1968 *Present :* **Pandita-Gunawardene, J.**

RAMASAMY *et al.*, Appellants, *and* GUNARATNE, Respondent

S.C. 521-526/68—M. C. Gampola, 8978

Criminal procedure—Magistrate's Court—Joinder of charges—Trial of indictable offence together with offences triable summarily—Omission to assume jurisdiction under s. 152 (3) of Criminal Procedure Code—Illegality—Criminal Procedure Code, ss 152 (3), 180 (1), 425.

Where a number of offences alleged to have been committed in the course of one and the same transaction are tried together summarily by a Magistrate, but one of those offences is an indictable offence, the joinder of the indictable offence with the offences triable summarily vitiates the entire proceedings *ab initio*. In such a case, the failure of the Magistrate to assume summary jurisdiction under section 152 (3) of the Criminal Procedure Code is an illegality which is not curable by section 425 of the Criminal Procedure Code.

[1](*1967) 71 N. L. R. 88.* [2](*1968*)*71 N. L. R. 93.*
[3](*1968*) *71 N. L. R. 233 at 237.*

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

N. Satyendra, for the accused-appellants.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 16, 1968. PANDITA-GUNAWARDENE, J.—

The appellants were charged and convicted in the Magistrate's Court of Gampola on the following counts :—

(1) that they on 10.11.67 at Black Forest Estate, Pussellawa were members of an unlawful assembly, the common object of which was to voluntarily cause hurt to Murhu Vellayan of South Delta Group and thereby committed an offence punishable under Section 140 of the Penal Code, Cap. 19 R.L.E.C.

(2) at the time and place aforesaid and in the course of the same transaction as set out in Count 1 above, the accused were all armed with deadly weapons, to wit, knives and clubs while being members of the said unlawful assembly and thereby committed an offence punishable under Section 141 of the Penal Code, Cap. 19 R.L.E.C.

(3) that all the accused being members of the said unlawful assembly while being armed with deadly weapons, did use violence in the prosecution of the said common object of the said unlawful assembly as set out in Count 1 and thereby committed an offence punishable under Section 145 of the Penal Code, Cap. 19 R.L.E.C.

(4) at the same transaction as set out in Counts 1 to 3 above, the above-named 1 to 3 accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group with a sharp cutting instrument, to wit, a pruning knife and thereby committed an offence punishable under Section 315 of the Penal Code, read with Section 32 of Cap. 19 R.L.E.C.

(5) at the time and place aforesaid and in the course of the same transaction as set out in Counts 1 and 3 above, the 4th and 5th accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group, Pussellawa, with clubs and thereby committed an offence punishable under Section 314 read with Section 32 of Cap. 19 R.L.E.C.

(6) at the time and place aforesaid and in the course of the same transaction as set out in Counts 1 to 3 above, the 6th accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group, Pussellawa by kicking at the abdomen and thereby committing an offence punishable under Section 314 of the Penal Code, Cap. 19 R.L.E.C.

The third count sets out an offence under Section 145 of the Penal Code. It is an offence triable by the District Court and not one in respect of which the Magistrate's Court had jurisdiction to try. Learned Counsel for the Appellants contends that the entire proceedings are tainted with illegality and therefore the convictions and sentences must be quashed.

The facts upon which the charges were brought are as follows :—On 10th November 1967, Vellayan, the Supervisor in Black Forest Estate, accompanied by one Nagalingam, was walking along a road in the Estate ; they were met by the appellants who obstructed them ; the appellants attacked Vellayan ; the first appellant is said to have cut Vellayan with a knife whilst the others struck him with clubs ; one of the appellants kicked him ; as a result of this assualt, Vellayan sustained injuries. They were however not of a serious or grievous nature as would appear from the Medico-Legal report, P1. The two knife injuries were skin deep, one on the back of the left wrist and the other on the inner aspect of the left knee. The other injuries were minor contusions and abrasions and they were on the right and left arms.

The charges against the appellants are based on facts relating to one incident. The joinder of the charges has been by virtue of Section 180(1) of the Criminal Procedure Code which provides " 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 ". It has been urged that as Count 3 discloses an offence not summarily triable by the Magistrate, the trial was bad in law and the proceedings are *ab initio* vitiated. It is manifest that Count 3—the offence of rioting—is an offence which the Magistrate had no jurisdiction to try and the trial upon that charge is illegal and is a nullity.

The question to which I have to address myself is whether it is permissible for me to quash the conviction and sentence on Count 3 and proceed to consider the remaining Counts which are properly triable by the Magistrate. Learned Counsel for the Appellants argues that that is a course not open to me. It is submitted that the facts in this case relate to one transaction ; that charges inclusive of Count 3 are based on one incident of assault upon Vellayan ; that the joinder of the charges has been for the reason that the offences were committed in the course of one and the same transaction ; and that it has been one trial on all the

chargos. It has been said, and with much force, that the Magistrate could not commence trial in this case in view of Count 3, a count which he was not competent to try.

The learned Magistrate has apparently proceeded to try the appellants in the erroneous belief that all the offences were triable by him as Magistrate. In the proceedings of 11th January 1968, after the evidence of Vellayan had been led, the learned Magistrate has said " In view of this witness's evidence, it is not necessary to act under Section 152 (3) of the Criminal Procedure Code. I proceed to charge the accused and try them on the powers vested in me as Magistrate without assumption of jurisdiction ". Had the learned Magistrate taken the trouble to refer to the first schedule to the Criminal Procedure Code, he would have seen that Count 3—an offence under Section 145 of the Penal Code—is clearly one which is not triable by him as Magistrate. What the learned Magistrate should have done was to have adopted the procedure laid down in Section 152 (3) of the Criminal Procedure Code. Section 152 (3) states " Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of opinion that such offence may properly be tried summarily, he may try the same summarily following the procedure laid down in Chapter XVIII and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose ".

In the case of *Madar Lebbe. v Kiri Banda at al.*[1] it has been held—I am quoting from the headnote—" There is no objection to a Police Magistrate applying Section 152(3) of the Criminal Procedure Code to a case where an accused charged with several offences, some of which are triable by the Police Court and others are not, provided he inflicts no higher punishment than he has ordinary jurisdiction to impose ". The facts of that case as reported are as follows :—the charges against the accused were for offences under Sections 140, 144, 146 and 439 of the Penal Code. The Magistrate proceeded to try the accused summarily in his capacity as District Judge, invoking the provisions of Section 152 (3) of the Criminal Procedure Code. Section 140 discloses an offence which the Magistrate had jurisdiction to try as Magistrate and the sentence imposed on that count was one of six months' rigorous imprisonment, which was within the powers of the Magistrate to impose. The sentence passed for the offence under Section 144 was two years' rigorous imprisonment, plus a fine of Rs. 2,500/- which clearly exceeded the punitive jurisdiction of a District Court, (*vide* Section 14 of the C.P.C.) where the maximum fine is Rs. 1,000/-. The sentence on that count was therefore varied by reducing the fine to Rs. 1,000/-. De Sampayo, J (agreeing with Wood Renton, C.J. and Ennis, J) in the course of his judgment (*ibid.* at page 379) said " If the offence is one which is triable by the Police Court, the Police Magistrate has jurisdiction without any reference to Section 152(3) of the Criminal Procedure Code, and if he arrogates to himself higher punitive

[1] *(1915) 18 N. L. R. 376 (Full Bench).*

powers by purporting to act under that provision, the infliction of any punishment beyond the Police Court limit does not by itself vitiate a conviction, but is in my opinion an irregularity which may be cured as regards the sentence by the interference of the Supreme Court in appeal or in revision. Mr. Bawa, for the appellants, does not seriously contest this point, but he strenuously argues that where an accused is charged in the same proceedings with several offences, some of which are triable summarily by the Police Court and other are not, Section 152(3) is not applicable at all, and that if for the purpose of trying the latter offences summarily the Police Magistrate gives himself jurisdiction under that Section, a conviction for all or any of the offences is wholly bad ". . . . . "I do not think that this reasoning is sound ". . . . . " In my opinion there is no objection to a Police Magistrate applying Section 152(3) to a case where several offences of two descriptions of gravity are concerned, provided of course he inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose ".

The position in this case is that although among the offences was one which the Magistrate was not empowered to try summarily as Magistrate, the Magistrate in the mistaken belief that they were all offences which he could have tried as Magistrate, proceeded to trial. It is, in my opinion, not a case of an irregularity which is curable by Section 425 of the Criminal Procedure Code. Section 425 enacts that " Subject to the provisions herein before contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—

(*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial in any inquiry or other proceedings under this Code, or

(*b*) . . . . . .

(*c*) . . . . . .

unless such error, omission, irregularity, or want has occasioned a failure of justice."

The Magistrate's Court was certainly not a Court of competent jurisdiction in respect of Count 3, an offence under Section 145 of the Penal Code. The failure on the part of the Magistrate to act under the terms of Section 152(3) of the Criminal Procedure Code is therefore an illegality which is incurable.

Neither the researches of Counsel nor my own into this aspect of the matter has resulted in the discovery of any authority for the proposition that in circumstances such as are present here, it is permissible to separate the illegal trial of the offence under Count 3 from the trial of the remaining counts ; to quash the proceedings in respect of Count 3 ; and consider the remaining summarily triable counts. It would appear that the basic principle which militates against such a course is that the

trial by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences which have been joined together under Section 180(1) as forming part of the same transaction. It would seem to me that the case of *Madar Lebbe v. Kiri Banda* [1] lays down the procedure to be adopted by Magistrates in cases where some of the offences are triable summarily by a Magistrate and others are not. In such cases, the Magistrate is required to adopt the procedure laid down in Section 152 (3) of the Criminal Procedure Code, "provided of course he inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose".

The trial in this case has not been in accordance with the law and is therefore illegal. The convictions and sentences are hereby quashed.

Convictions quashed.