1974 *Present :* **Udalagama, J., and Malcolm Perera, J.**

T. THEVAKADACHAM, accused-appellant, *and* K. B. PUSVELLA, Inspector of Police (Traffic), Complainant-Respondent

S. C. 989/73—M. C. Jaffna 6836

Motor Traffic Act—charge on two counts—Charge of failure to avoid accident tacked on to charge of negligent driving—propriety of the conviction on both counts.

Where the accused-appellant was charged on two counts under the Motor Traffic Act, namely with contravening S. 151(3) and S. 149(1) and the Magistrate found the accused guilty on both counts.

Held, that a charge under S. 149(1) of the Motor Traffic Act, namely failure to take such action as may be necessary to avoid an accident, should not be tacked on to a charge of negligent driving as a matter of course. Unless the prosecution is able to prove what appropriate action the driver should have taken, in the circumstances of the case, to avoid the accident, it will be futile to add a charge of failure to take such action as may be necessary to avoid an accident, to a charge of negligent driving. The burden is on the prosecution to establish that the driver had failed to take the necessary action to avoid the accident and if the available evidence is not sufficient to establish this ingredient of the charge, it should not be tacked on to a charge of negligent driving.

APPEAL against conviction.

Accused-appellant absent and unrepresented.

M. L. M. Ameen, State Counsel, for the Respondent.

August 20, 1974, UDALAGAMA, J.—

The appellant in this case was charged on two counts under the Motor Traffic Act. On the first count he was charged with contravening Section 151 (3) and on the second count with contravening Section 149 (1). After trial the learned Magistrate found the accused guilty on both counts.

At the hearing of this appeal the accused was not represented or present. Judgment was reserved to examine the propriety of the Magistrate convicting the accused on both counts.

On the evidence, the learned Magistrate was right in holding that the accused-appellant was negligent in driving lorry No. EY-3622 in that he made no attempt to stop or reduce his speed on approaching the intersections of Temple road and Navalar road and permitting the traffic on his right to cross the junction. The question, however, arises whether the Magistrate was right, in addition to finding the appellant guilty on count 1 of negligent driving, finding the accused guilty on the second count of failure to take such action as may be necessary to avoid an accident.

This Court has on more than one occasion expressed the view that a charge under Section 149 (1) of the Motor Traffic Act should not be tacked on to a charge of negligent driving as a matter of course. Unless the prosecution is able to prove what appropriate action the driver should have taken in the circumstances of the case to avoid the accident, it will be futile to *add a charge of failure* to take such action as may be necessary to avoid an accident, to a charge of negligent driving. The burden is on the prosecution to establish that the driver had failed to take the necessary action to avoid the accident, and if the available evidence is not sufficient to establish this ingredient of the charge, it should not be tacked on to a charge of negligent driving. In *M. V. L. Perera v. Inspector of Police M. D. G. Perera* 59 N.L.R. 64, H. N. G. Fernando J. (as he then was) held) :

> " A charge under Section 151 (1) of the Motor Traffic Act (Old Ordinance) for failing to take such action as may be

necessary to avoid an accident should not be thoughtlessly appended to each and every charge of negligent or reckless driving".

The position, however, would be different if on the facts of the particular case it is doubtful whether the charge that could be established is one of negligent driving or failing to take such action as may be necessary to avoid an accident. In such a case the provisions of Section 181 of the Criminal Procedure Code would permit a charge of failing to take such action as may be necessary to avoid an accident to be framed, in the *alternative* to a charge of negligent driving.

In the present case, to the charge of negligent driving, a charge of failure to take such action as may be necessary to avoid an accident, has been tacked on. On the facts of this case, there could not have been any doubts in the mind of the prosecution as to the offence which the accused had committed. It is therefore, not clear as to why a charge of failure to take such action, as may be necessary to avoid an accident was added to the charge of negligent driving. It is our view that in the present case the accused cannot be found guilty of both negligent driving and failing to take such an action as may be necessary to avoid an accident.

Police officers are, we find, still filing plaints without a due regard to the above principles that have been repeatedly expressed by this Court causing confusion to accused persons and misleading Magistrates to making wrong orders. Magistrates should also be alert to such failures by the police, and see that when they charge the accused, he is charged on a properly drawn up charge sheet.

The conviction and sentence on the first count is affirmed. But the conviction on the second count is set aside. The fine on the second count will be remitted to the accused-appellant if it has been already paid.

MALCOLM PERERA, J.— I agree.

Order varied.