1928.

Present : Lyall Grant J.

PREMAWARDENE *v.* SIRIWARDENE *et al.*

344–344A—P. C. Balapitiya, 10,276.

Charge—Accused charged with criminal force, assault, criminal intimidation—Convicted of insult—Criminal Procedure Code, s. 181.

A person charged with having committed the offences of wrongful restraint, criminal force, criminal intimidation, and misconduct in public under sections 332, 343, 486, and 488, respectively, of the Penal Code cannot be convicted of insult under section 484 of the Penal Code without a specific charge being framed against him under the section.

APPEAL from a conviction by the Police Magistrate of Balapitiya. The two accused were charged with having wrongfully obstructed the complainant from proceeding in his bus and threatened to strike the complainant and thereby committing offences punishable under sections 332, 343, 486, and 488 of the Penal Code. The Magistrate, however, convicted the first accused of insult with intent to provoke a breach of the peace under section 484, and the second accused under sections 484 and 486.

De Zoysa, K.C. (with *Amarasekera*), for first accused, appellant.—The accused has been convicted of an offence with which he was not originally charged. All the possible offences with which the prosecution intended to charge the accused have been specifically referred to in the original charge. The present offence is a distinct one, and the Magistrate, before convicting him thereon, should have framed a fresh charge and given the accused an opportunity of meeting it.

Counsel cited (*1899*) *Koch's Reports, p. 33, and Dingirihami v. Adonchia.*[1]

Even if a fresh charge had been framed against the accused, the evidence in the case does not furnish all the elements necessary to constitute the offence of insult under section 484. There is no evidence that the accused's conduct was such as to cause the complainant to commit a breach of the peace or any other offence.

Counsel cited *Senanayake v. Don John,*[2] *Mataregawera v. Yaratenepi Unnanse*[3], *Waas v. Samaranayake*[4] and *Sabaratnam v. Perera.*[5]

Ranawake, for the second accused, appellant, urged the same points as above on behalf of the second accused in respect of the offence under section 484. The offence of criminal intimidation has not been made out; the actual threat used is not stated.

Counsel cited (*1899*) *Koch's Reports, p. 66*, and *Murukesu v. Karunakara.*[6]

Soertsz (with *Weerasinghe*), for complainant, respondent.—The convictions for insult are justified under sections 181 and 182 of the Criminal Procedure Code. The offence of insult was one of a series of acts committed in the course of one transaction. The accused can be convicted of any offence proved to have arisen out of these series of acts although not originally included in the charge.

As regards the offence of criminal intimidation, though the actual words used have not been referred to, the Magistrate was justified in inferring the nature of the threat used from the evidence.

November 6, 1928. LYALL GRANT J.—

The two accused in this case were charged with having, while in a state of drunkenness, wrongfully obstructed the complainant from proceeding in his bus, hauled the conductor from the bus, and threatened to strike the complainant, and thereby committing offences punishable under sections 332, 343, 486, and 488 of the Penal Code.

Section 332 refers to wrongful restraint, section 343 to assault or criminal force, section 486 deals with criminal intimidation, and section 488 with misconduct in public by a drunken person.

The Police Magistrate has not convicted the first accused of any of these offences, but he has convicted him of insult with intent to provoke a breach of the peace under section 484. He has convicted the second accused under sections 484 and 486. *Primâ facie*, the two accused have been convicted of offences with which they were not charged.

[1] (*1906*) *Lem. and Aser. 46.*
[2] (*1901*) *5 N. L. R. 22.*
[3] (*1914*) *2 Cr. Ap. Rep. 49.*
[4] (*1915*) *6 Bal. Notes 43.*
[5] (*1916*) *3 C. W. R. 120.*
[6] (*1923*) *2 T. C. L. R. 64.*

1928.

LYALL GRANT J.

Premawardene v. Siriwardene

It was argued for the complainant on appeal that this procedure was admissible under sections 181 and 182 of the Criminal Procedure Code ; section 181 provides :—

> " If a single act or 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 and in a trial before the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifying which one."

In the present case it is evident that the accused was charged with all the offences which it was thought that the facts which could be proved would be likely to constitute.

Section 181, it seems to me, is a section the application of which must be carefully limited, as an extended application would lead to results which would be very unfair to an accused person.

The instances given in the illustrations to the section are instances of offences of much the same character, offences which it is often exceedingly difficult to distinguish and which are punishable by much the same punishment.

It is obvious that the offence of insult is something entirely different from wrongful restraint or the use of criminal force. The offence under section 488 is also a totally different offence.

The only difficulty arises in regard to the question whether a person charged with committing the offence of criminal intimidation can reasonably be convicted of insult with intent to provoke a breach of the peace. The offence of criminal intimidation is defined in section 483. It consists in a threat of injury to a person with intent to cause alarm, or to cause him to do any act which he is not legally bound to do or to omit to do an act which he is legally entitled to do as a means of avoiding the execution of such threat.

It seems to me that the two offences are radically distinct and should be separately charged.

The convictions under section 484 must therefore be set aside. There remains the conviction of the second accused under section 486, and in order to decide whether this conviction is good it is necessary to examine the evidence.

The learned Police Magistrate has accepted the evidence for the prosecution and has rejected the evidence for the defence. In considering the weight that ought to be attached to these respective stories, one ought, I think, to take into account the fact that a considerable time elapsed between the date of the alleged occurrence

and the date on which a complaint was made. The offences were alleged to have been committed on February 21, but no complaint was made to the Court until March 2.

There is evidence that both the first and the second accused were the object of machinations by enemies or rivals. The first accused has been in Government service for twenty-five or six years and is a Vidane Arachchi and an Inquirer into Crimes. The second accused was a Patabendi Arachchi on probation at the time the charge was brought, and there is trustworthy evidence that the opposition to his appointment was pushed so far that on February 23 a question about it was asked in Legislative Council.

In regard to the direct evidence, the learned Police Magistrate has had the advantage of seing the witnesses, but I am bound to confess that a perusal of the written evidence leads me to the conclusion that the story of the defence is a more likely one than that of the prosecution.

I do not think it would be safe to convict the second accused on the evidence which has been led in the case.

Both appeals are therefore allowed and the accused acquitted.

Set aside.