[FULL BENCH.]

1918.

Present: Bertram C.J., Ennis and Shaw JJ.

THE KING *v.* VALLAYAN SITTAMBARAM.

70—D. C. (Crim.) Kandy, 2,884.

Indictment—Particulars of offences explained to accused under s. 155, Criminal Procedure Code—Different charges framed in the indictment—Is it illegal or irregular?—Right of accused to make unsworn statement at the trial—Accused brought from India on a warrant under the Fugitive Offenders Act—Trial of accused on charges not stated in the warrant—Misappropriation of moneys collected from several persons for payment to a particular person—One charge in respect of total sum collected.

Per FULL COURT.—A prisoner may, if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box. Where a District Judge refused to allow the prisoner to make an unsworn statement, it was held that the irregularity was of such a nature as necessarily to cause a failure of justice.

Per BERTRAM C.J. and ENNIS J. (SHAW J. *dissentiente.*)—The Attorney-General may frame a charge in respect of any offence disclosed at the preliminary inquiry before a Police Magistrate, though particulars of the offence were not explained to the accused at the commencement of the inquiry under section 155 of the Criminal Procedure Code.

SHAW J.—The Attorney-General has no power to indict the accused in respect of any offence with which he has not been charged under section 155, unless such offence is included in the original offence with which he was charged.

A District Court is not bound to accept and proceed upon any indictment presented by the Attorney-General without regard to whether it is authorized by law or not. "There having been no magisterial inquiry into the offences charged in the indictment, the indictment should, in my opinion, have been quashed."

BERTRAM C.J.—It is open to the Attorney-General, if he thinks such a course appropriate, to instruct the Police Magistrate before committing a case for trial to explain to the accused the nature of any offence on which he contemplates indicting him, and to afford him an opportunity of making any statement under section 155, or of cross-examining any witnesses on the depositions already taken, or of tendering new witnesses on his own account.

Even though the Magistrate may not think it necessary formally to explain to the accused any fresh offence which may incidentally be disclosed in the course of the inquiry, and in respect of which it is possible that a specific charge may ultimately be preferred, yet it is open to him, and in appropriate cases he ought, if the facts constituting the alleged offence were not before the accused when he made his statement under section 155, to interrogate him under

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section 295 with reference to these facts, and thus afford him an opportunity of giving any explanation with regard to them. This interrogation of the accused under section 295 is obligatory upon the Magistrate (see section 155 (3)), and should be administered, not with the object of investigating the facts, but in the interests of the accused. It is not an ordeal through which the accused must pass, but a privilege to which he is entitled. One of the things which the Magistrate may well bear in mind in the course of this interrogation is the fact that allegations have been made against the accused in the course of the inquiry which may conceivably be made the subject of a count in the indictment. He may well say to the accused: "Do you wish to make any statement as to this or that point?"

Per BERTRAM C.J. (points not reserved for the Full Court):—

(1) Where a person collects a sum of money from various persons, to pay the total sum so collected to a particular person, and misappropriates the sum so collected, it is competent to the Crown to prefer a single charge in respect of the total amount so appropriated; it is not necessary to treat the misappropriation of each single subscription as a separate offence, and to lay separate charges in respect of each subscription.

(2) The trial of a prisoner who was brought to Ceylon on a warrant under the Fugitive Offenders Act (from India) need not be restricted to the charge contained in the warrant.

THE facts are set out in the judgment of the Chief Justice.

Bawa, K.C., and *Arulanandan*, for the accused, appellant.

Garvin, S.-G., and *De Saram, C.C.*, for the Crown.

Cur. adv. vult.

August 2, 1918. BERTRAM C.J.—

The accused in this case was the manager of what is known as a "sittu" club, and the original complaint which was instituted against him was a general complaint of misappropriation of the funds of the club. It described the terms on which the members subscribed, and proceeded: "Segu Meedin became entitled to draw the third month's collection, Ahamadu the fourth, Maradai the fifth. No other lots were drawn, because none of these three were paid. The accused has bolted to the Coast. I contributed Rs. 240. I have not been paid that sum or any part of it. Accused has gone away with all the stakes. I charge him with criminal breach of trust," and moved for a warrant under the Fugitive Offenders Act. The complaint thus comprised four charges. But the warrant under the Fugitive Offenders Act, which was issued in consequence of the complaint, was confined to the case of the complainant himself, and charged him with "being a stakeholder of a 'sittu' club, and entrusted with Rs. 240, amount subscribed by one A. Kadiravail of Katukele, Kandy, did commit criminal breach of trust in respect of the same." The offence charged in this warrant was the only offence explained to the accused at the preliminary magisterial inquiry.

The facts were as follows. The accused was the manager or the stakeholder of the club. There were eleven shares, each share involving a subscription of Rs. 40 a month. One member might hold more than one share. The total membership was, in fact, nine. One member, a woman named Maradai, held three shares. The enterprise was to continue for a period of eleven months. The total subscriptions were sold by auction. The member who undertook to accept the least subscriptions in respect of that month's subscriptions became entitled to the amount subscribed. Upon its being ascertained what discount the successful purchaser was prepared to give in respect of the total of Rs. 440, a corresponding reduction was made from the subscriptions due from each member, and he was called upon to pay this reduced amount. It was the duty of the accused to collect these reduced amounts and pay them over to the successful purchaser. The auction was held on the 15th of each month, and the accused was expected to get in the subscriptions and pay them over to the successful purchaser by the 20th. The purchaser thus receiving the monthly pool, of course, continued liable for the subsequent subscriptions, and it was a rule of the club that any purchaser thus receiving a month's pool should give the manager a promissory note for the amount of the subsequent subscriptions due from him. The accused himself drew the first month's subscriptions in full, as remuneration for his services. The second month's subscriptions were duly paid to the person entitled to it. With regard to the next three months, namely, the December, 1916, and January and February, 1917, subscriptions, were not, in fact, paid on the due date. The auctions for these three months fixed the amount of the subscriptions at Rs. 355, Rs. 365, and Rs. 370, respectively. I will take these three months seriatim.

(*a*) *The December Pool, Rs. 355.*—This was bought by one Segu Nadar (referred to in the complaint as Segu Meedin), on December 15, 1916. On December 20 he ought to have received this sum less his own subscription. It was not paid over to him, or to his brother, who was looking after his affairs in his absence. It is suggested on behalf of the accused that his withholding of the money was due to the fact that there was no one authorized to give him a discharge or to sign a promissory note for the subsequent subscriptions. Segu Nadar returned to the Island in 1917. He demanded his money from the accused. The accused asked him for the usual promissory note securing future subscriptions. Segu Nadar was ready to give the note on the money being produced. On the money not being produced, Segu Nadar sued the accused, not for the amount of the December pool, but for the return of all the subscriptions he had paid. He got judgment for this amount, and ultimately, many months afterwards, the judgment was discharged by the accused's uncle.

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(b) *The January Pool, Rs. 365.*—This was bought by one Ahamadu. He demanded payment on January 20, but was told he must produce a surety for future subscriptions. After some discussion, on some date between January 20 and February 27, he was paid the Rs. 365 less his own subscription, on his giving a promissory note for future subscriptions, which the accused insisted on his making out for the full amount of Rs. 440, and which the accused then proceeded to put in suit. Only Rs. 240 was in fact due, and on this amount being paid, Ahamadu was given a clean discharge.

(c) *The February Pool, Rs. 370.*—This was bought by a woman named Kandasamy Maradai. It was due on February 20, but had not been paid at the commencement of March. Kandasamy Maradai, hearing that the accused was preparing to go to India, presented a petition in the Police Court. The Magistrate referred her to her civil remedy. Negotiations ensued, and on March 14 the accused paid Kandasamy Maradai the amount due to her in respect of the pool, and a little over. The amount due to Kandasamy Maradai was Rs. 370 less Rs. 106, being her subscription due in respect of three shares which she held in the club, that is to say, Rs. 264 nett. The amount she was actually paid was Rs. 270. At the same time the accused gave her a promissory note for Rs. 200, being the balance of the agreed amount of the subscriptions she had already paid. After giving this note the accused went (or, as it is variously expressed in the evidence, " bolted " or " absconded ") to India. He was brought back on a warrant under the Fugitive Offenders Act above referred to, and when he came back he did not pay the note for Rs. 200.

The case against the accused was presented with great incompleteness and inexactitude. No serious attempt was made to show the actual amount that reached his hands. It was proved that he received certain subscriptions, and the Court was asked to "presume," and, in fact, did presume, that he did receive the rest. He was charged with misappropriating the total amount of the pool. This involves a charge of misappropriating, not only his own subscriptions, but also the subscriptions of the member to whom the pool was due, and who, of course, would not pay the subscription for that month. In spite of this incompleteness and inexactitude, it, nevertheless, appeared that in each of the months under consideration a certain amount of trust money was in the accused's hands, and that he did not pay this sum to the person entitled to it on the due date. The question for the District Court to consider was whether, in the circumstances of this case, he must be held to have committed criminal breach of trust in respect of the sums so received and not paid over.

The accused was tried on an indictment containing three counts, one in respect of each of the months referred to. The District Judge

found him guilty of criminal breach of trust on each count, and sentenced him to one year's rigorous imprisonment on each count, the sentences to run concurrently.

On appeal, a series of preliminary objections was taken on behalf of the accused, with which I will deal successively.

The first was that it was not competent to the Crown to charge a criminal breach of trust in respect of a monthly total, but that it was bound to lay the charge in respect of specific contributions paid by particular members. It was contended that the appropriation of each sigle subscription was a separate offence, and must be so charged. I do not so understand the position. If a person collects an aggregate sum from various sources under a trust to pay the total sum when so collected to a particular person or for a particular object, this total, or such proportion of it as he may succeed in collecting, when so collected, is a trust fund in his hands, and, if this sum or any part of it is dishonestly appropriated to the use of the person collecting it, it is competent to the Crown to prefer a single charge in respect of the amount so appropriated. I see no reason why on principle this should not be so, and it has been so decided in England with regard to the corresponding offence of embezzlement (see *Reg. v. Balls* [1]). In that case the prisoner was a member of a co-partnership. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the gross amount received during the previous week. During each of three several weeks the prisoner received various small sums and failed to account for them at the end of the week, but embezzled the money. It was held that he might be properly charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of small sums received during each week was admissible to show how these aggregates were made up.

Another objection had reference to the fact that the prisoner was brought from India under the Fugitive Offenders Act. He was tried on charges other than those specified in the warrant. It was suggested that by analogy of the principles observed in extradition proceedings the trial of the prisoner must be restricted to the charge contained in the warrant. There is, however, no ground for this contention. The principles which govern extradition proceedings and proceedings under the Fugitive Offenders Act are not the same. The matter will be found explained in *Pigott on Extradition, pages 301 and 302.*

The third objection is of a more substantial nature, and it was with reference to this objection that I directed the case to be referred to the Full Court. As explained above, the charge on which the

[1] *(1871) L. R. 1 C. C. R. 328.*

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inquiry proceeded was not the original complaint of the complainant, but the charge embodied in the warrant under the Fugitive Offenders Act. It was the offence thus specified which was explained to the accused, in pursuance of section 155 of the Criminal Procedure Code. The offences on which the accused was finally indicted, however, did not comprise this offence, but were the other three offences referred to in the original complaint. It was contended by Mr. Bawa, for the appellant, that it was not competent to the Crown to indict the appellant on these charges, and that the only offence on which he could be indicted was the offence the nature of which was explained to him at the commencement of the inquiry under section 155. He urged, therefore, that an indictment on these three charges was an absolute illegality, or. if it was not an illegality, it was, at least, an irregularity, and an irregularity of such a nature as to prejudice the accused on his trial. This contention raises very important questions, which go to the root of the procedure applicable in preliminary inquiries under the Criminal Procedure Code.

It often happens in charges of criminal breach of trust or other forms of fraud that an inquiry instituted into a specific charge naturally and properly travels beyond the actual facts charged. It may be necessary to go into other items than those under consideration, and into the whole system and course of business out of which the charge originates. In this case the inquiry necessarily involved an inquiry into the whole system of the " sittu " club in question, and, as the result of this inquiry, the Crown found it more appropriate to lay charges in respect of three matters other than that put to the accused at the commencement of the inquiry, but which were of the same nature and were the subject of the same evidence. In order to determine whether it was competent to prefer these charges, let us examine the course of procedure in these preliminary inquiries. The stages in these inquiries are as follows:—

(*a*) " When the accused is brought before the Court "—words which seem to imply, as nearly as possible, at the commencement of the inquiry—" it is the duty of the Court to explain the nature of the offence of which he is accused " (section 155). In the case of summary inquiries the Magistrate must frame a charge (section 187). In non-summary inquiries, however, no charge is actually framed until the indictment.

(*b*) Upon the nature of the offence being explained to him, the accused is invited to make a statement. In the case of a summary trial he is not invited to make a statement, but is called upon to plead.

(*c*) Before the conclusion of the inquiry, if the Magistrate thinks that there is a *primâ facie* case of guilt, it is his duty to interrogate the accused under section 295, so as to enable the accused to explain any circumstances that may have appeared in the evidence against him.

(*d*) There is no express provision with regard to non-summary inquiries corresponding to section 172, under which, at an actual trial, the Court may alter the charge or add any additional charge to that under investigation.

(*e*) Upon the conclusion of the inquiry, if the Magistrate finds "that there are sufficient grounds for committing the accused for trial," the record is forwarded to the Attorney-General, and the Attorney-General, if he thinks fit, directs the committal of the accused upon an indictment in which the formal charge is for the first time framed.

It will be observed that it is nowhere said that, in framing the indictment, the Attorney-General is restricted to the offence, the nature of which was explained to the prisoner at the commencement of the inquiry. On the contrary, it appears from sections 178-181 that charges may be framed in various combinations. Three offences of the same kind committed within twelve months may be combined in the same indictment (section 179). A series of acts may be so connected together in one transaction as to constitute more than one offence; the acts alleged may constitute an offence falling within two or more separate definitions. Certain acts which themselves constitute offences may when combined constitute a different offence (section 180). So also, under section 181, a single act or a series of acts may be of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. The Code contemplates that it shall be open to the Attorney-General to frame the charges in the indictment accordingly. But it does not appear, when he can effectively do this, if he is restricted in his indictment to the actual offence explained to the accused at the commencement of the inquiry. It is said that the accused may suffer prejudice if he is indicted with an offence not explained to him at the inquiry, and with respect to which he is afforded no opportunity of making a statement provided for in section 155; but he is equally liable to be prejudiced if the Court adds a charge at his trial under section 172, and it is to be borne in mind that in any case the evidence tendered against him at his trial has been previously given at the inquiry in the form of depositions, of which he is cognizant.

The question is one not without difficulty, and as it is one with respect to which there is no express provision in the Code, it is one with regard to which, in accordance with section 6, we may legitimately have recourse to the principles of procedure in force in England.

In England, theoretically, not only the Crown, but any person is entitled to prefer an indictment before the Grand Jury. By the Vexatious Indictments Act, 1859, however, no bill or indictment can be presented in respect of the numerous offences comprised in that Act, unless the prosecutor has been bound over to prosecute, or

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unless the accused person has been committed for trial for the offence, or his trial has been ordered by a competent authority. Difficulties arose under that Act, owing to objections raised on behalf of prisoners that they had not been charged before the Magistrate with the precise offence stated in the indictment. It was accordingly provided by 30 and 31 Vict., c. 35, that the provisions of the Vexatious Indictments Act were not to prevent the presentment of an indictment containing a count for any of the offences mentioned in the Act, if the count was founded, in the opinion of the Court, upon the facts or evidence disclosed in the examination or depositions taken before the Magistrate in the presence of the person accused. Further, all jury trials in England are, with rare exceptions, in practice tried upon commitments from Magisterial Courts under the Indictable Offences Act, 1848, and connected Acts. It is the recognized practice in England that, whatever may be the charge on which the person to be indicted was originally charged or committed, it is open to the Crown to prefer a count in respect of any indictable offence disclosed by the depositions (see the case of *The Queen v. Brown* [1]) This principle is illustrated by the rules in force with regard to the use at the trial of depositions taken at the preliminary inquiry, when by reason of death, absence, or otherwise the deponent cannot be called. The Indictable Offences Act, 1848, section 17, prescribes the conditions under which these depositions may be used at the trial, and it has been held, " that the deposition is receivable only where the indictment is substantially for the same offence as that with which the defendant was charged before the Justices (*Rex v. Ledbetter* [2]). The charges, however, need not be identical. " The point is not whether the inquiry before the Magistrate was exactly the same as that before the Judge, but whether that inquiry was such that a full opportunity of cross-examination has been given to the party accused " (*per* Alverstone B. in *Rex v. Beeston* [3]).

I feel that grave inconvenience might be caused in the administration of justice in this country if any other rule were adopted, and if, in preferring charges as the result of preliminary inquiries, the Crown were confined to the offence specified by the Magistrate or some police authority at or before the commencement of the preliminary inquiry, or if the Crown could only prefer the appropriate charge as the result of directing a new inquiry altogether. I do not think, therefore, that it should be held that it was not open to the Crown in this case to present the charges preferred in the indictment.

While I am sensible, however, of the inconvenience which might result from the laying down of such a restrictive rule as that contended for, I am also sensible that inconvenience might in some cases result to the accused, if the principles which are in force in

[1] *(1895) 1 Q. B, 119.*

[2] *3 C. & K. 108.*

[3] *24 L. J. (M.C.) 5.*

England were applied, as all general principles can be applied, in an unreasonable and arbitrary manner. I would, however, draw attention to the fact that the Code is sufficiently elastic to afford the accused all possible facilities that may be necessary for his protection, and that it is the duty of Magistrates, and those who instruct them, to see that those facilities are in fact afforded.

(*a*) In the first place, there is nothing to prevent an inquiry being held into several offences together. If in the course of an inquiry fresh alleged offences come to light which are of such a nature that they may be appropriately embraced within the scope of that inquiry, there is no reason why the Magistrate, acting in pursuance of section 148 (*c*), should not explain the nature of these offences to the accused under section 155, give him an opportunity of making any statement, and proceed with the inquiry into the original offence and these offences concurrently. He is not bound to take this course. Facts may be deposed to which may simply be used as evidence of system, knowledge, or motive, and may never be made the subject of substantive charges at all. Whether he will deal with these facts as matters for action under section 155 is a matter within the discretion of the Magistrate.

(*b*) In the second place, if in the course of an inquiry another alleged offence comes to light, which is of such a nature that it cannot appropriately be investigated as part of the same inquiry, but ought to be made the subject of a separate inquiry, the Magistrate can proceed accordingly, and institute such a separate inquiry. It is also open to the Attorney-General, when the case is referred to him by the Magistrate, to direct this course to be taken. If, in fact, charges are embraced in the same preliminary inquiry of such a nature that this combination tends to obscure the issue or otherwise to embarrass the accused, I apprehend that this Court under its general powers would be competent to direct a new trial based upon a fresh preliminary inquiry.

(*c*) Further, it is open to the Attorney-General, if he thinks such a course appropriate, to instruct the Police Magistrate before committing a case for trial to explain to the accused the nature of any offence on which he contemplates indicting him, and to afford him an opportunity of making any statement under section 155, or of cross-examining any witnesses on the depositions already taken, or of tendering new witnesses on his own account. Finally, even though the Magistrate may not think it necessary formally to explain to the accused any fresh offence which may incidentally be disclosed in the course of the inquiry, and in respect of which it is possible that a specific charge may ultimately be preferred, yet it is open to him, and in appropriate cases he ought, if the facts constituting the alleged offence were not before the accused when he made his statement under section 155, to interrogate him under

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section 295 with reference to these facts, and thus afford him an opportunity of giving any explanation with regard to them. This interrogation of the accused under section 295 is obligatory upon the Magistrate (see section 155 (3), and should be administered), not with the object of investigating the facts, but in the interests of the accused. It is not an ordeal through which the accused must pass, but a privilege to which he is entitled. One of the things which the Magistrate may well bear in mind in the course of this interrogation is the fact that allegations have been made against the accused in the course of the inquiry which may conceivably be made the subject of a count in the indictment. He may well say to the accused: " Do you wish to make any statement as to this or that point ? "

Although the objection thus fails, yet, when the case went to trial before the District Judge, the point raised by this objection came up in another form, and here, I think, the point is fatal to the conviction. At the conclusion of the case for the Crown, when the accused was called upon for his defence, his counsel took the objection that his client had been prejudiced in his defence by the omission of the Magistrate to formulate the charges on which he was now indicted, and to record his statement under section 155. He said that his client was prepared to make his statement then, if he was given an opportunity, and tendered a statement in writing. The learned District Judge disallowed this application, holding that any statement made by the accused would have to be made in the witness box, subject to cross-examination. The learned Judge thus refused to the accused an opportunity of making an unsworn statement. It is, perhaps, not surprising that he did so. The effect of the change in the law of criminal procedure, which allows an accused person to give evidence on his own behalf, has been such that unsworn statements have now practically become obsolete. Moreover, the statement was not tendered as an unsworn statement to be made in lieu of formal sworn evidence, but as a special statement in lieu of the statement which ought to have been made in the Police Court. There is nothing, however, in the fact that the law now allows the prisoner to give evidence, to take from him the right which he previously enjoyed of making an unsworn statement. There is no provision on this subject one way or the other in the Code, and this is, therefore, another point on which we may have recourse to English procedure. The rules of English procedure are plain. The prisoner may still if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box, and on this analogy he has the same right in Ceylon. The action of the District Judge would, therefore, appear to be an irregularity, and an irregularity of such a nature as necessarily to cause a failure of justice, in that it necessarily prejudiced the defence of the accused. On these grounds, therefore, the appeal must be allowed.

There is another point of view from which this case may be regarded, and from this point of view it may be said that there was an irregularity. The Police Court proceedings were instituted by the complaint of Kadiravail, and Kadiravail's complaint comprised four charges. He charged, in fact, not only his own case, but the cases of the other three members, which were subsequently made the subject of the indictment. "After the lots were drawn Segu Meedin became entitled to draw the third month's collection, Ahamadu the fourth, Maradai the fifth. No other lots were drawn, because none of these was paid. The accused has bolted to the Coast. I contributed Rs. 240. I have not been paid that sum or any part of it. Accused has gone away with all the stakes."

The warrant under the Fugitive Offenders Act was issued with respect to Kadiravail's case alone. There was nothing wrong with this. It was quite competent to the Magistrate to choose one case for the purpose of the warrant. But the inquiry was an inquiry into the complaint of Kadiravail, and it was his duty, under section 155, to explain to the accused all the offences of which he was accused in the complaint. The Magistrate confined himself to explaining the single offence specified in the warrant. The accused thus had no opportunity of making a statement with regard to the other offences under section 155, although these offences were comprised in the complaint. From this point of view, therefore, there is an irregularity. Taken in itself, however, I do not think it would have been such an irregularity as to cause a failure of justice. But taken in conjunction with the refusal of the District Judge to allow the accused to make a statement at the trial, I think that it might be considered as an irregularity causing a failure of justice, and that on this ground the conviction might be set aside. It is enough, however, to say that the refusal of permission to make an unsworn statement at the trial is itself a sufficient irregularity for this purpose.

I have considered with reference to the facts proved in the case whether this is a case in which the Court ought to direct a new trial. The learned District Judge took a very strong view against the prisoner in the case. Mr. Bawa, on the other hand, pressed us very strongly to acquit the accused, urging that he had paid up more than he was ever proved to have received. The facts proved, though to a certain extent equivocal, do certainly lead to the impression, in this absence of some explanation by the accused, that he did not pay over the pools of December, January, and February, or such amount as he had collected, because he had not got the money available, and that the reason why he had not the money available was that he had used it for his own purposes. But we have not got the explanation of the accused; an explanation was tendered at the trial, but he was refused an opportunity of making that explanation. Under the circumstances, I do not think that it would be fair to put him to the expense of a fresh trial, more

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especially when one bears in mind the fact that, whatever may have been his original default, he appears to have done his best to make good all the sums for which he was responsible; that he has, in fact, satisfied the claims of the three persons in respect of whom the charges are brought; and that, in the case of another member who gave evidence at the trial, he surrendered the whole of his furniture in order to satisfy his claim. I, therefore, think that no new trial should be ordered, but that the accused should be discharged.

ENNIS J.—

Certain points of law in this appeal have been referred by my Lord the Chief Justice for decision by the Full Court.

For the purpose of the reference the facts are as follows. The accused was the secretary and stakeholder of a "sittu" club. There were eleven shares, and one member held three. The club was to continue for eleven months. For each share the holder was entitled once to receive the full amount of the subscriptions paid on the shares in one month. The particular shareholder to receive the monthly collection was decided by auction. The maximum subscription was taken to be Rs. 40 per share per month, total Rs. 440. The member who bid the smallest amount at the auction took the pool for that month. The contribution of each of the remaining shareholders being, for the month, the amount of the bid divided by eleven. These auctions took place on the 15th of each month, and it was the secretary's duty to collect and pay the amounts by the 20th of the month, taking from the successful bidder a promissory note for the payment of his shares in the subscriptions of the months yet to run.

The first auction was in September, 1916, and auctions continued month by month thereafter till February, 1917. In December one Saibo Marikar was the successful bidder, at Rs. 355; in January, Ana Mana Ahamadu, at Rs. 365; and in February, Maradai, wife of Manthai Kandasamy, at Rs. 370.

In March the accused left for India, and one Kadiravail complained to the Court that the accused had gone away with all the stakes. The Magistrate issued a warrant for his arrest, and the accused was brought back from India as a fugitive criminal.

Acting under the provisions of section 155 of the Criminal Procedure Code, the Magistrate informed the accused of the particulars of the offence with which he was charged as shown in the warrant, viz., of criminal breach of trust in respect of Rs. 240, money belonging to Kadiravail.

The Magistrate further informed the accused that he was prepared to hear any statement he might wish to make. Accused made a statement, which amounted merely to a denial that Kadiravail was a member of the club, a matter which turned out to be true, as the share was in the name of Kadiravail's wife.

The inquiry was proceeded with, and the case sent to the Attorney-General, who framed an indictment of three counts for criminal breach of trust in respect of the funds collected in December, January, and February. The accused was then committed for trial before the District Court. Towards the end of the trial counsel for the accused wished the accused to be allowed to make a statement, but this was refused. The accused was convicted, and he appealed.

It was urged for the appellant:—

(1) That the Attorney-General had no power to frame charges in respect of matters not within the scope of the Magistrate's inquiry, viz., criminal misappropriation of the money of Kadiravail.

(2) That the accused was materially prejudiced in his defence by this being done.

These two points have been referred to the Full Court.

On the first point, I am of opinion that the Attorney-General may frame a charge in respect of any offence disclosed at the inquiry. The object of the inquiry is to investigate the " accusation, " and the charge is to give the accused specific notice of the offence for which he will be tried (compare sections 155 and 167). Section 172 empowers the Court of trial to alter any charge, to substitute one charge for another, or to add a new charge, at any time before judgment is pronounced. In my opinion this provision shows that the trial is to be concluded in respect of the offence or offences which the evidence discloses, and is not limited to offences which the accusation originally disclosed. The rule in England appears to be similar (*Queen v. Brown*[1]).

With regard to the second point, section 171 provides that no error or omission in the charge in stating the offence or the required particulars shall be regarded in any stage of the case as material, unless the accused was misled by the error or omission; section 173 gives power to stay a trial should the accused be prejudiced in his defence by an alteration of charge; and section 425 provides that no error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial shall be a ground for altering or revising a judgment on appeal, unless such error, omission, or irregularity has occasioned a failure of justice.

Sections 171 and 173 show certain kinds of error or omission which may occasion a failure of justice, *viz.*, errors or omissions by which the accused has been misled or prejudiced in his defence. In my opinion it is impossible to say that the accused has not been prejudiced by having no opportunity during the inquiry of making a statement with regard to moneys contributed by members other than Kadiravail, coupled with the subsequent refusal of the

[1] *(1895) 1 Q. B. 119, at Page 127.*

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Trial Judge to allow him to make a statement. The consequence has been that no statement by the accused on the real points against him was available, and he wished to make such a statement before the conclusion of the trial. If no objection had been taken at the trial, it would probably have been possible to hold that he had not been prejudiced; but when he had something to say, which he was not allowed to say, because he did not wish to say it on oath, he may have been prejudiced. I may add that, in my opinion, section 155 of the Code is so worded as to show that it was intended that an accused should be allowed to make a statement, not on oath, if he so wishes. I would accordingly hold in favour of the appellant on the second point reserved.

SHAW J.—

The accused-appellant was brought before the Magistrate from India upon an extradition warrant charging that he "being stakeholder of a 'sittu' club, and entrusted with Rs. 240, being the amount subscribed by one A. Kadiravail of Katukele, Kandy, did commit criminal breach of trust in respect of the same."

The Magistrate explained to him from the warrant the particulars of the offence with which he was charged, and addressed him as provided by section 155 of the Criminal Procedure Code. The accused then made the following statement: "Complainant was not a member of my 'sittu' club. He did not pay me money, and I did not issue any receipts to him. I am not indebted to him, therefore I am not guilty. No witnesses." The Magistrate then proceeded with the inquiry under chapter XVI. of the Criminal Procedure Code.

The accused was the manager of a "sittu" club, and it was in respect of his conduct as such manager that the charge of dishonest misappropriation of the money of Kadiravail was made.

In the course of the inquiry evidence was given by other members of the "sittu" club, who had bought certain of the pools, to the effect that they had had difficulties in getting the money due to them from the accused. This evidence was admissible under sections 14 and 15 of the Evidence Ordinance, on a charge of misappropriating the money of Kadiravail, as showing the intention of the accused and negativing good faith on his part.

At the conclusion of the inquiry the record was forwarded to the Attorney-General, under the provisions of section 157 of the Code. The Attorney-General then settled the indictment upon which, with a few immaterial alterations subsequently made, the accused was charged, and directed the commitment of the accused to the District Court.

The indictment dropped altogether the charge of misappropriating the money of Kadiravail, which, for several reasons that I need not particularize, could not be supported on the evidence given at the

inquiry, and charged him in three counts with having on or about December 20, 1916, January 20, 1917, and February 20, 1917, respectively, committed criminal breaches of trust in respect of certain specified sums of money, entrusted to him in his capacity of stakeholder or manager of the club, to be paid to Meera Saibo Marikar, Ana Mana Ahamadu, and Kandasamy Maradai. These persons were members of the club, who had bought the pools for December, 1916, and January and February, 1917, and had experienced difficulty in getting the amounts of their pool from the accused.

The District Judge at the trial found the accused guilty on all the three counts of the indictment, and sentenced him to one year's rigorous imprisonment on each count, the sentences to run concurrently.

Numerous objections, both of law and on the facts, are taken to the conviction. Of these, I need only examine one, which appears to me to conclude the appeal. This objection is that there has been no magisterial inquiry into the offences in respect of which the accused has been indicted and convicted, and that these offences were not stated or explained to him when before the Magistrate, as provided for by section 155 of the Code, and he has been given no opportunity to make an unsworn statement regarding them, as the section provides. The objection is, in my opinion, fatal to this conviction. The intention of the Criminal Procedure Code appears to me clearly to be that, before a person shall be put on trial for a criminal offence before the District or Supreme Court, there shall be an inquiry before a Magistrate into the alleged offence, conducted as the Code provides.

The only exception to this is provided for in section 385, namely, that the Attorney-General may exhibit to the Supreme Court informations for all purposes for which His Majesty's Attorney-General for England may exhibit informations on behalf of the Crown in the High Court of Judicature. This provision has, however, no bearing on the present case, and I need not discuss to what offences such informations apply.

It was contended on behalf of the Crown that it is open to the Attorney-General in Ceylon, after a magisterial inquiry has been held, to indict the accused for any offence disclosed in the evidence given before the Magistrate, although the inquiry may primarily have been with regard to a different offence, and even one of an entirely different character. The English law, as laid down in *Rex v. Baker*,[1] was cited as an authority for the proposition.

I am unable to agree with the contention. The English procedure is governed by the English common law and statutes, and differs in many material particulars from the procedure provided by our Code. By the English common law it was permissible for any one to

[1] *(1895) 1 Q. B. 119.*

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prefer an indictment before a Grand Jury against another person for any indictable offence, without any committal for trial by a Justice, and, indeed, without any inquiry before a Justice at all. This right has now been limited by the Vexatious Indictments Act, 1859, and other statutes, but in many cases is still in existence.

Even supposing that the English procedure can have any application here, the case of *Rex v. Brown*[1] does not in any way appear to support the Solicitor-General's argument. *Rex v. Brown*[1] was a case of an indictment on a charge falling within the Vexatious Indictments Act, and the question arose whether it was permissible for the prosecutor to add a count for an offence not within the Act, and in respect of which the accused had not been charged when before the Magistrates who held the inquiry. The count was, however, of a cognate nature to, and based on, the same facts as the charge originally made, and to which the Act applied, and was in respect of an offence that was disclosed in the evidence given at the inquiry.

The reason the count for the new charge was held good was that by section 1 of 30 and 31 Vict., c. 35, it is provided that the provisions of section 1 of the Vexatious Indictments Act are not to " extend or be applicable to prevent the presentment to or finding by a Grand Jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the said count or counts be founded (in the opinion of the Court on or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examination or depositions taken before a Justice of the Peace. "

The fact that it was thought necessary to pass this statute to allow a new charge to be added that was disclosed in the evidence at the inquiry seems to show that in cases where indictments could not under the Act be presented to the Grand Jury as of right, it was at least doubtful whether such a count could be added without express legislative authority.

The procedure prescribed by the English Indictable Offences Act, 1848, and the provisions of our Code as to procedure at inquiries, differ in very substantial particulars, and the provisions of section 155 of our Code provide valuable safeguards for the assistance of a less well-educated and less intelligent class of prisoners than those who generally come before the English Courts.

The provision contained in the Indictable Offences Act is that at the conclusion of the evidence for the prosecution the accused shall be addressed as follows: " Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial. "

[1] *(1895) I. Q. B. 119. at page 127.*

The provision in the Ceylon Code is: " When the accused appears or is brought before the Police Court, the Magistrate shall state to him the nature of the offence of which he is accused, giving such particulars as are necessary to explain the same," and then ask for his statement, which, by another provision of the law, the prosecution is obliged to put in evidence at the trial, which is not the case in England.

The object of our provision is not merely to give the accused an opportunity to promptly make an unsworn statement when confronted with the charge, which becomes evidence at the trial, but to direct his attention to the points on which he should cross-examine the witnesses and direct any evidence he may desire to call. What is the use of explaining to him an accusation of house-breaking if he is aftewards to be indicted, on the evidence given at the inquiry, on a charge of murder? What useful purpose is gained by stating to him the nature of the offence of rape, if the charge may be subsequently dropped and he may be indicted for stealing the property of the girl's father? In my opinion, if the evidence at the inquiry discloses some new offence, or some offence of a more serious nature than that with which the accused has been charged, the Magistrate should frame a new or additional charge, and again proceed under section 155, and, if necessary, recall the witnesses for cross-examination by the accused, and this is the practice commonly adopted. If, when the record is sent to the Attorney-General at the conclusion of the inquiry, the Attorney-General is of opinion that the accused ought to be indicted for some other and different offence that is disclosed in the evidence, and which is not included in the offence explained to the accused under section 155, he ought to send back the case to the Magistrate under the provisions of chapter XXXV. of the Code with instructions for further proceedings. In my opinion he has no power to indict the accused in respect of any offence with which he has not been charged under section 155, unless such offence is included in the original offence with which he was so charged. The power given to this Court of trial, by section 172 of the Code, to alter an indictment or charge and to substitute one charge for another in an indictment, or to add a new charge to an indictment, is submitted as showing that it is not always necessary that the accused should be confronted with the actual offence for which he is indicted at the magisterial inquiry. It is, however, entirely discretionary in the Court to act under this section, and it is not, in my opinion, intended to authorize an entirely new charge for a different offence to that which has been inquired into, but is intended to apply to cases where the facts given in evidence in proof of the offence inquired into constitute a different offence in law to that charged in the indictment.

There having been no magisterial inquiry into the offences charged in the indictment, the indictment should, in my opinion, have been quashed and the conviction should be set aside.

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I am quite unable to assent to the argument of the Solicitor-General that a District Court is bound to accept and proceed upon any indictment presented by the Attorney-General, without regard to whether it is authorized by law or not.

One other objection to the conviction, I may mention, which was not taken in the petition of appeal, but became apparent at the hearing, namely, that the Judge at the trial refused to allow the accused to make a statement unless he did so from the witness box and subjected himself to cross-examination. Our Code is silent as to whether or not it is open to an accused to make an unsworn statement at the trial.

Section 6 of the Code, however, provides that, as regards matters of criminal procedure for which no special provision is made, the law relating to criminal procedure for the time being in force in England shall be applied, so far as the same shall not conflict or be inconsistent with the Code and can be made auxilliary thereto.

In England it has always been open for an accused to make an unsworn statement at the trial, should he desire to do so, and this right still exists, notwithstanding the right of an accused to give evidence on oath under the provisions of the Criminal Evidence Act, 1898. In my opinion the accused has a similar right here, and the refusal to allow him to do so is also good ground for setting the conviction aside.

Conviction quashed and accused discharged.