1954 *Present :* **Swan J.**

K. WIJESINGHE (Excise Inspector), Appellant, *and* A. DON MARTIN, Respondent

S. C. 1,074—M. C. Colombo South, 55,620

Charge—Duplicity—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), s. 26—Criminal Procedure Code, ss. 171, 425.

The charge against the accused was that he did "sow, plant or cultivate" hemp plants in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance.

Held, that the charge was not bad for duplicity. Section 26 of the Poisons, Opium and Dangerous Drugs Ordinance created one offence, whether it was committed by sowing, planting or cultivating.

Held further, that, even if there was error in the charge, the error was immaterial.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

E. H. C. Jayetileke, Crown Counsel, for the complainant appellant.—The failure to mention in the charge the Minister of Health as the proper authority to issue the licence is a curable irregularity—*Simon Singho v. Thoradeniya*[1]. The facts establish cultivation on the part of the accused—*Marambe v. John*[2].

Boyd Jayasooriya, for the accused respondent.—The charge is bad for duplicity. It alleged that the accused did either "sow or plant or cultivate five hemp plants" on a particular day. It alleged therefore that the accused committed several offences in the alternative, not that he committed one offence in alternative ways. The English Court of Criminal Appeal held in *R. v. Molloy*[3] that such a charge was bad in law and quashed the conviction. *Molloy's case* was followed here in *Pakir Saibo v. Nayar*[4].

In *Sub-Inspector of Police, Dehiowita v. Perera*[5] Jayewardene A.J. held that a conviction on a charge which was bad for duplicity should be quashed, if it prejudiced the accused in his defence, although in an earlier judgment in *Police Sergeant, Lindula v. Stewart*[6], he had taken the view that the defect was curable. *Molloy's case* had not been cited to His Lordship in either case. In the present case the accused pleaded that he was unable to defend himself because he did not know what offence he was charged with.

[1] *(1954) 55 N. L. R. 451.*
[2] *(1946) 47 N. L. R. 526.*
[3] *(1921) 2 K. B. 364.*
[4] *(1940) 42 N. L. R. 151.*
[5] *(1926) 27 N. L. R. 511.*
[6] *(1923) 25 N. L. R. 166.*

For an example of a charge which alleged that the accused committed one offence in alternative ways, see *Thomson v. Knights* [1].

E. H. C. Jayetileke, in reply, referred to section 171 of the Criminal Procedure Code and relied on *Police Sergeant, Lindula v. Stewart* (supra).

Cur. adv. vult.

November 22, 1954. SWAN J.—

This is an appeal by the complainant with the sanction of the Attorney-General from an order of the learned Magistrate of Colombo South acquitting the accused. The accused was charged in this case that he did on 13.3.1954 " without a licence from the Minister sow, plant or cultivate five hemp plants (*Cannabis Sativa L*) on his land called Gorakagahawatta, in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) read with section 76 (1) (*a*) and thereby committed an offence punishable under section 76 (5) (*a*) of Chapter 172 of the said Ordinance." He was acquitted after trial on the ground that the charge was defective in that it referred to the Minister without particularizing which Minister it was. In point of fact it is the Minister of Health (see *Gazette* Notification No. 10,407 of 2.6.52 and No. 10,608 of 28.10.53) who is the proper authority.

In the course of his order the learned Magistrate said :—" I accept the evidence of the prosecution witnesses on the facts. I have not the slightest doubt that the accused was seen by the prosecution witnesses doing certain acts, that he was cultivating the plants—such as heaping the earth and removing a thorny creeper round the plants. Advocate Mr. Perera also raised the question whether the charge was defective inasmuch as it states, ' sow, plant or cultivate '. I hold that the charge is not defective on this ground for, the section is so worded, ' No person shall . . . . sow, plant or cultivate ' and it would not be necessary for the prosecution, in the plaint itself, to take up a definite position whether it was sowing, planting or cultivating as in this case. The evidence led would establish any one of these matters mentioned in the charge. But, the point raised by Advocate Mr. Perera that the charge was defective in that the proper authority, that is, the Minister of Health is not mentioned, is entitled to prevail. It was held in a case reported at page 451 of *55 N. L. R.* that there was an error in the charge in that case where the proper authority was mentioned as the Minister of Justice and not the Minister of Health. The Supreme Court held that the mention of the wrong person was nothing more than a mere irregularity under section 425. The powers under section 425 are reserved only for the Supreme Court. I hold therefore that the charge has been defective in that the proper authority has not been mentioned."

[1] (*1947*) *1 K. B. 336.*

The case of *Simon Singho v. Thoradeniya*[1] referred to by the learned Magistrate was decided by me. There I held that the mention of the wrong Minister was a mere irregularity that did not vitiate the conviction. I expressly made reference to section 425 of the Criminal Procedure Code because it says *inter alia* "no judgment passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the . . . . charge . . . . unless such error, omission, or irregularity has occasioned a failure of justice". But section 171 of the same Code expressly states that "no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission".

Learned Crown Counsel submits that the learned Magistrate is clearly wrong and that the order of acquittal must be set aside and the accused convicted and sentence passed on him. Mr. Jayasooriya who appeared for the respondent did not seek to justify the order of acquittal for the reasons given by the learned Magistrate. He however maintains that the charge is bad for duplicity. Sow, plant or cultivate, he argues, connote three different and distinct operations, each of which constitutes an offence. In this connection he referred me to the case of *Pakir Saibo v. Nayar*[2] where Wijeyewardene J. held that the charge was defective in that it failed to give particulars of the manner in which the alleged offence was committed *and that it was open to objection on the ground of duplicity*. But duplicity is not a fatal defect. It is an irregularity and not an illegality. As Jayewardene A.J. said in *Police Sergeant, Lindula v. Stewart*[3] "the defect is, however, not fatal to the conviction as it is one of duplicity and not of misjoinder".

The learned Magistrate himself considered whether the charge was bad for duplicity and came to the conclusion that it was not. I am inclined to agree. The section is so worded that one is forced to the conclusion that it created one offence, whether it was committed by sowing, planting, cultivating, obtaining or having in one's possession any of the prohibited plants, or collecting or having in one's possession the seeds, pods, leaves, flowers or any part of such plant. The gravamen of the charge is that one should have anything to do with the prohibited plants *without the licence of the proper authority*. The manner in which the law has been transgressed is only incidental.

But the evidence led at the trial was of cultivation and as the accused cannot conceivably complain of prejudice, I would hold that the error in the charge, if error there is, is immaterial.

I set aside the order of acquittal and convict the accused. The case will be remitted to the lower Court for the learned Magistrate to pass sentence.

Acquittal set aside.

[1] *(1954) 56 N. L. R. 451.* [2] *(1946) 42 N. L. R. 151.*
[3] *(1923) 26 N. L. R. 166.*