[IN THE PRIVY COUNCIL]

1965 *Present:* **Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Donovan, and Lord Pearson**

A. K. A. M. KHAN, Appellant, *and* M. M. G. ARIYADASA, Respondent

PRIVY COUNCIL APPEAL NO. 46 OF 1963

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

Criminal procedure—Joinder of charges—Charges based on existence of unlawful assembly joined with charges framed relying on s. 32 of Penal Code— Validity of such joinder of charges—" Distinct offence "—" More offences than one "—" Common object "—" Common intention "—Penal Code, ss. 32, 38, 67, 138, 140, 146—Criminal Procedure Code, ss. 178, 180, 181, 184.

Charges based on the existence of an unlawful assembly may be joined together at one trial with charges in respect of offences committed by the accused acting in furtherance of a common intention within the meaning of section 32 of the Penal Code, if the offences are alleged to have been committed in the course of one and the same transaction within the meaning of section 180 (1) of the Criminal Procedure Code.

The words " more offences than one are committed " in section 180 (1) of the Criminal Procedure Code must mean and must be understood as meaning more offences than one are alleged to have been committed.

Six persons, the second of whom was the appellant, were jointly charged in counts 1 to 4 with having been members of an unlawful assembly and with having committed, as members of the unlawful assembly, the offences of house trespass, rioting and causing hurt (sections 140, 434/146, 144 and 314/146 of the Penal Code). They were also charged in counts 5 to 10 with having directly committed, in the course of the same transaction, offences of house trespass, wrongful confinement, causing simple hurt and causing hurt with a dangerous weapon (sections 434, 333, 314 and 315 of the Penal Code). The first accused was acquitted altogether. All the other accused were found Guilty of the first seven charges. The appellant alone was found Guilty of the eighth charge. The appellant and the fourth accused were found Guilty of the ninth charge. The appellant, against whom alone the tenth charge was laid, was acquitted of that charge.

Held, that there was no misjoinder of charges.

" If five or more people are charged in one count with an offence punishable under section 434 (of the Penal Code) read with section 146 and in another count with an offence punishable under section 434 they are being charged with what are, for all practical purposes, distinct and separate offences. It would be wrong to regard them as being in reality one offence (so as to make inapplicable section 180 (1) of the Criminal Procedure Code). That this is so is illustrated by considering the nature and extent of the evidence which could establish guilt in respect of each count. Thus if it were not established that there was an unlawful assembly (as for example if it were not shown that there was an assembly of five or more persons but only of a lesser number) there could not be a conviction in respect of the former count but the evidence might establish that house trespass was committed by one of them or alternatively by some of them in furtherance of their common intention in which cases either that one or

those of them (who might number less than five) who had that common intention could be convicted of the latter count. It is well recognised that section 32 of the Penal Code expresses and declares a legal principle of law but does not create a substantive offence."

Don Marthelis v. The Queen (65 N. L. R. 19) and *The Queen v. Thambipillai* (66 N. L. R. 58) overruled.

APPEAL, with special leave, from a judgment of the Supreme Court reported in (*1963*) *65 N. L. R. 29.*

E. F. N. Gratiaen, Q.C., with *T.O. Kellock* and *M. I. Hamavi Haniffa*, for the 2nd accused-appellant.

No appearance for the complainant-respondent.

Mark Littman, Q.C., with *Dick Taverne*, as *amicus curiae*, for the Attorney-General of Ceylon.

Cur. adv. vult.

April 27, 1965. [*Delivered by* LORD MORRIS OF BORTH-Y-GEST]—

The appellant was convicted and sentenced by the Magistrates Court at Matara on the 12th July 1962 and his appeal from that conviction was dismissed by the Supreme Court of Ceylon on the 6th May 1963. In this appeal (brought by special leave) the main contention of the appellant is that at his trial there was a misjoinder of charges which rendered the charge sheet invalid and the trial void.

The appellant was the second of six persons who were accused. All were officers of the Excise Department. The accusations arose out of events which took place on the 27th December 1960 and of which the respondent complained. The respondent's wife is Daisy Gunaratna Wickremasingha. The respondent has a brother Mahanthi Mulle Gamage Gomis. The respondent alleged that during the afternoon of the 27th December 1960 the six persons went by car to his house. According to his allegations the subsequent events were as follows. After the car was halted on his compound the six persons entered the verandah of his house. The first accused kicked him and the second (the appellant) struck him on the back of his neck. The third accused handcuffed him and the fourth the fifth and the sixth accused pushed him into the car. When his wife pleaded with the party it was alleged that she was struck by the appellant with a baton. The respondent's brother came to see what the commotion was and he, it was alleged, was assaulted by the appellant who used his hands and by the fourth and fifth accused who used batons and he also was pushed into the car.

The respondent and his brother were in fact driven away. They were under arrest. One of the questions which had to be decided in the later proceedings was whether the appellant and his companions were, as they asserted, engaged as Customs Officers in a lawful raid in the course of which they arrested the respondent and his brother for being in wrongful possession of what was known as ganja.

The captives were taken to the Walgama Excise Station and later to the Matara Hospital where an allegation was made by the appellant that the respondent had ganja on him at the time that he was seized. The two men were thereafter released by the appellant on bail. They then went to the Police Station and complained of the assault made upon them. The respondent and his brother were later charged in the Magistrates Court by the appellant with the unlawful possession of ganja. On the date of trial, which was not until July 1961, a material witness (i.e. the present appellant) was not present. The Magistrate refused an application for a postponement and acquitted the respondent and his brother. The prosecution did not appeal against the acquittal.

The respondent, as complainant, himself presented a plaint in the Magistrates Court on the 18th January 1961. His complaint in substance was that the appellant and his companions were bent on assaulting him and were covering themselves by fabricating a case against him of being in wrongful possession of ganja. His allegation was that the six accused were members of an unlawful assembly the common objects of which were to commit house trespass and to cause hurt to him. He alleged that they had committed an offence under section 140 of the Ceylon Penal Code. He further alleged that the six accused did commit house trespass and had committed an offence punishable under section 434 read with section 146 of the Ceylon Penal Code. He further alleged that they committed rioting by using force and violence and by assaulting him and his wife and his brother and had committed an offence punishable under section 144 of the Ceylon Penal Code.

On the 16th February 1961 the respondent as complainant gave evidence in support of his plaint and the Magistrate directed the issue of a summons on the six accused with a copy of counts as then set out in their plaint. The hearing was to be on the 30th March 1961. There were various adjournments (to the 1st June then to the 21st June then to the 27th July and then to the 3rd August and then to the 23rd August). On the 23rd August in the presence of the accused the respondent gave evidence. The Magistrate, being also a District Judge, on a consideration of the evidence, decided (pursuant to section 152 (3) of the Criminal Procedure Code) that he could properly try the case summarily and decided that he would do so. Charges were then framed. They were as follows :—

"IN THE MAGISTRATE'S COURT OF MATARA.

No. 66552

You are hereby charged that you did within the jurisdiction of this Court at Wewahamanduwa on the 27th December 1960—

1. Were members of an unlawful assembly the common objects of which were :—

(*a*) to commit house trespass by entering into a building used as a human dwelling to wit: the house in the occupation of the complainant above named situate on the land called Balagewatta at Wewahamanduwa aforesaid with intent to cause hurt to the complainant.

(*b*) to voluntarily cause hurt to the complainant and that you did commit an offence punishable under section 140 of the Ceylon Penal Code.

2. That at the same time and place aforesaid and in the course of the same transaction set out in Charge 1 above, you did in the prosecution of the said common object commit house trespass by entering into a building used as a human dwelling to wit: the house in the occupation of the complainant M. M. G. Ariyadasa situated on the land called Balagewatta aforesaid with intent to cause hurt to the complainant which said offence was in prosecution of the said common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common objects of the said unlawful assembly and that you being members of the said unlawful assembly are thereby guilty of an offence punishable under section 434 read with section 146 of the Ceylon Penal Code.

3. At the same time and place aforesaid and in the course of the same transaction you did commit rioting by using force and violence by assaulting the complainant, complainant's brother M. G. Gomisappu and complainant's wife Daisy Wickremasingha with hands and batons and that you have thereby committed an offence punishable under section 144 of the Ceylon Penal Code.

4. At the same time and place aforesaid and in the course of the same transaction set out in Charge 1 above, one or more members of the said unlawful assembly did cause hurt to M. G. Ariyadasa, M. G. Gomisappu and Daisy Gunaratna Menike Wickremasingha which said offence was committed in prosecution of the said common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object of the unlawful assembly and that you being members of the said unlawful assembly did commit an offence punishable under section 314 read with section 146 of the Ceylon Penal Code.

5. At the same time and place aforesaid and in the course of the same transaction you did commit house trespass by entering into a building used as a human dwelling to wit: the house in the occupation of M. M. G. Ariyadasa situate on the land called Balagewatta at Wewahamanduwa with intent to cause hurt to the said Ariyadasa and you have thereby committed an offence punishable under section 434 of the Ceylon Penal Code.

6. At the same time and place aforesaid and in the course of the same transaction you did wrongfully confine the said M. M. G. Ariyadasa at Wewahamanduwa and other places and that you did thereby commit an offence punishable under section 333 of the Ceylon Penal Code.

7. At the same time and place aforesaid and in the course of the same transaction you did wrongfully confine M. M. G. Gomisappu at Wewahamanduwa and other places and you did thereby commit an offence punishable under section 333 of the Ceylon Penal Code.

8. At the same time and place aforesaid and in the course of the same transaction you did voluntarily cause hurt to M. M. G. Ariyadasa and that you did thereby commit an offence punishable under section 314 of the Ceylon Penal Code.

9. At the same time and place aforesaid and in the course of the same transaction you the 2nd, 3rd and 4th accused did cause hurt to M. M. G. Gomisappu and did thereby commit an offence punishable under section 314 of the Ceylon Penal Code.

10. At the same time and place aforesaid and in the course of the same transaction that you the 2nd accused above named did cause hurt to Daisy Gunaratna Menike Wickremasingha with an instrument which when used as a weapon of offence is likely to cause death to wit a baton and that you did thereby commit an offence punishable under section 315 of the Ceylon Penal Code."

To those charges each of the six accused pleaded Not Guilty. One of the charges (Charge 3) would not have been triable summarily but for the power given to the Magistrate (being also a District Judge) by the above-mentioned section of the Criminal Procedure Code. The trial was fixed for the 6th October. It was postponed to the 17th October, then to the 29th December, then to the 11th January 1962 and then to the 22nd February 1962. On that day the respondent again gave evidence as did his brother. On the evidence the Magistrate decided to assume jurisdiction. The accused pleaded Not Guilty. The further trial was fixed for the 17th April 1962. The date was re-fixed for the 11th May. On that day the respondent again gave evidence as did his wife and his brother and other witnesses. The trial was resumed on the 9th June 1962 when other evidence for the prosecution was given. The trial was resumed on the 21st June 1962 when the first two accused gave evidence. The trial was resumed on the 5th July. The case eventually reached the stage of judgment on the 12th July 1962. The first accused was acquitted altogether. All the other accused were found Guilty of the first seven charges. The appellant alone was found Guilty of the eighth charge. The appellant and one other (the fourth accused) were found Guilty of the ninth charge. The appellant was acquitted of the tenth charge. The appellant was sentenced to three months' rigorous imprisonment on each of Charges one to nine but the sentences were to run concurrently.

It is not necessary to record fully the conclusions of fact reached by the learned Magistrate. Suffice it to say that he found that some two days before the 27th December 1960 the respondent had assaulted one of the accused because of certain unseemly behaviour on the latter's part. The

learned Magistrate found that the fact that there had been such assault was the motive for a concerted attack on the respondent on the 27th December by the second to the sixth accused. They had purposely gone to the respondent's house in order " to teach him a lesson ". The learned Magistrate therefore rejected the evidence of the appellant (the second accused) to the effect that he had only been engaged upon a legitimate raid in connection with his duties as an officer in the Excise Department. The conclusion was that the accused who were convicted planned and carried out a concerted assault on the respondent in retaliation for an incident connected with one of their number.

The appellant and others appealed to the Supreme Court. By a judgment of the 6th May 1963 T. S. Fernando J. dismissed the appeals. Of the points argued in the Supreme Court on behalf of the appellant the only one which is now material was that there had been a misjoinder of charges in that charges based on the existence of an unlawful assembly had been joined with charges framed relying on section 32 of the Penal Code.

Certain sections of the Penal Code call for notice. Section 32 is as follows :—

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Section 140 is as follows :—

> " Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

Section 146 is as follows :—

> " 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. "

For the purposes of sections 140 and 146 the word " offence " denotes a thing made punishable by the Penal Code (see section 38).

Certain sections of the Criminal Procedure Code also call for notice. Section 178 is as follows :—

> " 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."

Section 180 is as follows :—

" (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 before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with and tried at one trial for each of such offences, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(4) Nothing contained in this section shall affect section 67 of the Penal Code."

Section 181 is as follows :—

" If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which 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 before 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."

Section 184 is as follows :—

" 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."

For the purpose of those sections " offence " means any act or omission made punishable by any law for the time being in force in Ceylon.

On behalf of the appellant it was argued in the Supreme Court that the trial was invalid in that some of the charges were joined with others in violation of the provisions of the above quoted sections. More specifically it was contended that even if all the ten alleged offences were committed in the course of one and the same transaction the joining together at one trial

of charges 2, 3 and 4 with charges 5, 6, 7 and 8 amounted to a fatal misjoinder of charges. That contention was rejected by the Supreme Court and the appeal was dismissed.

Special leave to appeal was granted to the appellant. The appeal raises an important issue in connection with the administration of the criminal law in Ceylon and their Lordships understand that some confusion exists concerning the law relating to the joinder of charges: indeed there are conflicting decisions in relation to the main point which arises in this appeal.

The main contention which has been advanced on behalf of the appellant may be summarised. It is said that though section 146 of the Penal Code creates a liability on a member of an unlawful assembly for an offence committed by another member of such an unlawful assembly in prosecution of the common object, yet it does not create an offence distinct from the offence committed by the other member. Accordingly it is said that though certain charges, e.g., the charges in counts 2 and 5 were for the purposes of section 178 of the Criminal Procedure Code charges of distinct offences which required separate charges and required separate trials they did not come within section 180 (1) because they did not for the purposes of that section involve " more offences than one ". This contention which involves a reading of the words " distinct offence " in section 178 in a different sense from the words " more offences than one " in section 180 calls for closer examination. The argument runs as follows. If there is a count charging an offence say under section 434 read with section 146 then the allegation is that one or more of those who were members of the unlawful assembly committed house trespass with the result that all are vicariously guilty of house trespass: that being so a count under section 434 charging the direct commission of house trespass cannot, so the argument runs, be joined and tried at the same time for that would be a charge of the same offence and there would not be charges of " more offences than one ".

It will be convenient to consider the appellant's contentions by reference to some of the counts in the charge. No question arises in regard to count 1. It alleged a definite offence which was undoubtedly a distinct offence. It alleged that the accused were members of an unlawful assembly, i.e., that they were members of an assembly of five or more persons whose common object came within one of the objects defined in section 138. The count charged an offence punishable under section 140 of the Penal Code. Count 2 alleged an offence punishable under section 434 read with section 146 of the Penal Code. The allegation was that all the accused committed house trespass in furtherance of the common object of the unlawful assembly. In order to convict the appellant on this count it was necessary to prove that he was a member of an unlawful assembly, that some member or members of the unlawful assembly committed the offence of house trespass, and that such offence was either in prosecution of the common object of the assembly or was such as the members of the assembly knew to be likely to be committed in prosecution of that object. Thus if A, B, C, D, E and F are members of an unlawful assembly which has house trespass in the house of O as

its object, then if some of them commit house trespass in the house of O and do it as members of the unlawful assembly and in prosecution of the common object all are guilty.

Where there are unlawful assemblies it will often be difficult for the prosecution to be sure at the outset as to which facts will be clearly proved. If the prosecution present a case that A, B, C, D, E and F were members of an unlawful assembly which had house trespass in the house of O as its object and that some of the members committed house trespass there would be a charge under section 434 read with section 146. If it was proved that A committed house trespass but if it was not proved that there was an unlawful assembly or if it was proved that there was an unlawful assembly but if it was not proved that A was a member of it, there would have to be an acquittal of A of the charge under section 434 read with section 146. He would however have committed an offence under section 434. Nevertheless he could not be convicted of such offence on the charge as laid. This was illustrated by the decision in *The King v. Heen Baba* [1].

In that case the accused were charged (under section 146) with having committed as members of an unlawful assembly, the offences of house-breaking, robbery, grievous hurt and hurt (sections 443, 380, 383, and 382 of the Penal Code). The verdict of the jury was that there was no unlawful assembly but that the offences of house-breaking, robbery, grievous hurt and hurt were committed by the accused acting in furtherance of a common intention within the meaning of section 32 of the Penal Code. The presiding Judge had directed the jury that it was competent to them to find the accused guilty under sections 443, 380, 383 and 382 read with section 32. The jury did so find. The question for decision on appeal was whether it was competent for the jury to return a verdict of guilty of offences under those sections read with section 32 when those offences did not form the subject of separate charges but were referred to in charges coupled with section 146. It was held (and their Lordships think rightly held) that in the absence of a charge the accused could not be convicted under sections 433, 330, 383 and 382 read with section 32. The case does not decide that charges under those sections could validly have been joined but the indications are that the Court so thought. There was certainly no suggestion that the accused could not thereafter be charged with offences under sections 443, 380, 383 and 382. Nor could it be said that they had been acquitted of those offences. The missing charges were charges of different offences and it would be unfortunate and undesirable if in such a situation separate and later proceedings were always necessary.

There is a difference between the situation where someone who is a member of an unlawful assembly commits an offence as such member and in prosecution of the common object of that assembly and the situation where someone commits a similar offence without there being the existence of an unlawful assembly.

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

To a like effect as the actual decision in *Heen Baba's* case is the decision in *Nanak Chand v. State of Punjab* [1]. (The provisions of section 32 and section 146 of the Ceylon Penal Code correspond respectively to sections 34 and 149 of the Indian Penal Code.)

If five or more people are charged in one count with an offence punishable under section 434 read with section 146 and in another count with an offence punishable under secton 434 they are being charged with what are, for all practical purposes, distinct and separate offences. It would be wrong to regard them as being in reality one offence. That this is so is illustrated by considering the nature and extent of the evidence which could establish guilt in respect of each count. Thus if it were not established that there was an unlawful assembly (as for example if it were not shown that there was an assembly of five or more persons but only of a lesser number) there could not be a conviction in respect of the former count but the evidence might establish that house trespass was committed by one of them or alternatively by some of them in furtherance of their common intention in which cases either that one or those of them (who might number less than five) who had that common intention could be convicted of the latter count. It is well recognised that section 32 of the Penal Code expresses and declares a legal principle of law but does not create a substantive offence.

Proof that there was an unlawful assembly might fail for lack of proof that those composing an assembly of five or more had a common object which was within any one of the requirements of section 138 of the Penal Code. If on the other hand membership of an unlawful assembly was established, and membership at the time that an offence was committed by some member or members in prosecution of the common object of the assembly, and if the offence was such as the members of the assembly knew to be likely to be committed in prosecution of the common object, there could be conviction of a charge of the offence (under its appropriate section read with section 146). In such a case it would not however necessarily be the case that, if the principle of section 32 had to be relied upon, there would be a conviction of a charge of the offence. Though the offence was one known to be likely to be committed in prosecution of the common object (see the language of section 146) the criminal act might not have been done "in furtherance of the common intention of all" (as section 32 requires).

Under section 32 criminal liability results from the doing of a criminal act in furtherance of the common intention : under section 146 criminal liability may result merely from the membership of the unlawful assembly

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

at the time of the commission of an offence known to be likely to be committed in prosecution of its object. As was said in *Nanak Chand v. State of Punjab* (supra) " An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence although there may have been no common intention and no participation by the other members in the actual commission of that offence. "

In delivering the judgment of the Board in *Barendra Kumar Ghosh v. Emperor*[1] Lord Sumner said (at page 7) :—" 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."

In *Don Marthelis v. The Queen* [2] there were certain counts which were based on the allegation of unlawful assembly and certain other counts which related to the offences of causing simple hurt and committing mischief which were based on common intention. Crown Counsel in that case conceded that the joinder of the two sets of charges was not according to law and that the result was that the indictment was invalid. Accepting the concession of Crown Counsel the Court quashed the convictions.

In the present case T. S. Fernando J. felt himself free not to follow *Don Marthelis'* case. Their Lordships consider that he was right in not following it. He did however point out that the effect of joining charges must be understood as limited by the provisions of section 67 of the Penal Code.

[1] *A. I. R.* [*1925*] *P.C. 1.* [2] (*1963*) *65 N. L. R. 19.*

It follows from what their Lordships have set out that they are unable to agree with the decision in *The Queen v. Thambipillai* [1].

In the present case five of the accused (the appellant and four others) have been held guilty of house trespass. They have been held guilty of being members of an unlawful assembly the common object of which was to commit house trespass. Each one was therefore guilty under count 2 of the offence of house trespass at any rate as committed by the other four while being separately guilty under count 5 of the distinct and separate house trespass which he personally committed.

In passing their Lordships would observe that the wording employed in the opening part of count 2 viz. " you did in the prosecution of the said common object . . . . " is perhaps inappropriate where section 146 is being invoked. The wording employed in count 4 incorporating, in the opening part, the wording " one or more members of the said unlawful assembly did " etc. and concluding " and that you " etc. would seem to their Lordships to be more appropriate.

For the reasons which have been set out their Lordships conclude that a count for an offence punishable under section 434 read with section 146 and a count for an offence punishable under 434 are counts which accuse of distinct offences. If section 178 did not set out exceptions there would have to be separate charges and separate trials. One exception to that requirement is contained in section 180. The opening words of that section are " 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 . . . . " Whether a person has in fact committed an offence which he does not admit is the very question with which a trial is concerned. Their Lordships consider therefore that it cannot be doubted that the words " more offences than one are committed " must mean and must be understood as meaning more offences than one are alleged to have been committed.

Their Lordships are quite unable to accept the submission that a charge of an offence punishable under section 434 read with section 146, and a charge of an offence punishable under section 434, relate to the same offence so as to make inapplicable the exception (set out in section 180 (1)) which applies if in one series of acts so connected together as to form the same transactions more offences than one are alleged to have been committed by the same person.

[1] *(1963) 66 N. L. R. 58.*

In the present case their Lordships consider that the offences if committed were committed " in one series of acts so connected together as to form the same transaction " within the meaning of the words in section 180 (1). It is a question for decision in any particular case whether the facts out of which charges have arisen are so closely connected and interrelated that it can fairly be said that there was one series of acts and that the acts by being connected constituted one and the same transaction. It follows therefore as was decided by the learned Judge, T. S. Fernando J, that there was no misjoinder of charges.

This conclusion suffices to dispose of the appeal and their Lordships will humbly advise Her Majesty that it be dismissed. Their Lordships think that it is desirable that they should refer to one matter which was discussed in the course of the arguments. They would preface this reference by a reminder that the reaching of conclusion without any avoidable delay and the concentration upon issues of real relevance (both so desirable in criminal administration) are greatly assisted if those responsible for prosecutions make every reasonable effort to minimise the number of counts and to avoid complexity.

One matter in particular to which reference may be made relates to the decisions of the learned Magistrate on counts 4 and 8. For the reasons already expressed their Lordships have concluded that the joinder of those counts was unobjectionable. It was submitted however that there ought not to have been findings of guilt against the appellant on both counts 4 and 8. The finding of the learned Magistrate in regard to count 8 (which charged all the accused with voluntarily causing hurt to the respondent, an offence punishable under section 314) was that the appellant alone (and not the others) was guilty. The appellant was also (together with the other accused except the first) found guilty on count 4. That count which alleged an offence under section 314 read with section 146, alleged the causing of hurt to the respondent and his brother and his wife. As to that the finding of the learned Magistrate was thus expressed—" The 2nd, 4th and 5th accused have, whilst being members of an unlawful assembly, caused simple hurt to Ariyadasa and Gomis and thereby all the members of the unlawful assembly have been guilty of an offence under section 314 read with section 146 of the Penal Code". That was a reference to count 4. There can be no criticism of the finding or of the conclusion that all were guilty. In view of the finding just quoted it is not clear why on the 8th count the finding was that it was only the 2nd accused (the present appellant) who assaulted Ariyadasa and who alone was therefore guilty on the 8th count. It was suggested that it was erroneous for the appellant to have been convicted on the 8th count as well as on the 4th count. Even

accepting however that he alone was guilty on the 8th count he was also guilty on the 4th count if any one of the others caused hurt to Gomis. The 4th accused was in fact held guilty of causing hurt at least to Gomis even if, contrary to the finding above quoted, he did not additionally cause hurt to Ariyadasa.

On the conclusions of the learned Magistrate his findings of guilt as recorded cannot therefore be assailed.

The question which was discussed in argument was as follows. If in a case where five or more persons are charged with an offence under section 140 and are also charged in a further count with an offence punishable under a section of the Penal Code read with section 146 and are also charged in another count with the offence punishable under the particular section it is found that only one of the persons charged actually committed the offence punishable under the particular section, ought he to be found guilty (apart from secton 140) on more than one of the two other counts ? Thus if five or more persons form an unlawful assembly the object of which is to commit house trespass they are all guilty of an offence under section 140. They may additionally be charged with an offence under section 434 read with 146. They may additionally be charged with an offence under section 434. If when the facts are ascertained it is found that one only of the group actually committed house trespass the question arises as to the correct findings in his case. All are guilty of the offence under section 140. All are guilty of the offence under section 434 read with section 146. In some circumstances and upon certain findings they might (as a result of the provisions of section 32) be guilty of the offence under section 434. The actual house trespasser would be guilty of the offence under section 434. All would undoubtedly be guilty of two offences but the question arises whether the actual house trespasser should be found guilty of all three offences and whether (in certain circumstances) all the others might be found guilty of all three offences. The problem may be merely academic and so far as sentence is concerned may be of no consequence. Their Lordships would think it preferable that guilt on two only and not on all three of the counts should be recorded but as the point has not arisen and as their Lordships accordingly cannot have the benefit of the considered views of the Court in Ceylon upon it and as it does not immediately arise their Lordships consider that they must reserve consideration of it.

For the reasons already given their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Appeal dismissed.