broke into this house and who stole ornaments and jewellery of great value. We are also satisfied that some one or more of that gang committed the murders of Mt. Ram Devi and Bhagwati Prasad, but we are not satisfied that the appellant Mathuri was actually one of the murderers. Against, Ram Bharose there is, of course, the evidence of the approver who deposes positively that he was present and took part in the affair. Further, according to Puttu Singh, Ram Bharose was actually concerned in the murder of Mt. Ram Devi. We may say at the outset that we are not satisfied that this part of Puttu Singh's evidence has been corroborated. There is a suggestion that enmity existed between Puttu Singh and Ram Bharose, but we are not satisfied that Ram Bharose has been falsely implicated because of this enmity. However, it may be that enmity may have caused Puttu Singh to attribute to Ram Bharose a greater part in the affair than he actually performed. In any event upon the evidence we cannot hold that Ram Bharose actually committed murder.

38. On the other hand, we are satisfied that there is ample corroboration of Puttu Singh's statement that Ram Bharose was one of the members of the gang. There is the evidence of Ram Pratap who saw him near Mt. Ram Devi's house and who later identified him in identification proceedings. As we have stated, this witness appears to be perfectly independent and there is nothing to suggest that the identification proceedings were in any way irregular. He had stated from the first that there was a fifth person whom he did not know hut whom he could recognize, and that fifth person he did identify as Ram Bharose.

39. Further there is the evidence of the police who arrested Ram Bharose that he had on his person upon arrest five golden sovereigns. Ram Bharose admits this, but explains the fact by saying that he had received them from his mother. According to him, when his mother fell ill some time before this occurrence she gave her ornaments and money together with twelve sovereigns to one Diwari Lal in order that the same should be equally divided between her two sons if she died. This Diwari Lal was not produced by Ram Bharose as a defence witness but one Jiwa Lal was called to depose to this fact. This latter witness, however, does not assist Ram Bharose, because he states that the accused's mother recovered, and that in consequence Diwari Lal had returned to her the ornaments, sovereigns and the other money. How, therefore, can this be an explanation of the fact that Ram Bharose was found to have five golden sovereigns in his possession when he was arrested? He had been concerned in a burglary in which golden sovereigns were stolen and, therefore, it was natural to expect that he should have golden sovereigns in his possession or in his house. On arrest such golden sovereigns were found upon him, and in our judgment that is very strong corroboration of Puttu Singh's statement that he was concerned in this affair.

40. On behalf of Ram Bharose evidence with a view to establishing an alibi was produced, but that evidence is in our opinion quite worthless and was rightly rejected by the learned Sessions Judge. The evidence which was called did not establish that it was physically impossible for Ram Bharose to be at the scene of the murder on the night of 17th May and yet to be at Ikauri on the 18th of May. However, the witnesses called to establish this alibi cannot be relied upon. There was other evidence tending to show that Ram Bharose and Puttu Singh had been

concerned in a marpit, but the evidence upon this is most conflicting and unsatisfactory and in our view cannot be accepted. In our view, though some slight enmity may have existed in the past between these two persons, we are satisfied that Puttu Singh has implicated Ram Bharose in the burglary because he was actually one of the members of the gang who broke into Mt. Ram Devi's house on the night in question when some person or persons did Mt. Ram Devi and Bhagwati Prasad to death.

41. For the reasons which we have given we are satisfied that both the appellants Mathuri and Ram Bharose took part in this affair and therefore were clearly guilty of an offence under Section 457, I.P.C. We are not satisfied that either of them actually committed murder, and that being so, they were in our view rightly acquitted of the charge under Section 302, I. P C. Though clearly guilty of an offence under Section 457, I.P.C., they were not convicted under that section but were convicted under Section 460, I.P.C., though neither of them was charged under that section.

42. It has been contended before us that a conviction under Section 460, I. P C, cannot be sustained and must be set aside and that at most these appellants can only be convicted of an offence under Section 457, I.P.C. It is argued that the offence under Section 460 is a more serious offence than the one under Section 457, and whereas a conviction for a minor offence is permissible where an accused person is charged with a major offence, a conviction for the latter is never permissible where the charge is only of a minor offence. Counsel for the appellants rely strongly on Section 238(1), Criminal P.C., but in our view a conviction under Section 460, I.P.C., is abundantly justified by reason of Sections 236 and 237, Criminal P.C. Section 236, Criminal Procedure Code, provides that:

If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

43. The occurrence which took place on the night of the 17th and 18th May 1934 consisted of a series of acts and it could not be said with any certainty before the trial which of several offences the accused were guilty. That being so, each of the accused could have been charged with each of the offences committed during the occurrence, or they could have been charged with such offences in the alternative. Having regard to the evidence in this case, both Mathuri and Ram Bharose could have been charged under Sections 457, 460 and 302, I.P.C., as well as a number of other sections, such as Sections 395 and 396, I.P.C., They were not charged, however, under Section 460, I.P.C., but it is clear that they could have been so charged. Section 237, Criminal P.C., provides that:

If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

44. In other words, in a case where it is doubtful which of several offences a person has committed, he may be charged with all of them or with a number of them in the alternative. In such a case he may be convicted if the facts proved show that he is guilty of an offence with which he might have been charged under Section 236, though in fact he was not specifically charged with that particular offence. The decision in Begu v. Emperor 1925 23 ALJ 636, makes this abundantly clear. Viscount Haldane, who delivered the judgment of their Lordships of the Privy Council in that case, stated on p. 638, after discussing Section 237, Criminal P. C:

The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been done.

45. This is an authoritative pronouncement upon Sections 236 and 237, Criminal P.C., and they precisely cover this case. Both Mathuri and Ram Bharose might well have been charged under Section 460, I.P.C., as well as under Sections 302 and 457, I.P.C., and the facts proved have established an offence under Section

460, I.P.C. They can be convicted under that section although they were not specifically charged with that offence. In our judgment both these appellants were properly convicted under Section 460, I.P.C., and there is no ground whatsoever for interfering with their convictions or with the sentences passed upon them. That being so, their appeal against their convictions must be dismissed.

46. We will now consider the cases of the appellants, Mt. Sundar and Bishnu, who were charged with an offence under Section 411, Penal Code. As we have stated previously the case for the prosecution was that certain jewellery was discovered in the house of Mt. Sundar and upon the parson of Bishnu which was afterwards identified as being the property of Mt. Ram Devi which was stolen on the night when she was murdered. To establish the charge a number of witnesses were called and the effect of their evidence is that whilst the search of Mt. Sundar's house was being carried on the appellant Bishnu attempted to run away. He was caught and searched and in the folds of his dhoti was found a pair of gold karanphuls which were identified later as being the property of Mt. Ram Devi. After Bishnu's arrest the house of Mt. Sundar was further searched but nothing incriminating was found until a heap of bhusa in the angan was searched when broken pieces of ornaments were found which were later identified as the property of Mt. Ram Devi. If this evidence is accepted there can be no doubt of the guilt of these two persons, but we are not satisfied that we can place implicit reliance upon such evidence.

47. In the first place it is in evidence that a previous search of Mt. Sundar's house produced nothing incriminating. The fact that her house was searched must have made Mt. Sundar realise that she was under suspicion because she was Birja's mother. That being so it is extremely unlikely that she would keep any incriminating articles in her house after such an escape. However, it is the case for the prosecution that she did keep such articles and actually kept them in a heap of bhusa in the angan of the house. Further it is quite clear from the evidence of one of the search witnesses, viz. Chutkao, that the bhusa was not searched until somebody shouted that a search of it should be made. The case for the defence is that one Gajja suggested that the bhusa should be searched because he himself was the guilty person and had hidden the incriminating articles in the bhusa in

order to free himself from suspicion and to cast suspicion upon Mt. Sundar. Mt. Sundar suggests that Gajja had actually received stolen property from Birja and was in league with the police and had therefore cot been arrested.

48. It is significant that the police did not obtain their search witnesses as is usually done from the village, but obtained a number of persons from elsewhere who wore certainly not well disposed towards the accused persons. This in itself throws some suspicion upon the case, and that coupled with Chutkao's statement that the bhusa was not searched until somebody suggested it does afford some corroboration of Mt. Sundar's statement. However, the matter does not rest there, because it is clear that a number of persons lived in this house and it cannot be said with certainty that Mt. Sundar was in possession of this heap of bhusa. As we have stated it was situate in the angan of the house to which all the occupants had access and it in no way follows that Mt. Sundar was responsible for these ornaments because they were found in this heap of bhusa. They aright well have been placed by Gajja as suggested by the defence or by some inmate of this house who was in league with Gajja or Birja. The mere fact that Mt. Sundar lived in this house is not sufficient to establish that she was in possession of these stolen articles. In our judgment the evidence against Mt. Sundar creates a case of grave suspicion against her, but in our view it does not establish beyond all reasonable doubt that she was guilty of an offence under Section 411, I.P.C. There is an element of doubt in her case and that being so we are bound to find that she is not guilty.

49. The case against Bishnu is also not free from suspicion. It is an admitted fact that Bishnu who was Birja's brother had been sent to the village of Uberia by the kotwal of Farrukhabad to ascertain, if possible, the whereabouts of his brother. He had only arrived shortly before the search and yet it is said that upon his arrest he was found to have in his clothes ornaments which were undoubtedly stolen from Mt. Ram Devi's house. Further, the version of his arrest is rather a strange one. It would appear that Bishnu for some reason or another ran away whilst the search was in progress though why he should do so is not very clear. He should have been searched when the party first came to the house, but that does not appear to have been done. His conduct in running away with stolen articles on his person, if

true, is somewhat strange and we must say that we have some doubt about the evidence on this point. We find it difficult to believe that if Bishnu had stolen articles on his person he would have waited until the search began before attempting to make good his escape. Further, as he had only just arrived at his mother's house from Farrukhabad to obtain information for the police of Farrukhabad it is somewhat strange that he should have so soon acquired stolen property and taken possession of it. Bishnu denies that he attempted to run away or that he had stolen property upon his person and states quite boldly that the property was planted on him. Upon the evidence we are unable to hold that Bishnu's version is true one and we do not so hold, but taking the whole of the facts of the case into consideration we are not satisfied that the evidence of the police and of the search witnesses is such that implict reliance can be placed upon it. In the case of Bishnu also there is an element of doubt and as that doubt is a reasonable one he must be acquitted.

50. In the result, therefore, we hold that the charge under Section 411, I.P.C., against the appellants, Mt. Sundar and Bishnu has not been established and that being so they were wrongly convicted. We therefore allow their appeals, set aside their convictions and sentences. As both these appellants are on bail we direct that they need not surrender to their bail and their bail bonds are hereby discharged. At this stage it is necessary shortly to consider the appeal of the Local Government against the acquittal of Mathuri and Ram Bharose upon the charge under Section 302, I.P.C. In an earlier portion of this judgment we have discussed at considerable length the evidence which was called in support of this charge. The evidence of Puttu Singh the approver, if accepted, shows that these two appellants were the persons who actually killed Mt. Ram Devi, but even if this evidence is accepted they cannot be convicted upon it alone. The practice of this Court is now abundantly clear that an accused person should not be convicted solely upon the evidence of an approver. To support a conviction the approver's evidence must be corroborated in material particulars. We have earlier considered at length the evidence adduced by way of corroboration of Puttu Singh's testimony and it is unnecessary further to discuss such evidence. That evidence, in our judgment, amply corroborates Puttu Singh's evidence that these two persons were concerned in the burglary and were on the premises when murder was committed,

but it falls short of corroborating Puttu Singh's statement that they were the actual murderers. There is nothing in the evidence adduced other than that of Puttu Singh which tends to connect either Mathuri or Ram Bharose with the actual murders. All that the evidence, other than Puttu Singh's, goes to show is that these two persons were present on the premises on the night upon which the murders were committed.

51. In short, our view is that whilst Puttu Singh's evidence implicating these two persons of an offence under Section 460,I.P.C., is amply corroborated, his evidence implicating them of the actual murder is not sufficiently corroborated to warrant us in convicting both or either of them on that charge. There were five persons in this affair and the murder may have been committed by all five or by one or more of them. There is nothing except Puttu Singh's evidence to show who were the actual persons who committed the murder. In our judgment it is impossible for the prosecution to pray in aid the provisions of Section 34, I.P.C., to obtain a conviction of Mathuri and Ram Bharose of the offence of murder. The evidence makes it clear that the common intention of the parties was house-breaking by night and theft. There is nothing in the evidence to suggest that when these men broke in they had any intention of committing murder and there is nothing except Puttu Singh's evidence to suggest that at any later stage they all agreed to do away with Mt. Ram Devi and Bhagwati Prasad. They may have so agreed or they may not it is quite impossible to say. Omitting Puttu Singh's evidence concerning the actual murder the facts are equally consistent with any one or more of the gang having committed the murder. Upon the evidence we cannot say with certainty that the murder of Mt. Ram Devi was committed by Mathuri and Ram Bharose. Puttu Singh says so, but we cannot act upon his evidence in the absence of some independent testimony which suggests that that part of his evidence is true. In the absence of such independent testimony we cannot hold these two persons or either of them guilty of murder. In our judgment the learned Sessions Judge rightly acquitted Mathuri and Ram Bharose of the offence of murder and therefore the Government appeal is dismissed. As we have stated previously they were however rightly convicted under Section 460, I.P.C., and their appeals, as we have previously stated, are dismissed.

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