1912.

*Present:* Pereira J.

THE KING *v.* PODISINNO *et al.*

*112 and 113—D. C. (Crim.) Ratnapura, 1,029.*

*Bias—District Judge also head of police—Police acting in the case on the instruction of the District Judge—Misjoinder of charges—Illegality.*

The police acted in this case on the instructions of the District Judge who was also the head of the police in the Province.

*Held,* that the District Judge should not have tried the case.

The two accused in this case were charged in one indictment with theft of seven cases of gelignite in the first count; the first accused only was charged in the second count with having on August 13 dishonestly retained 113 cartridges of gelignite knowing that they were stolen; the second accused only was charged with having dishonestly retained 27 cartridges on August 15.

*Semble,* that the joinder of the second and third counts in the indictment is bad.

The joinder of two separate charges against two separate individuals in one indictment is illegal.

THE facts are fully set out in the judgment.

*H. A. Jayewardene* (with him *Morgan* and *Tambyah*), for the accused, appellants.

*Bawa, K.C.*, for the Crown.

*Cur. adv. vult.*

November 11, 1912. PEREIRA J.—

In this case the two accused are charged in the first count of the indictment with having, between July 23 and 27, 1912, committed theft of seven cases of gelignite from a building used for the custody of property. In the second count of the indictment the first accused only is charged with having on August 13, 1912, dishonestly retained 113 cartridges of gelignite knowing that they were stolen property; and in the third count of the indictment the second accused only is charged with having, on August 15, 1912, dishonestly retained 27 cartridges of gelignite knowing that they were stolen property. The District Judge has acquitted both the accused on the first count, and convicted the first accused on the second count, and the third accused on the third count of the indictment. Two objections were taken by the appellants' counsel. The first is that the second and third counts could not be put together in one indictment, and he cited the case of *Emperor v. Jethalal* [1] in support of it.

[1] *7 B. L. R. 527.*

The leading authority on the question of misjoinder of charges is the decision of the Privy Council in the case of *Subramanian Ayer v. King Emperor*,[1] in which it was held that a misjoinder of charges in contravention of the provisions of the sections of the Indian Code of Criminal Procedure, corresponding to section 178 and the sections immediately following it of our Criminal Procedure Code, was not a mere irregularity, but an illegality, which could not be cured by the application of the section of the Indian Code corresponding to section 425 of ours. The case cited by the appellants' counsel is similar to the present, in that the misjoinder was of two separate charges against two separate individuals, and in that case a majority of the Court, following the decision in *Subramanian Ayer v. King Emperor*,[1] held that the indictment was bad. In the present case I have no doubt that it was in view of the first count of the indictment that the second and third charges were also inserted in it. It was evidently supposed that if the gelignite removed from the store at Medapola between February 23 and 27, 1912, was stolen by the two accused, then the offences mentioned in the second and third counts would be ramifications of the same transaction, and that the insertion of these two counts in the same indictment would be justified by section 184 of the Criminal Procedure Code, which enacted that when more persons than one were accused of different offences committed in the same transaction, they might be charged and tried together or separately as the Court thought fit; but it will be seen that even such a view is repelled by the decision in the case of *Abdul Majid v. King Emperor*.[2] Considering my decision on the other objection taken by the appellants' counsel, I need say no more on this objection than that I hope that if, in view of the District Judge's finding on the first count of the indictment, that count be withdrawn at the new trial, the propriety of trying the two accused on the second and third charges on one indictment will be considered by those concerned. The other objection taken by the appellants' counsel is by far the more serious of the two.

After the indictment was read to the accused, counsel appearing for them objected to the trial of the case by the then officiating District Judge, because he was also the head of the police of the Province within which the offences were alleged to have been committed, and the police had acted on his instructions. I shall cite *verbatim* the record of the incident made by the District Judge. It is as follows: " Mr. Morgan objects, on behalf of the accused, to the case being tried by me, as I am head of the police, and the police acted on my instruction in this case."

*Order*—" I am afraid I cannot uphold that objection. It might be taken against all cases which I try."

[1] *(1901) I. L. R. 28 A. 257; I. L. R.*

[2] *Cal. L. R. Rep., III., 412.*

[3] *Mad. 61; 5 Cal. W. N. 866.*

1912.

PEREIRA J.

*King v. Podisinno*

If this is all that the District Judge had to say on the objection, and especially with reference to the grounds put forward in support of the objection, it is clear that the objection must prevail. From about the year 1890, if not earlier, this Court has in a series of cases animadverted upon the trial by revenue officers and police officers of cases in which they may be supposed to have an official interest. In *Rode v. Bawa* [1] a Superintendent of Police who had given orders that all persons committing street nuisances should be arrested and prosecuted sat as Police Magistrate and convicted the accused who had been brought up for such an offence, and Bonser C.J., in the course of his judgment, by which he quashed the conviction, observed " that justice should be believed by the public to be unbiassed is almost as important as that it should be in fact unbiassed," and, citing from *Regina v. Huggins*,[2] he said that " it is far safer to enlarge the area of this class of objection to the qualification of justices than to restrict it." In *Daniel v. Careem* [3] a Superintendent of Police, acting as Police Magistrate, tried the case on the complaint of one of his subordinate officers. It did not appear that he had said or done anything with reference to the prosecution, but the conviction was quashed on the ground of reasonable apprehension of bias in the Magistrate. In *Peris v. Simanis*,[4] on information given to a Magistrate by a proctor that one of his witnesses had been interfered with by the accused, the Magistrate directed a Sergeant-Major of Police to charge the accused under Ordinance No. 11 of 1894, and it was held that it was not competent to the Police Magistrate to try the charge so instituted. In *James v. Latiff*,[5] however, Bonser C.J. held that a Magistrate whose primary duty was not to superintend the police was not disqualified to hear a case of hurt instituted by a police constable, but in the course of his judgment he observed " the case was a trifling one," and he thought that the Magistrate, as a police officer, was not so identified with the members of his force as to give rise to a reasonable apprehension of bias. In the present case, however, not only was the charge a most serious one, but the police " acted in the case on the instructions of the District Judge," and I am convinced that, in these circumstances, the suspicion of bias in the Judge would be almost irresistible to the mind of the ordinary litigant of this country. As observed by Lord Justice Fry in a case not dissimilar to this (see *Leeson v. General Council of Medical Registration* [6]), " it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual bias or prejudice of the Judges, but that they shall be free from the suspicion of bias or prejudice," and as held by Mr. Justice Mitra in the case of *Ghose v. Rajjab Ali*,[7]

[1] *(1896) 1 N. L. R. 373.*
[2] *(1895) 1 Q. B. 305.*
[3] *(1899) 1 Tamb. Rep. 60.*
[4] *(1896) 2 N. L. R. 62.*
[5] *(1901) 5 N. L. R. 312.*
[6] *((1889) 43 C. D. 366-390.*
[7] *Cal. L. J. R., III., 647.*

in judging of this bias or prejudice, " the appreciation of a mind properly constituted, that is to say, of a well-balanced and impartial mind capable of tracing the true springs of human actions, and discovering their harmony, however apparently incongruous the actions may be, is not the standard, but the feelings of the ordinary man accused of a criminal offence.

For these reasons I quash the conviction and the proceedings since the arraignment of the accused before the District Court, and direct that proceedings be had *de novo* before another Judge.

*Conviction quashed.*