1962 *Present:* **Sansoni, J., and Sinnetamby, J.**

G. PIYADASA, Appellant, *and* THE QUEEN, Respondent

S. C. 109/1961—D. C. (Crim.) Hambantota, 40/28342

Indictment—Joinder of charges—Consolidation, in one indictment, of offences inquired into in separate non-summary proceedings—Illegality—Criminal Procedure Code, ss. 165F, 165F (1A), 425.

It is illegal for the Crown to join in one indictment charges which formed the subject of separate non-summary proceedings terminating in separate commitments.

Three separate non-summary inquiries were held against the same accused person in respect of three cases of cheating. In each of the three cases the Magistrate committed the accused to stand his trial in the District Court, but the Attorney-General drew up one indictment containing the counts inquired into in the three cases.

Held, that the indictment was not valid and the District Judge had no jurisdiction to try the accused on it. In such a case, the error strikes at the root of jurisdiction and cannot, therefore, be cured under section 425 of the Criminal Procedure Code.

The King v. Michael Fernando (1951) 52 N. L. R. 571 not followed.

APPEAL from a judgment of the District Court, Hambantota.

Colvin R. de Silva, with *M. L. de Silva* and *D. S. Wijesinghe*, for the Accused-Appellant.

E. H. C. Jayetileke, Crown Counsel, for the Crown.

Cur. adv. vult.

March 2, 1962. SANSONI, J.—

The accused has appealed against his conviction on all six counts of the indictment framed against him. Counts (1) and (2) charge him with cheating in respect of a document, and abetting the uttering of that

document which he knew to be forged. Counts (3) and (4), (5) and (6) contain two other sets of similar charges in respect of two other documents.

The point pressed on his behalf at the hearing before us was that the Attorney-General had no power to draw up one indictment containing the six counts, because one non-summary inquiry in Magistrate's Court case No. 28342 was held in respect of only counts (1) and (2), while counts (3) and (4) relate to offences which were inquired into in case No. 28343, and counts (5) and (6) relate to offences which were inquired into in case No. 28345. In each of the three cases the Magistrate committed the accused to stand his trial in the District Court, but the Attorney-General drew up one indictment containing six counts relating to the six offences inquired into in the three cases.

The only question we have to decide is whether a trial held upon such an indictment is valid. Crown Counsel supported the procedure adopted by referring us to the decision of Gratiaen, J. in *The King v. Michael Fernando* [1], where the learned Judge held that it was not illegal for the Crown to join in one indictment charges which had formed the subject of two separate non-summary proceedings terminating in separate commitments, though he also held that such a procedure could not be permitted in that case, because the effect of it was to supplement at the trial the insufficient evidence relied on in one proceeding by the evidence recorded in the other proceeding. The learned Judge gave no reason for his view that the Crown could join charges in that way.

The matter has, however, been further considered in two later decisions to which the learned Judge was a party, and we ought to follow them. In *Vythialingam v. The Queen* [2], Gunasekara, J. (Gratiaen, J. agreeing) held that an indictment can charge the accused only with offences alleged in the charges upon which they have been committed for trial, or offences of which they can be lawfully convicted upon a trial of those charges. That case was one where the offences inquired into were the offences for which the accused were indicted; but the particulars set out in the counts of the indictment were different from the particulars appearing in the charges into which the Magistrate inquired. Gunasekara, J. examined closely the provisions of the Criminal Procedure Code relating to inquiries and commitments, and he held that the Attorney-General had no power to draw up an indictment in that way.

The question came up again before Gratiaen, J. in *The Queen v. Thiagarajah* [3]. He held that the power of a Magistrate to commit under section 163, and the power of the Attorney-General to direct a committal under section 391, are both determined by the scope of the particular charges which formed the subject matter of the magisterial inquiry, and that the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

[1] *(1951) 52 N. L. R. 571.* [2] *(1953) 54 N. L. R. 345.*
[3] *(1955) 57 N. L. R. 58.*

These two decisions were given at a time when the Code did not contain the amendment made in 1956, and now to be found in section 165F (1A). By that amendment the Attorney-General has been empowered, subject to the provisions of the Code relating to the joinder of charges, to include in the indictment any charge in respect of any offence which is disclosed by the evidence taken by the Magistrate, notwithstanding that such charge may not have been read to the accused by the Magistrate. But the ground upon which those two decisions proceeded is important, and it is this—that the Attorney-General had acted *ultra vires*, and the indictments were therefore bad and should be quashed.

Coming now to the case before us, a similar test to that applied in those two cases must be applied, namely: Is the indictment upon which the trial proceeded one which the Attorney-General had the power to present to the District Court ? If he had no such power, the indictment was bad and the District Judge had no jurisdiction to try the accused on such an indictment.

The Attorney-General's power with regard to the presentation of indictments is a purely statutory power derived from section 165F. The principle is clear that each non-summary proceeding shall, if there is sufficient evidence to put the accused on his trial, be followed by a separate commitment and a separate indictment. There is no provision of the Code which authorises the Attorney-General to consolidate commitments and join together, in one indictment, counts relating to offences inquired into in separate non-summary proceedings. It follows that the Attorney-General in this case acted *ultra vires*, and the District Court was not a court of competent jurisdiction to try the accused on this particular indictment. It was not open to the Attorney-General to invent a new procedure or to give himself new powers, as he sought to do in this case. A valid indictment is a condition precedent to a valid trial.

Crown Counsel suggested that since the accused would not have been prejudiced by the course followed, we should not interfere with the conviction. This is not a case to which section 425 of the Code can apply, for that section presupposes that the court is a court of competent jurisdiction. An error which strikes at the root of jurisdiction can never be cured under section 425—see *Morarka v. The King* [1] decided by the Privy Council.

We therefore quash the conviction and set aside the sentence passed on the appellant.

SINNETAMBY, J.—I agree.

Conviction quashed.

[1] *A. I. R. (1948) P. C. 82.*