1954 *Present :* **Sansoni J.**

B. S. COORAY *et al.*, Appellants, *and* DIAS (S. I. Police), Respondent

S. C. 105-106—M. C. Colombo South, 42,527

Joinder of accused—" Same transaction "—Criminal Procedure Code, ss. 148 (1) (b), 184, 187 (1)—Excise Ordinance (Cap. 42), ss. 17, 43 (g), 44.

When two or more persons are accused of different offences committed in the same transaction within the meaning of section 184 of the Criminal Procedure Code, it is not necessary that the charge must expressly state that the offences were committed in the same transaction.

But where the charge is framed by Court under section 187 (1) of the Criminal Procedure Code without any prior evidence that the offences were committed in the course of the same transaction and exactly in terms of a police report which does not contain even an accusation that the offences were so connected, an accused person cannot be convicted of the offences if the evidence led at the trial does not prove that the offences were committed in the course of the same transaction.

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

First accused was charged with selling arrack in breach of section 17 of the Excise Ordinance. In the same proceedings first and second accused were charged with unlawful possession of arrack, punishable under section 44 of the Excise Ordinance. The trial court entered convictions on both the counts.

S. B. Lekamge, for the accused appellants.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 1, 1954. SANSONI J.—

A report under section 148 (1) (*b*) of the Criminal Procedure Code (Cap. 16) was filed in the Magistrate's Court by a Sub-Inspector of Police on 25th June, 1952, in the following terms :—" I, P. D. P. A. Liyanage,

H. Q. S. I. Police, Mirihana, in terms of section 148 (1) (*b*) of the Criminal Procedure Code (Chapter 16) hereby report to the Court that :—(1) B. Simon Cooray of No. 70/1, Station Road, Nugegoda, (2) N. A. Jayasinghe of No. 70/1, Station Road, Nugegoda, did on the 16th day of June, 1952, at Nugegoda within the jurisdiction of this Court the above-named 1st accused did in contravention of section 17 of the Excise Ordinance (Chapter 42) sell to A. Wijegunawardene of Nugegoda an excisable article to wit : Arrack, without a licence granted in that behalf by the Government Agent and thereby committed an offence punishable under section 43 (*g*) of the Excise Ordinance (Chapter 42) of the R. L. E. (2) At the same time and place aforesaid the above-named 1st and 2nd accused did have in their possession an Excisable Article to wit : about ½ bottle (8 drams) of unlawfully manufactured arrack without lawful authority and thereby committed an offence punishable under section 44 of the Excise Ordinance (Chapter 42) of the R. L. E.". The two accused were present in Court at the time on Police Bail and the Magistrate framed charges against them under section 187 (1) of the Code in terms which are exactly similar to those appearing in the report. The accused severally pleaded " Not guilty " and the trial eventually took place on 11th May, 1953, one counsel appearing for both accused.

It appeared from the evidence of the prosecution witnesses that a decoy was sent by a Sub-Inspector of Police to the 1st accused's hotel with instructions to buy arrack. The Sub-Inspector shortly afterwards followed him to the hotel through the back door. They saw the 1st accused seated on a bed in a room, and the 2nd accused standing near that bed ; the decoy was standing there with a glass containing arrack in his hand, and there was a bottle containing arrack on a teapoy in the room. Under the bed was found another bottle containing arrack. The defence evidence was to the effect that there was no sale, that the bottle alleged to have been under the bed was not in fact there, that the decoy never entered the premises, and that the Police Officers entered the room and assaulted the 1st accused. The 2nd accused admitted that he lived in that hotel but he denied that he was in the room at that particular time. It was proved by analysis that the bottle on the teapoy contained Government Arrack while the bottle under the bed contained unlawfully manufactured arrack. It was also proved by production of the householder's list that the chief occupant of these premises is the 1st accused. Among the names of 14 other occupants in that list was the name of the 2nd accused who was described as a servant of the 1st accused.

The Magistrate accepted the evidence of the prosecution witnesses which also proved that the one rupee note which had been given to the decoy by the Sub-Inspector prior to the decoy going to this hotel was found in the 1st accused's waist. The decoy's evidence was to the effect that the 1st accused had sold him the arrack which was in the glass.

The Magistrate convicted the 1st accused on the charge of sale, and both accused on the charge of possession of the bottle of arrack found under the bed. His reason for convicting both accused of possession was that they were in joint possession of that bottle. It seems to me

that as the 1st accused was the chief occupier of the premises it is he alone who, in the circumstances of this case, can be said to have been in possession of the bottle which was found under the bed on which he was seated. Crown Counsel, quite rightly in my opinion, did not seek to support the conviction of the 2nd accused and he should have been acquitted.

The appellants' counsel did not challenge the Magistrate's findings of fact but he submitted that the conviction could not stand because of the irregularity of the charge framed, which thereby rendered the proceedings invalid. He submitted (1) that there was no allegation that the two offences were committed in the course of the same transaction, and for this submission he relied on section 184 of the Code; (2) that there was no justification for the charges of sale and possession being joined inasmuch as they could not be said to have been committed in the course of the same transaction. I think the answer to the first submission is to be found in section 184 itself. The section refers to cases " when more persons than one are *accused* of jointly committing the same offences or of different offences committed in the same transaction ", and provides that " they may be *charged* and tried together or separately as the Court thinks fit ". The words " accused " and " charged " clearly do not mean the same thing. Illustration (*a*) reads " A and B are accused of the same murder. A and B may be indicted and tried together for the murder ". The other illustrations to this section also make this distinction clear.

In the case of *Emperor v. Datto Hanmant Shahapurker* [1], Batty J. said :— " Section 239 (which corresponds to section 184 of the Ceylon Code) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered the test ". The Privy Council in the case of *Choukhani v. King Emperor* [2] expressly approved of the judgment of Batty J., and I might add that in the case decided by the Privy Council there was no statement in the charge as to the transaction being the same, and no criticism was made regarding this omission. I gather from the judgment of Hearne J. in the case of *The King v. Sunderam* [3] that the learned Judge took the same view. Lord Wright says in the Privy Council judgment :—" The clause (that is, section 239 of the Indian Code) deals with three matters : accusation, charge, trial ". The first objection must therefore be deemed unsound.

I turn now to the second objection taken by the appellants' counsel. As I have said, the proceedings started with a report filed under section 148 (1) (*b*), and upon that report the Magistrate framed the charge under section 187 (1). A similar course would be taken in India by a Magistrate

[1] *I. L. R. 30 Bombay 49.* [2] *(1938) L. J. P. C. 35.*

[3] *(1943) 44 N. L. R. 227, at page 230.*

in warrant cases, where he would frame a charge under section 254. When such a procedure is adopted by the Magistrate, and he is clearly acting regularly in so doing, he does not necessarily record evidence bearing on the circumstances under which the different offences were committed. If it turns out later that the offences were not committed in the course of the same transaction where the accusation in the report was that they did, would the joinder of the charges be irregular ? I think not. Take again a case where a Magistrate records evidence prior to framing the charge and he forms the opinion that several offences may be joined in the charge as forming one transaction. It may later transpire at the trial that the offences were not committed in the course of one transaction. " The opinion of the Magistrate may be wrong in law as to there being a same transaction, or the evidence which led him to think *prima facie* that this condition existed may be insufficient or may eventually be falsified " (*per* Lord Wright). Even then the proceedings would not be illegal or invalid, for the relevant point of time is that of the accusation and not of the eventual verdict, but if there is prejudice or embarrassment caused to the accused this Court will interfere and quash the proceedings. But in this particular case which I have now to decide there was not, in the report under section 148 (1) (*b*), even an accusation that the two offences were committed in the course of the same transaction, nor was any evidence led prior to the framing of the charge from which the Magistrate could have formed the opinion, even wrongly, that the two offences were so connected.

The joinder of the two offences can, therefore, be justified only if the evidence led at the trial proved that they were committed in the course of the same transaction : if it did not, the infringement of section 184 would constitute an illegality as distinguished from an irregularity. In my opinion the two offences should not have been joined in one charge. There is no connection whatever between them because the 2nd accused had nothing to do with the sale. " We think the foundation for the procedure in that section is the association of two persons concurring from start to finish to attain the same end ", said Batty J. in the judgment I have already referred to. In *Gopal Raghunath v. Emperor* [1] Baker J. said :—" So long as the accusation against all the accused persons is that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled ". Wijeyewardene J. in *Jonklaas v. Somadasa* [2] where an examination of section 184 was necessary, said " In discussing the meaning of this word (transaction) in the corresponding sections of the Indian Code of Criminal Procedure the High Courts of India have held that the substantial test for determining whether several offences are committed in the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action ".

I would therefore allow the appeal of the 1st accused also and quash the proceedings.

Appeals allowed.

[1] *(1929) A. I. R. Bombay 128.*

[2] *(1942) 43 N. L. R. 284.*