Allahabad High Court
Sri Ram Varma vs The State on 16 March, 1956
Equivalent citations: AIR 1956 All 466, 1956 CriLJ 959
Author: R Dayal
Bench: R Dayal, B M Lall, Asthana
JUDGMENT Raghubar Dayal, J.

1. Sri Ram Varma was committed for trial to the Court of Session, Etah for offences under Sections 409 and 477A, Penal Code. The charge under Section 409 Penal Code was that he being a public servant in the employment of the Director of Medical and Health Services, U. P. at Etah and being entrusted with and having dominion over property in such capacity committed criminal breach of trust with respect of the said property to the extent of .Rs. 569-10-3 and thereby committed an offence punishable under Section 409, Penal Code.

2. The charge under Section 477A was that he in the year 1947 at Etah wilfully and with intent to defraud, altered multilated falsified account which had been kept and maintained by him on behalf of his employer and made false entries in and committed to make entries & made alterations in material particulars in such books of accounts in the year 1947 and thereby committed an offence punishable under Section 477A, Penal Code.

3. The sum of Rs. 569-10-3 was made up of the amounts relating to four different items. The Additional district Government counsel applied to the Assistant Sessions Judge to whose Court the case had been transferred that trial for an offence under Section 477A with respect to four items was not permissible and that therefore the case be split up into two cases one relating to three items of criminal breach of trust and 3 offences under Section 477A Penal Code with respect to those three items and that the offence with respect to the fourth item of Rs. 10-10-3 be made the subject matter of a different case.

The learned Assistant Sessions Judge acceded to the request and ordered the case to be split up into two cases. The accused was dissatisfied with the order and went up in revision to the learned Sessions Judge who took a different view from that of the Assistant Sessions Judge and made this reference recommending that the order of the Assistant Sessions Judge for splitting up the Sessions trial into two separate cases be set aside and the trial be ordered to proceed on the charges framed by the learned Committing Magistrate.

4. The accused was committed to the Sessions Court in two other cases also. There also the charges were in similar terms and the charge about criminal breach of trust including more than three items. Each of those cases has also been ordered to be split up into two cases on similar lines and the learned Sessions Judge has referred those cases also with the similar recommendation. Those references are Nos. 246 and 248 of 1954.

5. At the hearing of these references both the learned counsel for the accused and the learned Assistant Government Advocate submitted that the reference be accepted and that the trial on the charges as framed by the Magistrate was quite legal.

6. Agreement of the parties or any concession by the accused cannot give jurisdiction to a Court to try a certain matter and does not ordinarily bar the accused to contend the legality of the trial in case the decision goes against him but this would be the position when the Court exercises the jurisdiction on the basis of such agreement or concession, jurisdiction which it did not otherwise possess. This is not the position in the present case. The Assistant Sessions Judge had jurisdiction to try the case for various offences.

The only question is how he should proceed and conduct the trial. If an accused agrees to a certain mode of trial and contends that that mode of trial is more desirable than the other ordered by the Court and that the other mode of trial will be harmful to him it would not be open to him to say later that the mode of trial he had agreed to did result in prejudicing him in haying a fair trial.

Whatever may have been the legal position about the validity of a trial in which an accused had been tried for charges which could not have been joined at one trial in view of the provisions of Sections 233, 234, and 236, Criminal P. C., till 31-12-1955, the recent amendment in the Criminal Procedure Code by the Code of Criminal Procedure (Amendment) Act of 1955, 26 of 1955, has altered the position. Now since 1-1-1956 the relevant portion of amended Section 537, Criminal P. C., is:--

"Subject to the provisions hereinbefore contained no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. 27 or on appeal or revision on account--

(a) .....

(b) of any error, omission or irregularity in the charge including any misjoinder of charges, or

(c) .....

(d) .....

Explanation:'-- In determining whether any error, omission or irregularity in any proceeding 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."

7. In view of this provision it is clear that no misjoinder of charges would be fatal to the trial of an accused unless such misjoinder of charges has occasioned a failure of justice. Further in view of the Explanation of this section the Court can consider in determining whether such failure of justice has taken place whether the objection to joinder and misjoinder of charges could and should have been raised at an earlier stage in the proceedings.

It should follow that if an accused and the State instead of raising objection to the joinder of charges state that the joinder of charges is correct and that an order for separating the charges is wrong, I cannot conceive of any situation in which merely on account of the joinder of charges it would be possible for any party to urge and for the Court to hold that the joinder of charges has prejudiced

any party. I may note that the provisions of amended Section 537 will govern these cases against Sri Ram Verma in view of Section 116 of the aforesaid Act No. 26 of 1955. In this view of the matter I would accept the reference.

8. Further I am of opinion that the trial of the accused on the charges framed by the Magistrate is in accordance with law.

9. Sub-section (2) to Section 222, Criminal P. C. is: "When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence Is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234:

Provided that the time included between the first and last of such dates shall not exceed one year."

10. In view of this provision the single charge framed by the Magistrate that the accused committed criminal breach of trust of the total specified amount within a particular year was a perfectly correct charge. It was not necessary to split up this charge into as many charges as were the items which totalled up to the total figure. Such a mention if made in the charge would be just for the sake of clarification and not for the purpose of alleging that a separate offence was committed with respect to each item.

It is true that this sub-section provides that such a charge would be deemed to be a charge of one offence within the meaning of Section 234 and does not say in general that it would be a charge for one offence. I, however, fail to see that if it is one charge of one offence for the purpose of Section 234 it would be considered to be several charges for several offences for the purpose of any other section. Reference to Section 234 in my opinion was due to the fact that it is Section 234 'alone which authorises joinder of charges with respect to the number of offences committed.

Section 235 lays down no limitation of offences to be charged and tried at one trial in the various circumstances mentioned in that section. Section 236 lays down no limitation to the number of charges which can be tried in the circumstances mentioned in the section. When the charge of criminal breach of trust for the gross sum is one offence it must be deemed that the commission of the criminal breach of trust of the various items included in the gross sum was done in the course of the same transaction.

I am unable to imagine the commission of one offence in several transactions. If the commission of the offence continues throughout the year the transaction in which that offence is committed also continues throughout. The tampering of the entries in account books in connection with such commission of criminal breach of trust must also be deemed to be in the course of the same transaction which led to the commission of the criminal breach of trust.

The entries are not independent of the misappropriation committed. They are made in order to cover up the misappropriation. In this view of the matter too it appears to me that the joint trial of the offences under Section 409 with respect to the gross item misappropriated in the course of the year and of the offence under Section 477A relating to the entries altered, mutilated or falsified is legal.

11. It is not, therefore, necessary to consider the question whether Sections 234 and 235, Criminal P. C., are mutually exclusive and that only one of them can be availed of at one trial. This reference was made to the Pull Bench for the decision of such a question in view of conflicting views being expressed in Mangi v. State, 1953 All 228 (AIR V 40) (A) to which I was a party and T. B. Mukerji v. The State, 1954 All 501 (AIR V 41) (B). I have anxiously considered the question and am of opinion that the provisions of both these sections can be availed of at one trial.

12. Section 233, Criminal P. C. is:

"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."

13. It is true that the use of the word 'and' in the sections mentioned at the end of the section does not mean that separate distinct offences can be grouped together only, if the conditions of all the sections 234, 235, 236 and 239 are complied with. This is clear both from the various conditions laid down in these sections and also from the fact that the first three sections relate to the framing of the charges against a particular accused and Section 239 deals with the joint trial of several persons and not to the joint trial of one person on various charges.

The word 'ana' can be taken to mean 'or' in the context, but I do not see why by giving such a meaning to the word 'and' it must be held that a case of joinder of charges must satisfy fully the conditions laid down in only one of these sections.

14. It is apprehended that, if the provisions of all these sections be taken recourse to in justifying the joinder of charges at one trial, the trial may be for so many offences that it would be embarrassing both to the accused and to the Court to deal with them properly. The Court is the best person to judge how far it would be proper and convenient to charge and try an accused for certain offences.

The Court is always free to split up cases but that should not mean that, if it does not split up a case and tries the accused on those several charges it could join keeping in view the provisions of various sections, the trial would be bad. Sub-section (1) of Section 235 permits a joinder of charges in respect to offences more than one committed by the same person in one series of acts so connected together as to form the same transaction.

There is no limit to the number of offences to be charged with and tried at one trial if they were all committed in the course of the same transaction. It should follow therefore that it is not the number of offences charged against a person which leads to an embarrassment to the accused and to the

Court and makes a proper trial difficult but it is the nature of the offences and the 'circumstances in which they were committed which may create such embarrassment and inconvenience.

14A. It is said that exceptions should be strictly construed and that the general rule being that for every distinct offence there be a separate charge the provisions making an exception to this general rule should be strictly construed. Section 233 itself is a restrictive section and therefore an exception to this section should be construed liberally and not strictly the exception being a restrictive provision.

15. Lastly, I may refer to two cases of the Supreme Court in this connection. One is Chandi Prasad Singh v. State of U. P., 1956 SC 149 (AIR V 43) (C). In this case the accused was charged with three offences under Section 409 and one under Section 477A, Penal Code. The accused received three different sums of money from three persons in December 1948 and misappropriated them. The three offences under Section 409, I. P. C. were about these sums.

The offence under Section 477A, I. P. C., was on account of the accused's falsifying the minute book by not showing therein the receipt of these sums. It was contended that the joint trial was in violation of Section 234, Criminal P. C. It was held that the case was governed by Section 235, Criminal P. C., as the several offences under Sections 409 and 477A arose out of the same acts and formed part of the same transaction. It was further observed:

"Moreover the appellant has failed to show any prejudice as required by Section 537."

16. This observation in the context means that even if the several offences did not arise out of the same acts and did not form pant of the same transaction the trial was not bad as there was not any proof of the fact that the accused had been prejudiced. It follows therefore that a trial for offences under Sections 409 and 477A is not fatal unless there had been prejudice to the accused, in case the offences cannot be said to be committed in the same transaction, and that the acts of misappropriation and of falsifying accounts arise out of the same acts and form part of the same transaction.

17. The other case is of Willie Slaney v. State of M. P., 1956 SC 116 ((S) AIR V 43) (D). Bose J. delivering the judgment on behalf of himself and S. R. Das, Ag. C. J., observed at p. 127:

"In our opinion, Sections 233 to 240 deal with joinder of charges and they must be read together and not in isolation. They all deal with the same subject-matter and set out different aspects of it. When they are read as a whole, it becomes clear that Sections 237 and 238 cover every type of case in which a conviction can be sustained when there is no charge for that offence provided there is a charge to start with.

They do not deal with a case in which there is no charge at all, and anything travelling beyond that when there is a charge would be hit by Sections 233, 234, 235 and 239 read as a whole, for the reasons we have just given. But if that is so, and if Section 535 is excluded where Sections 237 and 238 apply, then what is there left for it to operate on except cases in which there is a total omission

to frame a charge?

We do not think these sections should be regarded disjunctively. In our opinion, they between them (including Sections 535 and 537) cover every possible case that relates to the change and they place 'all' failures to observe the rules about the charge in the category of curable irregularities. Chapter 19 deals comprehensively with charges and Sections 535 and 537 cover every case in which there is a departure from the rules set out in that Chapter."

18. It is clear from these observations that Sections 234 to 240 dealing with the joinder of charges must be read together and not in isolation and that they should not be regarded disjunctively. It should follow from these observations that the provisions of the various sections can be availed of to justify a joint trial for several offences.

19. In view of the above I would accept the reference, set aside the order of the Assistant Sessions Judge and order the trial to proceed on the charges framed by the Magistrate with such amendments as the learned Assistant Sessions Judge may find necessary to make.

Brij Mohan Lall, J.

20. This Criminal Reference is connected with two other Criminal References, viz., 246 and 247 of 1954. All of them arise in exactly similar circumstances.

21. It appears that one Sri Ram Verma was a clerk in the office of the District Medical Officer of Health at Etah in the years 1947, 1949 and 1950. He is said to have embezzled large sums of money in that office and to have falsified the accounts-Three prosecutions under Sections 409 and 477A, I. P. C, were started against him. It was alleged that in 1947 he had embezzled four sums of money totalling Rs. 569-10-3 and made false entries in the account books in respect of items 2 to 4. In 1949 he is said to have similarly embezzled six sums of money totalling Rs. 1,409-15-9 and to have committed falsification of accounts in respect of the first three items only.

As regards the year 1950, the charge against him was that he embezzled ten sums of money totalling Rs. 1,23845-0 but committed falsification of accounts in respect of the first three items only.

22. The learned committing Magistrate framed charges against him under Sections 409 and 477A, I. P. C., in all the three cases and committed all those cases to the Court of session. These cases came up for hearing before the learned Assistant Sessions Judge of Etah.

The District Government counsel moved an application before him in each case alleging that there was a misjoinder of charges and praying that each case might be split up into two cases. His suggestion was that the three items of falsification of accounts in each case should be grouped together with the corresponding three items embezzled and should form the subject-matter of one case and that the remaining items of embezzlement in respect of which there was no falsification of accounts should be tried as a separate case.

23. The learned Assistant Sessions Judge acceded to this request and, relying on the case of Rex v. Daya Shankar, 1950 All 167 (AIR V 37) (E) split up each case into two cases. Thus the number of cases before him became six instead of three.

24. The accused went up in revision to the learned Sessions Judge who differed from the learned Assistant Sessions Judge. He placed reliance on the case of 1953 All 228 (AIR V 40) (A).

The learned Sessions Judge has therefore made these references to this Court with the recommendation that the order splitting up each case into two cases be set aside. He has further suggested minor amendments with a view to remove arithmetical mistakes and to supply details in the said charges. Criminal Reference No. 247 of 1954 relates to the year 1947; Criminal Ref. No. 246 of 1954 to the year 1949 and Criminal Ref. No. 248 of 1954 to the year 1950.

25. These references came up for hearing before a learned single Judge who pointed out in his order that the case of 1953 All 228 (AIR V 40) (A) had been dissented from by another Bench in the case of 1954 All 501 (AIR V 41) (B). At his suggestion this and the connected references have been put up before the Full Bench so that this conflict of judicial opinion may be settled.

26. We have heard Sri M. N. Shukla in support of the references. Sri J. R. Bhatt, Assistant Government Advocate has appeared on behalf of the State, but he has also supported the references. We were thus denied the benefit of hearing arguments in support of the contrary view. Sri Bhatt has, however, cited some authorities which favour the opposite view.

27. It has been argued before us that since the accused himself desires that all offences with which he is charged in respect of any one year may be tried jointly, we should accede to this request.

It is true that rules forbidding the joinder of charges have been, framed for the benefit of the accused. The underlying idea is that if too many charges are grouped together against an accused person, he might be handicapped or embarrassed in conducting his defence. Moreover, there is a likelihood of the jury or the Judge being unconsciously prejudiced against the accused when a large number of accusations are brought against him.

But once the law about the joinder of charges has been embodied in the statute, the Courts have to interpret the law as enacted. The accused's wish cannot override the law. In the present case, the accused wants a joint trial because he will find it more inconvenient and more1 expensive to stand more trials than one in respect of each year.

But this does not mean that in the event of his conviction, he will be debarred from questioning the validity of the trial and conviction on the ground of misjoinder provided he can prove it. Disregard of provisions forbidding joinder of charges will amount to a breach of 'the mandatory requirements of law and will vitiate the whole trial.

The accused will also be able to contend that he has been prejudiced in his defence. The accused's wish may be taken into consideration where it is optional with the Court to hold a joint or a separate

trial but not in a case where a joint trial is forbidden by law.

28. Even if it had been possible to pin the accused down to the stand taken by him, viz., that he did not object to a joint trial, I would have refrained from doing so because our decision would have in that event been an authority for this particular case only.

The object of constituting this Full Bench is to clarify the law for the guidance of the lower Courts. I have already stated that there are two conflicting rulings on the point. The existence of such conflicting decisions always puzzles and perplexes the Courts below who are at a loss to understand which decision to follow.

It is desirable that the law should be clarified |as early as possible. I propose; therefore, to consider the question of law involved in this and the connected cases on merits irrespective of the wishes of the accused.

29. I am-alive to the fact that the law has recently been amended by Act 26 of 1955 and that under the amended Section 537, Criminal P. C., a defect of misjoinder of charges can also be condoned if it has not occasioned a failure of justice. But Section 537, Criminal P. C. applies where the irregularity has already been committed in the lower Court and it is detected by the Court of appeal or revision.

The said Court is then faced with the problem as to whether it should brush aside the whole proceedings or condone the defect. Section 537, Criminal P. C. does not contemplate a case where the legality of a certain procedure about to be adopted but not yet adopted is brought into prominence in the trial Court and the Court is called upon to decide about its legality.

In such a case the Court cannot adopt a wrong procedure in the hope that ultimately it would be condoned under Section 537, Criminal P. C. In the present case, the question about the misjoinder of charges was raised at the very initial stage before the trial commenced. The decision has to be given on merits.

If joinder of charges is' not permissible charge cannot be allowed to be joined in the hope that the accused will not be prejudiced and Section 537, Criminal P. C. will be availed of in appeal or revision.

30. The basic rule about the joinder of .charges is contained in Section 233, Criminal P. C., which runs as follows: (After quoting the section as in para. 12 above, the judgment proceeds:) It will appear from a plain reading of this section that the basic rule is subject to four exceptions given in Sections 234, 235, 236 and 239. In this connection, reference may also be made to Section 222(2), Criminal P. C., which runs as follows: (Section quoted as in para 9), It will have to be seen whether the present case falls within any one of the aforesaid exceptions,

31. It is obvious that Section 239 applies to a case where the accused are more than one in number. Since there is only one accused in the present case, Section 239 does not apply.

32. Section 236 contemplates a case where a single act or series of acts is of such a nature that it is doubtful which of several offences the f acts which can be proved will constitute. In such a case, the accused may be charged alternatively with any of such offences. There is no such ambiguity in the present case and therefore Section 236 also has no application to the facts of this case.

33. It remains to see how far Sections 234 and 235 can be availed of to justify a joint trial.

34. Before proceeding further it is necessary to dispose of an argument, viz., that the aggregate amount embezzled during the course of any one year can by virtue of the provisions of Section 222(2), Criminal P. C., be treated as an item and that the three falsification of accounts in each case may be deemed to have been done as part of the transaction resulting in the embezzlement of the entire amount for the year. This argument does not appear to be sound.

The aggregate amount embezzled during the course of any one year can certainly be treated as one offence but for the purpose of Section 234 only. When it is sought to treat the embezzlement of different items and the falsifications of accounts as part of the same transaction, help has to be taken from Section 235, Criminal P. C.

But the difficulty is that the entire amount embezzled during the course of a year cannot be treated las one amount for the purpose of S, 235. The privilege of treating the entire amount embezzled as one offence is, as already stated, available for the purposes of Section 234 only. If help is to be taken from Section 235, the items of embezzlement are to be deemed to be separate offences and not a single offence.

35. Moreover, Sections 234 and 222(2), Criminal P. C., speak of "offence' but not of "transaction". From the circumstance that the embezzlement of the entire amount for a whole year shall be treated as one offence, it does not follow that the embezzlements of different items will certainly form part of one transaction.

Such a conclusion is not borne out by the language either of Section 234 or of Section 222(2), Criminal P. C. The aforesaid argument is, therefore, unacceptable to me and cannot be used as a justification for joining all charges of embezzlement committed during the course of one year with charges for falsification of accounts.

36. It is next contended that all embezzlements and all falsifications of accounts form part of the same transaction. If so, they can certainly be jointly tried by virtue of Section 235, Criminal P. C. alone. In that case it will not be necessary to invoke the aid of Section 234 at all. Further, it will be immaterial in that case that the limit of three offences imposed by Section 234 is exceeded. That limit is to be observed if joinder of charges is made by virtue of Section 234.

But if this section is not invoked and if joinder is sought to be justified by the provisions of any other section, be it Section 235 or Section 236 or Section 239, the limit, if any, imposed by the section sought to be invoked will have to be considered and not the limit prescribed by Section 234. If the section under which joinder is sought allows the grouping together of more than three offences, the

joinder is permissible, otherwise not.

37. It is, therefore, necessary to see whether the offences with which the accused stands charged form part of one transaction. In a case of conspiracy involving a number of persons it is possible to hold that separate acts of embezzlement and of falsification of accounts, though committed at different times and at different places by different persons, form part of one transaction.

But in the absence of a conspiracy different acts done by a person at different times in respect of money received from different persons may or may not have been done in the course of the same transaction. No hard and fast rule can be laid down as to when certain acts are to be deemed to have been done in the course' of the same transaction. Each case has to be judged on its own circumstances.

In the present case, all that we know is that the same person is said to have committed a number of embezzlements and a number of falsifications of accounts at different times. No other circumstance has been brought to our notice as lending support to the sameness of transaction. The learned Sessions Judge also has not held that all the acts formed part of the same transaction. The mere fact that the author is the same person is not sufficient to justify a conclusion that all acts were done as part of the same transaction.

38. It was suggested that since the learned counsel for the accused had advanced arguments on the assumption that different acts committed by the accused were part of the same transaction, we may accept that position as correct. This argument does not appeal to me. Whatever may be the argument advanced by the learned counsel for the accused, the accused himself has not so far admitted that he has committed any one of the acts with which he stands charged. Much less has he admitted that the said acts were done by him as part of the same transaction.

An assumption made by the learned counsel for the purposes of his argument cannot bind the accused. Neither the learned counsel for the accused nor the learned State Counsel has brought to our notice any piece of evidence to lend support to the version that the said acts were done as part of the same transaction.

With the materials placed before me I am unable to record a finding that all the acts with which the accused stands charged were committed by him as part of the same transaction. This means that a joint trial of all offences committed during the course of the year, i.e., the offences under Sections 409 and 477A, I. P. C., cannot be justified by the provisions of Section 235 alone.

39. Similarly, a joint trial cannot be justified under Section 234 alone because that section contemplates, inter alia, the joinder of the offences of the same kind. Offences under Sections 409 and 477A I. P. C. are not offences of the same kind.

40. The next question that arises for decision is whether recourse can be had to both these sections jointly in order to have a joint trial. In other words is it open to the prosecution to take help partly of one section and partly of another in order to justify the joinder of charges. Or is it the intention of

law that the sections should be mutually exclusive and only one of them can be availed of at one time. This is a point on which there is a considerable conflict of opinion in different High Courts.

In our own High Court also there has been a conflict & the decisions have, by no means, been uniform. But there is no Full Bench decision of this Court so far. As this Bench has been constituted to decide which of the two conflicting views is to be adopted and to overrule the decisions which support the contrary view, it will be enough to discuss the arguments in favour of each view & to draw a conclusion therefrom. It will not be necessary to review each case individually.

41. It is a well-known rule of interpretation of statutes that the scope of an exception is not to be enlarged. The normal rule as embodied in Section 233, Criminal P. C. has, as already pointed out, been made subject to the exceptions laid down in Section 234 or 235 or 236 or 239. To put it otherwise Section 234 or 235 or 236 or 239 is an exception. But certainly it was not intended that Section 234 plus Section 235 should constitute an exception. Nor was it intended that Section 234 plus Section 236 should constitute an exception and so on. Each section was to be an exception individually.

It was riot the intention of the legislature to group together different sections in order to constitute an exception. Had the legislature intended not to treat the sections mutually exclusive, the relative clause of Section 233, Criminal P. C. would have been something like this:--

"Except in the cases mentioned in one or more' of the sections 234, 235, 236 and 239".

The legislature has purposely refrained from using such language and it will not be possible for the Courts to read in the language of the statute words which do not exist. By adopting the interpretation suggested by the learned counsel for the accused and the State counsel the scope of the exception will be enlarged and this is forbidden by all recognised canons of interpretation.

42. The next argument advanced in support of the plea for joinder of charges is that the word "and" finds place between the figures 236 and 239 in Section 233, Criminal P. C. It is suggested that the use of the word "and" instead of "or" will justify an interpretation permitting the use of the sections collectively rather than individually. This argument found favour with the learned Judge in the case of 1953 All 228 (230-231) (AIR V40) (A).

With great respect I am unable to subscribe to this view. When a number of sections are enumerated as each constituting an exception the word "and" must, according to the ordinary rule of grammar, precede the last figure. This word had to be used in order to make the sentence complete and grammatical. The word "and" used in such circumstances does not lend support to the contention that all the sections collectively were to form the exception. I may, in this connection, usefully refer to the following remarks in the judgment of Desai J. in the case of 1954 All 501 (B) at p. 503 viz. :--

"The word 'and' is used because there are four exceptions and they are enumerated. It is certainly not the meaning that a joint trial is permitted only where the case is covered by provisions of all the lour sections. The word 'and' is not used in a cumulative sense; it is used in the sense of the word

'or'."

With this opinion I respectfully agree. I am., therefore, of opinion that the use of the word 'and" in Section 233, Criminal P. C., does not justify the conclusion that aid can be taken from more than one section to constitute an exception to the normal rule laid down in Section 233, Criminal P. C.

43. Yet another argument was advanced in support of the joinder of charges, and that is the argument which found favour with the learned Judges in the case of 1953 All 228 (231) (AIR V40) (A). This argument can best be reproduced in the language of the learned Judges which is as follows:--

"Take a case in which an accused is tried of three offences of the same nature committed within the course of twelve months and the Court finds that in respect of one of these offences the accused is guilty not of that offence but of a different offence arising out of the some transaction and that before evidence was led it was doubtful which of the two offences on the facts proved in the case the accused could be said to have been guilty.

Can the Court convict the accused of a different offence or not? Section 237 clearly says that the Court can do this. It, therefore, follows that the trial would not have been bad if along with the charges of the three offences of the same nature another charge of a different nature arising out of the same transaction out of which one of such offences had arisen had been joined".

This argument, though plausible, is capable of an easy answer. The learned Judges have taken into consideration the result or the final verdict in the case which, it may be respectfully remarked, is not the criterion for the joinder of charges. The basic rule embodied in Section 233, Criminal P. C., to which reference has already been made, says that for every distinct offence of which "any person is accused" a separate charge shall be framed.

Similarly, Section 234 begins by saying that "when a person is 'accused' of more offences...." It will thus appear that the criterion for the joinder of charges is the accusation and not the ultimate result of the trial. Their Lordships of the Privy Council emphasised in the case of 'Babu Lal v. Emperor, 1938 PC 130 (133) (AIR V 25) (P) that the words of the statute are "accused" and not "rightly accused" nor "accused and convicted".

It is, therefore, obvious that if the prosecution case as put forward in Court permits the joinder of charges the joinder can be made irrespective of the result. If ultimately it is found that the facts on the basis of which joinder could be permissible have not been proved, the case will not suffer from the defect of misjoinder. If this principle is borne in mind, the argument which appealed to the learned Judges in the aforesaid case is easily answered.

The circumstance that conviction of a different offence by application of Section 237, Criminal P. C. may be permissible will not affect the question of joinder of charges if at the time of the beginning of the trial the prosecution case was that all the three offences were of a similar nature and had been committed during the course of a year.

44. It is true that in the case of 1950 All 167 (AIR V37) (E) the learned Judges remarked at page 175 as follows:--

"In our view the charge or charges for criminal misappropriation in respect of three items may be 'linked with three charges for falsification of accounts arising out of the same three transactions".

But this was an 'obiter dictum', pure and simple. As a matter of fact, the learned Judges held that the trial in that particular case was vitiated by misjoinder of charges and they actually quashed it. It is, therefore, not necessary to pursue this case any further. Suffice it to say that this case was dissented from by a Full Bench of the Bombay High Court in 'D.K. Chandra v. The State', 1952 Bom 177 (AIR V39) (FB) (G).

In the Bombay case the accused was charged under Section 409 I. P. C. for criminal breach of trust committed in respect of a sum of Rs. 2,500/- on 12-4-1949 and, in the alternative, w,as charged under Section 420, I. P. C., with having committed an offence of cheating in respect of the same sum on the same day. He was also charged under Section 409 I. P. C. with having committed criminal breach of trust in respect of a sum of Rs. 900/- on 20-4-1949 and, in the alternative with having committed an offence of cheating in respect of the same sum on the same day.

The Full Bench held that these charges could not be joined together. It is obvious that the alternative charges could be brought together under Section 236. It is equally clear that two cases of cheating or two cases under Section 409 could be joined together under Section 234. But if all the four had to be joined, help would have been taken from both sections 234 and 236 simultaneously. It was held that this was not permissible and both sections could not be invoked at one and the same time.

45. A similar view was taken by a Full Bench, of the Saurashtra High Court in 'Shah Himatlal Amulkh V. The State', 1955 Sau 77 (AIR V42) (H). The Full Bench has held that the exceptions contained in Sections 234, 235, 236 and 239 are mutually exclusive and that it is not permissible for the prosecution to cull out some conditions from one section and some conditions from another but that it is necessary that all the conditions of one or the other exception should be satisfied.

The learned Judges have further held that it would be enlarging the scope of the sections mentioned in Section 233, Criminal P. C. to hold that a joint, trial would be permissible not only in cases where the joinder is justified by these sections singly but also in cases which partly satisfy the conditions of one section and partly of another. They dissented from the decision of this Court in 1953 All 228 (AIR V40) (A) I respectfully agree with their view.

46. There are a number of other cases of this Court which have adopted the same view. In 'Faujdar Mahto v. Emperor', 1926 All 261 (AIR V 13) (I) the accused had kidnapped a girl and sold her off as a Chattri girl which she was not. On another occasion he again committed a similar act in respect of another girl and sold her to a third person. Both these acts were totally independent of each other. It was held that the accused could be tried by virtue of Section 234 of two offences., of kidnapping in one trial, or of two offences of cheating in one trial, and that by virtue of Section 235 he could be tried of one offence of cheating and one offence of kidnapping in one trial.

But advantage could not be taken of both Ss. 234 and 235 to group together in one trial two offences of kidnapping and two offences of cheating. A similar view was expressed in the cases of 'Sheo Saran Lal v. Emperor', 7 All LJ 225 (J), 'Shankar v. Emperor', 11 All LJ 188 (K), 'Shuja Uddin Ahmad V. Emperor', 1922 All 214 (1) (AIR V9) (L); and 'Janeshar Das v. Emperor', 1929 All 202 (AIR, V 16) (M).

47. The case of 1954 All 501 (AIR V41) (B) was really a case under Section 239 and the question for decision was whether the different clauses of that section were or were not mutually exclusive. But the learned Judge discussed Sections 234 & 235 also and held that they too were mutually exclusive and advantage could not be taken of both of them to justify a joint trial.

48. Reference was made also to the case of In re 'Bal Gangadhar Tilak', 33 Bom 221 (N). In, that case the late Bal Gangadhar Tilak was tried for writing two articles in the pages of 'Kesri' and in respect of each of them he was charged with having committed offences punishable under Sections 124A and 153A. The Court held that the two articles were written as part of the same transactions. If that was so, the trial could be justified under Section 235 (1) Criminal P. C.

But the learned Judges went on to hold that even otherwise the trial was valid and advantage could be taken of both Sections 234 and 235. That was clearly an 'obiter dictum'. Moreover, this decision has lost all force by virtue of the Full Bench decision of the Bombay High Court, cited above, viz., that of 1952 Bom 177 (AIR V39) (G).

49. The cases of 'Ramkishen Pershad v. Emperor', 1934 Pat 232 (AIR V21) (O), 'Kashiram v. Hurdat Rai Gopal Rai', 1935 Cal 312 (AIR V22) (P), 'Raj Kishore v. Rex', 1949 All 139 (AIR V36) (Q) Ramnath Rai v Emperor', 1934 Pat 483 (AIR V21) (R), 'Gajadhar Lal v. Emperor', 1920 Pat 775 (AIR V7) (S) and 'Sanuman v. Emperor', 1921 All 19 (AIR V8) (T) are distinguishable because the finding in these cases was that different acts formed part of one transaction. So they could be tried together by virtue of Section 235 (1), Criminal P. C. alone.

50. The cases of 'Gurucharan Samal v. State :1953 Orissa 258 (AIR V40) (U), 'Debi Prasad v. Emperor', 1944 Oudh 122 (AIR V31) (V), Michael John v. Emperor', 1931 Pat 349 (AIR V18) (W), Emperor v. Mathuri, 1936 All 337 (AIR V23) (X) & Kashinath v. Emperor', 1932 All 25 (AIR V19) (Y) no doubt take a contrary view. But with all respect to the learned Judges responsible for these decisions I find myself unable to subscribe to the view taken by them. I respectfully dissent from these decisions.

51. It is also necessary to notice two very recent decisions of the Supreme Court. In the case of 1956 SC 149 (AIR V43) (C) their Lordships observe as follows at page 153:--

"It is next contended that there has been a violation of Section 234, Criminal P. C. in that the appellant had been charged with three offences under Section 409 and one under Section 477A. But the case is governed by Section 235, as the several offences under Sections 409 and 477A arise out of the same acts and form part of the same transactions. Moreover, "the appellant has failed to show any, prejudice as required by Section 537. This objection must accordingly be overruled".

It will be noticed that the trial was one under Sections 409 and 477A, but their Lordships permitted a joint trial on the ground that several offences with which the accused was charged arose out of the same acts and formed part of the same transaction. If that was so, Section 235 alone was sufficient justification for a joint trial.

In the case before us it has been pointed out that all the offences committed were not part of the same transaction. It may be that a certain item embezzled and the corresponding entry about falsification of account did form part of one transaction. But, as pointed out above, there is nothing to indicate that all the items of embezzlement and all the items of falsification of account formed part of one and the same transaction.

52. Prom the circumstances that in the last but one sentence in the observation of their Lordships, quoted above, they remarked that the appellant had failed to show that any prejudice had been caused to him does not indicate that their Lordships intended to hold that Sections 234 and 235 could both be availed of to hold a joint trial. Therefore I find nothing in this case to support the suggestion which was put forward on behalf of the accused.

53. The other case is that of 1956 SC 116 (AIR V43) (D). That was not a case of misjomder of causes of action. Bose J., in delivering the judgment on behalf of himself and S. R. Das A.C.J., observed at page 127 as follows:--

(After quoting the portion of the judgment as given in Para 17 above, His Lordship proceeds as under :--) What his Lordship meant was that Sections 233 to 240 and Sections 535 and 537 contain between themselves the entire law on the question of joinder of charges and one group of these sections, viz. Sections 233 to 240 should not be read! disjunctively from the other group consisting of Ss, 535 and 537, Criminal P. C.

It was not their intention to hold that Sections 234 and 235 could both be availed of to justify joinder of charges. As a matter of fact, misjoinder of charges was, as already stated, not an issue before their Lordships and no remark in the aforesaid judgment is to be interpreted as laying down any proposition about the misjoinder of charges.

54. The result, therefore, is that, in my opinion, each of the four Sections 234, 235, 236 and 239 can individually be relied upon as justifying a joinder of charges in respect of any trial, but use cannot be made of two or more of these four sections together to justify a joinder. In this view of the law, the joinder of three charges of criminal breach of trust with three charges of falsification of accounts cannot be upheld.

I will, therefore, hold that each of the three trials, pending before the learned Assistant Sessions Judge of Etah should be split up into two trials. In one trial there should be charges for all the amounts in respect of which embezzlement? was committed during the course of one year. In the other trial there should be charges for the three offences of falsification of accounts committed during the course of that year.

As already stated, the charges of falsification of accounts do not exceed three in any of the three cases. In the circumstances, I reject the references made by the learned Sessions Judge of Etah, but at the same time I do not uphold the view of the learned Assistant Sessions Judge. Instead I direct the splitting up of the trials as indicated above.

The charges shall be reframed in the light of the observations made above. The details of the different amounts in respect of which falsification of accounts has taken place shall be given in the charges. Care shall also be taken to remove the mistakes which exist in some of the charges in totalling the different items.

Asthana, J.

55. I have had the advantage of reading the judgment of my learned brother Brij Mohan Lal, J. and I am in full agreement with the conclusions arrived at by him and the order proposed. I would, however, like to add a few words.

56. The questions which are involved in these cases are whether the several exceptions provided in Sections 234 to 239, Criminal P. C. to the general rule embodied in Section 233 that for every distinct offence there shall be a separate charge and every such charge shall be tried separately, are mutually exclusive or supplementary to each other, and what is the meaning of the words 'same transaction' in Section 235, Criminal P. C.

57. It was contended before us, both on behalf of the accused as well as the State, that if the exceptions provided in Sections 234 to 239, Criminal P. C. were not applicable simultaneously and only one section was applicable at one time to decide whether the joinder of charges was permissible, the scope of the exceptions would be very much limited and there would be much multiplicity of proceedings.

It is a well settled rule of law that such joinder of charges should not be permitted as would prejudice the accused in his defence even if there have to be separate trials for different charges. It is not so much the multiplicity of proceedings as the interest of the accused and the fairness of the trial that have to be considered in the matter of joinder of charges.

The different exceptions mentioned in Sections 234, 235, 236 and 239, Criminal P. C. are meant to apply to different conditions and classes of cases and each is complete in itself. In order to apply any one of these exceptions to a particular case it is necessary that the conditions under which they are applicable are completely satisfied. For example, if three offences of the same kind are committed within a period of one year Section 234 will apply and the accused can be tried of them at one trial.

Similarly, if different offences are committed by an accused person in the course of the same transaction he can be tried of all these offences at one trial and his case will be covered by section 235 Criminal P'. C. If, however, an accused person commits three similar offences, for instance dacoity, within one year and also commits criminal breach of trust and falsification of accounts, the last two in the course of the same transaction, it is very doubtful if he can be tried of all these

offences at one trial.

The case will not be covered either by Section 234 or Section 235 because the conditions of neither of them will be satisfied. In order to apply both the sections simultaneously it is necessary that the conditions of both the sections should be complied with and the joinder should not be inconsistent either with Section 234 or Section 235, Cri. P. C. If more than three offences of the same kind are combined, or three offences of different kinds are combined at one trial, S, 234 is violated, and, similarly, if offences not committed in the same course of transaction are combined, Section 235 is violated.

58. I think that the exceptions provided in Sections 234, 235, 236 and 239, Criminal P. C. are alternative and not cumulative and so are the exceptions provided in the different sub-clauses of Section 239 Criminal P. C. I do not agree with the contention on behalf of the applicant that the scope of the exceptions will be narrowed if they are held to be mutually exclusive. The number of the exceptions remains the same and one has to choose which particular exception will be applicable to the case under consideration.

If joinder of different offences is allowed in cases where the conditions provided in Sections 234, 235, 236 and 239 are not completely satisfied but are only partly satisfied, then that would enlarge the scope of the exceptions rather than restrict it. I do not think that the scope of the exceptions can be enlarged by applying the provisions of all the above four sections simultaneously even if the conditions requisite for their application are not fulfilled.

59. In order to apply the different exceptions mentioned in Sections 234, 235, 236 and 239 simultaneously to a case it is necessary that the conditions requisite for the application of each of them should be completely satisfied, which, in my opinion, is neither feasible nor practicable on a consideration of the conditions mentioned therein. I have already mentioned above that a combination of the provisions of Sections 234 and 235, Criminal P. C. is not possible as in that case neither the conditions of Section 234 nor the conditions of Section 235 will be completely satisfied.

An examination of Section 239, Criminal P. C. shows that it mentions six classes of cases in which persons committing the same offence, or different offences, may be tried together at one trial. If all the clauses mentioned in this section are to be considered supplementary to each other and not mutually exclusive, the result will be that the different classes of persons mentioned in the various sub-clauses committing different offences at different times which have no connection whatsoever with each other, may be tried together.

According to Sub-clause (a), persons accused of the same offence committed in the course of the same transaction may be tried together; and according to Sub-clause (f), persons accused of offences under Sections 411 and 414, Penal Code, or either of those sections., in respect of stolen property the possession of which has been transferred by one offence, may be tried together. If both these clauses are utilised for the purpose of deciding whether joint trial of different persons is possible or not, then persons committing entirely different offences can be tried with persons committing the offences under Sections 411 and 414, I, P. C.

60. Again, persons accused of offences under Sections 411 and 414 I. P. C. may be jointly tried under clause (g) with persons accused of offences tinker Chap. 12, Penal Code relating to counterfeit coin, or abetment of the same. It need not be said that if such kind of joinder is permitted it will lead to confusion as the evidence in respect of the different offences which have been combined will be altogether different, I do not think that it could be the intention of the Legislature that the different clauses of Section 239 could be joined together in order to bring the case within the exceptions.

I am, therefore, of opinion that the exceptions provided in Sections 234, 235, 236 and 239 are mutually exclusive and that it is not possible to combine the provisions of two or more sections, or the different Sub-clauses of Section 239 in any one case, or to justify a trial of several persons partly by applying the provisions of one clause and partly by applying the provisions of another clause or other clauses, and that a joint trial is permissible only if it is permitted by any one of these sections. I have given my reasons in detail in 1954 All 501 (AIR V41) (B).

61. I now come to the next question as to what is the meaning of the words 'same transaction', in Section 235, Criminal p. C. The words 'same transaction' have not been defined anywhere in the Code.

It was held in 'Abdul Aziz v. Rex' 1950 All 364 (AIR V 37) (Z) that the expression 'same transaction' suggested not necessarily proximity in time so much as continuity of action, and in such cases the test was that the acts done might be so related to each other in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action, and if two persons belonging to different places went to a market place independently to sell contraband opium and both were caught simultaneously it did not follow that there was any continuity of action or purpose between them.

In the present case the applicant is being tried for offences of criminal breach of trust in respect of a number of items committed during a period of three years, and for falsification of accounts to cover them up. It cannot be said that these offences were all committed during the course of the same transaction. If it were so, the applicant could be tried in respect of the embezzlement and falsification of accounts for the entire period at one trial.

In my opinion, embezzlement of each item constitutes a separate offence and so also the falsification of accounts with respect to each item. It may be that the embezzlement of a particular item and the falsification of accounts to cover up that item are offences which were committed in the course of the same transaction. There can, however, be no doubt that the falsification of accounts with regard to different items of embezzlement committed at different times could not be said to have been committed in the course of the same transaction.

Reference was made to 3. 222(2), Criminal P. C. in support of the contention that embezzlement of different items committed within a period of one year and the falsification of accounts with respect to these items, could be treated as part of the same transaction. I am afraid that this contention is based on some misconception. Section 222(2) only provides that for purposes of Section 234, Criminal P. C. if the accused commits embezzlement of different items within a period of one year he

can be charged for a lump sum in respect of the total amount embezzled by him during this period, and for that purpose the offence would be one offence.

This section, however, does not lay down that the embezzlement of different items committed at different times will be deemed to be one transaction for the purpose of Section 235, Criminal P. C. There is a difference between the words 'offence' and 'transactions'.

The embezzlement of different items at different times within a period of one year may become the subject of one offence but it cannot be one transaction. I am, therefore, of opinion that offences relating to embezzlement and falsification of accounts which do not form part of the same transaction, cannot be combined together with the aid of Section 235, Criminal P. C. BY THE COURT:

62. The reference is rejected and it is ordered that each of the three trials pending before the Assistant Sessions Judge be split up into two trials, that in one trial there should be charges for all the amounts in respect of which criminal breach of trust was committed during the course of one year and that the other trial be with respect to the charges for the three offences of falsification of accounts committed during the course of that year.

63. This order governs Criminal References Nos. 236 and 248 of 1954 as well.