1942 *Present :* **Soertsz and de Kretser JJ.**

THE KING *v.* PIYASENA.

64—D. C. Colombo, 395.

Cognate offences—Charge of theft—Power of Court to convict accused of assisting in disposal of stolen property—Doubt which offence the facts proved will constitute—Criminal Procedure Code, ss. 181 and 182.

Where an accused person is charged with the offence of theft under section 367 of the Penal Code, the Court has no power to convict him of the offence of assisting in the disposal of stolen property under section 396 of the Penal Code.

Sections 181 and 182 of the Criminal Procedure Code which enable a Court, when an accused is charged with one offence, to convict him of another offence apply where the different offences contemplated are cognate offences and it is doubtful which of these offences the facts proved will ultimately be found to constitute.

The doubt must arise from the nature of facts or series of facts and not from a failure to appreciate the value of unambiguous facts or from an inaccurate view of the position in law arising from those facts.

APPEAL from a conviction by the District Judge of Colombo.

H. V. Perera, K.C. (with him *N. M. de Silva*), for accused, appellant.

H. W. R. Weerasooriya, C.C., for Crown, respondent.

Cur. adv. vult.

November 26, 1942. SOERTSZ J.—

On February 24, 1942, Inspector Marjan reported to the Magistrate's Court in Colombo that the appellant and another had committed theft of a motor car, an offence punishable under section 367 of the Penal Code.

On that day, the appellant surrendered to the Court and, after the evidence of P. S. Herath had been recorded, the Magistrate explained to the appellant, in conformity with section 156 of the Criminal Procedure Code, the charge in respect of which the inquiry was being held. The non-summary form appearing at page 23 of the proceedings in the

Magistrate's Court shows that the charge of which information was given to the appellant was that of theft, an offence punishable under section 367 of the Penal Code.

Thereafter, the evidence of several witnesses was taken on several subsequent dates, and, at the close of the case for the prosecution, the Magistrate, acting in compliance with sections 159 and 160 of the Criminal Procedure Code, read and explained to the appellant the charge framed against him as one of abetment of theft, "an offence punishable under sections 367 and 102 of the Penal Code". The appellant was duly cautioned and he made a statement purporting to exculpate himself. The Magistrate, then, committed the appellant for trial before the District Court.

In the District Court, the indictment presented against the appellant charged him with the offence of theft under section 367 of the Penal Code, and this remained the charge throughout the trial.

At the conclusion of the trial, the Judge convicted the appellant of this offence, and sentenced him to a term of one year's rigorous imprisonment.

The appellant now appeals, and the main questions submitted for our consideration are :—

(a) Whether, on the evidence, the charge of theft can be said to have been established ;

(b) Whether, in the event of its being found that the charge of theft has not been established, it is open to us to alter the conviction to one under section 396 of the Penal Code, on the footing that the evidence establishes that the offence of the appellant was that of voluntarily assisting in the disposal of property which he knew or had reason to believe to be stolen property, an offence under section 396 of the Penal Code.

It is, I think, clear that, so far as the appellant is concerned, it is impossible to sustain the charge of theft. The evidence is that, at the time the appellant first came to take part in the transaction out of which this case arose, the offence of theft has already been committed. The car had been taken completely out of the possession of the owner. The appellant, if he was guilty of theft, was guilty only under the English Law, in the sense that he was an accessory after the fact, but not guilty of that offence, in the view of our Law. Under our Law, on the evidence in the case, he would be guilty, if he was guilty at all, of an offence under section 396 of the Penal Code.

Crown Counsel does not dispute that the position is as I have stated it to be. But he submits that the evidence establishes that the appellant committed the offence of assisting in the disposal of stolen property, and he asks us to alter the conviction from one of theft, to one under section 396 of the Penal Code.

The first question, then, is whether it is open to us to do what we are invited to do.

Crown Counsel relies mainly on sections 171, 181 and 182 of the Criminal Procedure Code, read with section 347.

I do not think that section 171 has any application in a case like this. The illustrations appended to that section make that perfectly clear.

To charge a man with theft when the evidence discloses that his real offence is, say mischief, is, no doubt, an error in a certain sense, but that is not the kind of error contemplated by section 171.

The answer to the question raised seems to me to depend on the interpretation of sections 181 and 182 of the Criminal Procedure Code. Section 182 is the only relevant section, in the circumstances of this case, that can be advanced, as enabling a Court, when an accused is charged with one offence, to convict him of another offence, although he was not specifically charged with it, if it appears from the evidence that he might have been charged with it. But the scope of this section is expressly limited to "the case mentioned in the preceding section". That section is in these terms :

> "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts that can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial Court the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifying which one."

The illustration appended to this section shows that the different offences contemplated are cognate offences, and it is doubtful which of these acts or series of acts may, ultimately, be found to constitute. This section, however, postulates a case in which a doubt arises from the *nature* of the fact or series of facts and not from a failure to appreciate the value of unambiguous facts or from an inaccurate view of the position in law arising from those facts.

The present case cannot, in my opinion, be brought under this section because, in this case, the facts or series of facts relied upon by the prosecution as against the appellant "is of such a nature that it cannot be said to be doubtful which of several offences those facts if proved will constitute". Indeed, the facts relied upon from beginning to end, both in the Magistrate's Court and in the District Court, were quite inconsistent with the offence of theft. If they were established they pointed unequivocally to an offence under section 396 of the Penal Code.

Crown Counsel relied also on section 347 (*b*) (11) of the Criminal Procedure Code. But that sections does not, in my opinion, mean anything more than this. On appeal, the verdict may be altered in the circumstances such as are provided for in sections 181, 182 and 183 (*a*), and 307 of the Criminal Procedure Code, that is to say the verdict can be altered from one offence to another offence of which the trial Judge himself could have found the accused guilty without framing a new charge. That was the view taken, and if I may say respectfully, correctly taken, by Howard C.J. in *Siriwardanehamy v. Sinnetamby* [1].

In regard to the case of *Brereton v. Ruebun Ratrunhamy* [2] cited to us, that was a case in which the verdict was held to be alterable in the circumstances that, by an oversight, an accused had been charged and convicted of an offence under an Ordinance which had run its term of years and had been superseded by another Ordinance which reproduced the indentical offence and under which he should have been, but was not

[1] *43 N. L. R. 119.*

[2] *19 C. L. W. p. 11.*

charged. That was a case that was within section 171 of the Criminal Procedure Code, and the verdict could have been altered under section 347 of the Criminal Procedure Code. The case of *Rex v. Bairn Silva*[1] was one in which an accused was convicted of the offence of conspiracy said to have been committed at a time when conspiracy had not come into the Statute Book as a distinct offence. The conviction was altered to an abetment of the offence, the commission of which was alleged to be the purpose of the conspiracy. Such an alteration is easily understood. One form of abetment is conspiring to do a thing and it was found, in that case, that the principal offence had been committed. This case is, by no means, a precedent for what we are asked to do here.

Crown Counsel relied strongly on the judgment in the case of *The King v. Arnolis*[2]. In that case, the accused had been charged with retaining stolen property knowing it to be stolen. The facts disclosed that if any offence was committed "it was the offence of theft and not that of retaining stolen property". The Judge invited Counsel for the Crown to amend the indictment. He did not accept the invitation and the Judge after trial acquitted the accused of the offence charged on the ground that the accused had given an account of his possession of the property and the Judge took the view that "the circumstances of the case do not show that this cannot be a true account". On appeal, Bertram C.J. regretted that he could not "share that charitable view of the learned Judge", but went on to convict the accused of theft in pursuance of section 182. In doing that, he observed as follows:—"The learned District Judge was perfectly right in saying that the evidence disclosed theft or nothing. It was open to him, however, under section 182 of the Criminal Procedure Code to convict the accused of theft, if he thought the circumstances of the case justified".

With great respect, I find it difficult to reconcile that view with sections 181 and 182. If it was perfectly clear, as it was held to be, and as it was in fact, that the offence of the accused, on the facts of that case, was *theft or nothing*, section 181 of the Criminal Procedure Code does not come into operation at all. The condition precedent for its operation is, as I have observed, the existence of a genuine doubt arising from the nature of the facts in the case. If section 181 does not operate it necessarily follows that section 182 does not apply.

For these reasons, I am of opinion that the appellant was wrongly convicted of theft, and that it is not open to us, on appeal, to alter that conviction in the manner suggested.

I would, therefore, set aside the conviction and send the case back to the District Court for the accused to be indicted on a charge under section 396 and to be tried on that charge. I send the case back to the District Court and not to the Magistrate's Court for proceedings *ab initio*, in view of the ruling given by the majority of the Bench in the Divisional Bench case of *The King v. Vallayar Sillambarem*[3].

DE KRETSER J.—I agree.

Set aside.

[1] *4 Times of Cey. L R. p. 3.*

[2] *23 N. L. R. 225.*

[3] *20 N. L. R. 257.*