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locked. The appellant also knew the whereabouts of the property inside the house of his maternal grandfather. He attempted to sell a few mufflers a day before the recoveries were made. He was seen arriving at the house, during the night, in a car with some persons and then removing property which looked like bales from the car to the house. All these circumstances go to support the finding that he had assisted in the concealment of the stolen property and had thus committed the offence under s.414 I.P.C.

We therefore see no force in this appeal and, accordingly, dismiss it.

Appeal dismissed.

STATE OF ANDHRA PRADESH

v.

CHEEMALAPATI GANESWARA RAO & ANR.

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April 23.

(K. SUBBA RAO, RAGHUBAR DAYAL and J. R. MUDHOLKAR JJ.)

Criminal Trial—Joinder of charges and persons— Conspiracy, charge of—If illegal after conspiracy fructifies—Examination of accused—Right of accused to examine himself as witness—If duty of Court to inform accused of right—Pardon, legality of—Approver—Refreshing memory by reference to documents—If Permissible—Admissibility of evidence—Account Books —Absence of entries of payments alleged—Code of Criminal Procedure, 1898 (5 of 1898), ss. 233 to 339,342,337,529,537—Indian Evidence Act. 1872(1 of 1872), ss.5,11,34,159,160.

A and B were tried together at one trial, A of offences under ss. 120-B, 409,477-A and 471 read with s. 476 Indian Penal Code and B of offences under ss. 120-B,409 read with 109

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and 471 read with 467 Indian Penal Code. The Sessions Judge who tried them convicted A of all the offences charged and B of the first two charges. On appeal the High Court acquitted both of them. The State appealed to the Supreme Court. The respondents contended: (i) that there was a misjoinder of charges and persons on account of the cumulative use of the various clauses of s. 239 of the Code of Criminal Procedure which was not permissible, (ii) that no charge of conspiracy could be framed after the conspiracy had fructified, (iii) that the Sessions Judge had failed to inform the accused of their right under s. 342 (4) of the Code to examine themselves as witnesses, (iv) that the pardon had been granted to the approver illegally, (v) that the approver had been allowed illegally to refresh his memory by reference to documents at the time when he was examined before the Court, and (vi) that the account books of certain firms which contained no entries regarding payments alleged to have been made to them were inadmissible in evidence.

Held that there was no misjoinder of charges and of accused persons. It is open to the Court to avail itself cumulatively of the provisions of the different clauses of s. 239 of the Code for the purpose of framing charges. Sections 233 to 236 do not override the provisions of s. 239. But the provisions of ss. 234 to 236 can also be resorted to in the case of a joint trial of several persons permissible under s. 239. Even if there was a misjoinder the High Court was incompetent to set aside the convictions without coming to the definite conclusion that the misjoinder had occasioned failure of justice.

Re: Vankavalapati Gopala Rao, A.I.R. 1956 Andhra 21 and *T.B. Mukherji* v. *State*, A.I.R. 1954 All. 501, not approved.

State of Andhra Pradesh v. *Kandimalla Subbaiah*, [1962] 2 S.C.R. 194, *K.V. Krishna Murthy Iyer* v. *State of Madras*, A.I.R. 1954 S.C. 406, *Willie (William) Slaney* v. *State of Madhya Pradesh*. (1955) 2 S.C.R. 1140, *Birichh Bhuan* v. *The State of Bihar*. (1964) Supp. 2 S.C.R. 328.

Held further that where offences have been committed in pursuance of a conspiracy, it is legally permissible to charge the accused with these offences as well as with the conspiracy to commit those offences. Conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy, the liability of the conspirators for the conspiracy itself cannot disappear.

State of Andhra Pradesh v. *Kandimalla Subbaiah*. (1962) 2 S.C.R. 194, relied on.

S. Swamirathnam v. *State of Madras*, A.I.R. 1957 S.C. 340 and *Natwarlal Sakarlal Mody* v. *State of Bombay*, Cr. A. No. 111 of 1959, dt. 19.1.1961, referred to.

Held further, that there was no violation of the provisions of s. 342 of the Code. The Sessions Judge had erred on the side of overcautiousness by putting every circumstance appearing in the evidence to the accused. Copies of the questions put to the accused were given to them before hand. Any point left over in the questions was covered in the written statements filed by the accused. In such circumstance the length of the questions or of the examination could not perjudice the accused. Further, there was no duty cast on the Court to inform the accused of their right under s. 342 (4) to examine themselves as witnesses. They were represented by counsel who must have been aware of this provision.

Held further, that the pardon was legally granted to the approver under s. 337 of the Code and was a valid pardon. The offences with which the accused were charged were all such in respect of which a pardon could be granted under s. 337 (1). The offences under s. 467 read with s. 471 which was exclusively triable by a court of sessions and the offence under s. 477-A which was mentioned in s. 337 (1) itself and thus both fell within the ambit of s. 337 (1). The offence under s. 409. and consequently the offence under s. 120-B also, was punishable with imprisonment for life or with imprisonment not exceeding ten years and was an "offence punishable with imprisonment which may extend to ten years" within the meaning of s. 337 (1). Further, under G.O. No. 3106 dated September 9, 1949, of the Madras Government, the power of a District Magistrate to grant pardon was specifically conferred on Additional District Magistrates, and the Additional District Magistrate, (Independent) who granted the pardon in the present case was competent to do so.

Held further, that the Sessions Judge acted legally and properly in allowing the approver to refresh his memory, while deposing, by referring to the account books and other documents produced in the case. Where a witness has to depose to a large number of transactions and those transactions are referred to or mentioned either in the account books or in other documents there is nothing wrong in allowing the witness to refer to the account books and the documents

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while questions are put to him. Such a course is specifically permitted by ss. 159 and 160 of the Evidence Act.

Held further, that the account books of the firms which contained no entries wtih respect to payments alleged to have been made were not relevant under s. 34 of the Evidence Act, as that section is applicable only to entries in account books regularly kept and says nothing about non-existence of entries. But they were relevant under s. 11 of the Act as the absence of the entries would be inconsistent with the receipt of the amounts which was a fact in issue. They were also relevant under s. 5 to prove the facts alleged by the prosecution that payments were never made to these firms and that those firms maintained their accounts in the regular course of business, and both these were relevant facts.

Queen Empress v. *Grees Chander Banerjee* (1884) I.L.R. 10 Cal, 1024, and *Ram Pershad Singh* v. *Lakhpati Koer*, (1902) I.L.R. 30 Cal. 231, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 39 of 1961.

Appeal by special leave from the judgment and order dated January 30, 1960 of the Andhra Pradesh High Court (in Criminal Appeals Nos. 277 and 278 of 1957 and Criminal Revision Case No. 810 of 1957.

A.S.R. Chari, K.R. Choudhry and *P.D. Menon*, for the appellant.

Bhimasankaram and *R. Thiagarajan* for respondent No. 1. *R. Mahalingier*, for respondent No. 2.

1963. April 23. The Judgment of the Court was delivered by

Mudholkar J.

MUDHOLKAR J.—The respondent No. 1 was tried before the Court of Sessions, Visakhapatnam for offences under s. 120-B, Indian Penal Code, s. 409, s. 477-A and s. 471 read with s. 467, I.P.C. while respondent No. 2 was tried for an offence under

s. 120-B and for offences under ss. 409 read with s. 109, 477-A and 471 read with s. 467, I.P.C. Each of the respondents was convicted of the first two offences, but the respondent No. 1 alone was convicted of the other two offences. Various sentences were passed against them by the Additional Sessions Judge, Visakhapatnam, who presided over the court. The respondents preferred appeals before the High Court challenging their convictions and sentences. The State on the other hand preferred an application for revision under s. 439, Cr. P.C. for the enhancement of the sentences passed on the respondents. The High Court allowed the two appeals, acquitted the respondents and dismissed the application for revision preferred by the State. The State of Andhra Pradesh has come up before this Court in appeal by obtaining special leave under Art. 136 of the Constitution.

The prosecution case in so far as it is material for the decision of this appeal is as follows :

In the year 1929 the Andhra Engineering Co., which was originally a partnership firm formed by one D.L.N. Raju was converted into a private limited company with its headquarters at Visakhapatnam. (We shall refer to this company throughout as the AECO). It obtained licences from the Government under the Electricity Act for supply of electrical energy to Visakhapatnam, Anakapalli and some other places. As the AECO did not have the necessary capital to undertake the work Raju floated in the year 1933 a public limited company called Visakhapatnam Electric Supply Corporation Ltd., (referred hereafter as VESCO) and another in the year 1936 called the Anakapalli Electric Supply Corporation Ltd. The AECO transferred its licences for the supply of electrical energy to the consumers of Visakhapatnam to VESCO and similarly transferred to AECO the licence to supply

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electrical energy to consumers at Anakapalli. The AECO was appointed Managing Agent for each of these Corporations under separate agreements. Some time later other industrial concerns, the Andhra Cements Ltd., Vijayawada and the East Coast Ceremics, Rajahmundry were started apparently by Raju himself and the AECO was appointed the Managing Agent of each of these concerns. The original managing agency agreement in favour of AECO with respect to VESCO was for a period of 15 years *i.e.*, from 1933 to 1948 and was later renewed for the remaining term of the currency of the licence granted by the Government under the Electricity Act. A mention may be made of the fact that in June, 1952 the VESCO undertaking was acquired by the Government under the provisions of the "Electricity Undertaking Acquisition Act" but nothing turns on it.

The VESCO had its own Board of Directors while the AECO had also its own separate Board of Directors. The VESCO had no Managing Director but at each meeting of its Board of Directors one of the Directors used to be elected Chairman. The same practice was followed at the meeting of the general body of the shareholders. The AECO on the other hand always had a Managing Director, first of whom was D.L.N. Raju. He died in the year 1939 and was succeeded by R.K.N.G. Raju, an Advocate of Rajahmundry. This person, however, did not shift to Visakhapatnam on his becoming the Managing Director but continued to stay most of the time at Rajahmundry. According to the prosecution both these concerns were running smoothly and efficiently during the lifetime of D.L.N. Raju because he was personally attending to their affairs. His successor, however, apart from the fact that he continued to be staying mostly at Rajahmundry, was also interested in several other ventures, including a sugar factory at Dewas in Central India.

Eventually many of those ventures failed. According to the prosecution the second Raju was not bestowing sufficient care and attention on the affairs of VESCO.

The AECO as Managing Agents of VESCO had appointed in the year 1939 one D.V. Appala Raju, a trusted employee, as its representative and as the secretary of VESCO. In 1944 this person resigned from his appointments and started his own business in radio and electrical goods in the name of D. Brothers. He was succeeded by T. Visweswara Rao, P.W. 6, an employee of the AECO.

The respondent No. 1, Ganeswara Rao was also an old employee of AECO, having been appointed a stenotypist in the year 1923 on an initial salary of Rs. 40/- p.m. Eventually he became the Head Clerk therein. He pressed his claim for appointment as Secretary of VESCO and representative of the Managing Agents at Visakhapatnam and R K.H.G. Raju appointed him to that post. All this is not disputed. The respondent No. 1, even after his appointment on two posts connected with VESCO, continued to work with the AECO also whose business had by then been confined only to that of Managing Agents of the four companies floated by D.L.N. Raju.

It is the prosecution case that as Secretary of VESCO and the resident representative of the Managing Agents, the respondent No. 1 was attending to the day to day affairs of VESCO, which included the receiving of all sums of money due to VESCO, spending money for the purpose of VESCO, attending to the appointment, supervision and control of the staff of VESCO, purchasing materials required for the purpose of VESCO and supervising over the accounts of VESCO. He was thus all important with respect to the every day affairs of

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VESCO. His dual capacity enabled the respondent No. 1 to earn the confidence not only of the Directors of AECO but also of those of VESCO. The accounts maintained by the VESCO used to be explained by him not only to the Directors but also to the shareholders. The knowledge of the Financial position of VESCO obtained by them used to be derived essentially from the respondent No. 1. As Secretary of VESCO it was his duty to convene the meetings of the Board of Directors, to present before them the periodical statement of receipts and expenditure of VESCO, to convene meetings of the General Body, to prepare the Managing Agents' report and the Directors' report as also to see to the presentation of auditors' report and the statement of accounts. The explanations of the Managing Agents and the Directors of VESCO with respect to the items mentioned in the orders of the Board used also to be placed by him before the shareholders. It was also his duty to have the accounts of VESCO audited by the auditors elected by the general body and to produce before the auditors the relevant accounts, vouchers, bank statements and so on.

There were no complaints about the management of the affairs of VESCO or the AECO till the end of 1946 or the beginning of 1947. One significant fact, however, which occurred prior to 1946 is referred to by the prosecution. Till the year 1945 Messrs C. P. Rao & Co., a firm of Chartered Accountants were the auditors of VESCO but after the respondent No. 1 became Secretary, one B. Rajan was elected Auditor not only for VESCO but for all the other four concerns, including AECO. This person was Auditor for Greenlands Hotel at Visakhapatnam, of which the respondent No. 1 was a Director.

R.K.N.G. Raju took till towards the end of 1947 and died at Madras in April, 1948. According

to the prosecution the respondent No. 1 wanted to take advantage of this fact and conceived of a scheme for misappropriating as much money belonging to VESCO as possible before the managing agency agreement of AECO came to an end in October, 1948. The respondent No. 1 secured the promotion of the approver K.V. Ramana, who was originally Accounts Clerk, to the post of Senior Accountant. Similarly K. V. Gopala Raju was transferred from the post of Stores Clerk to the general department and K.S.N. Murty, the discharged accused, was appointed Stores Clerk in his place. Later, however, Murty was also got transferred to the general section and replaced by P. W. 18, Srinivasa Rao originally a stores boy.

The approver who was originally an Accounts clerk with the AECO was, it may be mentioned, appointed a cashier in VESCO in 1946 at the instance of the respondent No. 1 and was thus beholden to him. He was later promoted as Senior Accountant and in his place the respondent No. 2 Lakshminarayana Rao was appointed the Cashier. According to the prosecution the respondent No. 1 took both the approver and Lakshminarayana Rao in his confidence as also some other persons "known and unknown" for carrying out his nefarious purpose, namely, the misappropriation of the funds of VESCO during the subsistence of AECO's managing agency of VESCO. The conspiracy is said to have been hatched in the year 1947 and falsification of accounts and misappropriation of funds of VESCO went on till the end of the accounting year. The term of the managing agency was renewed in 1943 and AECO continued to be managing agents until the VESCO was taken over by the Government in 1952. The respondent No. 1 continued to be the Secretary of VESCO and resident representative of the Managing Agents throughout the period of conspiracy.

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After the death of R.K.N.G. Raju, it was discovered that the AECO was indebted to many concerns which were under its managing agency, the liability being shown either as that of AECO or that of R.K.N.G. Raju personally. Again, the VESCO was shown as indebted to the Andhra Cements to the extent of Rs. 42,000/-. This amount was, however, paid by the AECO from the funds of VESCO. The respondent No. 1 and some of his friends were in search of a rich and substantial man who would be amenable to them to fill the post of Managing Director of AECO. Eventually their choice fell on G. V. Subba Raju, P. W. 25, a resident of Manchili, who held a large number of shares in the AECO and who was, besides, related to R.K.N.G. Raju by marriage. It is said that this person has not received much education and knows only how to sign his name in English. He was assured that by consenting to become the Managing Director he would not be required to discharge onerous duties and that the respondent No. 1 would look to all the affairs of VESCO. He was also told that apart from signing important papers which may be sent to him by the respondent No. 1 from time to time to Manchili or wherever he might be, he would have no work to do. He agreed and was elected Managing Director of AECO in the middle of 1948. Upon this understanding he accepted the position offered to him.

The VESCO used to receive large amounts of money from high tension power consumers such as the railways, K. G. Hospital, the Port Administration, the Andhra University etc., by cheques. But domestic consumers usually paid their bills in cash to the bill collectors who used to hand over their collections to the respondent No. 2. The respondent No. 2 was asked by the respondent No. 1 to maintain a private note book. In that book payments which used to be made by respondent No. 2 on the

basis of slips issued by the respondent No. 1 (which included payments to his relatives or to business firms in which he was personally interested) used to be noted and the amount totalled up at the end of the day. This amount was posted in VESCO's Cash Handover Book as "by safe" indicating that this amount was kept in the safe, though in fact it was not. On the basis of the entries in the Handover Book the final accounts were written up. The respondent No. 1 opened four personal accounts in different banks, including the Imperial Bank of India (as the State Bank then was). When the respondent No. 1 had to issue a personal cheque on any of these Banks he used to ask the second respondent to send an equivalent amount to the Bank concerned for being credited to his account. These amounts also used to be noted in the private note book and entered 'by safe' in the Handover Book.

Another thing which the respondent No. 1 initiated was opening a heading in the ledger called "advance purchase of materials." Amounts which had been misappropriated used to be posted therein though in fact no orders were placed for any material. It may be mentioned that Subba Raju used to visit Visakhapatnam twice a month and check up the account books. At that time it used to be represented to him that the amounts which were shown to be in the safe and not found therein (but which were actually misappropriated) had been sent to the Bank for being deposited. Apparently Subba Raju was fully satisfied with this and other explanations and, therefore, he appointed one C. S. Raju, who was the Manager of Andhra Cements to supervise over the affairs of VESCO. Apparently because of this a new method of misappropriation was adopted by the respondents by starting in the VESCO account books, an account called "suspense account". A lakh of rupees passed through that account. Amounts which were misappropriated used to find their way in this

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account. A new cash book was also said to have been prepared by the conspirators with the object of covering up the misappropriations which had been made.

Subba Raju was not satisfied with the nature of supervision exercised by C. S. Raju over the affairs of VESCO because he used to look only at the cash book entries of the days on which he paid visits to VESCO's office, to which he used to go with previous intimation. Besides that, C. S. Raju's management of Andhra Cements had landed it into a loss of Rs. 30,000-. Because of all these things he had C. S. Raju replaced towards the end of the year 1951 by one Subbaramayya, a retired Finance Officer from the Madras Electricity Board both as a Director of Andhra Cements and as a Supervisor over the accounts of VESCO. Subbaramayya took his work seriously and called for information on a number of points from the respondent No. 1. He, however, was unable to obtain any information. In January, 1952 he therefore brought one S. G. Krishna Aiyar who had vast experience in the maintenance of accounts of electrical undertaking's having been Chief Accountant of the South Madras Electric Supply Corporation, to undertake an investigation and then to act as Financial Adviser.

In the meantime on November 29, 1951 there was a meeting of the General Body at which the accounts were, among other things, to be considered. There was a considerable uproar at that meeting because the respondent No. 1 said that the Auditor's report had not been received. The shareholders felt that the report had been received but was being suppressed or deliberately withheld. However, the meeting was postponed and eventually held on December 9, 1951. On that date the respondent No. 1 produced the auditor's report (Ex. p. 234 of which Ex. P. 235 is a printed copy). According to

the prosecution the report is a forged document. That was also the feeling of a number of shareholders who wanted to see the original but one Dutt who was Chairman of the meeting after seeing Ex. P. 234 said that the report seemed to be a genuine one.

S. G. Krishna Aiyar after his appointment in January, 1952, made close enquiry and submitted an interim report. That report showed that during the period 1948-49 Rs. 33,271-10-0 shown as paid to the Andhra Power System were in fact not paid. The respondent No. 1 on being asked to explain said that he would give his explanation to the Managing Director. The Interim Report showed that there was a shortage of about Rs. 90,000/- for this period. On February 12, 1952 the respondent No. 1 wrote to the Managing Director admitting his responsibility and agreed to make good the amounts found short or such other amounts as would be found short up to the end of March, 1952. Further scrutiny of the accounts was being carried out by Krishna Aiyar and in his subsequent report he pointed out that Rs. 2,38,000/- which were shown as having been paid to the Andhra Power System had actually not been paid. In fact in April, 1952 the Collector attached VESCO properties for realising this amount. On April 30, 1952 the respondent No. 1, by selling some of his property, himself paid Rs. 50,000/- to the Andhra Power System towards the sum due to it from VESCO and had promised to pay the balance shortly thereafter. He was given time for doing so but he failed to pay it.

The Directors of VESCO thereafter authorised K. S. Dutt, one of the Directors to lodge a complaint with the police which he accordingly lodged on May 19, 1952. On the next day the police placed an armed guard around the office of the respondent No. 1 and seized a number of papers. As a result of investigation they found that there was a total misappropriation

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of Rs. 3,40,000/-. On May 13, 1954 a charge-sheet was filed against the two respondents as well as Murti and the approver Ramana. On September 13, 1954 Ramana offered to make a full confession to the Additional District Magistrate (Independent) who was empowered to grant pardon under s. 337 of the Code of Criminal Procedure. He, however, directed Ramana to make his confession before a Sub-Magistrate. The latter accordingly made a confession on November 15, 1954 and on November 17, 1954 the Additional District Magistrate (Independent) granted him pardon and that is how he came to be examined as a witness in this case.

As already stated, the Additional Sessions Judge convicted both the respondents, the respondent No. 1 in respect of each head of the offences with which he was charged and the respondent No. 2 in respect only of the offences of conspiracy and misappropriation. The High Court set aside the conviction of the respondents on a number of grounds. In the first place according to the High Court, joint trial of two or more persons in respect of different offences committed by each of them is illegal and that here as they were charged with having committed offences under s. 120-B, s. 409, s. 477-A and s. 476/467, I.P.C. they could not be tried jointly. According to it the provisions of s. 239 were of no avail. Next according to the High Court even if s. 239 is applicable its provisions are subject to those of s. 234 and as such the trial being for more than three offences was impermissible. Then according to the High Court offences under. s. 409 and s. 471/467 are of different kinds and are not capable of joint commission. Therefore, they could not be jointly tried. Further, according to the High Court where a conspiracy has yielded its fruits the conspirators can be charged with the actual offences committed and not with conspiracy to commit those offences. Charge of conspiracy, according to the High Court, can be validly made

only when the prosecution establishes that every conspirator expected to receive a personal benefit from it and that the prosecution has not been able to establish that the respondent No. 2 or the approver evidently had any such expectations since they did not in fact receive any corresponding benefit. In so far as the respondent No. 2 is concerned the High Court has held that since he was charged with a specific offence under s.409, I.P.C. he could not be convicted of mere abetment of an offence. The approver's evidence was held by the High Court to be inadmissible because the pardon granted to him was illegal. The High Court has also held that his evidence is unreliable and further that the Additional Sessions Judge was in error in allowing him to refresh his memory by referring to various documents in a manner not permitted by s. 159 of the Evidence Act. The High Court has further stated that inadmissible evidence was taken on record by the Additional Sessions Judge, namely, account books of Billimoria Brothers, maintained in Gujrati and further that the Additional Sessions Judge was in error in allowing the prosecution to use those account books for establishing absence of entries with regard to certain payments alleged in the VESCO books to have been made to them. Finally, the High Court held that the examination of the respondent under s. 342 of the Code was unfair for a number of reasons and that the Additional Sessions Judge had failed to perform an important duty in that he did not call the attention of the respondents to the provisions of s. 342 which enable an accused person to give evidence in his own behalf.

Mr. Bhimasankaram, appearing for the two respondents, however, has not sought to support the judgment of the High Court on all these points. The points which he urged are briefly these:

(1) That there was a misjoinder of charges and persons in that the various provisions

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of s. 239 were clubbed together and an omnibus charge of conspiracy was framed which on its face was one likely to embarrass the respondents and make their task of defending themselves difficult.

(2) The procedure adopted in the investigation and committal stages was irregular.

(3) Irrelevant evidence was introduced and some evidence was introduced in a manner not authorised by the Evidence Act.

(4) That the Court abused its powers under s. 342, Cr. P.C. while conducting the examination of the respondents.

(5) The evidence of the approver was inadmissible because the pardon granted to him was illegal, that, in any case, it is unreliable, was so found even by the Sessions Judge and must, therefore, be rejected. If the evidence of the approver is left out the remaining evidence would be inadequate to sustain the prosecution case.

We shall deal with Mr. Bhimasankaram's contentions in the order in which we have set them out. The first question for consideration is whether there was a misjoinder of parties and of persons. The first charge is in respect of the conspiracy alleged to have been entered into by the two respondents, K. V. Ramana, the approver, and others "known and unknown" to commit criminal breach of trust of the funds of VESCO and, in order to screen its detection, to falsify the accounts of VESCO and to use forged documents as genuine. On the face of it this is a valid charge. But certain objections have been taken to it with which we will deal at th

appropriate place. The second charge is for an offence of criminal breach of trust punishable under s. 409 and the accusation therein is that the two respondents along with Ramana, misappropriated 69 items aggregating to a little over Rs. 3,20,000/-. It is clear from the charge that some of the amounts were misappropriated between April, 1947 and March, 1950, some between April, 1947 and March, 1949, some between April, 1947 and March, 1951 and quite a large number between September, 1947 and March, 1950 and a still large number between April, 1951 and March, 1952. It is thus apparent that offences committed within a space of 12 months were tried along with offences committed beyond that period. Unless, therefore, the provisions of s. 239 are applicable it would follow that there was a misjoinder of charges. The third charge is that the two respondents, along with the approver Ramana made false entries on seven different dates in the account books between September 19, 1947 and March 18, 1952 and thus committed an offence under s. 477-A, I.P.C. The fourth charge is that the two respondents, along with the approver Ramana forged six documents on different dates between March 28, 1949 and November 12, 1951 and thus committed an offence under s. 471 read with s. 467, I.P.C. As we have pointed out earlier the respondent No. 1 alone was convicted by the Additional Sessions Judge in respect of the third and fourth charges.

Mr. Bhimasankaram supports the reason given by the High Court for coming to the conclusion that there was a misjoinder of charges. The main reasons upon which the conclusion of the High Court is based are firstly that there could be no clubbing together of the provisions of the various clauses of s. 239 and secondly that the respondents were charged with more than three offences of the same kind and that this was in contravention of s. 239 (c). In coming to the conclusion that the

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provisions of various clauses of s. 239 cannot be applied cumulatively the High Court has relied upon the decision in *Re: Vankavalapati Gopala Rao* (1). There the learned Judges have held thus:

> "These clauses are mutually exclusive and they cannot be simultaneously applied and to construe them as supplementing each other would be enlarging the scope of the exceptions. Each clause is an exception to the general rule enacted in s. 233, Cr. P.C. If such a combination is permissible, all persons accused of offences described in cls. (a) to (g) can be tried together in one case which certainly involves a bewildering multiplicity of charges and which would obviously set at naught the salutary principle contained in s. 233." (p. 24)

In support of this view the High Court in that case has relied upon the decision in *T. B. Mukherji* v. *State* (2) and referred to the decision in *Singaracharier* v. *Emperor* (3) and *D. K. Chandra* v. *The State*(4).

Before considering these decisions it will be useful to look at the scheme of Chapter XIX of the Code of Criminal Procedure which deals with the charge. The chapter is split up into two sub-heads, "Form of charges" and "Joinder of charges." Sections 221 to 232 are comprised under the first sub-head and ss. 233 to 240 in the second. Sections 221 to 223 deal with the framing and content of charge. s. 224 deals with the interpretation of the language of the charge and s. 225 with the effect of errors in the charge. Sections 226 to 231 deal with the power of the court with regard to framing and altering charges and the procedure to be adopted at the trial where a charge is found to be defective or there is no charge or where a new charge is to be

(1) A.I.R. 1956 Andhra 21.
(2) A.I.R. 1954 All. 501.
(3) A.I.R. 1934 Mad. 673.
(4) A.I.R. 1952 Bom. 177, F.B.

framed. Section 232 deals with the power of the appellate court or the High Court when it discovers that there is material error in the charge. Then we come to the other sub-head of this chapter. Section 233 provides that for every distinct offence of which any person is accused there shall be a separate charge. It thus lays down the normal rule to be followed in every case. But it also provides that this will be subject to the exceptions contained in ss. 234, 235, 236 and 239. The first three provisions relate to the framing of charges against a single accused person. Section 234 (1) deals with the trial of a person for offences of the same kind not exceeding three committed within the space of 12 months from the first to the last of such offences and s. 234 (2) what is meant by the expression 'offences of the same kind'. This provision lifts partially the ban on the trial of a person for more than one offence at the same trial. Section 235(1), however, goes a step further and permits the trial of a person for more offences than one if they are so connected together as to form the same transaction. Thus under this provision if the connection between the various offences is established the limitations placed by s. 234(1) both as regards the number and the period during which the offences are alleged to have been committed will not apply. Full effect cannot possibly be given to this provision if we hold that it is subject to the limitation of s.234(1). Sub-section (2) of s. 235 deals with a case where an offence falls within two definitions and sub-s.(3) deals with a case in which a number of acts are alleged against an accused person, different combinations of which may constitute different offences. Then we come to s. 236 which provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and further provides that any number of such

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charges may be tried together. It also permits that charges could be framed against an accused person in the alternative if the court thinks fit. Thus, this is a special provision available in case of doubt and is neither subject to the limitations prescribed by s. 233 nor those of the other preceding provisions.

Now, if the respondent No. 1 were alone tried upon the second, third and the fourth charges the provisions of s. 235(1) could have been pressed in aid if the allegations were that the offences were so connected together as to form one and the same transaction and the validity of the trial would not have been open to any attack. Similarly if the second respondent were alone tried on the second charge his trial would not have been open to any objection if the allegation were that the offences were so connected together as to form the same transaction. Here, however, we have a case where the prosecution alleges that there was additionally a conspiracy to which apart from the two respondents the approver and some other persons were parties and where in both the respondents were tried together. A conspiracy must be regarded as one transaction and, therefore, a single individual charged with it could be tried with the aid of s. 235(1) for all the acts committed by him in furtherance or in pursuance of the conspiracy without the limitations imposed by s.234(1). For, where all the acts are referable to the same conspiracy their connection with one another is obvious.

The only provision in the Code which permits the joint trial of more than one person is s. 239 and what we have to see is whether under that provision the two respondents could have been jointly tried for the offences with which they were charged. Let us, therefore, examine closely the provisions of

s. 239. It will be useful to set out the provisions of that section which run thus :

"The following persons may be charged and tried together, namely:—

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession

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of which has been transferred by one offence; and

(g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges."

This first thing to be noticed is that s. 239 does not read as if its various clauses can be applied only alternatively. On the other hand at the end of cl. (f) there is a conjunction 'and'. If the intention of the Legislature was that the provisions of these clauses should be available only alternatively it would have used the word "or" and not "and" which has the opposite effect. Grammatically, therefore, it would appear that the provisions of the various clauses are capable of being applied cumulatively. The opening words of the section show that it is an enabling provision and, therefore, the Court has a discretion to avail itself cumulatively of two or more clauses. Of course a Court has the power to depart from the grammatical construction if it finds that strict adherence to the grammatical construction will defeat the object the Legislature had in view. The concluding portion of s. 239 shows that the provisions contained in the former part of Chapter XIX shall, as far as may be, apply to the charges framed with the aid of s. 239. Does this mean that the provisions of s. 233, 234, 235, and 236 must also be complied with? Obviously, s. 233 does not override the provisions of s. 239. Section 234 cannot also be regarded as an

overriding provision because reading it that way will lead to the clear result that whereas several accused persons can be charged at the same trial with any number of different offences committed by them in the course of the same transaction they cannot be tried also for offences of the same kind exceeding three in number and committed beyond a space of 12 months from the first to the last. It could not have been the intention of the Legislature to create such a situation. Again, as already stated, s. 234(1) does not override the provisions of s. 235(1) which premits trial of a person for more offences than one committed during any period provided they are so connected together as to form one transaction. Unless we read s. 234(1) as not enacting a fetter on s. 235(1), it may not be possible to give full effect to the latter. Now, since s. 234(1) cannot be properly read as overriding s. 235(1) there is no valid reason for construing it as overriding the provisions of s. 239 either. There are also other reasons which point to this conclusion which we will set out while considering the argument advanced by Mr. Bhimasankaram.

Mr. Bhimasankaram contended that s. 239 must be read at least subject to ss. 234(1) and 235(1) on the ground that if there are certain restrictions with respect to the trial of a single accused there is no reason why those restrictions will disappear if an accused person is tried along with several other persons. Thus he points out that where several persons are accused of more offences than one of the same kind committed by them jointly within a period of 12 months, the number of offences for which they could be tried cannot exceed three. In this connection he relied upon the words "within the meaning of s. 224" occurring in cl. (c) of s. 239. These words, he contended, clearly show that cl. (c) of s. 239 is subject to the provisions of s. 234. In our opinion the words "within the meaning of s. 234" indicate that what was meant by the words offence of the same kind"

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in cl. (c) of s. 239 is the same thing as was meant by the identical expression used in s. 234(1) and defined in s. 234(2) and nothing more. If it was the intention of the Legislature to provide that the number of offences for which several accused persons could be tried under cl. (c) of s. 239 should be limited to three as provided in s. 234(1), the Legislature would either have said "persons accused of more offences than one of the same kind not exceeding three in number" or may have used the words "persons accused of more than one offence of the same kind to the extent permissible under s. 234". Language of this kind would have made perfectly clear that cl. (c) of s. 239 was subject to s. 234(1). As already stated, if s. 239(c) is construed as being subject to s. 234(1), there would be this anomaly that whereas the same accused person could be charged with and tried jointly for any number of offences of different kinds committed by them, for more than three offences of the same kind committed by them jointly there will have to be a separate trial with respect to such offences. Surely such could not have been the intention of the legislature. The object of enacting s. 239 was to avoid multiplicity of trials and the only limitation which could properly be placed on the trial of several persons for the same kind of or different offences would be that which considerations of justice and fairness would require. No doubt, such a construction would also give rise to the result that whereas so far as the trial of a single accused person is concerned the charges must be limited to three offences committed by him within the space of 12 months from the first to the last of such offences, there would be no such limitation when along with that accused person there are one or more persons who have jointly committed those offences. The reason for this possibly is that the Legislature did not want to differentiate between cases where any number of different offences were committed jointly by a group of persons from cases where any number

of offences of the same kind were committed by a group of persons.

According to Mr. Chari s. 235(1) cannot be construed as having an overriding effect on s. 239 because whereas it contemplates acts so connected together as to form the same transaction resulting in more offences than one, s. 239(d) contemplates offences committed in the course of the same transaction and nothing more. The question is whether for the purposes of s. 239(d) it is necessary to ascertain anything more than this that the different offences were committed in the course of the same transaction or whether it must further be ascertained whether the acts are intrinsically connected with one another. Under s. 235(1) what has to be ascertained is whether the offences arise out of acts so connected together as to form the same transaction, but the words "so connected together as to form" are not repeated after the words "same transaction" in s. 239. What has to be ascertained then is whether these words are also to be read in all the clauses of s. 239 which refer to the same transaction. Section 235(1), while providing for the joint trial for more than one offence, indicates that there must be connection between the acts and the transaction. According to this provision there must thus be a connection between a series of acts before they could be regarded as forming the same transaction. What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or

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unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and, therefore, the mere absence of the words "so connected together as to from" in cl. (a), (c) and (d) of s. 239 would make little difference. Now, a transaction may consist of an isolated act or may consist of a series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stands out independently, they would not form part of the same transaction but would constitute a different transaction or transactions. Therefore, even if the expression "same transaction" alone had been used in s. 235(1) it would have meant a transaction consisting either of a single act or of a series of connected acts. The expression "same transaction" occurring in cls. (a), (c) and (d) of s. 239 as well as that occurring in s. 235(1) ought to be given the same meaning according to the normal rule of construction of statutes. Looking at the matter in that way, it is pointless to inquire further whether the provisions of s. 239 are subject to those of s. 236(1). The provisions of sub-s. (2) and (3) of s. 235 are enabling provisions and quite plainly can have no overriding effect. But it would be open to the court to resort to those provisions even in the case of a joint trial of several persons permissible under s. 239.

Section 236 is also an enabling provision to be availed of in case of doubt and it is meaningless to say that s. 239 is subject to s. 236. Bearing in

mind the fact that the provisions in the "former part" of Chapter XIX are applicable to charges made with the aid of s. 239 only "so far as may be" it would not be right to construe s. 239 as being subject to the provisions of ss. 233 to 236. It was contended by Mr. Chari that the expression "former part" would apply to the first sub-division of chapter XIX which deals with the form and content of the charges and the powers of the court with regard to the absence of charge and alteration of charge. We cannot, however, give the expression such a restricted meaning. For, even in the absence of those words, the earlier provisions could not have been ignored. For, it is a rule of construction that all the provisions of a statute are to be read together and given effect to and that it is, therefore, the duty of the Court to construe a statute harmoniously. Thus, while it is clear that the sections preceding s. 239 have no overriding effect on that section, the courts are not to ignore them but apply such of them as can be applied without detracting from the provisions of s. 239. Indeed, the very expression 'so far as may be' emphasises the fact that while the earlier provisions have to be borne in mind by the Court while applying s. 239 it is not those provisions but the latter which is to have an overriding effect.

Apart from this, the question whether the provisions of ss. 233 to 236 have or have no overriding effect on s. 239 is not strictly germane to the question considered by the High Court that is, clubbing together all the provisions of the various clauses of s. 239. Whether they can or cannot be read cumulatively must be determined by consideration of the language used in those clauses. We have already indicated how those clauses may be grammatically read. On a plain construction of the provisions of s. 239, therefore, it is open to the Court to avail itself cumulatively of the provisions of the different clauses of s. 239 for the purpose of framing charges

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and charges so framed by it will not be in violation of the law, the provisions of ss. 233, 234 and 235 notwithstanding.

The decision of the Allahabad High Court in *T. B. Mukherji's case* (1), is directly in point and is clearly to the effect that the different clauses of s. 239 are mutually exclusive in the sense that it is not possible to combine the provisions of two or more clauses in any one case and to try jointly several persons partly by applying the provisions of one clause and partly by applying those of another or other clauses. A large number of decisions of the different High Courts and one of the Privy Council have been considered in this case. No doubt, as has been rightly pointed out in this case, separate trial is the normal rule and joint trial is an exception. But while this principle is easy to appreciate and follow where one person alone is the accused and the interaction or intervention of the acts of more persons than one does not come in, it would, where the same act is committed by several persons, be not only inconvenient but injudicious to try all the several persons separately. This would lead to unnecessary multiplicity of trials involving avoidable inconvenience to the witnesses and avoidable expenditure of public time and money. No corresponding advantage can be gained by the accused persons by following the procedure of separate trials. Where, however, several offences are alleged to have been committed by several accused persons it may be more reasonable to follow the normal rule of separate trials. But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves. We entirely agree with the High Court that joint trial should be founded on some 'principle'. But we find it difficult to appreciate what seems to

(1) A. I. R. 1954 All. 501.

be the view of the High Court that because each clause of s. 239 enunciates a separate principle those principles are, so to speak, mutually exclusive and cannot be cumulatively resorted to for trying several persons jointly in respect of several offences even though they form part of the same transaction. The High Court has propounded that the connection described in each of the various clauses is mutually exclusive, that no two of them can exist simultaneously in any case and that one cannot, therefore, have in any case persons connected with one another in two or more ways. In other words, as the High Court puts it, persons included in two or more of the groups cannot all be tried together and that since there is absolutely nothing to connect one group with any other, the persons of one group cannot be tried with those of any other. No reason has been stated in support of this view. Let us consider whether there is anything intrinsically incompatible in combining two clauses of s. 239. Take cls. (a) and (b). Clause (a) says that persons accused of the same offence committed in the course of the same transaction may be charged and tried together. Clause (b) says that persons accused of an offence and persons accused of abetment, or, of an attempt to commit such offence may also be charged and tried together. Now, if persons A, B and C are tried for an offence of murder what intrinsic difficulty would there be in trying X, Y and Z of abetment of the same offence? The transaction in which all of them have participated is the same and the abetment by X, Y and Z of the offence committed by A, B and C would itself establish the connection of their acts with those of X, Y and Z. Next, let us take cls. (a) and (c). Clause (c) provides that persons accused of more than one offence of the same kind within the meaning of s. 234 committed by them jointly within the period of twelve months could also be charged and tried together. Let us consider these clauses along with another illustration. Two persons A and

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B enter a house at night and first together commit the murder of a man sleeping there and then also his wife. Each of them has committed two offences and each of them participated in the same offence. Why can they not be tried jointly for both murders and why should there be two trials for the two murders ? The offences are of the same kind and must be deemed to have been committed in the course of the same transaction because of association and mutual connection. Now, supposing in the illustration given A killed the man and B killed his wife. Under cl. (c) they could be tried together because the offences are of the same kind. It would be ridiculous to say that they cannot be tried together for jointly committing the murder of the man and the wife because cl. (a) and (c) cannot be combined. For, without combining these two clauses their joint trial for the two offences in each of which both have participated would be impermissible. Then take cls. (a) and (d). Under cl. (d) persons accused of different offences committed in the course of the same transaction can be tried together. Let us suppose that a group of persons are accused of having been members of an unlawful assembly the common object of which was to overawe by sheer force another group of persons and take forcible possession of a piece of land. Some of the members of the unlawful assembly carried axes with them while some others carried lathis and attacked the other group. During the course of the attack one person from the second group was killed, as a result of blows with an axe inflicted by the aggressors A, B and C. Two persons of the second group sustained grievous hurt as a result of lathi blows and one person sustained simple hurt. Let us say that the grievous hurt was caused as a result of lathi blows given by X and Y, simple hurt was caused by lathi blows given by Z. Here, the offences committed were those under ss. 147, 302, 325 and 323, I.P.C. The offences being different and the persons commiting the offences being different, they could not

be tried jointly only with the help of cl. (a) of s. 239. Nor again, could they be tried jointly only with the help of cl. (d). Yet the transaction in which the offences were committed is the same and there is a close association amongst the persons who have committed the different offences. What intrinsic difficulty is there in trying them all together simultaneously availing of cls. (a) and (d) of s. 239? These are enabling provisions which circumstance implies that the court may avail itself of one or more of these provisions unless doing so would amount to an infringement of any of the provisions of the Code. All these persons can be jointly tried for offences under s. 147 by recourse to cl. (a). So also A, B and C could be jointly tried together for an offences under s. 302. X and Y can be charged not only with offences under ss. 147 and 325, I.P.C. but also under s. 302 read with s. 149. Similarly Z can be charged with offences under ss. 147, 323 and offences under s. 302 read with s. 149 and s. 325 read with s. 149. The same offence committed by all of them is that under s. 147 and all of them can be tried jointly in respect of that offence under cl. (a). Similarly, if we take cl. (d) by itself all of them can be tried jointly for the different offences committed by each of them in the course of the same transaction and if cl. (a) is unavailable they could not be tried for the offence under s. 147 at the same trial. This means that the trial for an offence under s. 147 will have to be separated from the trial for the different offences committed by them. It is difficult to appreciate what purpose would be served by separating the trial for the same offence from the trial for different offences. To repeat, the object of the legislature in enacting s. 239, Cr.P.C. clearly was to prevent multiplicity of trials and not only would that object be defeated but an extraordinary result will ensue if the various clauses of s. 239 are read disjunctively. The reasons given by the Allahabad High Court, therefore, do not merit acceptance.

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The decision in *Singaracharlar's case* (1), has really no bearing upon the point before us. What was held there was that ss. 235 (1) and s. 236 are mutually exclusive and if a case is covered by one of them it cannot be covered by the other. In that case the question was whether a person who was first tried for an offence under s. 380, I.P.C. for stealing a blank second class railway ticket from the booking office, tried, for it and acquitted, could not be tried subsequently for the offence of forgery by making entries in that ticket and using it. The acquittal in the previous case was urged as a bar under s. 403(1) of the Code to the trial for an offence under s. 467, I.P.C. The contention apparently was that this was a case which fell under s. 236, Cr. P.C. and that if he had been tried alternatively for both the offences at the same trial the Court could have dealt with him under s. 237, Cr. P.C. The High Court, however, held that to be a kind of case which fell under s. 235(1) of the Code and that since that was so, the provisions of s. 236 were excluded. It is difficult to appreciate how this case assists the conclusion arrived at by the High Court.

In *D.K. Chandra's case* (2), it was held that the provisions of ss. 234, 235 and 236 being exceptions to s. 233 must be strictly construed and that if joinder of charges did not fall under any of them it would be illegal and contrary to law. The precise point which we have to consider here did not fall for consideration in that case *i.e.*, whether the provisions of the various clauses of s. 239 could be used together or not. This decision is, therefore, of little assistance. On the other hand there is the decision of this Court in *The State of Andhra Pradesh* v. *Kandimalla Subbaiah* (3), which is to the effect that where several persons had committed offences in the course of the same transactions, they could jointly be tried in respect of all those offences under s. 239 of the Code of Criminal

(1) A.I.R. 1934 Mad. 673. (2) A.I.R. 1952 Bom. 177, F.B.
(3) [1962] 2 S. C. R. 194.

Procedure and the limitation placed by s. 234 of the Code could not come into operation. There, nine persons were jointly tried for an offence under s. 5 (1) (c) and (d) of the Prevention of Corruption Act, 1947, and s. 109, I. P. C. read with s. 420, s. 466 and s. 467, I. P. C. and all except one for offences under ss. 420, 467/471, I.P.C. Some of them were also charged with separate offences under some of these provisions. Two of the accused persons preferred a revision application before the High Court of Andhra Pradesh in which they challenged the charges framed against them. The High Court allowed the revision application. But on appeal by the State of Andhra Pradesh to this Court, this Court held that there was no misjoinder of charges, that the introduction of a large number of charges, spread over a long period was a question of propriety and that it should be left to the Judge or the Magistrate trying the case to adopt the course which he thought to be appropriate in the facts and circumstances of the case. In so far as some of the charges were concerned this Court pointed out that the Special Judge who was to try the case should consider splitting them up so that the accused persons would not be prejudiced in answering the charges and defending themselves. It is true that the question of reading the various clauses cumulatively did not specifically arise for decision in that case but the High Court had held that the first charge was an omnibus charge containing as many as 203 offences and that it was in direct violation of ss. 234, 235 and 239 of the Code of Criminal Procedure. Dealing with this matter this Court held at p. 200 :

> "No doubt, sub-s. (1) of s. 234 provides that not more than three offences of the same kind committed by an accused person within the space of 12 months can be tried at the same trial. But then s. 235 (1) provides that if in any one series of acts so connected together

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as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. Therefore, where the alleged offences have been committed in the course of the same transaction the limitation placed by s. 234 (1) cannot operate.. No doubt, the offence mentioned in charge No. 1 is alleged to have been committed not by just one person but by all the accused and the question is whether all these persons can be jointly tried in respect of all these offences. To this kind of charge s. 239 would apply. This section provides that the following persons may be charged and tried together, namely :

(1) persons accused of the same offence committed in the course of the same transaction;

(2) persons accused of abetment or an attempt to commit such an offence;

(3) persons accused of different offences committed in the course of the same transaction.

Clearly, therefore, all the accused persons could be tried together in respect of all the offences now comprised in charge No. 1."

This Court has thus clearly read the provisions of the various clauses cumulatively and we see no reason to read them differently.

There remains the decision of this Court in *K.V. Krishna Murthy Iyer* v. *The State of Madras* (1), on which Mr. Bhimasankaram strongly relied. In that case this Court upheld the order of the High Court of Madras in quashing the charges in the exercise

(1) A. I. R. 1954 S. C. 406.

of its inherent powers even before the conclusion of the trial. It is true that there the charges were 67 in number and spread over a long period of time. That again was a matter which came before the High Court before conviction and not after the trial was over. When an objection is taken at an early stage, there is time enough to rectify an error. But in the case before us no objection was taken to multiplicity or misjoinder of charges before the learned Additional Sessions Judge and it was only in the High Court that the point was raised. In such circumstances what the Court has to consider is whether prejudice has in fact been caused to the accused by reason of the multiplicity of charges or misjoinder, if any, of the charges. This is quite clear from the provisions of s. 537 of the Code as amended by Act 26 of 1955. In *Willie (William) Slaney* v. *The State of Madhya Pradesh* (1), all the learned Judges were in agreement on the point that this section and s. 535 cover every case in which there is departure from the rules set out in Ch. XIX ranging from error, omissions and irregularities in charges that are framed, down to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial. The whole question has again been examined by this Court recently in *Birichh Bhuian* v. *The State of Bihar* (2). Subba Rao J., who delivered the judgment of the Court has stated the position thus :

> "To summarise: a charge is a precise formulation of a specific accusation made against a person of an offence alleged to have been committed by him. Sections 234 to 239 permit the joinder of such charges under specified conditions for the purpose of a single trial. Such a joinder may be of charges in respect of different offences committed by a single person or several persons. If the joinder of charges was contrary to the provisions of the Code it would

(1) [1955] 2 S. C. R. 1140. (2) [1963] Supp. 2 S.C.R. 828.

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be a misjoinder of charges. Section 537 prohibits the revisional or the appellate court from setting aside a finding, sentence or order passed by a court of competent jurisdiction on the ground of such a misjoinder unless it has occasioned a failure of justice."

Even if we were to assume that there has been a misjoinder of charges in violation of the provisions of ss. 233 to 239 of the Code, the High Court was incompetent to set aside the conviction of the respondents without coming to the definite conclusion that misjoinder had occasioned failure of justice. This decision completely meets the argument based upon *Dawson's case* (1). Merely because the accused persons are charged with a large number of offences and convicted at the trial the conviction cannot be set aside by the appellate court unless it in fact came to the conclusion that the accused persons were embarrassed in their defence with the result that there was a failure of justice. For all these reasons we cannot accept the argument of learned counsel on the ground of misjoinder of charges and multiplicity of charges.

Mr. Bhimasankaram, supporting the view taken by the High Court then contends that it is not permissible to frame a charge of conspiracy when the matter has proceeded beyond the stage of conspiracy and that in pursuance of it offences have actually been committed. A similar view was expressed by the same High Court in the case which was reversed by this Court in *The State of Andhra Pradesh* v. *Kandimalla Subbaiah* (2), and it was held that conspiracy to commit an offence being itself an offence a person can be separately charged with respect to such a conspiracy. Then this Court has observed:

> "Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those

(1) (1960) 1 All. E.R. 558. (2) [1962] 2 S.C.R. 196.

offences as well as with the offence of conspiracy to commit those offences. As an instance of this we may refer to the case in S. *Swamirathnam* v. *State of Madras* (1). Though the point was not argued before this Court in the way it appears to have been argued.....before the High Court of Andhra Pradesh, this Court did not see anything wrong in the trial of several persons accused of offences under s. 120-B and s.420. I.P.C. We cannot, therefore, accept the view taken by the High Court of Andhra Pradesh that the charge of conspiracy was bad. If the alleged offences are said to have flown out of the conspiracy the appropriate form of charge would be a specific charge in respect of each of those offences along with the charge of conspiracy." (pp. 201-202).

This decision is sufficient to dispose of the point under consideration.

In *Swamirathnam's case* (1), which is a decision of this Court certain persons were tried for the offence of the conspiracy to cheat the members of the public and for specific offences of cheating in pursuance of that conspiracy. It was urged before this Court that there was misjoinder of charges and persons. Negativing the contention this Court held that the charge as framed disclosed a single conspiracy although spread over several years, that there was one object of the conspiracy and that was to cheat the members of the public, that the fact that in the course of years other joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy did not have the effect of splitting the conspiracy into several conspiracies, that the several instances of cheating being alleged to be in pursuance of that conspiracy were parts of the same transaction and, therefore, the joint trial of the accused

(1) A. I. R. 1957 S. C. 340, 343, 344.

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persons for the different offences was not vitiated. No doubt, there is no discussion there as to the question whether the various clauses of s. 239 could be combined or as to the impact of the provisions of s. 233 to 236 on those of s. 239. The actual decision of the case is, however, directly opposed to the contention now put forward before us. This decision has been followed in *Natwarlal Sakarlal Mody* v. *The State of Bombay* (1). In that case the impact of s. 120-B, I.P.C. on ss. 233 and 239 of the Code of Criminal Procedure was considered by this Court and this Court observed:

> "The combined effect of the three provisions (ss. 235, 236 and 239) is that if there is a criminal conspiracy to commit different offences, the persons who are members of that conspiracy may be charged and tried together but the necessary condition for invoking the provisions of s. 239 (d) is that the offence should have been committed in the course of one transaction *i.e.*, in the present case one and the same conspiracy."

Here again, the question of clubbing together of the various provisions of cls. (a) to (d) of s. 239 was not raised expressly in the argument before the Court. But the ultimate decision of the case would negative such argument.

Mr. Bhimasankaram then relying upon the decision in *R. v. Dawson* (2), contended that in any event it was not desirable to try the respondents at the same trial for as many as 83 offences and pointed out that these observations had received the approval of this Court in *The State of Andhra Pradesh* v. *Kandimalla Subbaiah* (3). In the first place there the trial had not actually begun. Again, what was said by this Court was that it is undesirable to complicate a trial by introducing a large number of charges

(1) Crl. A. No. 111 of 1959 decided on January 19, 1961.
(2) (1960) 1 All. E.R. 558. (3) [1962] 2 S.C.R. 194.

spread over a long period but even so this was a question of propriety which should be left to the discretion of the Judge or Magistrate trying the case.

Objection was taken very seriously by Mr. Bhimasankaram to the charge of conspiracy framed in this case. That charge reads thus :

> "That both of you along with K.V. Ramana, Ex.-Senior Accountant of the Vizagapatam Electric Supply Corporation Ltd., Visakhapatnam (approver) and others, known or unknown, in or about April, 1947, at Visakhapatnam, agreed to do illegal acts, to wit, commit criminal breach of trust in respect of the funds belonging to the Vizagapatam Electric Supply Corporation Ltd., Vizagapatnam ; and to screen yourselves from detection of the same, to wilfully, and with intent to defraud, falsify the accounts of the said Vizagapatam Electric Supply Corporation Ltd., Visakhapatnam and that pursuant to the said agreement, [you committed criminal breach of trust in respect of funds of the said Vizagapatam Electric Supply Corporation Ltd., Visakhapatnam to the extent of over Rs 3,20,000 and falsified the said accounts between April, 1947 and March, 1952, and also used forged documents as genuine], offences punishable under Sections 409, Indian Penal Code and 477-A, Indian Penal Code and 471 read with section 467, Indian Penal Code ; and thereby committed an offence of criminal conspiracy punishable under Section 120-B of the Indian Penal Code and within my cognizance."

Adverting to the portion which we have bracketed, his first objection was that the charge comprises within it not merely the conspiracy but also what

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was in fact done in pursuance of the conspiracy. His next objection was that it brought within its purview all the various offences which were alleged to have been committed by the respondents. The third objection was that no charge of conspiracy could have been framed after the conspiracy had borne its fruits. The last objection was that the charge of conspiracy was added to the charge sheet very late.

We shall first deal with the third point. The offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy the liability of the conspirators for the conspiracy itself cannot disappear. In the Indian Penal Code, as originally enacted, conspiracy was not an offence. Section 120-B which makes criminal conspiracy punishable was added by the Indian Criminal Law Amendment Act, 1913 (8 of 1913) along with s. 120-A. Section 120-A defines conspiracy and s. 120-B provides for the punishment for the offence of conspiracy. Criminal conspiracy as defined in s. 120-A and consists of an agreement to do an illegal act or an agreement to do an act which is not illegal by illegal means. Section 120 B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall be punishable in the same manner as if he has abetted such offence unless there was an express provision in the Code for the punishment of such conspiracy. Criminal conspiracy was, however, not an unknown thing before the amendment of the Indian Penal Code in 1913. But what the amendment did was to make that conspiracy itself punishable. The idea was to prevent the commission of crimes by, so to speak, nipping them in the bud. But it does not follow that where crimes have been committed the liability to punishment already incurred

under s. 120-B by having entered into a criminal conspiracy is thereby wiped away. No doubt, as already stated, where offences for committing which a conspiracy was entered into have actually been committed it may not, in the particular circumstances of a case, be desirable to charge the offender both with the conspiracy and the offences committed in pursuance of that conspiracy. But that would be a matter ultimately within the discretion of the court before which the trial takes place. In so far as the fourth point is concerned, that would have a bearing not on the form of the charge but on the credibility of the evidence bearing on the point of conspiracy. As we are remanding the appeal to the High Court for a fresh decision after full consideration of the evidence adduced in the case it would be open to it to consider this matter particularly while judging the credibility of the evidence of the approver.

In so far as the portion included in the bracket is concerned we agree with the learned counsel that it should not have found place there. The ideas, however, of the committing magistrate in stating all that is said there appears to have been merely to describe the conspiracy and do nothing more. We do not think that either that or the other objection raised, that is, that the charge embraces within it all the offences said to have been committed by the respondents can properly be said to vitiate the charge. The object in saying what has been set out in the first charge was only to give notice to the respondents as to the ambit of the conspiracy to which they will have to answer and nothing more. Even assuming for a moment that this charge is cumbersome in the absence of any objection by the respondents at the proper time and in the absence of any material from which we could infer prejudice, they are precluded by the provisions of s. 225 from complaining about it at any rate after their conviction by the trial court.

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Coming to the next point of Mr. Bhimasankaram regarding the abuse of powers under s. 342 his first contention was that long and involved questions were put to the respondents. His second contention was that reference was made to a number of documents in some of these questions and those documents were not made available to the respondents for answering those questions. The third contention was that the questions were involved, confusing and bordered on cross-examination. Finally he said that the court did not perform its duty under s. 342 (4) of the Code as amended as it failed to bring to the notice of the respondents that they may, if they chose, give evidence in their defence.

In support of his first contention he referred to questions Nos. 4, 8, 9, 10 and 20 put to the respondent No. 1 and question No. 12 put to the respondent No. 2 and tried to show that those questions rolled up a large number of separate questions and that it could not have been possible for the respondents to give any rational answers to those questions. We have read the questions and so also the answers. While we are disposed to agree with learned counsel that the questions embrace a number of matters and that it would have been better if those matters had been made the subjects of separate questions, the answers given by the respondents clearly show that they understood the questions and wherever possible they have given complete answers to those questions. That is to say, they have given their explantion regarding the circumstances appearing in the evidence set out in the questions and wherever that was not feasible they have said that they would do so in their written statements. In fact written statements have been filed by each of them in which every point left over has been fully answered. We are informed that the questions had been prepared before hand by the learned Additional Sessions Judge, copies thereof were made available to

each of the respondents and it was with reference to those copies that they gave their answers in the court. A pointed reference was made to question No. 20 put to respondent No. 1 which contains as many as 22 sub-heads and it is said that it was an extremely unfair and embarrassing question. What the learned Additional Sessions Judge has done is to err on the side of over-cautiousness by putting every circumstance appearing in the evidence to the respondents for eliciting their explanations. His object was to obviate the possibility of a complaint before the appellate court that they were denied the opportunity of explaining the circumstances appearing in evidence against them because of defective questions. Nor again, do we think that there is any substance in the complaint made that the respondents had no opportunity of referring to the documents to which reference has been made in certain questions. No objection was taken on their behalf before the learned Additional Sessions Judge and from the manner in which they have answered the questions there is no doubt that they must have had opportunity to look at the relevant documents and answer the questions. We are also satisfied that there is no substance in the complaint that the questioning bordered on cross-examination. Undoubtedly the learned Additional Sessions Judge has questioned the respondents very fully and elaborately but to say that this bordered on cross-examination is wholly unjustifiable. The object of the learned Additional Sessions Judge quite clearly was, as already stated, to leave no loophole for a complaint to be made before the appellate court of incomplete or insufficient examination under s. 342.

Finally we are clear that it was not the duty of the court to draw the pointed attention of the respondents to the provisions of sub-s. (4) of s. 342 and tell them that they may, if they chose, enter the witness box. It is true that by introducing this provision

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the disability placed on an accused person in respect of giving evidence on oath in his own defence has been removed and to that extent such person is placed on par with an accused person under the English law. The new provision, however, does no more than lift the ban and does not impose a duty on the court to draw the attention of an accused person to its contents. Apart from that, the respondents were represented by counsel at the trial who knew very well what the law was. No complaint was made by the respondents even in appeal that they were ignorant of their right, that had they known about it they would have given evidence on oath in their defence and that because of this they have been prejudiced. In the circumstances this point must also be rejected as being without substance.

The irrelevant evidence to which Mr. Bhimasankaram referred was certain account books. The entries in the account books of VESCO show that certain sums of money were paid to various parties, Crompton Engineering Co., Lumin Electric Co., D. Brothers, Radio and Electricals, Madras, Vizagapatam Municipality, P. V. Ramanayya Bros., and Andhra Power System. They also show payment of electricity duty to Government. The prosecution case was that the payments which were entered in the account of VESCO do not find a place in the account books of the corresponding firms or authorities because they were never made by VESCO. The High Court has pointed out that the main evidence on which the prosecution rests its case that the amount represented by the entries against these various firms were in fact misappropriated by the respondents in the circumstance that there are no corresponding entries in the account books of those firms. The argument before the High Court was and before us is that the absence of an entry cannot

be established by reference to s. 34 of the Indian Evidence Act which reads thus:

> "Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

This section appears in a group of sections headed "Statements made under special circumstances". What it does is to make entries in books of account regularly kept in the course of business relevant in all proceedings in a court of law. These entries are, however, not by themselves sufficient to charge any person with liability. Therefore, when A sues B for a sum of money it is open to him to put his account books in evidence provided they are regularly kept in the course of business and show by reference to them that the amount claimed by him is debited against B. The entry though made by A in his own account books, and though it is in his own favour is a piece of evidence which the court may take into consideration for the purpose of determining whether the amount referred to therein was in fact paid by A to B. The entry by itself is of no help to A in his claim against B but it can be considered by the court along with the evidence of A for drawing the conclusion that the amount was paid by A to B. To this limited extent entries in the account books are relevant and can be proved. Section 34 does not go beyond that. It says nothing about non-existence of entries in account books. We, therefore, agree with the High Court that the account books of the various concerns to whom payments are said to have been made by the respondents are not by themselves evidence of the fact that no payments were received by them. The decision in *Queen Empress* v. *Grees Chunder Banerjee* (1), upon which reliance

(1) (1884) I. L. R. 10 Cal. 1024.

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is placed by the High Court in support of its view is also to that effect. Similarly in *Ram Pershad Singh* v. *Lakhpati Koer* (1). Lord Robertson during the course of the hearing has observed that no inference can be drawn from the absence of any entry relating to any particular matter which observation supports the view taken in *Queen Empress* v. *Girish Chander Banerjee* (2). That, however, is not the only provision to be considered. There is s. 11 of the Evidence Act which provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact. Some of the facts in issue in this case are whether payments of certain sums of money were made to Crompton Engineering Co., and other firms or authorities. These are relevant facts. Absence of entries in their account books would be inconsistant with the receipt of the accounts and would thus be a relevant fact which can be proved under s. 11. The fact that no payments were received by those firms has been deposed to by persons connected with those firms and whose duty it was to receive and acknowledge amounts received by the firms or who were in charge of the accounts of these firms. For the purpose of showing that no amounts were received by the firms, their account books would thus be as relevant as the VESCO account books for the purpose of showing the contrary. Similarly there is s. 5 of the Evidence Act which reads thus:

> "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

It is the case of the prosecution that the alleged payments were never made by VESCO to the various firms. It is also their case that these firms maintain their accounts in the regular course of business and it is their practice to enter in those accounts all payments received by them. Both the sets of facts are

(1) (1902) I. L. R. 30 Cal. 231, 247. (2) (1884) I.L.R. 10 Cal. 1024.

relevant, that is, non-receipt of the amounts by the firms and non-existence of entries in their account books pertaining to those amounts. It is permissible, therefore, for the prosecution to lead evidence to prove both these facts. The best evidence to prove the latter set of facts consists of the account books of the firms themselves. It is under these provisions that the account books of the firms must be held to be relevant. What value to attach to them is another matter and would be for the Court of fact to consider.

It may further be mentioned that the account books of VESCO show certain payments made to Billimoria & Co., of Kharagpur. Papers seized by the police include receipts purporting to have been signed by one J. J. Billimoria on behalf of the firm. The prosecution case is that these receipts are forged documents and the entries in the account books of VESCO are false. One of the partners of the firm was examined by the prosecution as a witness in the case and he produced the account books of the firm. Those account books are in Gujrati and he stated in his evidence that the accounts were regularly kept and that there were no entries in them corresponding to the entries in the VESCO accounts. The High Court held that since the account books were not translated they are not admissible in evidence. The High Court was clearly wrong in so holding. In coming to this conclusion it has relied upon the provisions of s. 356 (2A) of the Code of Criminal Procedure. That section reads thus:

> "When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of

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such evidence in the language of the Court or in English shall form part of the record."

This provision relates only to the oral evidence adduced in a case and not to documentary evidence. Mr. Bhimasankaram, therefore, very rightly did not support the view of the High Court. In the circumstences we wish to say nothing further on the point. We may, however, point out that Billimoria himself gave his evidence in English.

Another point urged by Mr. Bhimasankaram was that as many as 2,000 documents were "dumped" by the prosecution in this case out of which 1600 documents were not sought to be proved by it. Further, 64 documents were missing from the records when they came to the High Court and that this has caused serious prejudice to the respondent. No objection, however, was taken in the courts below on this score and in the absence of any prejudice to the respondents we do not think that we should take notice of the complaint made by Mr. Bhimasankaram.

The third point stressed by him was that the approver was allowed to refresh his memory, while deposing in the case, by referring extensively to the account books and various documents produced in the case. This, according to him, was an absue of the provisions of s. 159 of the Evidence Act. Now, s. 159 expressly enables a witness while under examination to refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is being questioned or soon afterwards, or to a writing made similarly by another person and read by the witness immediately or soon after the writing was made. Section 160 provides that a witness may also testify to the facts mentioned in any such document as is mentioned in s. 159. The complaint of Mr. Bhimasankaram is that the approver should have been questioned

about the various facts which were sought to be established through his evidence and it was only if and when he was in a difficulty that he should have been allowed to refer to the account books. Instead of doing that what he was permitted to do was just to prove the various documents or read those documents and then depose with reference to them. In our opinion, where a witness has to depose to a large number of transactions and those transactions referred to are or mentioned either in the account books or in other documents there is nothing wrong in allowing the witness to refer to the account books and the documents while answering the questions put to him in his examination. He cannot be expected to remember every transaction in all its details and s. 160 specifically permits a witness to testify the facts mentioned in the documents referred to in s. 159 although he has no recollection of the facts themselves if he is sure that the facts were correctly recorded in the document. That is precisely what happened in this case and we do not think that the Additional Sessions Judge adopted a procedure which was either a violation of law or was an abuse of the power of the Court.

The next point is a formidable one. According to Mr. Bhimasankaram, the pardon tendered to the approver was illegal and if the pardon is illegal his evidence is wholly inadmissible. Further, according to him, the evidence of the approver was found by the Additional Sessions Judge to be unreliable and therefore, the first condition referred to in *Sarwan Singh* v. *The State of Punjab* (1), was not satisfied. For all these reasons the evidence of the approver must be left out of account. If it is left out of account, he contends, there is nothing left in the prosecution case, because, as pointed out by the Additional Sessions Judge himself the evidence of the approver is the pivot of the prosecution case.

(1) [1957] S. C. R. 953.

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The pardon is stated to be illegal for two reasons. The first reason is that none of the offences alleged to have been committed falls within s. 337 of the Code of Criminal Procedure and the second reason is that the pardon was granted by an authority not empowered to grant it. Section 337 (1) as it stood before its amendment by Act 26 of 1955 read thus :

> "In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code namely, sections 161, 165, 165A, 216A, 369, 401, 431, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowlege relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof :
>
> Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall

exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof."

His contention is that where none of the offences is exclusively triable by the High Court or the Court of Sessions pardon could be granted only if the offences are punishable with imprisonment which could extend to ten years but not if a higher punishment were provided for them. Here, one of the offences alleged against the respondents is criminal breach of trust punishable under s. 409, I.P.C. It is not exclusively triable by a Court of Sessions and the punishment as set out in the 7th column of Schedule II, Cr. P. C. was transportation for life or imprisonment of either description for ten years and fine. He contends that since the offence is punishable with transportation for life, s. 337 (1) could not be availed of for granting pardon to the approver. It seems to us that it would not be correct to read s. 337 (1) in the way sought by learned counsel. The very object of this provision is to allow pardon to be tendered in cases where a grave offence is alleged to have been committed by several persons so that with the aid of the evidence of the person pardoned the offence could be brought home to the rest. The gravity is of course to be determined with reference to the sentence awardable with respect to that offence. On the strength of these considerations Mr. Chari for the State contends that if the words "any offence punishable with imprisonment which may extend to 10 years" were interpreted to mean offences which were punishable with imprinsonment of less than 10 years grave offences which are not exclusively triable by a court of Sessions will be completely out of s. 337 (1). He suggests that this provision can also be reasonably

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interpreted to mean that where the offences are punishable with imprisonment exceeding 10 years pardon may be granted to the approver. No doubt, if this interpretation is accepted the object of the section, that is, to embrace within it the graver offences, would be fulfilled, but we wish to express no opinion on it. For, the pardon granted in this case can be regarded as being within the ambit of s. 337 (1) for another reason. It will be noticed that transportation for life was not the only punishment provided for an offence under s. 409 of the Indian Penal Code even before the amendment made to the Indian Penal Code by s. 117 of the Act 26 of 1955, the other alternative being imprisonment up to 10 years. Therefore, since the offence under s. 409 was not merely punishable with transportation for life but alternatively also punishable with imprisonment which could extend to 10 years, s. 337 (1) would apply. This section does not expressly say that the only punishment provided for the offence should be imprisonment not exceeding 10 years. The reason why two alternative maximum sentences are given in col. 7, that is, transportation for life (now imprisonment for life) and imprisonment not exceeding 10 years appears to be that the offence is not exclusively triable by a court of session and could also be tried by a Magistrate, who, except when empowered under s. 30 would be incompetent to try offences punishable with transportation for life (now imprisonment for life) and the further reason that it should be open to the court of Session, instead of awarding the sentence of transportation for life to a convicted person to award him imprisonment in a jail in India itself for a period not exceeding 10 years. Now, of course, by the amendment made by s. 117 of Act 26 of 1955 for the words "transportation for life" the words "imprisonment for life" have been substituted, but the original structure of all the sections now amended continues. That is why they read rather queer but even so they serve the purpose

of allowing certain offences triable by a court of Session, to be triable also by Magistrates of the First Class. Be that as it may, there is no substance in the first ground.

What we have said about pardon in respect of an offence under s. 409 would apply equally to that for one under s. 120-B because the punishment for it is the same as that for the offence under s. 409.

The offence under s. 467 read with s. 471 is punishable with imprisonment for life or imprisonment of either description for a period of 10 years but it is exclusively triable by a court of Session and, therefore, in so far as such offence is concerned the argument of Mr. Bhimasankaram would not even have been available. As regards the offence under s. 477-A, it is one of those sections which are specifically enumerated in s. 337 (1) and the argument advanced before us—and which we have rejected—would not even be available with regard to the pardon in respect of that offence. It is true that the respondent No. 1 alone was convicted by the Additional Sessions Judge of this offence and the offence under s. 467 read with s. 471 but the validity of a pardon is to be determined with reference to the offence alleged against the approver alone and not with reference to the offence or offences for which his associates were ultimately convicted.

Coming to the next ground of attack on the validity of pardon, the argument of Mr. Bhimasankaram is that whereas s. 337 (1) speaks of pardon being granted by a District Magistrate, or Presidency Magistrate, a Sub-Divisional Magistrate or any Magistrate of First Class, except in cases where an enquiry or trial was pending before another Magistrate, the pardon here was granted by the Additional District Magistrate in a case where an enquiry was pending before the District Magistrate and is, therefore, illegal and of no avail. He contends that

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s. 337 (1) speaks of the District Magistrate which expression does not include an Additional District Magistrate. Mr. Bhimasankaram's argument on the point may be summarised thus: Such a power cannot be conferred upon an Additional District Magistrate because s. 337 (1) does not contemplate grant of pardon by an Additional District Magistrate and that the Additional District Magistrate would have no status other than that of a Magistrate, First Class. No doubt, under entry (9-a) in Part III of Sch. III to the Code a Magistrate, First Class, has the power to grant pardon under s. 337 but it is limited by the proviso thereto to certain classes of cases. A case under enquiry or trial before another magistrate does not fall in any of these classes. Therefore, a pardon granted by him in such a case would be illegal. The Magistrate before whom the enquiry or trial is proceeding or the District Magistrate would be the only authorities competent to grant a pardon in such a case. Alternatively, the State Government has not made any directions under sub-s. (2) of s. 10 specifying the powers of the District Magistrate which would be exercisable by the Additional District Magistrate concerned.

In order to appreciate and consider the argument it is desirable to bear in mind the changes in the magisterial set up in the former province of Madras which comprised within it the district of Visakhapatnam. By Government Order No. 3106 dated September 9, 1949 the Government of the Province of Madras issued certain instructions to the Magistrates in pursuance of the separation of the judiciary from the executive. It divided the magistrates into two groups, judicial magistrates and executive magistrates. The latter category comprises of the executive officers of the Revenue Department, on whom the responsibility for the maintenance of law and order was to continue to rest. Para 4 of the instructions provides

".....To enable them to discharge this responsibility, these officers will continue to be magistrates. The Collector, by virtue of office, will retain some of the powers of a District Magistrate and will be called the 'Additional District Magistrate'. To distinguish him from his Personal Assistant, he may be called 'Additional District Magistrate (Independent)'. He will continue to be the Head of the Police. Similarly, the Revenue Divisional Officers will be ex-officio First Class Magistrates, and the Tahsildars and the Deputy Tahsildars will be ex-officio Second Class Magistrates. The extent of their magisterial powers will be as indicated in the Schedule of allocation of powers. They will exercise these powers within their respective revenue jurisdictions." Para 5 provides that as officers of the Revenue Department, those magistrates would be under the control of the Government through the Board of Revenue. The Additional District Magistrates (Independent) would also be under the control of the Government through the Board of Revenue. The category of Judicial Magistrates was constituted of the following: (1) District Magistrate; (2) Sub-divisional Magistrates; (3) Additional First Class Magistrates and (4) Second Class Magistrates (Sub-magistrates). The District Magistrate was constituted as the principal magistrate of the District and as such was entrusted with the duty of general administration and superintendence and control over the other judicial magistrates in the district. In addition to his general supervisory functions and the special powers under the Code of hearing revision petitions, transfer petitions, appeals from Second Class Magistrates and the like, the District Magistrate was also to be assigned a specific area, the cases arising from which would be disposed of normally by himself. This body of magistrates was made subordinate to the High Court. Till the separation between the judiciary and the executive was effected the Collector as the head of the Revenue Department was also the

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District Magistrate. Consequent on the separation he became only an Additional District Magistrate. Part IV of the Government order deals with the allocation of powers between the judicial and executive magistrates. Para 19(3) occurring in this part deals with allocation of powers under the provisions of the Code otherwise than these referred to in the earlier paragraphs. It specifically provides that the power to tender pardon under s. 337 shall be exercised by executive magistrates except in cases referred to in the proviso to sub-s. (1) of that section, in which case a judicial magistrate may exercise that power.

In spite of the Government order all Magistrates who have, under Sch. III to the Code of Criminal procedure, the power to grant pardon will continue to have that power and, therefore, a pardon granted by a judicial Magistrate in contravention of the Government order will not be rendered invalid. However, that is not the point which is relevant while considering the argument of Mr. Bhimasankaram. His point is that the proviso to s. 337(1) confers the power on "the District Magistrate" to grant pardon in a case pending before another Magistrate and not on "a District Magistrate" and, therefore, his power to grant pardon in such cases cannot be conferred under sub-s.(2) of s. 10 on an Additional District Magistrate. According to him, under that section only the powers of "a District Magistrate" meaning thereby only the powers under Entry 7 (a) in Part V of Sch. III as distinguished from the power under the proviso to s. 337 (1) can be conferred upon an Additional District Magistrate. Secondly, according to him, no direction has in fact been shown to have been made by the State Government conferring upon an Additional District Magistrate the power of the District Magistrate to grant pardon. In our opinion, there is no subtance in the contention. The power conferred by sub-s. (1) of s. 337 on the different clauses of Magistrates is of the same character.

The power to grant pardon in a case pending before another Magistrate is no doubt conferred by the proviso only on the District Magistrate. But Entry 7 (a) in Part V of Sch. III when it refers to the power of a District Magistrate under s. 337 (1) does not exclude the power under the proviso. There is, therefore, no warrant for drawing a distinction between the powers of "the District Magistrate" and the powers of "a District Magistrate." The power of a District Magistrate to grant pardon has been specifically conferred on Additional District Magistrates as would appear from s. no. 37 of Sch. III of the Government Order, which reads thus :

"Sl. no.	Judl. magistrate	Exec. magistrate	Concurrent jurisdiction	Remarks
37	——	—	337(1), 2nd paragraph (proviso)	Reference to the District Magistrate in the proviso should be construed as reference to the Executive District Magistrate. Reference to the Magistrate making the enquiry or holding the trial etc., should be construed as a reference to the judicial Magistrate."

No doubt, here the reference is to the Executive District Magistrate. But it is clear from the other part of the Government Order that what is meant by that is the Additional District Magistrate (Independent). This was, and, we are told, is being regarded as a direction of the Government falling under sub-s. (2) of s. 10 of the Code. Whether the interpretation is correct or not, we feel little doubt that the

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action of the Additional District Magistrate (Independent) Visakhapatnam in granting a pardon to the approver in this case though it was pending enquiry before the District Magistrate (Judicial), was *bona fide*. A pardon granted *bona fide* is fully protected by the provisions of s. 529, Cr. P. C.

The High Court has not considered any of the provisions to which we have referred but held that as the offence was being enquired into by the District Magistrate, the Additional District Magistrate could not usurp the functions of the former and grant a pardon. Had it done so, it would not have come to this conclusion. We are, therefore, unable to accept it.

Mr. Chari for the State advanced a further argument before us in case his main argument that the pardon was valid failed and said that the approver, even if we ignore the pardon, was a competent witness. In support of his contention he strongly relied upon the decision in *Kandaswamy Gounder In re : the appellant* (1), and the cases referred to therein, in particular the decision in *Winson* v. *Queen* (2). What has been held in all these cases is that where the trial of a person who was charged with having committed an offence or offences jointly with several persons is separated from the trial of those persons, he would be a competent witness against them though of course there will always be the question as to what weight should be attached to his evidence. Mr. Chari then referred to s. 133 of the Evidence Act and pointed out that this section clearly makes an accomplice evidence admissible in a case and that an approver whose pardon is found to be invalid does not cease to be an accomplice and contends that he is, therefore, as competent a witness as he would have been if he had not been granted pardon at all and not been put on trial. Learned counsel further pointed out that the decisions show

(1) I.L.R. 1957 Mad. 715. (2) (1866) L.R. 1 Q.B. 289.

that however undesirable it may be to adduce the evidence of a person jointly accused of having committed an offence along with others, his evidence is competent and admissible except when it is given in a case in which he is being actually tried. This legal position does not, according to him, offend the guarantee against testimonial compulsion and he points out that that is the reason why an accused person is not to be administered an oath when the court examines him under s. 342 (1) for enabling him to explain the circumstances appearing in evidence against him. If pardon is tendered to an accused person and eventually it is found that the pardon is illegal such person is pushed back into the rank of an accused person and being no more than an accomplice would be a competent witness. The question raised is an important one and requires a serious consideration. Mr. Chari in support of his contention has cited a large number of cases, Indian as well as English, and certain passages from Halsbury's Laws of England. But in the view we take about the legal validity of the pardon tendered, we do not wish to pronounce one way or the other on this very interesting question.

Now, as regards the reliability of the approver. It is no doubt true that an approver has always been regarded as an infamous witness, who, on his own showing has participated in a crime or crimes and later to save his own skin, turned against his former associates and agreed to give evidence against them in the hope that he will be pardoned for the offence committed by him. The High Court seems to think that before reliance could be placed upon the evidence of the approver it must appear that he is a penitent witness. That, in our opinion, is not the correct legal position. The section itself shows that the motivating factor for an approver to turn, what in England is called "King's evidence" is the hope of pardon and not any noble sentiment like contrition

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at the evil in which he has participated. Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to the circumstances in which he has come to give evidence whether he has made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on and so forth. The court has, in addition, to ascertain whether his evidence has been corroborated sufficiently in material particulars. What is necessary to consider is whether applying all these tests we should act upon the evidence of the approver should be acted upon.

We however, find that certain documents upon which Mr. Chari wants to rely are not included in the paper book. It would take considerable time if we were to adjourn this matter now and give an opportunity to the parties to include those documents on record. The better course would be for us to set aside the acquittal of the respondents and send back the appeal to the High Court for being decided on merits. The High Court will of course be bound by the finding which we have given on the questions of law agitated before us. What it must now do is to consider the entire evidence and decide for itself whether it is sufficient to bring home all or any of the offences to the respondents. We may mention that the High Court's observation that the approver's evidence was treated as unreliable by the learned Additional Sessions Judge is not correct. Of course, the view taken by the Additional Sessions Judge is not binding on the High Court. But it should remove from its mind the misconception that the Additional Sessions Judge has not believed him. There is another thing which we would like to make clear. The decision in *Sarwan Singh* v. *The State of Punjab* (1), on which reliance has been placed by the High Court has been explained by this Court in the case of

(1) [1957] S. C. R. 953.

Maj. E. G. Barsay v. *The State of Bombay* (1). This Court has pointed out in the latter decision that while it must be shown that the approver is a witness of truth, the evidence adduced in a case cannot be considered in compartments and that even for judging the credibility of the approver the evidence led to corroborate him in material particulars would be relevant for consideration. The High Court should bear this in mind for deciding whether the evidence of the approver should be acted upon or not. Then again it would not be sufficient for the High Court to deal with the evidence in a general way. It would be necessary for it to consider for itself the evidence adduced by the prosecution on the specific charges and then to conclude whether those charges have been established or not. The prosecution would be well advised if, instead of placing the evidence on each and every one of those large number of charges against the respondents, it chooses to select a few charges under each head other than the head of conspiracy and concentrates on establishing those charges, this would save public time and also serve the purpose of the prosecution. With these observations we set aside the acquittal of the respondents and remit the appeal to the High Court for decision on merits in the light of our observations.

Appeal allowed.
Case remanded.

(1) [1962] 2 S. C. R. 195.