

1961

*Present* : Sinnetamby, J., and Tambiah, J.THE QUEEN *v.* K. SIRIWARDENE *et al.**S. C. 4-7—D. C. (Criminal) Colombo, 1998/N**Criminal Procedure Code—Section 184—“Same transaction”—Misjoinder of charges—Illegality.*

Ten persons were charged on different counts with housebreaking in respect of two different houses, viz. premises Nos. 570 and 953. In respect of premises No. 570 the 1st accused was not charged with any offence, and in respect of premises No. 953 the 3rd accused was not charged with any offence, but, nevertheless, all ten accused were joined in one indictment.

*Held*, that there was a misjoinder of charges. The mere fact that count 1 of the indictment stated that the offences were committed in the course of the same transaction could not cure the defect when in point of fact the evidence did not disclose that they were so committed in the course of the same transaction.

*Held further*, that a misjoinder of charges is an illegality and not an irregularity capable of being cured.

**A**PPEAL from a judgment of the District Court, Colombo.

*M. M. Kumarakulasingham*, for the 4th accused-appellant.

3rd, 6th and 8th accused-appellants in person.

*S. S. Wijesinha*, Crown Counsel, for the Attorney-General.

February 15, 1961. SINNETAMBY, J.—

There were ten accused in this case and on counts 2 to 5 of the indictment the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th accused were charged with committing offences relating to an act of house-breaking which was committed in respect of premises No. 570, Pathiragoda. On counts 6 to 10 of the indictment the 1st, 2nd, 4th, 5th, 8th, 9th and 10th accused were charged with offences relating to an act of house-breaking in respect of premises No. 953, Wattegedera. It will thus be seen that in respect of premises No. 570, the 1st accused is not charged with any offence and in respect of premises No. 953 the 3rd accused is not charged with having committed any offence, but, nevertheless, all ten accused have been joined in one indictment. Count 1 relates to all the accused and it is suggested that they, in the course of the same transaction, did commit house-breaking by entering into house No. 570, Pathiragoda, and also house No. 953, Wattegedera.

Objection is taken to the charges set out in the indictment on the ground that there is a misjoinder of charges. This objection does not appear to have been taken on behalf of the accused in the lower Court, but the learned District Judge himself has discussed it in his judgment. It must be stated that some of the accused were unrepresented.

The question that now arises for our consideration is whether this misjoinder amounts to an illegality which will render all proceedings void or whether it is an irregularity which can be cured.

Learned Crown Counsel sought to support the indictment on the footing that section 184 of the Criminal Procedure Code permitted the joinder of different offences provided they are committed in the course of the same transaction. But, as was pointed out in the case of *Jonklaas v. Somadasa*<sup>1</sup>, community of purpose and continuity of action are essential elements necessary to link together different acts so as to form one transaction. In this particular case the accused in respect of one transaction are different to the accused in respect of the other transaction. In this case the 1st accused, according to the indictment, was not a party to the other act of house-breaking, though all the others were charged with having taken part in both acts. It will thus be seen that it cannot be said that all the accused acted jointly in respect of both acts of house-breaking and section 184 therefore will not apply.

In the subsequent case of *Cooray v. Dias*<sup>2</sup> it was held that the mere fact that the indictment states that the offences were committed in the course of the same transaction will not cure the defect if in point of fact the evidence does not disclose that they were so committed in the course of the same transaction. That case, as in the case of *Subrahmaniam Ayyar v. King-Emperor*<sup>3</sup>, held that a misjoinder of charges is an illegality and not an irregularity capable of being cured.

In our opinion, in this case, there was a misjoinder of charges—the learned District Judge, I may say, was also of the same opinion—and it is a defect which cannot be cured. The proceedings, therefore, are illegal and the convictions are quashed. The case will go back for retrial before another Judge. The Crown may take such steps as they may be advised to in regard to the indictment.

TAMBIAH, J.—I agree.

*Convictions quashed.*

<sup>1</sup> (1942) 43 N. L. R. 284.

<sup>2</sup> 56 N. L. R. 234.

<sup>3</sup> I. L. R. 25 Madras 61.