1936 *Present :* **Abrahams C.J. and Maartensz J.**

THE KING *v.* IYER *et al.*

54/55—D. C. (Crim.) Mullaittivu, 69.

Joinder of accused—Same offences committed in two different transactions—Criminal Procedure Code, ss. 179, 180 and 184.

Two persons may be jointly tried for offences committed in the course of two distinct transactions provided the offences are identical.

The King v. Arlisappu (2 C. L. Rec. 189) over-ruled.

CASE referred by Abrahams C.J. to a Bench of two Judges. The facts are stated in the reference which is as follows :—

The appellants with a third man, who has not appealed, were convicted at one trial of burglary and theft in respect of two houses on the same date. There were four counts, each offence being separately charged. They appealed first, on the ground that the trial was illegal through misjoinder of charges, and secondly, that assuming the joinder was lawful the evidence did not justify the conviction.

I have found against the appellants on the second ground, and on the first ground I am of the opinion that the appeal should be referred to a Bench of two Judges, as my attention has been directed to a decision of Schneider J. in the *King v. Arlisappu*[1], in which it was held in parallel circumstances that the trial was bad through misjoinder. In that case four persons were jointly charged—(1) with housebreaking and (2) theft of goods from A, and (3) housebreaking and (4) theft of goods from B. The learned Judge said :—

"The joinder of the four accused is sanctioned by the provisions of section 184.

"Section 179 sanctions the joinder of the two charges of housebreaking only or of theft only but not the joinder of one or more of the charges of housebreaking with one or more of the charges of theft. Section 180 (1) sanctions the joinder of one of the charges of housebreaking with the theft which can be regarded as part of the same transaction but not the joinder of the two charges of housebreaking and of the two charges of theft, for they are two distinct transactions.

"It follows therefore that sections 179 and 180 (1) applied severally or in combination do not sanction the joinder of the four charges."

With all respect I am unable to concur with that decision. It appears to me that Schneider J. did not give adequate consideration to the application to the case of sections 179 and 180 of the Criminal Procedure Code in combination as sanctioned by the concluding words of section 178.

I am of opinion that those words enable two criminal transactions to be tried together, provided that the offences in the one transaction are identical with the offences in the other. To explain that view with reference to the facts of this particular case, it would appear that the first burglary being triable with the second burglary, and the first theft being triable with the second theft by virtue of section 179; and the first burglary being triable with the first theft, and the second burglary being triable with the second theft by virtue of section 180 it follows that a combination of the two sections enables the four charges to be tried together. I am unable to see how otherwise the concluding words of section 178 can have any meaning as regards an application in combination of sections 179 and 180.

L. A. Rajapakse (with him *S. Soorasangaran*), for accused, appellants.—Section 179 of the Criminal Procedure Code permits the joinder of offences

[1] *2 C. L. Rec. 189.*

of the same kind, and section 180 permits the joinder of different offences forming the same transaction, in cases where there is only *one* accused. Section 184 deals with the cases of *more than* one accused.

Section 179 may be combined with section 180, but section 184 cannot be combined with section 179 or 180, because the latter sections apply to the trials of *one* accused only, whereas section 184 applies to trials of more than one accused.

The only section that is applicable here is section 184, because there are three accused in this case.

Housebreaking and theft are distinct offences. (*The King v. Arnolis Appu*[1].)

Therefore there is a misjoinder unless they were committed in the same transaction. Whether offences are committed in the same transaction or not, is a question of fact. There must be a continuity of action and purpose. (*The King v. Aman*[2].)

In *Rex v. Arlisappu*[3] Schneider J. held that, in similar circumstances, there was a misjoinder.

Counsel also cited *3 Cr. Law J. 93 (Indian)* and *Krishnasami Pillai v. King Emperor*[4]. Misjoinder of charges is an illegality, not a curable irregularity. (*The King v. Subramaniam*[5].)

J. W. R. Illangakoon K.C., A.-G. (with him *Pulle C.C.*), for respondent.—Unlike the Indian section 233, our section 178 permits the application of these sections in combination. The combination of section 184 with section 179 justifies the present indictment.

Assuming section 184 alone applies, the two offences of theft and housebreaking in the two houses were committed in one night within four or five hours. It is clear they formed part of the *same* transaction.

It is always a question of fact whether certain offences form part of the same transaction or not. See *The King v. Aman* (*supra*). The judgment of Schneider J. in *The King v. Arlisappu* (*supra*) should be reconsidered.

October 21, 1936. ABRAHAMS C.J.—

I see no reason to recede from or vary in any way the opinion which I formed when I referred this matter that two persons could be jointly charged and tried in respect of two distinct transactions when the offences which were included in those transactions were identical. My brother Maartensz agrees with this view.

It has however been urged upon us by Mr. Rajapakse that the appellants were not actually charged with having been concerned in two different transactions but that the offences were specifically stated to have been committed in one transaction. This procedure was obviously adopted in order to avoid the consequences of the decision of *The King v. Arlisappu*[3] from which we now differ. It has been represented to us that the charge was in point of fact accurate. But the question as to whether a particular series of events does or does not form one transaction is a very complicated matter depending entirely on the individual circumstances of each case and as our finding one way or the other whichever it may be, may be taken as a precedent for future cases we think it better not to give a decision on this

[1] *2 Bal. Rep. 81.*
[2] *21 N. L. R. 375.*
[3] *2 C. L. Rec. 189.*
[4] *26 Madras 125.*
[5] *25 Madras 61.*

point. Assuming that there were two transactions and not one, the form of the charge containing words of surplusage, was a mere irregularity curable under the provisions of section 425 of the Criminal Procedure Code. The appellants suffered no prejudice by the form of the charge as the offence was very clearly made out.

We therefore dismiss the appeal.

MAARTENSZ J.—I agree.

Affirmed.