1967 *Present :* Siva Supramaniam, J.

S. WIMALASENA *et al.*, Appellants, *and* INSPECTOR OF POLICE, HAMBANTOTA, Respondent

S. C. 1440–1442/66—M. C. Hambantota, 52779

Criminal procedure—Joinder of charges and accused persons—Scope—Meaning of cognate offences—Alternative charges—Conviction permissible only in respect of one of them—Common intention—Proof—Criminal Procedure Code, ss. 180 (1), 181—Penal Code, ss. 32, 369, 394, 396, 413—Evidence Ordinance, s. 114 (a).

(i) The question of misjoinder of accused persons should be considered as at the time of accusation and not on the evidence as found at the conclusion of the trial.

(ii) After an article was suspended to have been stolen by a person breaking into a house, the 1st accused was in possession of the stolen article on the following day and attempted to dispose of it.

Held, that a charge of voluntarily assisting in disposing of stolen property could be joined against the accused as an alternative to a charge of dishonest retention of stolen property and also that these alternative charges could be combined with charges of house-breaking and theft. The joinder of the charges was permissible under section 181 of the Criminal Procedure Code inasmuch as the facts alleged in the present case could equally support any one of the several charges.

"While the illustration under section 181 shows that the different offences contemplated in the section are cognate offences, the illustration itself is not exhaustive of the cognate offences with which an accused person could be charged. An offence under section 396 of the Penal Code is one which is cognate to an offence under section 394 of the Code."

Where there are alternative charges, the accused can be convicted and sentenced only in respect of one of them.

(iii) Mere presence of an accused person is not sufficient to establish common intention within the meaning of section 32 of the Penal Code.

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

E. R. S. R. Coomaraswamy, with *W. M. S. Boralessa*, for the 1st and 2nd accused-appellants.

J. W. Subasinghe, for the 3rd accused-appellant.

Sunil de Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 26, 1967. SIVA SUPRAMANIAM, J.—

The three appellants were charged on four counts as follows :—

"(1) That, at Sooriya Wewa, between 22nd and 23rd May 1966, they did commit house-breaking by entering into the Radio room of the River Valleys Development Board in order to commit theft and thereby committed an offence punishable under S. 443 of the Penal Code.

(2) That at the same time and place aforesaid and in the course of the same transaction they did commit theft of a spare motor wheel bearing No. Y. S. H. 1895 valued at Rs. 500 of lorry No. 24 Sri 1394 and thereby committed an offence punishable under S. 369 of the Penal Code.

(3) That they did on 23rd May 1966 at Kumbukwewa dishonestly receive or retain the wheel referred to in count (2) knowing or having reason to believe the same to be stolen property and thereby committed an offence under S. 394 of the Penal Code.

(4) In the alternative to count (3), they did on 23rd May 1966 at Kumbukwewa voluntarily assist in disposing the wheel referred to in count (2) knowing or having reason to believe the same to be stolen property and thereby committed an offence punishable under S. 396 of the Penal Code.

The facts of the case, as found by the learned Magistrate, may be summarized as follows :—Abraham, the driver of lorry No. 24 Sri 1392, owned by the River Valleys Development Board, had left the spare wheel of the said lorry in the Radio room of the Board sometime prior to 22nd May 1966. One Gunapala who worked in the Radio room had been on duty from 6 a.m. to 12 noon on 22nd May 1966. At 12 noon when he closed the doors and windows of the room before going off-duty he saw the said wheel in the room. He handed over the keys of the room to another officer who was on duty from 1 p.m. At 6 p.m. that officer while going off-duty handed back the keys to Gunapala. On the morning of the 23rd May 1966, the room was opened again by Gunapala at 6 a.m. His attention was then drawn by one Gunadasa who also worked in the same room to the fact that one of the windows was open. At the same

time he noticed that the wheel was missing from the room. Abraham, from whom inquiry was made, stated that he had not removed it and a complaint was made to the Police regarding the loss.

At 10 p.m. on the same day, viz., 23rd May 1966, the 1st accused went to the house of one Albert, a motor van driver, who lived about six miles away from the Radio room from which the wheel had been stolen and offered it for sale to Albert. The 1st accused was accompanied by the 2nd and 3rd accused. Albert informed them that he could not examine the tyre then as it was dark and requested them to leave it behind and to call the next morning when he would make an offer after examining it. They left the tyre with Albert and received from him Rs. 10 for their expenses but they did not call the next day as promised.

On 25th May 1966 Police Constable Perera, who had been detailed to inquire into the complaint of theft, acting on certain information, went to the house of Albert at midnight and recovered the wheel. On a statement made by Albert, the three accused were arrested. Albert's evidence was corroborated by another witness Premadasa.

The 1st and 3rd accused did not give evidence. The 2nd accused gave evidence and denied any knowledge of the transaction and stated that he had been falsely implicated. His evidence was, however, rejected by the learned Magistrate.

All three accused were convicted of the charges contained in counts (1), (2) and (3) and each of them was sentenced to a term of six months' rigorous imprisonment on each count, the sentences to run concurrently. All of them have appealed.

The appeal has been pressed on two grounds :—

(1) that there was a misjoinder of accused and charges and the convictions should be quashed on that ground.

(2) that, in any event, the evidence did not warrant the conviction of the 2nd and 3rd accused.

The case for the prosecution was that all the accused acted in concert and consequently there was no misjoinder of the accused. The question of misjoinder should be considered as at the time of accusation and not on the evidence as found at the conclusion of the trial.

As regards the contention that there was a misjoinder of charges it was urged that a charge of voluntarily assisting in disposing of stolen property cannot be joined as an alternative to a charge of dishonest retention of stolen property and also that these alternative charges cannot be combined with charges of house-breaking and theft.

Counsel for the appellant relied strongly on the judgment of this Court in *The Queen v. Wijepala*[1]. In that case an accused was charged in the same indictment with the commission of the offence of theft of certain articles and, in the alternative, of retention and disposal of

[1] *(1962) 68 N. L. R. 344.*

stolen property. The facts of that case showed that the accused was found more than one year after the date of the alleged theft in possession of a gold chain which was one of the stolen articles and was concerned in a transaction involving a cheque leaf which had been torn from a cheque book which was another of the stolen articles. The possession was so long after the theft that no presumption could have been drawn against the accused under S. 114 (*a*) of the Evidence Ordinance. In order to establish the charge of theft the prosecution relied on certain evidence that about three months before the discovery of the loss of the articles the accused had been seen attempting to open an almirah in which the stolen articles had been kept. The evidence, however, showed that the almirah had not in fact been opened by the accused on that occasion. There was no connection at all between the evidence relating to the theft and the evidence relating to finding the accused in possession of the gold chain or the transaction involving the cheque leaf. They were three independent "transactions". It was held that the charges could not be joined under S. 180 (1) of the Criminal Procedure Code as the alleged offences were not committed in the course of the same transaction and that S. 181 was not applicable as the evidence relevant to the two alternative counts was quite distinct from that which related to the charge of theft.

In the instant case, however, the facts are quite different. The alleged theft took place on the 22nd May 1966 and the 1st accused was proved to have been in possession of the stolen article and to have attempted to dispose of it on the following day. It was submitted by Crown Counsel that the joinder of the charges was lawful under S. 181 of the Criminal Procedure Code.

That section provides as follows :—

"If a single act of 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.....

Illustration : A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust, and cheating."

In the case of *The King v. Piyasena*[1] Soertsz J. said: "This section postulates a case in which a doubt arises from the nature of the fact or series of facts and not from a failure to appreciate the value of unambiguous facts or from an inaccurate view of the position in law arising from those facts." On the facts established in the case under consideration by him, the learned Judge held that S. 181 had no application.

[1] *(1942) 44 N. L. R. 58.*

Sohoni (Commentaries on the Code of Criminal Procedure of India, 14th edition) while commenting on the section of the Indian Code, corresponding to S. 181 of our Code states at page 494 "The doubts for which the section seeks to provide are doubts as to what inferences will be drawn from the evidence if believed. The doubt which of several offences the facts proved will constitute must arise from the very nature of the acts of which it is intended to offer evidence."

In the instant case the prosecution relied on the following facts :—

(*a*) That there was a theft of the wheel in question between 12 noon on 22nd May 1966 and 6 a.m. on 23rd May 1966 from the Radio room.

(*b*) That the 1st accused accompanied by the 2nd and 3rd accused took the said wheel to Abraham at 10 p.m. on the 23rd May.

(*c*) That the 1st accused offered to sell the said wheel to Abraham.

(*d*) That the accused left the wheel in the custody of Abraham and,

(*e*) The Police recovered the wheel from Abraham.

The position of the prosecution was that while it was permissible for the Court to draw certain presumptions under S. 114 (*a*) of the Evidence Ordinance the facts themselves were of such a nature that it was doubtful which of the several offences set out in counts 1–4 those facts constituted. From the fact of recent possession after the theft, in the absence of a reasonable explanation, the Court was entitled to presume that the accused were the thieves or that they received or retained the wheel in question knowing or having reason to believe that it was a stolen article. The fact that the wheel had been left by the accused in the custody of Abraham and was found by the Police with Abraham could have led to the inference that the accused had voluntarily assisted in the disposal of the stolen article.

While the illustration under S. 181 shows that the different offences contemplated in the section are cognate offences, the illustration itself is not exhaustive of the cognate offences with which an accused person could be charged. An offence under S. 396 of the Penal Code is one which is cognate to an offence under S. 394 of the Code.

In *The Queen v. Vellasamy* [1] Basnayake C.J. said that in order that S. 181 of the Criminal Procedure Code may be applicable, "the facts must be such as would equally support any one of the several charges." The facts of the instant case answer this test. The joinder of the charges was therefore legal.

It was submitted on behalf of the 2nd and 3rd appellants that the evidence is not sufficient to establish that they were in possession of the

[1] *(1960) 63 N. L. R. 265 at page 271.*

stolen wheel. The learned Magistrate has set out his reasons for convicting the 2nd and 3rd appellants on counts 1, 2, and 3 as follows :—

> "The 2nd and 3rd accused were seen in the company of the 1st accused who was in possession of P1 on the night of 23.5.66. The 2nd and 3rd accused had not given any explanation as to their presence. In the absence of any such explanation one cannot escape from the conclusion that they were jointly engaged with the 1st accused in the commission of these offences."

The prosecution apparently relied on S. 32 of the Penal Code to bring home the offences against the 2nd and 3rd accused. It has been repeatedly held by this Court that the mere presence of an accused is not sufficient to establish common intention. On the evidence led it was not possible to draw a presumption against the 2nd or 3rd accused under S. 114 (*a*) of the Evidence Ordinance. It is only if the prosecution succeeded in establishing conclusively that the 2nd and 3rd accused were in possession of the stolen article that the question of a reasonable explanation by the accused would have arisen for consideration. The 2nd and 3rd accused are accordingly entitled to an acquittal.

The facts proved against the 1st accused were not seriously disputed in appeal. The question however arises as to whether on the evidence the accused could have been convicted on all the counts 1–3 and sentenced in respect of each of them. In view of the fact that the 1st accused was in possession of the stolen article soon after the theft and he failed to give a reasonable explanation for such possession it was open to the Court under S. 114 (*a*) of the Evidence Ordinance to presume that the 1st accused was either the thief or had received the wheel knowing it to be stolen. If the presumption is drawn that the accused is the thief and is found guilty and convicted under S. 369 of the Penal Code, the occasion to draw the alternative presumption that he received the wheel knowing it to be stolen will not arise and he should not therefore be convicted in addition under S. 394 of the Code. Gour (Penal Law of India, 7th edition) in commenting on the corresponding section of the Indian Code states at page 1913 :—"Where the Court on evidence in the case comes to the conclusion that the accused is a direct participator in the theft, there is no question of his receiving stolen property. The two offences are distinct and a person proved to have committed theft cannot be convicted for receiving the stolen property". At page 2164 he states :—"But there is nothing against his being tried for the two offences, but his conviction must be only for one offence, the accused being then acquitted of the other, unless the Court elects to convict him in the alternative".

In view of the conviction of the 1st accused under S. 369 of the Code, his conviction under S. 394 must be set aside.

Learned Counsel for the appellants also submitted that the evidence does not warrant the conviction of the 1st accused on the charge of house-breaking under count (1). I agree with that submission. Although

the evidence of Gunapala disclosed that he found one window open when he entered the Radio room on the morning of 23rd May, there was no other circumstance which led to a necessary inference that the person or persons who stole the wheel had entered the room or taken the wheel through that window. The officer who was on duty from 1 p.m. till 6 p.m. on the 22nd May was not called as a witness and one cannot exclude the possibility that the wheel was stolen while the office was open during that period. The Police Officer stated that when he examined the window there was no lock on it. There was no evidence that that window had a lock at the time the room was closed on the evening of the 22nd May or that it was, in fact, locked.

The conviction of the 1st appellant on count (1) cannot therefore stand.

In the result I set aside the convictions and sentences passed on the 2nd and 3rd appellants on all counts and acquit them. I also set aside the convictions and sentences passed on counts 1 and 3 on the 1st appellant. I affirm the conviction of the 1st appellant on count 2. Since the 1st appellant has been acquitted on the charge of house-breaking I substitute for the sentence of six months' rigorous imprisonment passed on count 2 on the 1st appellant a sentence of 4 months' rigorous imprisonment.

Conviction of the 1st appellant affirmed on count 2 only.

Appeals of the 2nd and 3rd appellants allowed.