Rash Behari Shaw (Handa) And Ors. vs Emperor on 10 July, 1936

Equivalent citations: AIR1936CAL753, AIR 1936 CALCUTTA 753

JUDGMENT

1. The appellants in these appeals are Rash Behari Shaw, Sushil Kumar Ghose, Patal Chandra Santra, Jagadish Singh, Manindra Nath Dey, Babulal Chowkhani, Ganesh Bahadur and Sailendra Nath Mukherji. They together with four other persons, Panchkari Banerji, Kumud Nath Nandy, Sailendra Nath Sanyal, and Harnarian Chatterji were jointly tried before the Chief Presidency Magistrate, Calcutta, and as a result of the trial the present appellants were convicted and sentenced on various charges, and the other four persons were acquitted. All the accused persons were charged with having been parties to a criminal conspiracy to commit theft by dishonest consumption and user of electrical energy belonging to the Calcutta Electric Supply Corporation between the month of January 1934 and 20th January 1935, and in consequence of such conspiracy theft was committed at the Bharat Laxmi Cinema, at the Jupiter Cinema and at other places. They were charged with being parties to this conspiracy together with, amongst others, three persons, Krishna Chandra Shome, Bholanath Chatterji and Hardwar Singh, who were originally in the position of being accused persons but later were discharged and called as witnesses on behalf of the prosecution. Certain other persons were alleged to be parties to the conspiracy, namely Aswini Kumar Panja, Nanilal Ghose, Md. Abdul Azim and Bhudeb Chandra Seth, all of whom were stated to be absconders at the time of the trial out of which these appeals arise, and they were subsequently arrested, tried and convicted, and the first three of them are the appellants in the supplementary case.

2. Against Babulal Chowkhani, who is the proprietor of the Bharat Laxmi Cinema which is situate at No. 2, Chittaranjan Avenue, there was a further charge that between April 1934, at the time when the Cinema was started, and 16th January 1935, he committed theft by dishonest consumption or user of electrical energy belonging to the Calcutta Electric Supply Corporation. Against Sailendra Nath Mukherji, Kumud Nath Nandy and Ganesh Bahadur there was a charge of aiding and a betting Babulal Chowkhani in the commission of the offence of theft of electrical energy belonging to the Calcutta Electric Supply Corporation. Sailendra Nath Mukherji, Rash Behari Shaw, Sushil Kumar Ghose and Jagadish Singh were charged with having aided and abetted Md. Abdul Azim, proprietor of the Jupiter Cinema, in the commission of theft of electrical energy at that Cinema between the month, of February 1934 and 23rd December 1934.

3. Put shortly therefore all the 12 persons who were tried together before the Chief Presidency Magistrate were charged with an offence punishable under Section 120-B, I. P. C , read with Section 39, Electricity Act, 1910, and Section 379, I. P. C. Babulal Chowkhani was charged with an offence punishable under Section 39, Electricity Act, 1910, read with Section 379, I. P. C. Sailendra Nath Mukherji, Kumud Nath Nandy and Ganesh Bahadur were charged with an offence punishable under Section 109, I P. C., read with Section 39, Electricity Act, 1910, read with Section 379, I. P. C.

Sailendra Nath Mukherji, Rash Behari Shaw, Sushil Kumar Ghose and Jagadish Singh were charged with an offence punishable under Section 109, I. P. C., read with Section 39, Electricity Act, 1910, read with Section 379, I. P. C.

4. The learned Magistrate in his elaborate and exhaustive judgment first of all gave a survey of the circumstances leading to the institution by the Calcutta Electric Supply Corporation of the proceedings against the present appellants and the other accused persons who were tried, and the Magistrate refers to certain evidence which was given for the purpose of showing that prior to the investigation which led to the arrest of the present appellants and other persons there had been an abnormal loss of electricity which could not be accounted for. As a consequence of this three special meter readers, Khambata, (P. W. 30), W.J. Hutchison (P. W. 31) and M.C. Hart (P. W. 32), were appointed on 7th July 1934. As a result of the readings taken by these three persons proof was obtained that in three places meters had been tampered with as they showed reverse readings, i.e., lower readings taken on certain dates than the readings taken on previous dates. The next step taken by the Corporation was to instruct a meter reader named N.K. Chatterji, (P. W. 6), to take daily readings at the Bharat Laxmi Cinema. When giving evidence on 30th January 1935 N.K. Chatterji stated that for the previous nine months he had, under orders, been taking weekly readings of the Cinemas and Theatres which he had been entering in two books, one for Central Calcutta and one for North Calcutta. He began to take weekly readings at the Bharat Laxmi Cinema and at the Jupiter Cinema on 4th June 1934, (Exs. 20 and 21). At the Bharat Laxmi Cinema he noticed a decrease in consumption which he reported to his superior officer, one Augustin, who thereupon ordered him to take daily readings at the Bharat Laxmi Cinema. This he did from 20th August 1934 to 4th September 1934 entering readings in a special note-book (Ex. 22). As a result he noted that there were reverse readings on two Mondays on two light and fan meters and also on one electric motor meter.

5. The next event, says the learned Magistrate, which led to the institution of this case, was a matter which was really put before the Court by the defence. This was a letter (Ex. D), dated the 21st September 1934, which purported to have been written by one Chandi Charan Mukherji to the Agent of the Calcutta Electric Supply Corporation, who sent it to the Commissioner of Police, Calcutta, for investigation by the police. In that letter Chandi Charan Mukherji stated that for the previous five or six months the teashop known as Chhaya Cabin, opposite Mukherji's house, and run by one Krishna Chandra Shome, had been used as the rendezvous of certain persons engaged in tampering with electric meters. He mentioned five persons and offered to assist in the arrest of the culprits. Inspector Sukrul Hossein (P. W. 11-A) of the Detective Department was deputed to investigate the matter. He made arrangements for a watch to be kept on the Bharat Laxmi Cinema from the third week of September 1934 and that watch continued till the latter part of December 1934. During the period from the 1st to the 12th November two officers of the Calcutta Electric Supply Corporation, Mr. M.S. Thacker (P. W. 8) and N. S. Rau (P. W. 9), took readings at the Bharat Laxmi Cinema. The prosecution case was that the readings taken by these two officers showed that the meters at that Cinema had been tampered with. On the 17th November a formal complaint was made to the Court of the Chief Presidency Magistrate, Calcutta, by M.S. Thacker on behalf of the Calcutta Electric Supply Corporation, that complaint being in compliance with the requirements of Section 50, Electricity Act.

6. Subsequently, a large number of persons were arrested, some of whom were discharged, and the others tried on charges out of which these appeals arise. Inspector Sukrul Hossein (P. W. 11-A) and Sub-Inspector P.K. Dutt (P. W. 44) kept watch on the Jupiter Cinema on the 23rd December 1934. At about 5-30 a.m. on that date Krishna Chandra Shome arrived at the Cinema on a bicycle and went to an office room in a building be-side the Cinema. Five or ten minutes later the police officers entered and arrested him there and also the Darwan of the Cinema, Jagadish Singh. They sub-sequently searched the house of Krishna Chandra Shome and there took possession of certain articles, namely, a brass die marked M-11 and another marked C. E. S. C. Ltd., certain lead seals, and wires etc., and also a letter addressed to one Aswini Kumar Panja, and another letter to Krishna Shome by one N.K. Chatterji (Ex. 36). While the search at Krishna's house was taking place, the police officers went out and saw a Baby Austin Saloon Car No. 36683 which was pursued and stopped near Jagannath Ghat. Sailendra Nath Mukherji who was in the car was then arrested. On the same day, that is, the 23rd December 1934, four other persons, Sushil Kumar Ghose, Manindra Nath Dey, Bholanath Chatterji and Rash Behari Shaw were arrested making a total of the persons arrested up to that time 7. On the 26th December two persons, Hardwar Singh and Panchkori Banerji were arrested. On the 29th December 1934 Kumud Nath Nandy and Saliendra Nath Sanyal were arrested: on 7th January 1935 Harnarain Chatterji was arrested; on the 8th January 1935 Patal Chandra Santra was arrested; and on the 10th January 1935 Ganesh Bahadur, the Darwan at the Bharat Laxmi Cinema. On that same day, that is, the 10th January 1935, the Bharat Laxmi Studio at Tollygunge owned by Babulal Chowkhani was searched by Sub-Inspector Jiban Chandra Chatterji and among the papers seized were six files of vouchers (Exs. 54/1 to 54/6), inside of which were two pay orders (Exs. 12 and 14) with vouchers attached (Exs. 12/2 and 14/2). These pay orders bore the signature of Babulal Chowkhani and he was arrested on the 16th January 1935, and on the 20th January 1935 his Studio was searched for the second time and another pay order bearing his signature was discovered; that is Ex. 16.

7. Of the persons arrested the following made confessions which were recorded by an Honorary Magistrate Rai Bahadur Ashutosh Ghose as follows: Krishna Chandra Shome on the 28th December 1934; Bholanath Chatterji on 29th December 1934; Hardwar Singh on the 30th December 1934; Rash Behari Shaw and Manindra Nath Dey on the 31st December 1934; Panchkori Banerji and Sushil Ghose on the 1st January 1935; and Jagadish Singh on the 2nd January 1935. At the beginning of the trial before the learned Chief Presidency Magistrate, on the application of the prosecution, Krishna Chandra Shome, Bholanath Chatterji and Hardwar Singh were discharged under Section 494, Criminal P. C., and they were examined as witnesses for the prosecution,'and the other five, they all retracted the confessions that they made. Three other persons were arrested and put on trial, namely Somrath Chowbey, Krishna Swamy Ghaneshyam, but they were discharged before the charges were framed. That was on the 2nd February 1935. The order recorded by the learned Magistrate runs as follows:

> 6 P. Ws. more examined. The accused Somrath Chowbey, Krishna Swamy Ghaneshyam, Sristidhar Bhattacharji, are discharged under Section 253, Criminal P. C. Charges framed against the rest and their plea recorded.

8. The enquiry before the Magistrate really commenced on the 21st January 1935. Between that date and the 2nd February the Magistrate had taken the evidence in chief of no less than 36 witnesses called on behalf of the prosecution. That is an important fact to be borne in mind in considering whether or not there was any illegality in connection with the joinder of the charges made against these appellants. The charges were framed clearly on the basis of the evidence given by these 36 witnesses prior to the time on 2nd February when the charges were framed by the learned Magistrate including such evidence as was given as to the events leading up to the investigation and the sending up to trial of the accused persons. The Magistrate thought fit to charge the appellants with the other four persons who were tried with an offence under Section 120-B, I. P. C. The learned Magistrate in his judgment having referred to the charges framed against the 12 persons whom he was trying says this:

> All the accused persons have pleaded not guilty and most of them have filed written statements explaining their position. Amongst them only one, Kumud Nath Nandy was in the service of C. E. S. C. at the time of his arrest. Sailen Mukerji, Sushil Ghosh, Sailen Sanyal, Hara Narayan Chatterji are ex-employees of the Electric Supply Corporation: accomplice witnesses Krishna Chandra Shome and Hardwar Singh are also ex-employees of the Electric Supply Corporation. Those accused persons who do not fall in that category are accused Rash Behari Shaw and Manindra Nath Dey, the accomplice witness Bholanath Chatterji P. W. 2 and the accused Aswini Kumar Panja and Nanilal Ghosh who are awaiting trial after disposal of this case. Babulal Chowkhani is proprietor of the Bharat Lakshmi Cinema and Ganesh Bahadur is durwan of that place. The accused Ganesh Bahadur is durwan of the Jupiter Cinema the proprietor of which Abdul Azim and his servant Bhudeb Chandra Sett are awaiting trial here-after....

9. The learned Magistrate then proceeded to set out the evidence tendered by the prosecution regarding the association of the accused persons, evidence to show that there was one general conspiracy between all the accused. According to the prosecution case, there were two groups of persons operating: (1) the consumers of the electrical energy and their servants who allowed meter tampering to be done and (2) those who did the actual tampering. The latter were either employees or ex-employees of the Calcutta Electric Supply Corporation or they were outsiders. Of the latter some had mechanical knowledge and had made or supplied articles required in connection with the tampering operations. The operators who were employees or ex-employees of the Electric Supply Corporation were Sailen Mukherji, Kumud Nandy, Sushil Ghosh, Sailen Sanyal Harnarayan Chatterji and Hardwar Singh, and those who were not in the services of the Supply Corporation either before or at the time of their arrest were Rash Behari Shaw, Manindra Nath Dey, Bholanath Chatterji, Aswini Kumar Panja, and Nanilal Ghosh.

10. It was further the case of the prosecution that Nanilal Ghosh was the originator of the plan and he it was said, got the idea from one B.N. Dey, a former employee of the Calcutta Electric Supply Corporation. It was said that Nanilal Ghosh brought in Sailen Mukerji who in his turn recruited Kumud Nandy, Harnarayan Chatterji and Sailendra Sanyal, his colleagues in the Supply Corporation. The other persons recruited by Sailen Mukherji were Sushil Ghosh, Panchkori Banerji,

Hardwar Singh, Aswini Kumar Panja and Bholanath Chatterji. Sailen and Krishna had been brought in by Nanilal Ghosh. Hardwar Singh introduced them to Babulal Chowkhani and his servants. Rash Behary was recruited by Sushil Ghosh and Bhudeb Chandra Sett was recruited by Rash Behary. Bhudeb secured his employer Md. Abdul Azim, the proprietor of the Jupiter Cinema, and finally the durwan Jagadish Singh. Patal Chandra Santra was the servant of Aswini Kumar Panja. The defence at the trial set up the contention that if there was any conspiracy it was not one conspiracy but two distinct separate conspiracies. The learned Magistrate was, however of opinion that the evidence which was put before him indicated that there was only one conspiracy and with regard to this he says in his judgment:

> The whole thing after it had been implanted in the brain of Sailen Mukherji develops from him. He is alleged to have secured no less than 22 of the 45 places where tampering is alleged to have been done and of the 12 accused persons no less than five namely, Sushil Ghosh. Manindra Nath Dey, Panch Kari Banerji, Kumud Nandy and Patal Chandra Santra worked with or for Sailen Mukherji; also the three accomplice witnesses Krishna Shome, Bholanath Chatterji and Hardwar Singh.

11. Having dealt with the question as to whether or not there was one extensive conspiracy as alleged by the prosecution the learned Magistrate proceeded to deal with the evidence against each of the persons on trial before him separately and in detail and as a result of his careful survey of the evidence his findings and orders were as follows: 1. The accused Babulal Chowkhani, was found guilty of theft and conspiracy; he was sentenced under Section 39, Electricity Act read with Section 380, I. P. C. to one year's rigorous imprisenment and a fine of Rs. 1,000; in default, six months' rigorous imprisonment. The whole of the fine if realised, would be paid to the Electric Supply Corporation as compensation. There was no separate sentence on the charge of conspiracy. 2. Ganesh Bahadur, his durwan, was sentenced for abetment under Section 39, Electricity Act read with Section 109, I. P. C. to three months' rigorous imprisonment. 3. Jagadish Singh, Durwan of the Jupiter Cinema,was found guilty of conspiracy and abetment of theft; he took a far more prominent part than the durwan of the Bharat Laxmi Cinema. He was therefore sentenced under Section 39, Electricity Act, read with Section 109, I. P. C., to six months' rigorous imprisonment. No separate sentence was passed for conspiracy. 4. Sailendra Nath Mukherji, the leader of the gang, was found guilty of conspiracy and abetment of theft at the Bharat Laxmi Cinema. He was sentenced under Section 39, Electricity Act, read with Section 120-B, I. P. C. to two years' rigorous imprisonment. There was no separate sentence for abetment. On the charge of abetment at the Jupiter Cinema he was acquitted for want of evidence. 5. Sushil Kumar Ghose, Manindra Nath Dey and Rash Behary Shaw who played subordinate parts in the conspiracy were sentenced to one year's rigorous imprisonment each under Section 39, Electricity Act read with Section 120-B, I. P. C. 6. Patal Chandra Santra, servant of Aswini Kumar Panja, who also played a minor part was sentenced to six months' rigorous imprisonment under Section 39, Electricity Act, read with Section 120-B, I. P. C. 7. Panch Cowri Banerji, Kumud Nath Nundy, Sailendra Sanyal , and Hara Narayan Chatterji were given the benefit of the doubt and acquitted of the charges framed against them.

12. The convicted persons have all appealed against these findings and sentences both on the ground that the findings of the learned Magistrate were not warranted on the facts adduced by the

prosecution and that the convictions were wrong on legal grounds. As regards the facts Mr. Carden Noad appearing on behalf of Babulal Chowkhani put forward the contention that the arrest of Krishna Chandra Shome at the Jupiter Cinema at 5-30 a.m., on 23rd December 1934 was in reality the outcome of a plot engineered by one Mukerji, the writer of the letter a copy of which was enclosed with the Electric Supply Corporation's letter of 23rd September 1934, acting possibly in conjunction with N.K. Chatterji, a meter reader, or even acting in conjunction with the Police and/or the Calcutta Electric Supply Corporation. Mr. Carden Noad suggested that the whole prosecution was the result of a desire on the part of Mukerji to curry favour with the Calcutta Electric Supply Corporation by arranging that somebody should be secured who could be made an example of in order to put a stop to the unlawful interference with electric meters which was presumed to be going on. Mr. Carden Noad further argued that the evidence given by Krishna Chandra Shome and Hardwar Singh being tainted evidence, was not such as ought to be relied upon for the purpose of establishing the case against his client. It is to be observed in this connection, however, that the learned Magistrate himself said (at p. 240 of the paper book, part 1) that he agreed with Mr. Carden Noad's statement on behalf of the defence that in the absence of certain vouchers it would not have been possible to place Babulal Chowkhani in the dock. Mr. Carden Noad as regards the evidence given at the trial further contended that even if there was any such conspiracy as alleged by the prosecution it could not be rightly said that Babulal Chowkhani was in any sense a party to that particular conspiracy.

13. Before dealing further with the evidence in the case, it is desirable that we should discuss and state our views upon the " legal grounds." These " legal grounds," or, in other words, the points of law which were raised and very fully and ably argued by Mr. Carden Noad, were these: Firstly that there was a misjoinder of charges and that the trial of all the accused persons in one trial was a violation of the principles laid down in Sub-section 233, 234 and 235, Criminal P. C., and that the form of the trial was not justified by the exception provisions contained in Section 239 of the Code. Consequently, the whole trial was illegal and the misjoinder was of such a nature as to make it incumbent upon this Court to quash all the convictions. Other points of law raised by Mr. Carden Noad were that Section 39, Electricity Act, 1910, has no application to the facts of the present case and that even if there had been any tampering with the meter at the Bharat Laxmi Cinema resulting in a diminution in the payments made by Babulal Chowkhani to the Supply Corporation for the supply of electricity, still there had been no theft within the meaning of Section 39 and if any offence at all had been committed it was of no more serious a nature than that constituted by the provisions of Section 44, Electricity Act, 1910. Consequently, it would follow from this that if Section 44 (c) was the appropriate section no charge of a general conspiracy could be laid against Babulal Chowkhani and/or the other accused without the sanction contemplated by Section 196 (a), Criminal P. C. These questions of law are no doubt matters of some complexity, and we have given them our anxious and careful consideration. With regard to the first point it is necessary to bear in mind the precise wording of the relevant parts of Section 239, Criminal P. C. which read as follows:

> The following persons may be charged and tried together, namely, * * * *
>
> (d) Persons accused of different offences 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.

14. The general principle laid down in Section 233, Criminal P. C., is that:

> For every distinct offence of which any person is accused there shall be alse parate charge, and every such charge shall be tried separately except in the cases mentioned in Sub-section 234, 235, 236 and 239.

15. Under Section 239 (d) discretion is given to a Court to try certain persons either jointly or separately. The manner in which this discretion should be exercised must depend on the facts of each case, and no doubt the High Court on a consideration of the circumstances of the case has power to hold that the accused should not have been tried jointly, and can set aside the convictions and sentences with or without directing a re-trial should it think fit: See Dwarka Singh v. Emperor 1915 Cal 743. Mukerji, J. held in Alimuddin Naskar v. Emperor 1925 Cal 341 that:

> Even where Sections 235 and 239 of the Code justify a joinder it should not be resorted to if there is a risk of embarrassment to the defence.

16. That is a sound principle which should be borne in mind when charges are framed or indictments preferred against accused persons. It is to be observed at the outset that where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of such conspiracy, the several offences generally form part of the same transaction within the meaning of that expression as used in Section 235. The principle that where there is a conspiracy and certain offences are committed in pursuance of such conspiracy those several offences will generally form part of the same transaction will also apply where the several offences are by different persons: See Abdul Salim v. Emperor 1922 Cal 107. That case was followed in V.M. Abdul Rahman v. Emperor 1925 Rang 296. The offence of conspiracy and acts done in pursuance of the conspiracy can rightly be said to come under one transaction, see Maung Ba Chit v. Emperor 1930 Rang 114, and it has been held that the transaction continues so long as the conspiracy continues: See Harsha Nath Chatterjee v. Emperor 1915 Cal 719. It follows therefore that where there is a conspiracy and specific offences are committed in pursuance of such conspiracy, persons who are parties to that (conspiracy and concerned in the specific offences can lawfully be tried in one and the same trial.

17. In the present instance, as already mentioned, it was argued by Mr. Carden Noad that there never was a conspiracy of the nature alleged by the prosecution. The learned Magistrate refers to this in the passage in his judgment (p. 227) to which reference has already been made. In order therefore to elucidate and determine the main point of law raised by Mr. Carden Noad, it is necessary first to decide whether or not there was a general conspiracy of the nature and extent alleged by the prosecution. The learned Magistrate is definitely of opinion that "there was one conspiracy," and having considered all the evidence relating to the association and operations of all the accused persons, he found that the present appellants were all parties to that conspiracy. Upon a review of the evidence given at the trial, all of which has been fully placed before us and after a close and careful examination of that evidence, we have however come to the conclusion that the learned

Magistrate was wrong in finding that all the accused persons were parties to one and the same extensive conspiracy. In order to constitute the offence of conspiracy as defined in Section 120-A (which is the section under which the present appellants and the other persons said to be parties were charged) it is only necessary for the prosecution to show that the persons concerned had agreed to do or cause to be done an illegal act, or an act which is not illegal, by illegal means, and the "explanation" given in Section 120-A states that it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

18. In the present instance it is in our opinion not possible at any rate except by straining language to say that every one of the accused was in agreement to do the same illegal act or cause the same illegal act to be done. It was the prosecution's own case that there were two classes of conspirators or, at any rate, two classes of operators, namely (1) those who did the actual tampering and their adherents and (2) the consumers and their servants who allowed the tampering to be done, or as Mr. Carden Noad put it, that there were "tamperers and tamperees." In our opinion the circumstances and facts of the case do not warrant the conclusion that-to use the words of the principal charge-the accused and the other persons named in the charge were all parties to a criminal conspiracy to commit theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited. It seems to us that the first class of operators were in agreement with each other and had in view one object, namely to obtain money unlawfully by tampering with meters whenever possible and the other class had in view the object! of wrongful gain to themselves by allowing tampering of their meters and the making of a false record of the amount of electric energy consumed by them wit consequent reduction in the amount of the bills they would have to pay to the Calcutta Electric Supply Corporation. In our opinion upon the evidence there is very little doubt that all the tamperers were actually acting in conjunction in close contact with one another and were giving to each other instruction, advice, and assistance in their unlawful avocation. It seems quite probable that they were all operating in concert in such a manner as to constitute a criminal conspiracy within the meaning of Section120-B, I. P. C. We are however unable to accept the contention that the consumers for example, Babulal Chowkhani and Md. Abdul Azim as proprietors of the Bharat Lakshmi Picture House and the Jupiter Cinema respectively, were acting in concert and/or in agreement with all the persons constituting the tamperer class or with each other. In our opinion the real position was that each of the consumers, abetted by his employees or servants was acting in conjunction with some of the tamperers but was not acting in agreement with other consumers. This was the position as disclosed at the end of the trial and therefore as a result of the trial it had become apparent that the offences charged against the accused were not in fact offences committed in the course of the same conspiracy. If therefore the question was whether or not there had been a misjoinder or a joint trial of several persons unlawfully the determination of which was solely dependent upon the right construction of the provisions of Section 239 (d), Criminal P. C. it might have been successfully urged that we should come to the conclusion that the whole trial was vitiated, because the acts complained of were not done in pursuance of any conspiracy and therefore not arising out of the same transaction. The subsection however says "persons accused of different offences committed in the course of the same transaction" which in itself implies that the criterion whether there is a defect in the trial of persons jointly, is to be the case alleged and not the case established against them. Most of the High Courts in India have held that the test to be applied for judging of the validity of a trial which purports to

have taken place under the provisions of Section 239, Criminal P. C. is the accusation made and not the result of the trial. In order to decide therefore whether several persons can be lawfully tried jointly with having committed offences forming parts of the same transaction, the Court has to look to the accusation, that is to say, the prosecution case as set forth in the charges and if according to that case the offences are such as could be regarded as parts of the same transaction, it will be justified in holding a joint trial. One of the earliest cases on this point is Emperor v. Datto Hanmant Shahpurkar (1906) 30 Bom 49, where the meaning of the word 'transaction' was discussed and Batty, J. at p. 54 said:

> According to its etymological and dictionary meaning the word 'transaction' means 'carrying through' and suggests, we think, not necessarily proximity in time, so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is 'in the course of the same transaction.' In Section 235, the phrase is used in a connection which implies that there may be a series of acts. Illus. (f) to that section indicates that the successive acts may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In Section 239 therefore a series of acts separated by intervals of time are not, we think excluded provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial even if incidentally one of those jointly tried has done an act for which the other may not be responsible [vide Section 239, Illus. (b)].

19. The learned Judge previously stated at p. 54:

> Section 239 admits of the trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of Section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test.

20. The next case in order of time is that in Abdul Salim v. Emperor 1922 Cal 107. In that case it was pointed out by Newbould, J. and Suhrawardy, J., that the law was not the same then as it was when the case in Subrahmania Ayyar v. Emperor (1902) 25 Mad 61 was decided. At p. 501 the learned Judges said:

> It was also contended that the trial was bad for the misjoinder of this charge of conspiracy with the other charges framed against the accused individually. Separate charge sheets with two, three or four heads have been drawn up against each of the accused.

21. Having set forth what the charges were the learned Judge proceeded thus at p. 594:

It is urged on behalf of the appellants that each of these ten sets of charges relate to entirely separate transactions for which the appellants could not be tried jointly. It is also urged that the charges of abetment of cheating and abetment of forgery under one head of charges are also separate transactions since in the cheating charges the person abetted is named while in the forgery charges he is described as a person unknown. There can be no doubt that these ten accused could not have been tried at one trial on the charges framed against them individually, if there had not been also the charge against them all of conspiracy punishable under Section 120-B read with Section 420, I. P. C. It is contended on behalf of the prosecution that once a charge of conspiracy is framed, anything done in pursuance of the conspiracy can be tried at the trial for conspiracy. This contention is supported by authority of decisions of this Court. In Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy 1915 Cal 688, it was held that the offence of conspiracy and offences committed in pursuance of that conspiracy formed one and the same transaction, and could be joitly tried. It was also so held in Harsha Nath Chatterjee v. Emperor 1915 Cal 719 and both these cases were cited and approved in Amrita Lal Hazra v. Emperor 1916 Cal 188. These decisions fully support the contention raised on behalf of the Crown, and we hold that there was no misjoindor of charges in the present case that would render the trial illegal.

It is also urged that, even if this misjoinder did not render the trial illegal, the Court had liscretion, under Section 239, Criminal P. C. to try the accused separately, and this discretion was improperly exercised. But even if this be regarded as an irregularity it cannot be held to have occasioned a failure of justice.

There is not the same objection to the joinder of a number of charges in a conspiracy trial that there might be in other cases, since, even if they had not been charged, the offences alleged to have been committed in pursuance of the conspiracy could have been proved to support the charge of conspiracy. This being so, we do not think that there was even an irregularity or an improper exercise of discretion in putting in the form of charge the specific acts specifically relied on as against each individual accused to show that they joined in the conspiracy.

22. Later (at p. 596) the learned Judges said:

Another objection on the ground of misjoinder was based on the acquittal of the appellant, Ahamad Mia, on the conspiracy charge. It is urged that this shows that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial. The answer to this objection is to be found in the wording of Section 239, Criminal P. C. It begins 'when more persons than one are accused.' That is to say the legality of the joint trial depends on the accusation and not on the result of the trial. The charge of conspiracy against this appellant was a real accusation and not a mere excuse for trying him with the others. The learned Sessions Judge has recorded that he cannot account for the verdict of not guilty

against this accused under Sub-section 120-B and 420, I. P. C.

23. This decision was considered and quoted with "approval" by the learned Chief Justice of this Court, Sir George Rankin, with the concurrence of Chotzner, J. in Satyanarain Mohata v. Emperor 1928 Cal 675, where the learned Chief Justice put the matter of the test thus (at p. 867):

> The indictment may be good or bad, but it cannot depend upon the facts which will ultimately be found by the jury, and it must be good or bad at the beginning of the trial.

24. In the meantime there had been a very important decision in the High Court at Allahabad in Abdullah v. Emperor 1924 All 233, where a very large number of persons had been tried jointly on charges of conspiracy and other offences said to have been committed in pursuance of the conspiracy. It had been contended on behalf of the convicted persons who were then appellants before the Court that there had been a misjoinder of charges sufficient to invalidate the entire trial in the Court below, and Mears, C.J. and Piggott, J., at p. 236, said:

> When the learned Sessions Judge entered upon the trial of this case and was faced with the question whether the provisions of Section 239, Criminal P. C., did or did not authorize him, not merely to try the 225 accused persons before him at one and the same trial, but to try them on each and all of the charges set forth against them under the order of the committing Magistrate, he could not possibly know what conclusion he would arrive at after hearing the whole of the evidence. He had to look to the case for the prosecution as set forth in the charges themselves. He was therefore for the reasons which we have already indicated warranted by law in entering upon this trial of the 225 accused on the charges as framed. The convictions which he has recorded are warranted by the conclusions at which he arrived on the evidence. As he had to regard merely the "charges" it was not necessary for him to consider what the position would be, if he had eventually come to the conclusion, either that no offence punishable under Section 120-B, I. P. C. was committed by any persons at Dumri Khurd on the forenoon of 4th February 1922, or that if any offence was so committed it was one excluded from his cognizance by Section 196-A, Criminal P. C. In any event, the acquittal of all the accused persons on the conspiracy charge would have removed any possible objection to the validity of the trial.

25. In Gam Mallu Doraj v. Emperor 1925 Mad 690, Krishnan, J., at p. 93 of the report put the matter thus:

> The question of the legality of a joint trial, in my opinion, really depends upon the accusation made and not upon the result of the trial; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. It was held in Abdul Salim v. Emperor 1922 Cal 107 and I am prepared to follow it. Is it not pretended here that there was any conscious attempt to join charges which could not otherwise be joined or that the charge as framed under

> count 1 was so framed for that purpose. The legality of the joint trial in this case has to be judged on the accusation and not on what was subsequently proved.

26. There is in the present case, in our opinion, no reason whatever for supposing that the charge under Section 120-B, I. P. C., was made for any evil purpose. We must take it, as we have already observed, that the learned Magistrate acting in his judicial discretion was of opinion that prima facie the evidence given in chief by the prosecution witnesses had come to a stage in the proceedings warranting a finding of the conspiracy charge. In the course of his judgment Krishnan, J. commenting on the expression "the same transaction" observed thus (p. 94):

> After all it cannot be said that any very satisfactory definition of the words has been given. Each case must be judged in my opinion on the facts of that particular case, Generally speaking I am prepared to follow the observations of the learned Judges in Choragudi Venkatadri v. Emperor (1910) 33 Mad 502, in which the effect of the previous decisions has also been considered as to the meaning of the expression. Abdur Rahim, J. says that the usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test, so far as I can see, is the unity of purpose. Continuity of action goes with unity of purpose.

27. Those observations are relevant to the question whether in the present case there was any conspiracy. The case in the Madras High Court was decided in October 1924. A few months later, namely in December 1924, the same point came before the High Court of Rangoon in V.M. Abdul Rahman v. Emperor 1925 Rang 296, where it was again held that the legality of a joint trial depends on the accusation and not on the result of the trial. The Chief Justice also added on the authority of the case in Abdul Salim v. Emperor 1922 Cal 107, that the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases (P. 105).

28. The point under discussion again came before this Court in the year 1928 when in Kali Kumar Das v. Nawab Ali Dhali 1929 Cal 160, it was held by Cuming and Lort-Williams, JJ. that:

> Section 239, Sub-section (d), Criminal P. C., contemplates all the offences committed by the accused persons, whether substantive offences or abetment of those offences, being tried together provided they were committed by the accused in the course of the same transaction. Therefore two persons can be jointly tried on three substantive charges and one of them of abetting those three offences. The legality of a joint trial depends upon the accusation and not on the result of the trial.

29. The curious feature of this case was as was pointed out by Cuming, J. in his judgment (p. 621) that it was contended not only by the vakil for complainamt, but also by the vakil who appeared for the petitioner (i.e., the convicted person) that the legality of a joint trial depended on the accusation and not on the result of the trial. It was, in fact, conceded on both sides that that is the law. In the

same year a case came before the Bombay High Court in which one Gopal and two others, Mhalrasa and Dada, had been charged under Sub-section 489-A, 489-B and 489-D, read with Section 120, I. P. C., with conspiracy to collect and possess materials for counterfeiting currency notes, and with using such notes as genuine. In the alternative they were all charged under Section 489-D with having in their possession materials for counter-feiting currency notes. The two other persons Mhalrasa and Dada were further charged under Section 489-A with having counterfeited currency notes and the accused were charged under Section 489-B with having used as genuine a counterfeit currency note. The trial resulted in the acquittal of the two persons Mhalrasa and Dada on all the charges and in the conviction of the accused Gopal for an offence under Section 489-B. Gopal appealed and contended that his trial jointly with the two other persons was contrary to law. It was held that the trial of the accused Gopal was not vitiated and was covered by Section 239 (d), Criminal P. C., as no prejudice was shown to the accused Gopal, and as the act of which the accused was convicted was so connected with the subject-matter of the other charges as to form a single transaction: Gopal Raghunath v. Emperor 1929 Bom 128. At p. 346 Madgavkar, J. said this:

> It is argued for the appellant that the joinder was illegal, the offences charged numbering more than three, and in any case, they caused serious prejudice to the appellant by letting in evidence which would not have been admissible, had the present charge under appeal, under which alone he was convicted, been tried separately. For the Crown it is contended these charges form part of the same transaction, and are therefore covered by Section 239, Clause (d), Criminal P. C., as well as by Section 235.
>
> As is often the case with a number of elaborate charges, it is difficult to lay down any single test or criterion. The cases, in my opinion, divide themselves into three. First, a case such as the one in Subrahmania Ayyar v. Emperor (1902) 25 Mad 61, not covered by Section 235 or Section 239, in which case, prejudice or no prejudice, the illegality entitles the appellant to an acquittal. The second case is where without such illegality, prejudice might nevertheless be caused to the accused so that even though the Crown may have the power of joinder, it might be fairer not to exercise that power. The third class of cases is where there is such a common thread or purpose underlying the alleged offences of the accused, even though separated by time and space, that they form part of the same transaction, and are difficult to present separately, in which case the law permits, and the Crown usually adopts, a joint trial with numerous accused and numerous charges. The question in each particular instance is as to which of these three classes of cases covers the particular case for decision. In the present instance the question turns upon whether the offence now under appeal is part of the same transaction as the offences in the other charges. The only transaction, if any, is the alleged conspiracy. True, the prosecution in the result failed to prove it, but that of itself does not necessarily make the trial illegal, the test being not what the prosecution has proved in the end but what they alleged at the beginning in the charges.

30. In a case, which came before the Allahabad High Court in 1931: Emperor v. Mohammad Yakub 1932 All 73, it was again affirmed that the illegality of a joint trial depends on the accusation and not on the result of a trial. Sulaiman, J., at p. 375, says:

> It may further be pointed out that the illegality of a joint trial depends on the accusation and not on the result of a trial, and that even if the charge of conspiracy were to fail ultimately, there would be nothing illegal in convicting the accused of the offence of being found in possession of cocaine under Section 60 (a).

31. Many of the cases dealing with joinder of charges and joint trials were reviewed in a case which came before the Madras High Court, the case in U. Satyanarayana v. Emperor 1933 M W N 528. The accused in the case had been charged with conspiracy as punishable under Section 120-B, I. P. C., read with Section 409, I. P. C., and with various acts of criminal breach of trust and forgery in pursuance of the conspiracy between the dates 30th November 1929 and 19th September 1931. An objection was taken that the whole trial was vitiated as offending against Section 234 (1), Criminal P. C , relying on Subrahmania Ayyar v. Emperor (1902) 25 Mad 61. It was held by Sir Owen Beasley, C. J., that Subramania's case (8) had no application to a case of this kind where there was a charge of conspiracy under Section 120-B, I. P. C., which was an addition subsequent to that decision. The learned Judges also held that the offence of conspiracy and the offences committed in pursuance of that conspiracy formed one and the same transaction. The learned Judges adopted the view taken by Krishnan, J. in Gam Mallu Doraj v. Emperor 1925 Mad 690, and reaffirmed the proposition that the legality of a joint trial in such a case depends on the accusation and not on the result of the trial; provided of course that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. The same view was taken by the Allahabad High Court in Ramdas v. Emperor 1934 All 61 where Rachhpal Singh, J. said at p.1353:

> Here at one trial the accused persons were charged with conspiracy and some other offences said to have been committed in the furtherance of the object of the conspiracy. The charge was perfectly correct. Accused persons may be charged at one trial with the offence of conspiracy and also with the offence alleged to have been committed in pursuance of the conspiracy because substantively the offence of conspiracy and the offences committed in pursuance thereof form one and the same transaction. Such a joint trial is permissible under the provisions of Section 239, Criminal P. C.

32. Finally, in a recent case before this Court, the case in The Superintendent and Remembrancer of Legal Affairs v. Raghulal Brahman (1935) 62 Cal 946, Lort-Williams, J., sitting with Jack, J. said at p. 743:

> It is to be observed that the provisions of Section 239, Clause (a) and (c), refer to persons accused, that is to say, charged. The provisions are intended to deal therefore with the position as it exists at the time of charge and not with the result of the trial.

33. In view of this long line of authorities it is impossible for us to do otherwise than act on the principle therein laid down. We must therefore look to this matter as it appeared to the learned Magistrate at the time when he framed the charges against the appellants and the other persons accused before him and not to the state of affairs as we see them long after the trial had proceeded on its way leading to the convictions of the appellants. We must therefore hold that 'having regard to all the facts before the Magistrate at the time when he was framing the charges against the accused as directed by Section 254, Criminal P. C., he was acting judicially and properly exercising the discretion given him by Section 239. Therefore, as regards the procedure adopted there was no such illegality as to compel us to quash the convictions on that ground. Moreover, if there was any irregularity at all, there was none which on the actual facts of the case caused any prejudice to the accused or by itself entailed any failure of justice. It is to be noted that no protest was made by or on behalf of any of the accused against the course adopted by the learned Magistrate in trying all the present appellants at one and the same trial, nor was any complaint made as regards the joinder either of the charges or of the persons charged. Moreover the learned Magistrate was careful to treat the case of each of the accused persons separately and upon the evidence properly directed against each. We hold, therefore, that there was no illegality in the joint trial of the accused persons.

34. The second point of law urged by Mr. Carden Noad was to the effect that in any event, even if the case for the prosecution was established, there had been no theft by his client of electrical energy under the provisions of Section 39, Electricity Act, 1910, by reason of the wrongful loss sustained by the Electric Supply Corporation consequent upon the consumer having procured an alteration and/or setting back of the figures of the dials of the meters. It is of importance to observe the exact language of Section39. The section reads as follows:

> Whoever dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Penal Code, and the existence of artificial means for such abstraction shall be prima facie evidence of such dishonest abstraction.

35. This section is no doubt based on an analogous provision in the English Electric Lighting Act of 1882 (45 and 46, Vict. Ch. 56), Section 23 which reads as follows:

> Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes, or uses any electricity shall be guilty of simple larceny and punishable accordingly.

36. In the Indian Act wasting or diverting energy is dealt with in Section 40. That section is in these terms:

> Whoever maliciously causes energy to be wasted or diverted or, with intent to cut off the supply of energy, cuts or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

37. In England the provisions which were formerly contained in Section 23 of the Act of 1882 are now to be found in the Larceny Act, 1916, Section 10 which runs as follows:

> Every person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny.

38. Mr. Carden Noad argued that the expression "energy" as used in Section 39 can only mean "energy belonging to the licensee," that is to say, in the present case, the Calcutta Electric Supply Corporation, and in this connexion he referred to Section 19 (a), Electricity'Act, 1910, which was added to that Act by the Electricity (Amendment) Act of 1922. That section declares that:

> For the purposes of this Act, the point at which the supply of energy by a licensee to a consumer shall be deemed to commence shall be determined in such manner as may be prescribed.

39. That has, in fact, been "prescribed" in Rule 31, Electricity Rules, 1922, which reads as follows:

> The point at which the supply of energy by a licensee to a consumer shall be deemed to commence shall:
>
> (a) Where the amount of energy supplied to a consumer or the electrical quantity contained in the supply is ascertained by meter, be in respect of a conductor from the service-line which passes through the meter the point at which such conductor enters the meter and in respect of a conductor from the service-line which does not pass through the meter on such conductor nearest to the meter;
>
> (b) Where the amount of energy supplied to a consumer or the electrical quantity contained in the supply is not ascertained by meter, be the point at which the cut-out is inserted in the service-line by the licensee in accordance with Rule 38.

40. Mr. Carden Noad argued that as by Section 39 the dishonest abstraction, consumption or use of energy is made theft, it must have been contemplated by the legislature that all the elements of "theft" as defined in Section 378, I. P. C., must be present. In dealing with this line of argument one must bear in mind that the words of Section 39 are "shall be deemed to have committed theft," not shall have committed theft or shall be guilty of theft. Therefore, the section means no more than that the offender is to be treated in the same way as if he had committed the offence of theft. In this connexion we would refer to the case in Emperor v. Maung Pu Kai 1929 Rang 203, per Heald, J. at p. 336.

41. Mr. Noad conceded that the element of taking possession of another's property might not be essentially present, but he did try to argue that what he called the root idea was a change in the possession of the property. Mr. Carden Noad said that Section 19 (a), Electricity Act, and Rule 31 were necessitated by the fact that there can be no actual property in electrical energy. At the same

time, he argued that as a man cannot steal what is his own there cannot be any "theft" of electrical energy once it passes through the meter installed on the consumer's premises, because in effect Section 19 (a) and Rule 31 in law operated to transfer some sort of property in the electrical current supplied. Mr. Carden Noad sought to fortify his argument by reference to Section 78, Contract Act (Act 9 of 1872), which, he said, governed the contract for the supply of the electrical energy as between the Calcutta Electric Supply Corporation and Babulal Chowkhani. Section 78, Contract Act, 1872 is now reproduced in Section 5, Sale of Goods Act, 1913. Sir Frederick Pollock and Sir Dinshaw Mulla in their commentary on that Act express the view that it is doubtful whether the Act is applicable to such things as gas, water and electricity. In our opinion, that view is correct, certainly as regards electricity. It is, therefore, not possible for Mr. Carden Noad to derive any support by reference to the law relating to the sale of goods. It is to be observed that Section 39 does not say that dishonest abstraction or consumption or use of energy is theft, but merely that if a person dishonestly abstracts, consumes, or uses such energy, he shall be deemed to have committed theft and so be liable to punishment under the provisions of the I. P. C.

42. Mr. Carden Noad further argued that there could be no offence under Section 39,. Electricity Act, 1910, unless there was, first of all, an "abstraction" of energy, and he invited us to read the section as if it read "whoever dishonestly abstracts and consumes or uses any electrical energy." In other words, Mr. Carden Noad invited us to take the view that the section only had reference to abstraction plus consumption or use and, therefore, could have no application to a case of mere user without abstraction. But for the close juxtaposition of the words "abstracts, consumes or uses" in the Indian section however, Mr. Carden Noad could not even have begun to put forward the argument with which we are now dealing. In the corresponding English Act the words "causes to be wasted or diverted" are interposed between the word "abstracts" and the word "consumes." As has been already pointed out, in the Indian Act "wasting or diverting energy" are dealt with in Section 40. But in our opinion their absence from Section 39 in no way militates against interpreting the section as if it read "dishonestly abstracts or consumes or uses." The absence of the word "or" between the words "abstracts" and "consumes" indicates nothing more than that the drafting of the section follows an ordinary literary form under which where there is a running series of words or expressions, a disjunctive or conjunctive word is placed only between the last two words or expressions. In our opinion, therefore, there is no substance whatever in Mr. Carden Noad's contention that abstraction must always be a necessary ingredient for an offence under Section 39. In our view what was here alleged against the consumers, if proved, amounted to dishonestly using and so comes within the purview of Section 39. One must bear in mind the definition of "dishonestly" as contained in Section 24, I. P. C., which runs thus:

> Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

43. "Wrongful gain" is defined in Section 23, I. P. C., as "gain by unlawful means of property to which the person gaining is not legally entitled." And "wrongful loss" is said to be loss by unlawful means "of property to which the person losing it is legally entitled." In the present case upon the assumption that the allegations against Babulal are correct, he used electricity in such a way as to cause a wrongful loss of money to the Calcutta Electric Supply Corporation and so, in effect,

wrongful gain to himself. The consuming of the electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered was, therefore, a dishonest user. The argument that as the electrical energy was being supplied under a contract, the consumer was merely using the electricity in a manner contemplated by the contract and that the tampering with the meters was something altogether distinct and separate from user cannot hold good. It obviously was never contemplated by the contract between the Calcutta Electric Supply Corporation and the Bharat Lakshmi Picture House, for example that there should be any supplying of electricity otherwise than in accordance with the provisions of Clause 5 of that contract which says:

> The supply of electrical energy shall be registered by a meter or meters upon the said premises to be provided, fixed and kept in order by the Company.

44. It follows that what was contemplated by the contract between the Calcutta Electric Supply Corporation and the Bharat Lakshmi Picture House, dated 4th April 1934, was that all electricity to be supplied by the Corporation should pass through the meters installed in the consumer's premises in such a way that a record of the supply would be made on the dials of those meters and that such record would remain intact and would not be interfered with in any way by the consumer and would be available to the Corporation's meter readers on their periodical visits. Mr. Carden Noad in the course of his argument referred to the case in Reg. v. White (1852) 6 Cox's C C 213, in order to support his contention that there could be no theft of electricity within the meaning of Section 39, once the electricity passed through the meter on the consumer's premises. But that case does not indicate that there can be no theft by way of dishonest user of electricity after it passes through the meter. That was a case where a house-holder in Berwick-upon-Tweed contracted with a gas company to consume gas and pay according to meter, in order to avoid paying for the full quantity of gas consumed, introduced into the entrance pipe another pipe for the purpose of conveying the gas to the exit pipe of the meter, and so to the burners for consumption without passing through the meter itself. The entrance pipe was the property of the householder, but he had not by his contract any interest in the gas or right of control over it until it passed through the meter. He was convicted of larceny, and that conviction was affirmed upon appeal. The argument put forward by Sergeant Ballantine, who appeared for the convicted person, was that an evasion of the meter and an interference with it stand on the same ground. He argued that the meter was only the voucher of an account, and if there was a delivery according to contract on the one hand, and only a fraudulent dealing with a voucher on the other, there was no larceny. The conviction was however affirmed, Lord Campbell, C.J. having remarked in the course of the argument:

> Is not this a taking invito domino?

45. In the present case it seems to us that consuming or using was invito domino in the sense that the Corporation never permitted or contemplated that electricity would be consumed or used save on the basis that the consumer would allow a correct and accurate record of the consumption and user to be made upon the meter and preserved until that record could be seen by the officer of the Electric Supply Corporation. There can be no doubt whatever in our opinion that the facts alleged against Babulal Chowkhani, if established, were sufficient to bring him within the words of Section 39 and that he must be deemed to have committed theft within the meaning of the Indian Penal

Code. No doubt, they would also constitute an offence of cheating as defined in Section 415, I. P. C., and indeed Mr. Carden Noad did not dispute this. He merely took the same kind of line as was taken by Sergeant Ballantine in Reg v. White (22) ubi supra namely that the offence was one of cheating and not one of theft. As a final point of law, Mr. Carden Noad endeavoured to argue that the offence committed by his client if any fell within the ambit of the provisions of Section 44, Electricity Act, 1910. Sub-sections (c) and (d) are as follows:

> (c) Whoever maliciously injures any meter referred to in Section 26, Sub-section (1), or any meter, indicator or apparatus referred to in Section 26, Sub-section (7), or wilfully or fraudulently alters the Index of any such meter, indicator, or apparatus, or prevents any such meter, indicator or apparatus from duly registering; (d) whoever improperly uses the energy of a licensee; shall be punishable with fine which may extend to Rs. 500 and, in the case of a continuing offence, with a daily fine which may extend to Rs. 50; and if it is proved that any artificial means exist for making such connexion as is referred to in Clause (a) or such communication as is referred to in Clause (b) or for causing such alteration or prevention as is referred to in Clause (d), and that the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, it shall be presumed, until the contrary is proved, that such connexion, communication, alteration prevention or improper use, as the case may be, has been knowingly or wilfully caused by such consumer.

46. With regard to this last provision it was pointed out to Mr. Noad that to say that the behaviour of his client fell within Sub-section (d) is inconsistent with his previous argument that after the electrical energy had passed through the meter it in effect became the property or quasi property of the consumer. No doubt, the facts of this case bring all the tamperers within the purview of Sub-section (c), and possibly also Babulal Chowkhani, who it is alleged is a person who caused or allowed a fraudulent alteration of the index of the meters. But even if that were so, there can be no force in Mr. Carden Noad's argument that because a specific offence is provided for in Section 44, Section 44 should have been resorted to by the prosecution and not Section 39 or any other provision of the penal law. Mr. Carden Noad's argument on this point is entirely destroyed by the provisions of the General Clauses Act (Act 10 of 1897), Section 26, which says:

47. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same.

We think that for the purpose of Section 26, General Clauses Act, it must be taken that Sub-section 39 and 44, Electricity Act, are to be considered as separate enactments: see Section 3, Sub-section 17, General Clauses Act. There can therefore be no doubt that it was quite open to the prosecution to charge the accused Babu Lal Chowkhani with such offences as the facts and circumstances seem to warrant. All the points of law put forward and argued by Mr. Carden Noad on behalf of Babulal Chowkhani were adopted and relied upon but without further argument by the learned advocates appearing for the other appellants respectively. Having disposed of all the legal points put forward on behalf of the appellants, and having held that the trial was not illegal by reason of any misjoinder

of charges or of the joint trial, it becomes necessary to be considered whether upon the facts all the convictions or some and which of them ought to be upheld. We have already expressed the opinion that it was not proved that the accused were all parties to one large conspiracy.

48. It now becomes necessary to consider the facts. We are not at all sure that Mr. Page (appearing on behalf of the Crown in support of the conviction) himself did not realise that he was confronted with considerable difficulty in seeking to argue that there was one conspiracy and one conspiracy only as between all the tamperers and each of the consumers, each of whom, as one would have thought, was merely concerned to secure a reduction of his own electricity bills without any interest in or knowledge of all the nefarious practices of other consumers. The conspiracy alleged was to commit theft. Mr. Page endeavoured to justify that allegation by saying that the agreement between the tamperers and the consumers, either taken together or in groups so intimately connected as to form an integral confederacy, was something like this: the consumer vis-a-vis the tamperer agreed to give access to his meter and to allow the tamperer to alter the index. The tamperer on his part vis-a-vis the consumer agreed, if rewarded, to come to the consumer's premises and to alter the index of the meter there. The consumer agreed to pay the tamperer as a reward for what he did so much per week or per month or agreed to pay to the tamperer as reward one-half of that amount of which it was the consumer's intention to avoid payment by means of what the consumer did. The agreement by the tamperer was the agreement to do an illegal act, namely to do the altering of the index of the meter. The agreement by the consumer was also an agreement to aid the tamperer in altering the index.

49. The intention of the tamperer by reason of which he entered into such an agreement was to make gain by way of a reward for aiding the consumer in destroying the evidence of dishonest consumption or user by the consumer of electrical energy, i.e., the evidence that the consumer had consumed or used energy which he had consumed or used with the intention of so doing without payment, i.e., to make gain as a reward for concealing evidence of theft by the consumer. It was the intention of the consumer, by reason of which he entered in to the agreement, to make gain by dishonestly using electrical energy, i.e., to make gain by means of theft and to obtain the aid of the tamperer in destroying the evidence of that theft.

50. Mr. Page contended that the agreement constituted criminal conspiracy since it was an agreement to do illegal acts, forming one series of acts: dishonest user (theft); alteration of the index of a meter (to destroy the evidence of theft). The essential ingredient was theft by dishonest user. Without the common object of the parties, the making of gain, the agreement could not have come into existence. But that though the gain was the ultimate object, the subsidiary but necessary object was the commission of the theft by the consumer. In our view the situation, as now appears from a survey of the whole of the evidence in the case, is that in all probability there was a conspiracy or, at any rate, a close association between all the tamperers as such, and an agreement between each individual consumer and his assistants including members of his own staff and the particular tamperers who brought about all the tampering. Holding as we do that it was not established that there was any conspiracy of the kind mentioned in the charge laid under Section 120-B, I. P. C., it follows that the convictions on the conspiracy charge must be set aside.

51. It then becomes necessary to determine whether and to what extent the convictions of the appellants on the other charges can be maintained. At the outset it is to be borne in mind that although these appeals are upon questions of fact as well as upon questions of law, we are not in a position of retrying the accused and although we can alter the findings, these proceedings are not a rehearing of the case. Therefore due weight must be given to the conclusions arrived at by the learned Magistrate who had the advantage of seeing and hearing the witnesses. We are satisfied that in spite of the form of the charge the accused were at no disadvantage by reason of the existence of the conspiracy charge and the learned Chief Presidency Magistrate dealt with the evidence as against each individual accused carefully and conscientiously.

52. We now proceed to consider whether the conclusions arrived at by the learned Magistrate as against each of the appellants severally were justified by the evidence given in the case. We have given this part of the matter our close and careful consideration. We deal with the case of each of the appellants in the order in which they are dealt with in the judgment of the Court below. Babulal Chowkhani was found guilty of theft as well as conspiracy. He was sentenced under Section 39, Electricity Act, 1910, read with Section 380, Penal Code. There was no separate sentence on the charge of conspiracy. The evidence on which the learned Magistrate based his conviction may be summarized thus: (The judgment then discussed the evidence and proceeded.) Looking at the evidence as a whole, we are quite satisfied that Babulal Chowkhani did employ persons to alter the index of his meter with a view to evading payment of a considerable portion of the electrical energy supplied to his premises by the Calcutta Electric Supply Corporation, that over a lengthy period as alleged by the prosecution, week by week, he had the intention of using electrical energy with the intention of evading payment for the electric energy used by him. In those circumstances, we are satisfied that his conviction on the charge under Section 39, Electricity Act, was correct and that he was rightly found guilty of theft. We think however that the sentences should have been passed under the provisions of Section 379 and not Section 380, Penal Code. We, accordingly, dismiss the appeal of Babulal Chowkhani (Appeal No. 464) and direct that the sentences of one year's rigorous imprisonment and a fine of Rs. 1,000, in default six months' rigorous imprisonment, be recorded as being passed under Section 39, Electricity Act read with Section 379, Penal Code. Babulal Chowkhani must surrender to his bail and serve out the sentence imposed upon him. (The judgment then discussed the evidence with regard to the other accused and proceeded.) It is perhaps desirable that we should observe at this point that although we have held that.there was no misjoinder of charges or mistrial of the appellants by reason of the framing of the conspiracy charge and combining that charge with certain other charges against certain of the accused persons, there is at the present time in this province too great a tendency to make charges against a number of persons that they were parties to a conspiracy and so guilty of an offence under Section 120 B, Penal Code, in circumstances where charges of ordinary substantive offences would be enough. The result is that what ought to be comparatively short and simple cases become long, complicated and unwieldly and instead of being disposed of quickly, drag on for a very long time Moreover, there are, as we know, certain obvious advantages which the prosecution may derive and sometimes unfairly derive, from the existence of a charge of conspiracy covering a number of persons said to have committed several offences either of one and the same kind or of different kinds within the four corners of the dimensions of the conspiracy. In the present instance if we had the slightest reason to suppose that any of the convicted persons had been unfairly dealt with by reason of the whole body of them

having been charged with conspiracy, we should have felt it our duty to quash the proceedings. It is fortunate for the prosecution that although we have given the closest attention and consideration to the points urged by the learned Advocates appearing for the appellants, we have not come to any such conclusion. The pieces of evidence which Mr. Carden Noad said would not have been admissible but for the existence of the charge of conspiracy, and also those pieces of evidence which Mr. Carden Noad declared would not be admitted in any event, none of these things have, in our opinion, had any influence adverse to the interests of the convicted persons or any of them. For the reasons given above, the appeal of Rash Behari Shaw (appellant in Appeal No. 446), Sushil Kumar Ghose (appellant in Appeal No. 461), Jagadish Singh (appellant in Appeal No. 462), Babulal Chowkhani (appellant in Appeal No. 464), Ganesh Bahadur (appellant in Appeal No. 465), and Sailendra Nath Mukherji (appellant in Appeal No. 466), are dismissed. These appellants will surrender to their bail bonds and will serve out the sentences imposed upon them. The appeal of Patal Chandra Santra (appellant in Appeal No. 461) and the appeal of Manindra Nath Dey (appellant in Appeal No. 453), are allowed. These two appellants will be discharged from their bail bonds and released forthwith.