1934 *Present* : Maartensz A.J.

| First Western Sessions, 1934. |

KING *v.* WICKREMASINGHE.

49—P. C. Colombo, 4,165.

Joinder of charges—Three offences against three different persons—Evidence of similar acts—Criminal Procedure Code, s. 179—Evidence Act, s. 14.

Where an accused was charged with having committed three acts of indecency with three different persons within a period of twelve months,—

Held, that the inclusion of the charges against three different persons in the same indictment was not obnoxious to section 179 of the Criminal Procedure Code.

Held, further, that the evidence of similar acts committed by the accused on the persons mentioned in the indictment was inadmissible.

Held, also, that separate trials should not be ordered in such a case merely because of the possibility that a Judge or Jury might suspect each of them to be true.

THE accused was charged before the First Western Sessions of the Supreme Court with having committed three acts of gross indecency with three different boys within a period of twelve months.

E. H. T. Gunasekera, C.C., for the Crown.

S. W. R. Dias Bandaranayake (with him *Rajakaruna*), for accused.

March 7, 1934. Maartensz A.J.—

The indictment in this case charged the accused with having committed three acts of gross indecency with three different boys within a period of twelve months.

The accused pleaded to the indictment ; but before it was read to the Jury two objections were taken to the indictment. It was contended that section 179 of the Criminal Procedure Code did not justify the indictment

the offences were against different persons. Section 179 of our Code corresponds to section 234 of the Indian Code. A conflict of opinion in India as to whether the three offences must be committed against the same person has been met by an amendment of the section 234. The words "whether in respect of the same person or not" being inserted in the section after the word "offences".

With due deference to the Indian decisions to the contrary, I prefer to follow the decision of Wood Renton C.J. in the case of *The King v. Senanayake*[1] where he held that section 179 of the Code did not require that the three offences with which the accused was charged should be against the same person. I respectfully agree that if that was the intention of the legislature it would have been provided for by the insertion of the words "against the same persons" in the section. In support of this view I would point out that these words are to be found in section 5 of the Larceny Act of 1881: a section in many respects similar to section 179 of the Code.

It was also argued that the joinder of the three charges would prejudice the accused as it would lead the Jury to suspect that each of them severally must be true. It was contended that this argument was accepted by Ennis A.C.J. in the case of *The King v. Wijesinghe*[2]. Ennis A.C.J. no doubt refers to the argument in his judgment; but I am clearly of opinion that he acquitted the accused in that case because inadmissible evidence had been received and acted upon by the District Judge who tried and convicted him.

It was held by Ennis A.C.J. and Wood Renton C.J. in the cases referred to that it was always open to the Courts on the application of an accused person to direct separate trials. But I do not think separate trials should be ordered merely because of the possibility that a Judge or Jury might suspect each of them must be true. Such an argument could be addressed to this Court in every case in which three charges are combined at one trial in pursuance of the provisions of section 179 of the Code. And there would be no purpose in retaining the section in the Statute Book. In my judgment there must be more substantial grounds for directing separate trials than that contained in the argument I have dealt with. I have read through the depositions and I am of opinion that accused will not be prejudiced by the three charges being tried together.

I accordingly over-rule both objections to the indictment.

Counsel for the defence also objected to any evidence being led of similar acts committed by the accused on the three persons mentioned in the indictment. Counsel for the Crown submitted that such evidence was admissible under section 14 of the Evidence Ordinance which enacts:

> "Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling is in issue or relevant."

[1] *(1917) 20 N. L. R. 83.*

[2] *(1919) 6 Ceylon Weekly Reporter 327.*

But he was unable to state definitely the state of mind, the existence of which the evidence would prove.

In support of his contention he referred to the case of *The King v. Ball and Ball* [1]. The defendants in that case, a brother and sister, were charged with incest, evidence was tendered and admitted of previous acts of the defendants with the view of showing what were the relations between them. The House of Lords held, reversing the decision of the Court of Criminal Appeal, that the evidence was admissible as the object of the evidence was to establish that the defendants had a guilty passion towards each other and to rebut the defence of innocent association of brother and sister.

This decision is not applicable in this case as the evidence of similar acts is not tendered to show a guilty passion between the accused and any of the boys or to rebut the suggestion of an innocent association, but merely to show that the accused is likely to have committed the offence with which he is charged.

I was also referred to the cases of *The King v. Shellaker* [2] and the case of *Harold Howitt (1925), 19 Criminal Appeal Reports p. 64,* where evidence of similar acts of sexual intercourse with the prosecutrix was held to be admissible in a charge of unlawful carnal knowledge of a girl under 16. These cases are not distinguishable from the present case. But we are governed by the provisions of the Evidence Ordinance of 1895, and I am of opinion that the evidence of similar acts is not admissible unless it can be shown to establish the existence of a state of mind of the nature referred to in section 14. Crown Counsel was unable to show that the evidence objected to would serve that purpose. I accordingly hold that evidence of similar acts is inadmissible.