
(1945) 03 CAL CK 0001
In the Calcutta High Court

Eusof Shaikh and Another

APPELLANT

Vs

King-Emperor

RESPONDENT

Date of Decision : 12-03-1945

Acts Referred:

Penal Code, 1860 (IPC) — Section 188, 71

Citation : AIR 1949 Cal 36 : (1949) CriLJ 895

Hon'ble Judges : Henderson, J

Bench : Single Bench

Judgement

Henderson, J.—This is a Rule calling on the District Magistrate of Khulna to show cause why the conviction of the petitioners should not be set aside on ground No. I attached to the petition which is in these terms: "For that Section 403, Criminal F. O., is a bar to a proceeding u/s 188, Penal Code." Now that the record has arrived it appears that this ground only applies to the case of petitioner 1. At the hearing Mr. Mukherji further contended that, even if the conviction is sustained, the sentences should be set aside in view of the provisions of s, 71, Penal Code.

2. The petitioners have been convicted of an offence punishable u/s 188, Penal Code on the allegation that they reaped the paddy of plot no. 454 in defiance of an order made by the Magistrate under 8. 144, Criminal P. O. They had been previously convicted of theft in connection with the same incident.

3. In order to make the ground good Mr. Mukherjee must bring the case within the terms-of Section 236, Criminal P. O., which is in these terms:

If a single Act....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 . . . or he may be charged in the alternative with having, committed some one of the said offences,

4. The interpretation of this section is far from easy and has led to a great divergence of judicial opinion. But at any rate it seems clear that there must be an element of doubt. In the present case the act is clearly one. It may be that

the prosecution may be unable to establish the ingredients of either of the offences charged. That, however, is not the kind of doubt with which the section deals. Here the offences are quite distinct and the petitioners might be guilty, or be to of them.

5. In the present case it would be impossible to make the Rule absolute on this ground. The point was not taken in the Magistrate's Court and a question of fact is involved. The complaint of theft was made on 4th December 1943. In view of the provisions of Section 195, Criminal P. C, the Magistrate had no jurisdiction to take cognisance of the present offence. This complaint was not made until 22nd February 1944. It is not known whether on that date the former case was still pending or not.

6. In order to succeed on the question of separate sentences, Mr. Mukherjee must bring, himself within part 1 of Section 71, Penal Code which is in these terms:

Where anything which is an offence is made up of parts any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences.

This section too has led to a great divergence of judicial opinion. Here, however, it is impossible to say that the theft was part of the offence punishable u/s 188, Penal Code, or that the disobedience of the Magistrate's order was part of the offence of theft. It is a case of an offence falling within two or more definitions of the law and comes within part 2 of the section, the terms of which have not been infringed in this case. The Rule is discharged.