

The State of Punjab v. Nathu, etc. (Dhillon, J)

(72) Before concluding the judgment, we may mention that in course of arguments, the counsel for the State stated that it was not the intention of the Government to stop the business of the petitioner-company. He added that the Government would be prepared to grant the licence in case the distillery was shifted without any undue delay from its present site to another suitable site. This again reflects the *bona-fides* on the part of the Government in having the distillery shifted elsewhere.

(73) In the result, the writ petition is disallowed. There will, however, be no order as to costs.

K. S. K.

REVISIONAL CRIMINAL

*before S. S. Sandhwalia and B. S. Dhillon, JJ.*

THE STATE OF PUNJAB.—*Petitioner.*

*versus*

NATHU, ETC.—*Respondents.*

**Criminal Revision No. 48-R of 1968.**

May 20, 1971.

*Code of Criminal Procedure (V of 1898)—Sections 235 and 239—Indian Penal Code (XLV of 1860)—Sections 307/34 and 397—Arms Act (LIV of 1959)—Section 27—Joint trial of two offences—When permissible—Point of time for determining the offences to have been committed in the same transaction.—Whether when accusation is made or when trial is concluded—Accused-persons charged with substantive offences under the Indian Penal Code as well as under Section 27, Arms Act—Whether can be jointly tried—Recovery of the fire arm subsequent to the occurrence in which such arm is used—Whether warrants a finding that the offence under the Arms Act does not from part of the same transaction.*

*Held*, that in order to decide whether a joint trial of two offences is permissible or not, the provisions of section 235 of the Code of Criminal Procedure shall have to be applied to the facts of each case. If from the facts as alleged by the prosecution the Court comes to the conclusion that one series of acts are so connected together so as to form the same transaction, a joint trial would be permissible. The factors which will help the Court in examining whether the provisions of section 235 of the Code are

applicable or not would generally be whether there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts. It is not necessary that every one of these elements should co-exist for a transaction to be regarded the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction. (Para 7)

*Held*, that the point of time in the proceedings at which it is to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled or not is at the time when the accusation is made and not when the trial is concluded and the result known. Both for the purposes of Sections 235 and 239 of the Code, if in a given case the Court comes to the conclusion at the time of the starting of the trial that the acts alleged against the accused persons which result into commission of different offences, form part of the same transaction, a joint trial for the offences committed and against the persons who participated in the same would be permissible. (Para 9)

*Held*, that if in a given case, the accusation, is that the accused person was armed with a fire-weapon while committing the offence of murder or any other offence under the Indian Penal Code and he used the same weapon in the commission of the said offence, he can be validly prosecuted jointly for the offence under the Arms Act. The mere fact that the recovery of the weapon is subsequent to the using of the same, will not warrant a finding that the commission of an offence under the Arms Act, even though it is complete by the allegation that the said weapon was in possession of the accused persons and was actually used, does not form the part of the same transaction. The prosecution allegations at the time of the framing of the charge have to be seen and if from those allegations it is *prima facie* concluded that an offence under the Arms Act is made out from the accusation which concerns the commission of the substantive offence also, a common trial, for the substantive offence as well as under the Arms Act, keeping in view the provisions of section 235 of the Code, is permissible. (Para 12)

*Case referred by the Hon'ble Mr. Justice S. S. Sandhwalia on 8th September, 1969 to a larger Bench for decision of the important questions of law involved in the case. The case was finally decided by the Division Bench consisting of Hon'ble Mr. Justice S. S. Sandhwalia and the Hon'ble Mr. Justice Bhopinder Singh Dhillon on 20th May, 1971.*

*Case reported under Section 438 of Cr. P. C. by Shri V. P. Sharma, Addl. Sessions Judge, Faridkot with his letter No. 25 dated 31st January, 1968, from the order of Shri Mohinder Singh, Judicial Magistrate 1st Class, Faridkot dated 14th July, 1967 committing all the five accused persons for trial to the Court of Sessions.*

G. S. TULSI, Assistant Advocate-General, Punjab, for the petitioner.

AMAR DATT, ADVOCATE AS AMICUS-CURIAE, for the respondents.

## JUDGMENT

DHILLON, J.—(1) This case has been referred to the larger Bench by the reference order of Sandhawalia, J. dated 8th September, 1969. Briefly stated the facts are that a dacoity was alleged to have been committed in village Pehluwala at the shop of Rura Mal in Tehsil Faridkot. It is alleged that Baggu accused, armed with a Gandasa, Nathu accused with a pistol, Shada and Pathana accused with a rifle each and Bohar accused participated in the offence. Nathu and Baggu accused are alleged to have entered the shop of Rura Mal P.W. where Gokal Chand P.W. and Surrinder Pal were sitting. The inmates of the shop were asked to go inside, but Gokal Chand P.W. managed to escape. Before he could run away, he was fired at by Shada and Pathana accused from their rifles and he suffered two lacerated wounds on his right thigh. It is alleged that Nathu and Baggu accused gave beating to Rura Mal P.W. and robbed off him of his golden locket, one pair of golden rings and one pair of golden Balis besides cloth and Rs. 200 in cash.

(2) After investigation, a challan under sections 307, 394, 397 and 109 of the Indian Penal Code and under section 27 of the Indian Arms Act, was presented against all the five accused persons. The learned Magistrate after recording the statements of some of the prosecution witnesses found that an offence under section 397 of the Indian Penal Code has been committed by Nathu, Baggu, Shada and Pathana accused persons; an offence under sections 397/109 of the Indian Penal Code by Bohar accused; an offence under sections 307/34 of the Indian Penal Code by Nathu, Baggu, Shada and Pathana accused and under section 27 of the Arms Act by Shada and Pathana accused. The learned Magistrate committed all the five accused persons for trial to the Court of Session.

(3) The learned Additional Sessions Judge, Faridkot, vide his order dated 31st January, 1968, made a reference to this Court recommending that the commitment order dated 14th July, 1967 be quashed on the ground that the joint trial of the accused persons under sections 397/307/109, of the Indian Penal Code, and under section 27 of the Indian Arms Act, is not permissible in law. The learned trial Judge relied upon the authorities reported in *Nur Khan and another v. Emperor*, (1); *Mohammad Khan v. Emperor*, (2), *Sukhdev Raj v. Emperor*, (3) *Onkar Singh v. Emperor* (4) and

(1) A.I.R. 1925 Lah. 326 (1).

(2) A.I.R. 1928 Lah. 34.

(3) A.I.R. 1933 Lah. 231.

finally *Arjan Singh v. The State*, (5), for recommending the reference. When this reference was placed before Sandhwalia J., he was inclined to accept the reference and in view of a Single Bench authority of this Court in *Arjan Singh's case* (5) (*supra*), he did not decline the reference but referred the matter to a larger Bench. So the sole question which has to be examined in this case is whether on the facts as alleged by the prosecution in this case joint trial against Shada and Pathana accused under sections 397 and 307 read with section 34 of the Indian Penal Code and under section 27 of the Indian Arms Act is permissible in law or not.

(4) In order to appreciate the point involved in the case, the relevant provisions of the Code of Criminal Procedure may be referred to. Section 233 of the Code of Criminal Procedure 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, 236, and 239 of the Code of Criminal Procedure. Thus the basic provision is that every distinct offence of which any person is accused shall be charged and tried separately. Sections 234, 235, 236, and 239 of the Code of Criminal Procedure are exceptions to this rule.

(5) Next we are mainly concerned with the provisions of section 235 of the Code of Criminal Procedure, which are in the following terms :—

“235(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(3) If several acts, of which one or more than one would by itself or themselves constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such

(4) A.I.R. 1934 Oudh. 457.

(5) A.I.R. 1965 Pb. 443.

acts when combined, and for any offence constituted by any one, or more of such acts.

- (4) Nothing contained in this section shall affect the Indian Penal Code, section 71."

(6) The next relevant provision is section 239 of the Code of Criminal Procedure, which provides as to which persons may be charged jointly. This section gives the class of persons who can be charged jointly. In this case we are mainly concerned with the interpretation of section 235 of the Code of Criminal Procedure. The whole question to be examined is whether the series of acts alleged against the accused Pathana and Shada form the same transaction or not. If the series of acts alleged which constitute offences under sections 397 and 307/34 of the Indian Penal Code and also under section 27 of the Indian Arms Act, form the same transaction, in that case, it cannot be said that the joint trial is not permissible in law and the reference made by the learned trial Judge has to be refused. As to whether one series of acts so connected together form the same transaction or not, would depend upon the facts of each case. It cannot be defined as to what series of acts, if so connected, will form the part of the same transaction. Their Lordships of the Supreme Court in a case reported in *The State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another*, (6), came to the same conclusion. Their Lordships held as follows:—

"What is meant by 'same transaction' is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by

(6) A.I.R. 1963 S.C. 1850.

a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and, therefore, the mere absence of the words 'so connected together as to form' in clauses (a), (c), (sic) and (d) of section 239 would make little difference. Now, a transaction may consist of an isolated act or may consist of a series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions. Therefore, even in the expression 'same transaction' alone had been used in section 235(1) it would have meant a transaction consisting either of a single act or of a series of connected acts. The expression 'same transaction' occurring in clauses (a), (c) (sic) and (d) of section 239 as well as that occurring in section 235(1) ought to be given the same meaning according to the normal rule of construction of statutes. Looking at the matter in that way, it is pointless to inquire further whether the provisions of section 239 are subject to those of section 235(1). The provisions of sub-sections (2) and (3) of section 235 are enabling provisions and quite plainly can have no overriding effect. But it would be open to the Court to resort to those provisions even in the case of a joint trial of several persons permissible under section 239."

(7) Thus it is clear that in order to decide whether a joint trial of two offences is permissible or not, the provisions of section 235 of the Code of Criminal Procedure shall have to be applied to the facts of each case. If from the facts as alleged by the prosecution, the Court comes to the conclusion that one series of acts are so connected together so as to form the same transaction, in that case, a joint trial would be permissible. The factors which will help the Court in examining whether the provisions of section 235 of the Code are applicable or not would generally be whether there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts. As their Lordships have held, it would, however, not be necessary that every one of these elements should co-exist for a transaction to be regarded the same. But if several

acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction.

(8) The words "same transaction", as used in section 239 of the Code of Criminal Procedure, were also the subject matter of interpretation in a case reported in *Ghumand Singh v. The State*, (7). In that case also, it was held that the word "transaction" as used in section 239 of the Code, carries a very wide connotation and covers a series of acts connected together in one way or the other. Of the main tests which are to be applied are proximity of time, unity of place, unity or community of purpose or design, and continuity of action. It was held that continuity of action is generally taken to be the main test, and as to what is the same transaction, must depend on the facts and circumstances of each particular case.

(9) The next important question which will arise is as to at what point of time the question whether the provisions of section 235 of the Code of Criminal Procedure are applicable or not, has to be taken into consideration. In that connection the matter is concluded by an authority of the Supreme Court reported in *Kadiri Kunhahammad v. The State of Madras*, (8). This is another authority which throws considerable light for the disposal of his case. In that case it was held by their Lordships of the Supreme Court that section 239 (d) of the Code of Criminal Procedure authorises a joint trial of a person accused of different offences committed in the course of the same transaction and there can be no doubt that in deciding the question whether or not more persons than one can be tried together under the said section the Criminal Court has to consider the nature of the accusation made by the prosecution. It was held that it would be unreasonable to suggest that if the accusation made by the prosecution would justify a joint trial of more persons than one, the validity of such a trial cannot be effectively challenged if the said accusation is not established according to law. Their Lordships further held that no doubt the Courts are required to examine carefully the nature of accusation; but if they are satisfied that *prima facie* the accusation made shows that several persons are charged of different offences and that the said offences *prima facie* appear to have been committed in the course of the same transaction, their joint trial can and should be ordered. Their Lordships referring to a Privy Council case reported in *Babulal Choukhani v. Emperor*,

(7) A.I.R. 1965 Pepsu 43.

(8) A.I.R. 1960 S.C. 661.

(9) held that the point of time in the proceedings at which it is to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled or not is at the time when the accusation is made and not when the trial is concluded and the result known. Thus it would be seen that their Lordships of the Supreme Court have finally settled that in order to see whether the provisions of section 239(d) of the Code of Criminal Procedure are applicable to the given facts of the case or not, the accusation at the time of the framing of the charge has to be kept in view. The same principle would apply while considering the application of section 235 of the Code of Criminal Procedure and if in a given case the Court comes to the conclusion at the time of the starting of the trial that the acts alleged against the accused persons which result into commission of different offences, form the part of the same transaction, in that case, a joint trial for the offences committed and against the persons who participated in the same would be permissible. It is in this light that the authorities referred to in the reference order by the learned Additional Sessions Judge, Faridkot, have to be examined.

(10) In the cases of *Nur Khan* (1), *Mohammad Khan* (2) and *Sukhdev Raj* (3) *supra*, the offence under the Arms Act with which the accused persons were charged, was under section 20 of the Arms Act. From the facts as alleged against the accused persons in those cases it could not be held that the offence under the Arms Act and the other substantive offences form part of the same transaction. In all these cases it was rightly held that the provisions of section 235 of the Code of Criminal Procedure were not applicable and their joint trial was not permissible.

(11) The authority reported in *Onkar Singh's case* (4) (*supra*) is an authority which is not applicable to the facts of the present case. In that case the joint trial was refused regarding the offence under section 19(d) of the Arms Act and the offence under section 411 of the Indian Penal Code. The facts which constituted both these offences could not be held to be the outcome of the same transaction.

(12) As regards the authority reported in *Arjan Singh's case* (5) (*supra*), it has to be noticed that in that case also the accused persons were charged with an offence under section 302 of the Indian Penal Code, and Arjan Singh accused was also charged under section 25 of the Indian Arms Act. H. R. Khanna, J. (as he then was), came to the conclusion that the two offences were distinct and



as provided under section 233 of the Code, they should be tried separately. Khanna, J. further came to the conclusion that though because of the prosecution allegation that the gun recovered from Arjan Singh would be relevant fact at the trial for murder, necessitating a finding on that point in the case under section 302, Penal Code, it could not all the same be said that the murder of the deceased and the recovery of the gun were part of the same transaction. Khanna, J. was of the view that the murder was committed on 31st March, 1964 while the gun was alleged to have been recovered from Arjan Singh on 3rd April, 1964. Therefore, the offence and the recovery of the gun were disassociated in time and it could not be said that there was any continuity of purpose and design or continuity of action in the commission of the two offences. With great respect, I am not prepared to subscribe to this view of Khanna, J. In *Kadiri Kunhammad's case* (8) (*supra*) their Lordships of the Supreme Court clearly held that in order to come to the conclusion whether the accusation alleged against the accused persons which constitute different offences form the part of the same transaction or not, has to be judged keeping in view the accusation at the time of the framing of the charge. In my view, if in a given case, the accusation is that the accused person was armed with a fire-weapon while committing the offence of murder or any other offence under the Indian Penal Code and he used the same weapon in the commission of the said offence, he can be validly prosecuted jointly for the offence under the Penal Code and also for the offence under the Arms Act. The mere fact that the recovery of the weapon was subsequent to the using of the same, would not warrant a finding that the commission of an offence under the Arms Act, even though it is complete by the allegation that the said weapon was in possession of the accused person and was actually used, would not form the part of the same transaction. It is a different matter as to what is the evidence to connect the said alleged weapon with the assailant at the time of the commission of the alleged offence under the Indian Penal Code, but at the same time the prosecution allegations at the time of the framing of the charge have to be seen and if from those allegations it is *prima facie* concluded that an offence under the Arms Act is made out from the accusation which concerns the commission of the substantive offence also, a common trial, keeping in view the provisions of section 235 of the Code, would be permissible.

(13) Section 25(1)(a) of the Indian Arms Act provides that whoever acquires, has in his possession or carries any fire arm or ammunition in contravention of section 3, shall be punishable with

imprisonment for a term which may extend to three years or with fine, or with both. It is not clear from the judgment of Khanna, J. whether in that case the accused who was charged under section 25 of the Arms Act was being tried under clause (a) or any other clause of sub-section (1) of that section. If the accusation was that Arjan Singh accused was in possession of a fire arm in contravention of section 3 of the Arms Act, in my opinion, the offence under section 25 of the Arms Act would have been complete the moment the allegation is made that Arjan Singh was armed with an unlicensed gun and if that was the accusation at the time of the framing of the charge, the joint trial under section 25 of the Arms Act and under section 302 of the Indian Penal Code, was permissible. If the authority laid down by H. R. Khanna, J. (as he then was) is taken to be laying down the law that because of the evidence of recovery of the gun having come into existence after many days of the commission of the murder, the joint trial was not permissible, with due respect, I am not inclined to subscribe to this view. The correct test would be that the prosecution accusation at the time of the framing of the charge has to be seen as a whole and if from the facts so alleged a *prima facie* conclusion can be reached that the facts so alleged are so connected together as to form part of the same transaction, and the facts if proved constitute different offences, in that case, the provisions of section 235 of the Code of Criminal Procedure, will be applicable and the joint trial would be permissible.

(14) Applying this test to the facts of the present case, I am inclined to hold that Shada and Pathana accused both are alleged to have used the rifles at the time of the commission of the dacoity and for that they are charged of an offence under section 27 of the Indian Arms Act which offence is complete if the prosecution accusation is proved that both of them were armed with rifles and they used the same in the commission of the alleged offence. In that view of the matter, in my opinion, the trial of Shada and Pathana accused under sections 397 and 307/34 of the Indian Penal Code, and under section 27 of the Indian Arms Act along with the other accused persons, is permissible. Therefore, the reference made by the learned Additional Sessions Judge would be refused and the learned Additional Sessions Judge is directed to proceed with the trial forthwith as the trial has been unduly delayed because of the reference having been made to this Court.

Sandhawalia, J.—I agree.

K. S. K.