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section 325 of the Code. That being so, I maintain the conviction of Dulla and Malu under section 325 of the Code and the sentence imposed upon them for that offence.

Harnam Singh, J.

In the result, I would order that Dulla and Malu should suffer rigorous imprisonment for seven years under section 304, Part II, of the Code and rigorous imprisonment for four years each under section 325 of the Code, sentences to run concurrently.

For the foregoing reasons I refuse to confirm the sentence of death imposed upon Dulla and Malu.

Khosla, J.

KHOSLA, J. I agree.

APPELLATE CRIMINAL

Before Kapur and Dulat, J J.

AMAR SINGH AND ANOTHER,—*Convicts-Appellants*

versus

THE STATE,—*Respondent.*

Criminal Appeal 488 of 1953

1953

Nov. 11th

Code of Criminal Procedure (Act V of 1898)—Section 239—Joint Trial of several persons—Conditions requisite—"The same offence"—Meaning of—Infringement of Section 239—Whether constitutes illegality or irregularity—Two versions of prosecution story—One version making one set of persons liable and other version making the other set of persons liable—Duty of prosecution and function of Court in such cases—Sections 169 and 170—Retrial in such cases—Whether advisable.

In this case one set of witnesses made N alone liable for all of the offences committed while the other set or witnesses made the other six accused persons liable for those

offences. The Court framed one set of charges against N and the other set of identical charges against the other six in respect of the same offences so that the two sets of charges were mutually exclusive. All the seven accused persons were tried jointly in one trial and two out of the six were convicted while N and others were acquitted. In appeal it was submitted that the joint trial of these two sets of persons was illegal being contrary to section 239 of the Code of Criminal Procedure.

Held, that in order to determine whether several persons can be jointly tried as having committed the same offence or not, the Court has to look to the accusation, i.e., the case set out by the prosecution in the charge itself, and if it can be held that accused persons have committed the same offence in the course of the same transaction, then they can be joined together, not otherwise, and it is not necessary to consider what the final result of the case would be.

Held, that "the same offence" in section 239 (a) of the Code of Criminal Procedure means an offence arising out of the same act or series of acts and cannot mean anything else.

Held, that it is settled law that the infringement of section 239 of the Code of Criminal Procedure would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed.

Held, that it is no part of the duty of the Public Prosecutor to put both versions before the Court, and a trial court is not to solve conundrums nor to determine as to who has committed the offence, but in all cases the function of the criminal Court is to adjudicate between the State and the accused as to whether the accused in that particular case is guilty of the offence with which he is charged. Whatever else the prosecution may do or may not do, they are not entitled to put up contradictory cases before the Court and ask it to choose. There are indications in the Code itself in sections 169 and 170 that the police have to make up their mind as to whether the evidence is sufficient or not and if sufficient against whom.

Held, that where one set of witnesses state that one set of accused persons have committed the offences while the other set of witnesses made the other set of accused persons liable for the same offences, no useful purpose will be served by ordering a retrial as the evidence given by one set of witnesses is mutually exclusive of the other and the two sets of witnesses are mutually destructive.

Appeal from the order of Shri G. C. Bahl, Sessions Judge, Amritsar, dated the 3rd September 1953, convicting the appellants.

J. G. SETHI, Y. P. GANDHI and R. L. KOHLI, *for Appellants.*

KARTAR SINGH, Assistant Advocate-General, for *Respondent.*

JUDGMENT

Kapur, J.

KAPUR, J. In this appeal which has been brought by Amar Singh and Chanan Singh the point for decision is the legality of the charge. Amar Singh has been convicted under section 302 of the Indian Penal Code and has been sentenced to death, and Chanan Singh has been convicted of an offence under section 307 of the Indian Penal Code and has been sentenced to transportation for life. The sentence of Amar Singh is before us for confirmation.

The story of the prosecution is that there was some previous enmity between the party of the complainants and of Amar Singh and others, accused Nos. 1 to 6. On the 21st January 1953, Banta Singh (P.W. 18), Thakur Singh (P.W. 19), Pritam Singh (P.W. 20) and Piara Singh, deceased, were sitting in the house of Thakur Singh. The party of accused Nos. 1 to 6 came there raising *changars.* Amar Singh, appellant, was armed with a gun and Chanan Singh with a pistol and the others had various sharp-edged weapons. The accused started abusing Banta Singh and others and began striking against the walls of Thakar Singh's house, and when the persons sitting inside the house came out Amar Singh fired a shot which hit Piara Singh and Thakar Singh. Chanan Singh fired a pistol shot which hit Pritam Singh and Banta Singh and then the accused ran away. Several persons including Jarnail Singh (P.W. 21), Kartar Singh (P.W. 22), Gurdial Singh (P.W. 23), and Santokh Singh (P.W. 24) are also alleged to have witnessed the occurrence. Piara Singh died on the 22nd January 1953. On the 23rd January Amar Singh, Gurdial Singh and Jagir Singh, accused, were arrested. Narinjan Singh and Shamir Singh, accused, were arrested on the 25th January and Chanan Singh, accused on the 28th January.

There is another story also which is given by Kehar Singh (P.W. 25). On the day of the occurrence there was some noise at a well and Banta Singh (P.W. 18), Thakar Singh (P.W. 19), Pritam Singh (P.W. 20) and Piara Singh, deceased, were raising shouts (Changars). Nathu, accused No. 7, came from the other side and asked Thakar Singh and others not to shout. Pritam Singh, Piara Singh, Banta Singh and Thakar Singh ran towards their houses and Nathu also reached there chasing them with a pistol in his hand. He fired one shot and then ran away towards Karmunwala, as a result of which four persons, Banta Singh, Thakar Singh, Pritam Singh and Piara Singh were injured, and Nathu was arrested on the 27th January 1953. On the 28th January an incomplete chalan against Nathu was put in. Another chalan was put in on the 14th February 1953, in which seven persons were accused of this matter, i.e., accused Nos. 1 to 6 and Nathu, accused. A third chalan was then put in, which is dated the 28th May 1953. This was stated to be a complete chalan.

Commitment proceedings against all the accused were started on the 8th March 1953. One inquiry started against both the sets of accused, i.e., Nos. 1 to 6 and No. 7, and both of them were committed to the Court of Session by an order, dated the 11th July 1953. The Committing Magistrate in the course of his order says :—

> "There are two parallel versions given by the prosecution in this case."

The order ends as follows :—

> "From the facts stated above *prima facie* case under sections 148, 302/149, 307/149 and 324/149, I.P.C. is found against the accused Amar Singh, Narinjan Singh, Chanan Singh, Shamir Singh, Gurdial Singh, Jagir Singh who are hereby committed to the Conrt of Session.

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Against Nathu, accused *prima facie* case under sections 302, 307 and 324, I.P.C. is found. He is also committed to the Court of Session along with the above-named to stand their trial in the said Court."

The charges framed were as follows :—

CHARGE SHEET

(CHARGE WITH THREE HEADS)

(*Sections* 221, 222, 223 *of the Code of Criminal Procedure*).

Charge In The Case Of

THE *STATE* v. *NATHU*

I, R. D. Joshi, Magistrate, 1st Class, Amritsar, hereby charge you Nathu as follows :—

Firstly—That you on or about 21st January 1953, at village Gharka did commit murder by intentionally or (knowingly) causing the death of Piara Singh and thereby committed an offence punishable under section 302, Indian Penal Code, and within the cognizance of the Court of Session.

Secondly—That you on the same day, time and place voluntarily caused simple and grievous injuries to Pritam Singh, P.W., with such intention or knowledge and under such circumstances that if by that act you had caused the death of Pritam Singh you would have been guilty of his murder and that you caused hurt to Pritam Singh by firing a pistol at him, and thereby committed an offence punishable under section 307, Indian Penal Code, and within the cognizance of the Court of Session.

Thirdly—That you on the same day, time and place voluntarily caused hurt to Banta Singh and Thakar Singh by means of a pistol which is

an instrument for shooting, and thereby committed an offence punishable under section 324, Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charges.

AMRITSAR DISTRICT R. D. JOSHI,

11th July 1953. Magistrate 1st. Class.

CHARGE SHEET

(CHARGE WITH FOUR HEADS)

(*Sections* 221, 222, 223 *of the Code of Criminal Procedure*)

Charge In The Case Of

THE *STATE* v. *AMAR SINGH*, ETC.

I, R. D. Joshi, Magistrate, 1st Class, Amritsar, hereby charge you Amar Singh, Chanan Singh, Narinjan Singh, Shamir Singh, Gurdial Singh and Jagir Singh as follows :—

Firstly—That you on or about 21st January 1953, at Village Gharka at about 4 p.m. formed an unlawful assembly and committed rioting while armed with deadly weapons, Amar Singh carrying a gun, Chanan Singh a pistol, etc., and thereby committed an offence punishable under section 148, Indian Penal Code, and within the cognizance of the Court of Session ;

Secondly—That you on the same day, time and place did commit murder by intentionally (or knowingly) causing the death of Piara Singh in prosecution of the common object of that unlawful assembly, and thereby committed an offence punishable under section 302/149, Indian Penal Code, and within the cognizance of the Court of Session ;

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Thirdly—That you on the same day, time and place voluntarily caused simple and grievous injuries to Pritam Singh, P.W. with such intention or knowledge, in prosecution of the common object of the said unlawful assembly under such circumstances that if by that act you had caused the death of Pritam Singh you all would have been guilty of his murder and that you caused hurt to Pritam Singh by firing a pistol at him, and thereby committed an offence punishable under section 307/149, Indian Penal Code, and within the cognizance of the Court of Session; and

Fourthly—That you on the same day, time and place in prosecution of the common object of you all voluntarily caused hurt to Banta Singh and Thakar Singh by means of a pistol, etc., which is an instrument for shooting, and thereby committed an offence under section 324/149, Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charges.

AMRITSAR DISTRICT : R. D. JOSHI,
11th July 1953. Magistrate 1st Class.

At the request of the Public Prosecutor the learned Sessions Judge amended the charges against accused Nos. 1 to 6, i.e., excepting Nathu, but it is not necessary to give this amended charge. Each of the accused was called upon to answer the charge and each one of them claimed to be tried. It may here be pointed out that two sets of charges seem to be mutually exclusive because on the first charge the person who is accused of offences under sections 302, 307 and 324, Indian Penal Code, is Nathu. In the second set of charges accused Nos. 1 to 6 were accused of the same offences committed against the same set of persons, i.e., of the murder of Piara Singh and of attempt to murder Pritam Singh and of causing injuries which fall under section 324, Indian Penal Code, in respect of other injured persons

Banta Singh and Thakar Singh. Thus the case presented by the prosecution in the Court of Session was that either Nathu had committed these various offences or Amar Singh and others had done so. The learned Sessions Judge acquitted everybody excepting Amar Singh and Chanan Singh whom he convicted under sections 302 and 307, Indian Penal Code, respectively. With regard to Nathu he held that he was not guilty of any offence, he had no grudge against the deceased or his family, he belongs to a different village and the occurrence took place at a time when visibility was not low, and that he could not believe that the eye-witnesses could have substituted for Nathu the other accused Nos. 1 to 6, i.e., Amar Singh and others. He, therefore, acquitted him. He also said that the police "had either been duped" in this case or they "were only too willing to fall into the trap" which had been laid for them and that they made no efforts to test the veracity of the two stories which were placed before them.

In appeal it was submitted that the joint trial of these two sets of persons was illegal and was contrary to section 239 of the Code of Criminal Procedure. The relevant portion of section 239 of the Code of Criminal Procedure would read as under :—

> "239. The following persons may be charged and tried together, namely :—
>
> (a) persons accused of the same offence committed in the course of the same transaction;
>
> * * * *
>
> * * * *
>
> and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges."

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This section, as was held by their Lordships of the Privy Council in *Babu Lal Choukhani* v. *Emperor* (1) deals with three matters, accusation, charge and trial. "It says nothing about verdict". The condition expressed in the words "persons accused of the same offence committed in the course of the same transaction" does not say "rightly accused" or "accused and convicted".

> "It is on the basis of what appears on the face of the accusation that the Court may proceed to charge and try. The accusation is necessarily anterior to the exercise of the discretion to charge and try. These are stages subsequent to the accusation."

It is settled law that the infringement of section 239 of the Code of Criminal Procedure would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed under the rule in *Subrahmania's case* (2) which was restated by their Lordships of the Privy Council in *Babu Lal Choukhani's case* (1).

"The same offence" in section 239 (a) of the Code of Criminal Procedure means an offence arising out of the same act or series of acts and cannot mean anything else; see *Nga Sar Kee* v. *The King* (3). There one accused was charged with having murdered a certain person at a certain place and another was charged with having murdered the same person at the same place and at the same time, and both were prosecuted, as in the present case, because there was evidence against both, but such evidence against them was mutually exclusive, and it was held that it could not be said that those persons were charged with the same offence committed in the course of the same transaction within the meaning of section 239 of the Code of Criminal Procedure, and

(1) (1938) 2 Cal. 295 p. 306 (P.C.)
(2) I.L.R. 25 Mad. 61 (P.C.)
(3) A.I.R. 1939 Rang. 390

it was also held that there was no provision in the Code under which these two persons could be tried together or that such a trial was a mere irregularity curable under section 537 of the Code. Following *Subrahmania's case* (1), that Court held that this was an illegality. There are other cases of that Court where the same view was taken; *see Intaj Khan* v. *Emperor* (2) where it was held that two persons accused of the same offence ought not to be tried together if the prosecution case against them is mutually exclusive. In an older Burma case *Azim-ud-Din* v. *Emperor* (3) where two accused were tried together on a charge of having caused grievous hurt to a person and the allegation was that either one or the other had committed the offence, it was held that the words "same offence" in section 239 of the Code of Criminal Procedure implied that both the accused should have acted in concert or association and did not apply to a case like the present and that the two accused ought to have been tried separately as required by the provisions of section 233 of the Code.

The learned Assistant to the Advocate-General, Mr. Chawla, submitted in the first place that the trial was perfectly legal as it was the duty of the prosecution to put the whole case before the Court and it was for the Court to determine what was the correct position and who was the guilty person. In support of this he has relied on a judgment of the Calcutta High Court in *Rani Ranjan Ray* v. *King Emperor* (4) where Sir Lawrence Jenkins, C.J., said at page 30:—

> "That purpose is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police but the Crown, and this duty should

(1) I.L.R. 25 Mad. 61 (P.C.)
(2) A.I.R. 1934 Rang. 193
(3) 14 Cr. L.J. 563
(4) 19 C.W.N. 28

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be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else."

Mr. Chawla also referred to an English case *Reg.* v. *Holden* (1), where the prosecution did not propose to call an eye-witness because she had been brought to Court by the defence, and the Presiding Judge remarked :—

> "She ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should have their evidence so as to draw their own conclusion as to the real truth of the matter."

But this was a case in which the Public Prosecutor did not call witnesses who, it was alleged, had seen the occurrence although the defence were repeatedly asking for them to be produced. This case has really no relevancy to the facts before us.

Their Lordships of the Privy Council, however, have now settled this matter in *Stephen Senevirathne* v. *The King* (2), where Lord Roche delivering the judgment of their Lordships said at page 300 :—

> ".....but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of consideration of number and of reliability, or that a prosecution ought to discharge the functions both

(1) (1838) 8 C. and P. 606
(2) A.I.R. 1936 P.C. 289

> of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."

Thus it was no part of the duty of the Public Prosecutor to put both versions before the Court, and after all a trial Court is not to solve conundrums nor to determine as to who has committed the offence, but in all cases the function of the Criminal Court is to adjudicate between the State and the accused as to whether the accused in that particular case is guilty of the offence with which he is charged. In the present case the prosecution were themselves not clear as to whether one set of accused had committed the offence or the other set, and to try the two sets together is, in my opinion, contrary to the provisions of the Code which has in Chapter XIX and sections 233 to 240 laid down provisions for joinder of charges.

Their Lordships of the Privy Council in *Babu Lal Choukhani's case* (1), have stated the law in the following terms :—

> "But the charges have to be framed, for better or worse, at an early stage of the proceedings. It would be paradoxical if no one could tell till the end of the trial whether the trial was legal or illegal."

Thus in order to determine whether several persons can be jointly tried as having committed the

(1) (1938) 2 Cal. 295 at p. 308

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same offence or not the Court has to look to the accusation, i.e., the case set out by the prosecution in the charge itself, and if it can be held that the accused persons have committed the same offence in the course of the same transaction then they can be joined together, not otherwise, and it is not necessary to consider what the final result of the case would be.

In the present case there has been a violation of the provisions of the Code of Criminal Procedure, and I am of the opinion, following the cases that I have quoted above, that the trial was illegal and I would, therefore, quash the convictions.

The question then arises whether a retrial should be ordered as was in the alternative contended for by Mr. Chawla. In my opinion no useful purpose will be served. According to the prosecution themselves there is a certain set of witnesses who mention that accused nos. 1 to 6 committed the murder and the other offences with which they were severally charged, and there is another set of witnesses, particularly Kehar Singh (P.W. 25) who states that the offence was committed by Nathu alone. I do not think that in these circumstances any Judge can convict the present appellants if they are put up for retrial because the evidence given by one set of witnesses is mutually exclusive of the other and the two sets of witnesses are mutually destructive.

Some criticism was levelled by Mr. Chawla against the evidence of the Deputy Superintendent of Police, Hukam Singh (P.W. 28), who has stated that in his presence the statements of Angrez Singh, Kehar Singh and Phuman Singh were recorded by the Station House Officer and the party of the complainants was also present at the time and this witness invited them to raise such objections to this evidence which they thought proper and they kept quiet. Whether this witness did his duty properly or improperly is not a matter before us unless his action amounted to involving innocent persons or making a false

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case against the accused, but all that the Court is concerned with is that it is not to be called upon to solve conundrums. Whatever else the prosecution may do or may not do they are not entitled to put up contradictory cases before the Court and ask it to choose. There are indications in the Code itself in sections 169 and 170 that the Police have to make up their mind as to whether the evidence is sufficient or not and if sufficient, against whom.

In any case, there is no sufficient reason for ordering retrial in the present case. I would, therefore, allow this appeal, set aside the convictions and the sentences passed on the accused and order that they be released forthwith.

It is unfortunate that neither the Public Prosecutor nor the Court gave any attention to the fact that there were two sets of accused persons who were being charged for the same offence and nobody seems to have noticed that a trial of this kind is contrary to the provisions of the Code of Criminal Procedure. As I have said above, Mr. Chawla did complain as to the conduct of the Deputy Superintendent of Police, Hukam Singh (P.W. 28). This is a matter which the Government has to look into itself. We direct that a copy of this judgment be sent to Government for taking such action as it thinks proper.

Dulat, J.

DULAT, J. I agree.

CRIMINAL WRIT

Before Kapur and Dulat, JJ.

RAM SINGH,—*Petitioner*

versus

THE UNION OF INDIA AND OTHERS *Respondents*

Criminal Writ No. 22 of 1952

1953

Nov. 11th.

Abducted Persons (Recovery and Restoration) Act (LXV of 1949)—Section 6—Tribunal constituted under—Decision by the Tribunal—Whether can be quashed by certiorari or under supervisory powers—Constitution of India—Articles 226 and 227—Writ of habeas corpus—Whether can issue—Principles of natural justice stated—Interpretation of Statutes—Rule stated.