1963 *Present :* **T. S. Fernando, J.**

A. K. A. M. KHAN and others, Appellants, *and* M. G. ARIYADASA, Respondent

S. C. 707–711 of 1962—M. C. Matara, 66552

Indictment—Unlawful assembly—Joinder of charges based on unlawful assembly with charges based on existence of common intention—Validity—Judicial precedents—Principle of stare decisis*—Scope—Offence committed by one member of an unlawful assembly—Nature of offence committed thereby—Criminal Procedure Code, ss. 152 (3), 180 (1) (2)—Penal Code, ss. 32, 67, 146.*

Charges based on the existence of an unlawful assembly may be validly joined in the same indictment with charges based on the existence of a common intention as described in section 32 of the Penal Code.

The five appellants were charged under section 146 of the Penal Code with having committed, as members of an unlawful assembly, the offences of house-trespass, rioting, and causing hurt. They were also charged with having committed, in the course of the same transaction, the substantive offences of house-trespass, wrongful confinement, and causing hurt.

Held, that there was no misjoinder of charges.

Don Marthelis v. The Queen (65 N. L. R. 19), not followed.

In regard to the principle of *stare decisis*, if a relevant authority or statutory provision is not mentioned in the judgment, the decision may be challenged.

Section 146 of the Penal Code creates an offence, but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore the appropriate punishment section must be read with it.

The question whether jurisdiction has been properly assumed in terms of section 152 (3) of the Criminal Procedure Code must be judged on the facts and circumstances as known to the Magistrate at the time the question came on to be decided by him and not by what may have happened at the trial at a point of time after he had decided that question.

APPEAL from a judgment of the Magistrate's Court, Matara.

Colvin R. de Silva, with *M. L. de Silva* and *A. H. Moomin*, for the 2nd and 4th accused-appellants.

G. E. Chitty, Q.C., with *Prins Gunasekera*, for the 3rd accused-appellant.

5th accused-appellant in person.

Colvin R. de Silva, with *D. R. Wijegoonewardene*, for the 6th accused-appellant.

C. Ranganathan, with *G. D. C. Weerasinghe*, for the complainant-respondent.

Cur. adv. vult.

May 6, 1963. T. S. FERNANDO, J.—

The 1st to the 5th appellants (who were respectively the 2nd to the 6th accused at the trial) and another who was the 1st accused thereat stood their trial in the Magistrate's Court of Matara on ten charges which are set out briefly in the following paragraph.

All six accused were charged in the first eight charges as follows :—

(1) being members of an unlawful assembly—punishable under section 140 of the Penal Code ;

(2) being members of the said unlawful assembly, committing house-trespass by entering the house of one Ariyadasa—punishable under section 434 read with section 146 of the said Code ;

(3) being members of the said unlawful assembly, using force or violence —punishable under section 144 of the said Code ;

(4) being members of the said unlawful assembly, one or more members of which caused hurt to certain persons—punishable under section 314 read with section 146 of the said Code ;

(5) committing house-trespass—punishable under section 434 of the said Code ;

(6) wrongfully confining the said Ariyadasa—punishable under section 333 of the said Code ;

(7) wrongfully confining one Gomis—punishable under section 333 of the said Code ;

(8) voluntarily causing hurt to the said Ariyadasa—punishable under section 314 of the said Code ;

Charge No. (9) was one framed against the 2nd, 3rd and 4th accused in respect of hurt caused to the said Gomis—punishable under section 314, while charge No. (10) named the 2nd accused alone as having caused hurt to one Daisy, the wife of Ariyadasa—punishable under section 315 of the said Code.

All ten charges save charge No. (3) were triable summarily. The Magistrate, being also a District Judge, assumed jurisdiction in terms of section 152 (3) of the Criminal Procedure Code to try charge No. (3) summarily and, after trial held on all ten charges, he found the 2nd to the 6th accused guilty on the first seven charges. He further found the 2nd accused guilty on charge (8) and the 2nd and the 4th accused guilty on charge (9). The 2nd accused was acquitted on charge (10). The 1st accused was acquitted on charges (1) to (8) i.e., on all the charges that had been framed against him. Each of the appellants was sentenced to a term of 3 months' rigorous imprisonment on each of the charges on which he was found guilty and convicted, the sentences being ordered to run concurrently.

The 1st accused was at the date of the commission of the offences the Officer-in-Charge of the Excise Station at Matara, while the 2nd accused was an Inspector of Excise and the 3rd to the 6th accused excise guards,

all attached also to the Matara Excise Station. The case for the prosecution which has been accepted by the learned Magistrate was that, some two days before the commission of the crimes alleged against these accused persons, the 6th accused had been assaulted by Ariyadasa, a bus driver employed under the Ceylon Transport Board, for unseemly behaviour and the making of indecent gestures at his (Ariyadasa's) wife, Daisy. The Magistrate has found that this assault was the motive for a concerted attack on the day in question on Ariyadasa by the 2nd to the 6th accused who arrived in one party by car at Ariyadasa's compound, entered his verandah, kicked him, handcuffed him, forced him into the car, and then forced also into the same car Ariyadasa's brother, Gomis, a retired vel vidane, who happened to come to his brother's house on hearing the noise of this disturbance. From his compound Ariyadasa and Gomis were taken in the car to the Walgama excise station, thence to a house and finally to the Matara hospital where an allegation was made by the 2nd accused that Ariyadasa had ganja on him at the time he was seized. The two men were thereafter released by the 2nd accused on bail, and they promptly hurried to the Police Station and complained of the assault on them.

Ariyadasa and Gomis were charged in the Magistrate's Court by the 2nd accused with the unlawful possession of ganja but, the 2nd accused (a material witness) being absent on the date of trial, the Magistrate, refusing an application for a postponement, acquitted the accused. No appeal was preferred by the prosecution against the acquittal.

At the trial in the present case the 1st accused relied on an alibi and pleaded that he was ignorant of any transaction in relation to Ariyadasa. The Magistrate has held that " the evidence against the 1st accused was unsatisfactory and insufficient to bring the charges home to him ". The 2nd accused testified at the trial in the course of which he stated that, with the 3rd to the 6th accused, he set out on this day on a legitimate raid on receiving information against Gomis ; that he saw Gomis on the road with a parcel ; that Gomis seeing the Excise car passed the parcel on to Ariyadasa and that they both then began running along the road ; that the Excise party had to chase these two men and arrest them with some effort, but not before some force had to be used to secure their arrest. The 3rd to the 6th accused gave no evidence. All six accused persons were defended by one counsel. The Magistrate rejected the evidence of the 2nd accused as being false.

In regard to the facts of the case I heard counsel for the appellants as well as the 5th accused who appeared by himself, but I found it impossible to reach a conclusion that there has been any wrong decision on the facts affecting any one of these appellants. The case against the 2nd accused was indeed strengthened by the admission of a confession of his guilt made by him to Mr. Samaraweera, at that time and even today the Minister of Local Government of this country. Quite apart from this circumstance, learned counsel who appeared for Ariyadasa has pointed out to me that the incidents detailed by the 2nd accused when

he gave evidence were not put to the prosecution witnesses, Gomis, Ariyadasa and Daisy, at any stage of the prosecution ; on the other hand, the case for the defence as put to these witnesses while they were being cross-examined was materially different. The appeals on the facts must fail.

Mr. De Silva advanced two matters of law as militating against the convictions. They were—

(*a*) that there has been in this case no proper assumption of jurisdiction in terms of section 152 (3) of the Criminal Procedure Code ;

(*b*) that there has been a misjoinder of charges in that charges based on the existence of an unlawful assembly have been joined with charges framed relying on section 32 of the Penal Code.

Mr. Chitty supported objection (*a*), but in answer to me stated that he preferred to say nothing in regard to objection (*b*).

In regard to (*a*), as I have pointed out already, all ten charges save charge No. (3) were triable summarily. Charge No. (3) in spite of the fearsome name it carries—rioting—implies nothing more than that hurt or mischief has been committed by persons who were at the time members of an unlawful assembly. Where both the offence of unlawful assembly and that of causing hurt or committing mischief are summarily triable, it will be seen that charge No. (3) is not summarily triable only in a very narrow and technical sense. In any event, the learned Magistrate was of opinion that the offence which was the subject of this charge No. (3) could itself be tried summarily. He has set out his reasons. They were that (1) the facts were simple, (2) there were no complicated questions of law, and (3) speedy and expeditious disposal of the case was desirable. The question whether jurisdiction has been properly assumed in terms of section 152 (3) must be judged on the facts and circumstances as known to the Magistrate at the time the question came on to be decided by him and not by what may have happened at the trial at a point of time after he had decided that question. In the instant case, however, I am satisfied that the reasons relied on by the Magistrate at the time he assumed jurisdiction have been vindicated by the events that accompanied the trial. I am unable to uphold objection (*a*).

In regard to objection (*b*), so far as I understood Mr. De Silva, he claimed that the trial was invalid in that certain charges which had been included in the total of ten charges could not have been joined with the others without violating the relevant provisions of Chapter XVII of our Criminal Procedure Code. More specifically, while conceding that all ten offences alleged may have been committed in the course of one and the same transaction as that expression is understood in that Chapter, he argued that the joining together at one trial (or in one indictment) of charges (2), (3) and (4) with charges (5), (6), (7) and (8) amounted to a fatal misjoinder of charges. I must confess that this argument came to me as quite a surprise having regard to my own knowledge of the practice of joining such charges together which has been obtaining in our courts

for a very long time. Indeed, had not the question been raised seriously by counsel of such long and tried experience as Mr. De Silva himself, I should have been minded to dismiss the point summarily as it seemed to me reasonably plain that the practice I have referred to above is warranted by section 180 (1) as well as by section 180 (2) of our Criminal Procedure Code.

Mr. De Silva, however, contended that what can be so joined together are different offences but not one and the same offence by different names. He argued that section 32 of the Penal Code which was obviously the foundation of charges (5), (6), (7) and (8) created no offence, and that likewise section 146 created no offence and remained merely a basis of criminal liability. Speaking for myself, I should have thought that this argument was set at rest some years ago by our Court of Criminal Appeal in the case of *The King v. Heen Baba* [1]. The answer to the question that confronted the three judges who decided that case depended on whether charges of offences (based on section 32) are implied in charges of offences based on membership of an unlawful assembly. Said the judges in that case :—

> " It is well settled law that section 146 creates a specific offence and deals with the punishment of that offence and that section 32 merely declares a principle of law and does not create a substantive offence."

For this statement of the law the Court relied on the opinion of the Judicial Committee of the Privy Council in the leading case of *Barendra Kumar Ghosh v. Emperor* [2] delivered by Lord Sumner. His Lordship, after referring to the Indian Penal Code equivalents of sections 32 and 146, viz., sections 34 and 149 of that Code, stated that "section 149, however, is certainly not otiose for in any case it creates a specific offence and deals with the punishment of that offence alone." In the course of the same speech, Lord Sumner, explaining the difference between the two sections 34 and 149, stated :—

> " There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of section 34, is replaced in section 149, by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance, and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

[1] *(1950) 51 N. L. R. 265.*

[2] *(1925) A. I. R. (P. C.) 1.*

Mr. De Silva suggested that the opinion of the Judicial Committee that section 149 creates a specific offence is an *obiter dictum*. I am unable to agree, but even if Mr. De Silva is right in that suggestion, it is necessary to remind ourselves that even an *obiter dictum* of the Judicial Committee is still entitled to the highest respect in our country.

The trial judge in *Heen Baba's case* (supra) had directed the jury that, where the indictment consisted solely of charges framed on the basis of the existence of an unlawful assembly, even if the jury reached a conclusion that no unlawful assembly was established, it was competent for them to find the accused guilty of the substantive offences alleged in the charges by placing reliance on section 32. The jury in that case found the accused not guilty on the charges in the indictment, but found them guilty of the substantive offences alleged in those charges read with section 32. This course is precisely what the Court of Criminal Appeal held it was not competent for the jury to do in the absence of specific charges. To quote the words of the judgment, " for the reasons given above we are of opinion that in the absence of a charge the appellants could not have been convicted (of any of the offences) under sections 433, 380, 383, 382 read with section 32. " I think the language used itself justifies one in inferring that the Court implied there that charges based on the existence of an unlawful assembly could have been validly joined with the charges based on the existence of a common intention as described in section 32.

If I may say so with humility, I am in respectful agreement with the decision of the Court of Criminal Appeal in *Heen Baba's case* (supra), and the practice of the Attorney-General in framing indictments, at any rate after the date of the judgment in that case, has always been in keeping with the law as interpreted therein. In any event, it is sufficient to observe that I am bound by the ruling of the Court of Criminal Appeal in that case.

Mr. De Silva, however, brought to my attention in the course of his argument a hitherto unreported judgment delivered by the Supreme Court on March 19, 1963, in the case of *B. Don Marthelis and others v. The Queen* [1]. In that case, Abeyesundere J. (with Herat J. agreeing), upholding an argument that the indictment presented by the Attorney-General was invalid in that charges based on the allegation of unlawful assembly could not be validly joined with charges based on common intention, stated as follows :—

> " Section 178 of the Criminal Procedure Code requires every charge to be tried separately except in the cases mentioned in sections 179, 180, 181 and 184 of that Code. Crown Counsel who appeared for the Attorney-General conceded that none of the four last-mentioned sections applied to the counts in the indictment in this case. The joinder of the two sets of charges referred to above is therefore not according to law. "

[1] *(1963) 65 N. L. R. 19.*

As I find that the Attorney-General, this concession of Crown Counsel notwithstanding, is even today persisting in presenting and supporting indictments in the same form which has been successfully objected to in *Don Marthelis v. The Queen* (supra), I fear I must surmise that the concession is personal to the learned Crown Counsel concerned and is not one made on the authority of the Attorney-General. Even if I am found to be wrong in this surmise, being a concession of counsel on a question of law, it is not binding on the court. I am therefore free to ignore it where I am satisfied that there is express provision in the Code enabling the joinder. I have referred above already to the enabling provisions, viz., sub-sections (1) and (2) of section 180 of the Criminal Procedure Code, and I need only add that the effect of joining charges must be understood as limited by the provisions of section 67 of the Penal Code. As no reference has been made in the recent judgment to *Heen Baba's case* (supra), it is not unreasonable to infer that the Court has not considered its effect on the point raised. Had the Court considered it I entertain little doubt that the Court would have referred to it in the judgment, particularly as the decision being one of the Court of Criminal Appeal is presumably binding on a bench of two Judges of the Supreme Court, although the Court of Criminal Appeal is technically a Court different from the Supreme Court. Moreover, the opinion of the Privy Council is binding on the Supreme Court.

In regard to the principle of *stare decisis* which is observed also in Ceylon, the law as at present understood appears to be that if a relevant authority is not mentioned in the judgment, the decision may be challenged. It is useful in this connection to refer to a fairly recent decision of the Court of Appeal in England, *Morelle, Ltd. v. Wakeling* [1], where five judges concurred in stating that

> " as a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned : so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence. "

If the wrong concession on the part of counsel has led to the court entertaining the feeling that it was unnecessary to examine the wording of section 180, and if that section, though referred to, did not come to be examined by the court, and if when it is now examined it plainly supports the validity of the set of charges, then it seems to me it may be said that the case has been decided *per incuriam* ; alternatively, as *Heen Baba's case* (supra) has not even been mentioned in the judgment, it must be

[1] *(1955) 1 A. E. R. at 718.*

presumed that the judgment was arrived at through forgetfulness of that decision which was binding on the Court. In that sense too, it seems to me that *Don Marthelis v. The Queen* (supra) was decided *per incuriam*.

As the sections of the corresponding provisions of the Indian Penal Code are word for word the same as those of our Penal Code which came to be modelled largely on that very Code, it may be of some interest to refer to the view taken recently by the Supreme Court of India on the question of law decided in *Heen Baba's case* (supra). In *Nanak Chand v. State of Punjab* [1], three judges of that Court have in the year 1955 come to a conclusion that a person charged with an offence read with section 149 cannot be convicted of the substantive offence without a specific charge being framed. Said Imam J., (delivering the judgment of the Court)—at p. 278—" A charge for a substantive offence under section 302 or section 325 is for a distinct and separate offence from that under section 302 read with section 149 or section 325 read with section 149 ". Mr. De Silva, in support of his argument that section 146 created no offence, pointed to the absence in that section of any provision in respect of punishment. This matter too has received comment in the Indian judgment where it states—see p. 278—that " Section 149 creates an offence, but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore the appropriate punishment section must be read with it. It was neither desirable nor possible to prescribe one uniform punishment for all cases which may fall within it. " The Code provides other similar instances of specific offences being created, e.g., abetment and conspiracy, where the punishment section has to be read with the section creating the offence. Further, it seems to me that a simple test for deciding whether what the prosecution alleges are two distinct and separate offences are in reality one and the same offence would be to consider whether the elements necessary to establish the one are the same as those necessary to establish the other. Judged by this simple test, it will be readily seen that what was alleged in charge No. (2) in this case was an offence different from that alleged in charge No. (5), and what was alleged in charge No. (4) was an offence different from that alleged in charge No. (8).

Whatever view may be taken on the question whether *Don Marthelis v. The Queen* (supra) was decided *per incuriam*, bound as I am by the decision of the Court of Criminal Appeal in *Heen Baba v. The King* (supra), I am free not to follow *Don Marthelis'* case.

The second question of law relied on also fails. In the result all the appeals are dismissed.

Appeals dismissed.

[1] *A. I. R. (1955) S. C. 274.*