[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present:* **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *v.* N. THAMBIPILLAI and two others

APPEALS NOS. 9–11 OF 1963, WITH APPLICATIONS NOS. 9–11

S. C. 2—M. C. Kalmunai, 3948

Indictment—Misjoinder of charges and persons—Joinder of charges based on unlawful assembly with charges based on common intention—Invalidity—Penal Code, ss. 32, 140, 346/146, 380/146, 346, 364, 380, 394—Criminal Procedure Code, ss. 178, 180 (1), 184, 425—Interpretation Ordinance, s. 2 (ii).

Charges based on the liability created by common intention under section 32 of the Penal Code cannot be joined in the same indictment with charges based on the existence of an unlawful assembly.

Five accused were indicted on different counts under the Penal Code. In counts 1, 1A and 2 they were charged under sections 140, 346/146 and 380/146 respectively. In counts 2A and 3 they were charged under sections 346 and 380 respectively. In count 4 the 1st accused alone was charged under section 394. In count 5 the 2nd accused alone was charged under section 364.

All the accused were acquitted of counts 1, 1A and 2. The 2nd and 3rd accused were acquitted of the remaining charges also. The 1st, 4th and 5th accused were convicted of the offences alleged in counts 2A and 3, and the 1st accused was in addition convicted of the offence alleged in count 4.

Held, that the joinder of counts 2A and 3 with counts 1, 1A and 2 was not authorised by section 180 of the Criminal Procedure Code. In such a case, the illegality cannot be cured by section 425 or any other provision of the Criminal Procedure Code.

Held further, that count 4 against the 1st accused alone and its joinder with the other counts against all the accused including the 1st accused was illegal.

APPEAL against certain convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *V. Kumaraswamy* and *Neville Wijeratne* (assigned), for 1st, 4th and 5th accused, who are 1st, 2nd and 3rd appellants.

S. S. Wijesinha, Crown Counsel, for Attorney-General.

June 11, 1963. BASNAYAKE, C.J.—

Five persons by name N. Thambipillai, R. Samithamby, K. Thambipillai, K. Velakuddy and K. Thambiappah were indicted on the following charges :—

" 1. That on or about the 2nd day of August 1961 at Thuraineelavanai, in the division of Batticaloa, within the jurisdiction of this Court, you were members of an unlawful assembly, the common object of which was to use criminal force on S. Bagawathy, otherwise than on grave and sudden provocation, and that you have thereby committed an offence punishable under section 140 of the Penal Code.

1A. That at the time and place aforesaid and in the course of the same transaction, you being members of the said unlawful assembly, did in prosecution of the said common object, use criminal force to the said S. Bagawathy intending thereby to dishonour the said S. Bagawathy and, that you being members of the said unlawful assembly at the time of the committing of the said offence are thereby guilty of an offence punishable under section 346 read with section 146 of the Penal Code.

2. That at the time and place aforesaid and in the course of the same transaction one or more members of the unlawful assembly aforesaid did commit robbery of a gold chain, two pairs of gold bangles and one ring, property in the possession of S. Bagawathy, which said offence was such as the members of the unlawful assembly aforesaid knew to be likely to be committed in prosecution of the common

object of the said unlawful assembly, and that you being members of the unlawful assembly aforesaid at the time of the committing of the said offence are thereby guilty of an offence punishable under section 380 read with section 146 of the Penal Code.

2A. That at the time and place aforesaid and in the course of the same transaction you did use criminal force to the said S. Bagawathy intending thereby to dishonour the said S. Bagawathy, and that you have thereby committed an offence punishable under section 346 of the Penal Code.

3. That at the time and place aforesaid and in the course of the same transaction, you did commit robbery of a gold chain, two pairs of gold bangles and one ring, property in the possession of S. Bagawathy and that you have thereby committed an offence punishable under section 380 of the Penal Code.

4. That at the time and place aforesaid and in the course of the same transaction, you the 1st accused abovenamed did retain stolen property, to wit, one gold chain, one pair of bangles and one ring, knowing or having reason to believe the same to be stolen property, and that you have thereby committed an offence punishable under section 394 of the Penal Code.

5. That at the time and place aforesaid and in the course of the same transaction, you the 2nd accused abovenamed, did commit rape on S. Bagawathy, and that you have thereby committed an offence punishable under section 364 of the Penal Code."

All the accused were acquitted of charges 1, 1A and 2. The 2nd and 3rd accused were also acquitted of the remaining charges—2A, 3, 4 and 5. The 1st, 4th and 5th accused were convicted of the offences alleged in charges 2A and 3, and the 1st accused was in addition convicted of the offence alleged in charge 4.

The submission of learned counsel on behalf of the appellants is that there is a misjoinder of charges and persons in the indictment. Now the rule in regard to charges is stated in section 178 which reads—

"For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 179, 180, 181 and 184, which said sections may be applied either severally or in combination."

Of the exceptions referred to in section 178, those mentioned in sections 179 and 181 have no application to the instant case. Only those mentioned in sections 180 and 184 need therefore be considered. The material subsection of section 180 reads—

"(1) If in one series of acts so connected together 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, and in trials tefore the Supreme Court or a District Court such charges may be included in one and the same indictment."

and section 184 reads—

"When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit ; and the provisions contained in the former part of this Chapter shall apply to all such charges."

The present indictment which contains a joinder of persons and charges is presumably based on sections 180 and 184. For the exception created by section 180 to be availed of—

(*a*) there must be one series of acts so connected together as to form the same transaction ; and

(*b*) more offences than one committed by the same person in that series of acts.

In a case where more offences than one are committed by the same person in a series of acts so connected together as to form the same transaction, he may be charged with and tried for every such offence at one trial. By virtue of the rule in section 2 (ii) of the Interpretation Ordinance, words in the singular number may be read as including the plural. When, therefore, the same persons commit more offences than one falling within the ambit of section 180, those offences can be charged and tried together. Charges 1, 1A and 2 refer to a series of acts so connected together as to form the same transaction. Offences committed by the same persons in that series of acts can therefore be joined. Now, although charges 2A and 3 recite that the offences stated therein were committed in the course of the same transaction as the other charges, they in fact are independent charges which bear no reference to the series of acts connected with the act of unlawful assembly to which the previous charges relate. 2A and 3 charge all the accused with jointly committing the offence specified therein. Charges 2A and 3 can be properly joined as the acts specified therein appear to be so connected together as to form the same transaction ; but they cannot be joined with charges 1, 1A and 2. The 4th charge is against the 1st accused alone and its joinder with the other charges against all the accused including the 1st accused is not authorised by section 180. These observations apply to the 5th charge which was against the 2nd accused who was acquitted of that charge.

Although section 146 of the Penal Code is referred to in charges 1A and 2, the prosecution does not appear to rely on the liability created by that section. In the instant case, as the allegation is that all the members of the unlawful assembly jointly committed the offence of using criminal force and the offence of robbery, learned Crown Counsel argued that the charges 1A and 2 charge the accused with specific offences under section 146 of the Penal Code. He relies on the remarks of Lord

Sumner in the case of *Barendra Kumar Ghosh v. Emperor* and especially on the following words at page 7 in 1925 A. I. R. (Privy Council) :—

> " 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."

That observation occurring in the judgment is *obiter*. Section 146 of our Penal Code (which is the same as section 149 of the Indian Penal Code) reads—

> " If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

The words " that offence " in the last sentence mean the offence which the members of the unlawful assembly committed in prosecution of the common object.

We were informed at the argument that in S. C. 707–711 of 1962/M. C. Matara 66552 (S. C. Minutes of 6th May 1953) [1] the case of *Heen Baba* [2], which is a decision of this Court, was regarded as a decision which lays down the proposition that charges depending on the liability created by section 146 of the Penal Code may be joined with charges in respect of the same acts depending on the liability created by section 32 of that Code.

We are unable to agree that *Heen Baba's* case decides that point. In that case the accused were indicted on six charges all based on the existence of an unlawful assembly the common object of which was to commit house-breaking and robbery. The jury acquitted them of all the charges ; but, acting on the directions of the presiding Judge that it was competent to them to find them guilty under sections 443, 380, 383 and 382 read with section 32, the jury found the accused guilty of those offences. This Court held that the direction was wrong and quashed the conviction of the accused. The Court did not give its mind to the legality of the joinder of another set of charges based on the liability created by section 32 and the judgment is not an authority for the proposition that such a joinder is legal.

A judgment is an authority only for what it decides. The result in the instant case then is that there has been a misjoinder of charges. The question that remains for our decision is whether we should quash the conviction and direct that a judgment of acquittal be entered or direct a new trial. Having regard to the fact that the illegality is one that cannot be cured by section 425 or any other provision of the Criminal Procedure Code, the proper course in our opinion is to quash the conviction and direct that a judgment of acquittal be entered, and we accordingly do so.

Accused acquitted.

[1] *(1963) 65 N. L. R. 29.* [2] *(1950) 51 N. L. R. 265.*

1961 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

THE REGISTRAR-GENERAL, Petitioner, *and* K. A. TIKIRI BANDA and others, Respondents

S. C. 236/1961—Application in Revision in D. C. Colombo, 2927/X

Birth registration—Errors as to name and sex—Correction by order of District Court—Scope—Births and Deaths Registration Act, No. 17 of 1951, ss. 28, 52 (1) (h).

Section 28 of the Births and Deaths Registration Act confers no jurisdiction on a District Court to alter the name of a person whose birth has been registered, until the person attains majority. Nor does it provide for the alteration of the entry relating to sex in a birth registration.

APPLICATION to revise an order of the District Court, Colombo.

Mervyn Fernando, Crown Counsel, for petitioner.

F. C. Perera, for respondents.

Cur. adv. vult.

December 15, 1961. H. N. G. FERNANDO, J.—

This is an application made by the Registrar General for the revision of an order made by the District Court of Colombo under the Births and Deaths Registration Act, No. 17 of 1951. It would appear that the present 2nd respondent was born on 2nd April 1954, being the child of the 3rd respondent by her husband the 1st respondent. The birth was registered on 24th April 1954, the name of the child being registered as " Sunil " and its sex as Male.

In June 1960, the 3rd respondent made an application to the District Court for an order directing the Registrar-General to alter the registration entries relating to the name and sex of the child to the female name " Sunila " and to Female respectively. After recording some evidence, and being satisfied that by some mistake or " twist of fate ", there had been an error at the time of the registration of the birth (as to the name and sex of the child) the District Judge made order allowing the application and directing the Registrar General to effect the alterations. This order was made purportedly under section 28 of the Ordinance. It is however manifest—

(1) that, although paragraph (*a*) of section 28 (1) authorises a court to order the alteration of the names of a person whose birth has been registered, such an alteration cannot be made until the person attains majority ;

(2) that section 28 does not provide at all for the alteration of the entry relating to sex in a birth registration.

The order of the District Judge made on February 21st 1961, directing the alterations prayed for, was clearly made without jurisdiction and is hereby set aside.

The mistake, if any, made in regard to the registration of the birth was an unusual one, and it is not surprising that the Act does not provide for such a situation. Section 52 (1) (*h*) of the Act would appear to enable the Registrar General himself to correct an error of fact or substance, but having regard to the context in which that power is conferred it would in my opinion be exercisable only if it is clear to the Registrar General that the registration entry is not in accordance with the particulars furnished to the Registrar in the " information " given under the Act which preceded the registration of the birth. I have no doubt that if such has been the case in this instance, the Registrar General will after due inquiry rectify the position under section 52 (1) (*h*). But if such has not been the case, the Law at present provides no remedy for the situation which, according to the parents of the child, has arisen in this case. The Registrar General will no doubt invite the attention of the proper authorities to the need for some amendment of the Law which may deal with such unusual situations.

SINNETAMBY, J.—I agree.

Order set aside.