1965 *Present :* **Alles, J.**

K. DON WILBERT, Appellant, *and* SUB-INSPECTOR OF POLICE, CHILAW, Respondent

S. C. 241/1965—M. C. Chilaw, 5252

Joinder of charges—Failure to aver that the offences were committed in the course of the same transaction—Effect—"Same transaction"—Criminal Procedure Code, ss. 178, 180 (1), 184—Motor Traffic Act (Cap. 203), ss. 151 (3), 161 (a) (iv), 214 (1) (a), 217 (2), 224.

(i) Where an accused person is charged at one trial with having committed two offences, an omission to aver in the charge that the second offence was committed in the course of the same transaction would not be fatal if in fact the evidence establishes that the two offences were committed in the course of the same transaction.

(ii) The accused-appellant was charged, under the Motor Traffic Act, on two counts : firstly, with driving a bus negligently and causing injury to a boy, and secondly, with failing to report the said accident to the Officer-in-Charge of the nearest Police Station. The evidence showed that, in spite of the accident, the accused did not stop the bus and that he drove off without informing the nearest Police Station.

Held, that both offences were committed by the same person in one series of acts so connected together as to form the same transaction within the meaning of section 180 (1) of the Criminal Procedure Code.

The Queen v. Wilegoda (60 N. L. R. 246) discussed.

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

A. Mahendrarajah, for the accused-appellant.

C. N. Goonewardene, Crown Counsel, with *A. N. Ratnayake,* Crown Counsel, for the complainant-respondent.

Cur. adv. vult.

July 9, 1965. ALLES, J.—

The accused in this case was charged on two counts : firstly, with driving vehicle No. IC 3490 in a negligent manner by doing one or more or all of the following negligent acts :

(*a*) By driving the said bus at an excessive speed,

(*b*) By driving the said bus without a proper control,

(*c*) By driving the said bus without a proper look-out,

(*d*) By driving the said bus without due care and proper precautions,

(*e*) By driving the said bus on the right side of the said highway,

(*f*) By driving the said bus without reasonable consideration for other persons using the said highway and thereby knocking down a pedestrian boy named W. Cyril Anthony of Pambala in breach of section 151 (3) read with section 214 (1) (*a*) of the Motor Traffic Act (Cap. 203) and thereby committing an offence punishable under section 217 (2) of the said Act ;

secondly, with having at the same time and place aforesaid driven the above said vehicle on the said highway and having met with an accident and thereby causing injury to the said Cyril Anthony, failing to report the said accident to the Officer-in-Charge of the nearest Police Station in breach of section 161 (1) (*a*) (iv) read with section 214 (1) (*a*) of the Motor Traffic Act and thereby committing an offence punishable under section 224 of the said Act.

Counsel for the appellant did not canvass the findings of fact but submitted that there was a misjoinder of charges since it was neither averred in the charge-sheet that the two offences were committed in the course of the same transaction nor in his submission did the facts establish that this was the case.

Under section 178 of the Criminal Procedure Code—

"For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 179, 180, 181, and 184, which said sections may be applied either severally or in combination."

Sections 179, 181, and 184 have no application to the facts of the present case and need not be considered. The joinder of the two charges can only be supported under section 180 (1) of the Code which is in the following terms :—

"If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment."

Although it was not averred that the second offence was committed in the course of the same transaction such an omission would not be fatal, if in fact the evidence establishes that the two offences were committed in the course of the same transaction. In *Choukhani v. Emperor* [1] the Privy Council expressly approved of the judgment of Batty, J. in *Emperor v. Datto Han mant Shahapurker* [2] that

"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."

[1] *1938 Cr. L. J. 452.* [2] *I. L. R. 30 Bombay 49.*

This principle has been accepted as part of our law—(vide *R. v. Sunderam*[1]; *Johardeen v. Ahmath*[2] and *Cooray v. Dias*[3]). The question whether a particular series of acts are so connected together as to form part of the same transaction must necessarily depend on the circumstances of each individual case.

The word 'transaction' has not been defined in the Criminal Procedure Code and the Courts both in India and Ceylon have endeavoured to lay down certain tests to be applied for the purpose of determining whether a particular series of acts formed part of the same transaction or not. In the case of *Jonklaas v. Somadasa*[4] Wijeyewardene, J. said:—

> "In discussing the meaning of this word in the corresponding section 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."

The test whether offences were committed in the course of the same transaction would depend on whether there was

> "....a *community of purpose and a continuity of action* which are regarded as essential elements necessary to link together different acts so as to form one and the same transaction."

This question has been considered in several decisions of our Courts. In *Weerakoon v. Mendis*[5] the facts were as follows:—

> "When the first accused accosted a lady passenger, an Inspector of Police, who was present, attempted to arrest him, and the accused ran away. A Muhandiram, who was in the company of the Inspector, gave chase, and the second accused, the father of the first, who came on the scene assaulted the Muhandiram. The first accused was charged with accosting, and the second with assaulting a public officer in the execution of his duty, in the same proceedings."

Jayewardene, A.J. in the course of the judgment said at p. 341:

> "Now, it cannot be said that this offence of accosting passenger ladies and the assault on the Muhandiram are offences committed in the same transaction. The offence of accosting was complete when the accused ran away from the place where the lady passengers were, and the assault on the Muhandiram by the second accused had no connection whatever with the offence of accosting the lady passengers by the first accused."

[1] *(1943) 44 N. L. R. 227 at 230.*
[2] *(1952) 55 N. L. R. 65.*
[3] *(1954) 56 N. L. R. 234 at 236.*
[4] *(1942) 43 N. L. R. 284.*
[5] *(1925) 27 N. L. R. 340.*

Again, in *Jonklaas v. Somadasa* (supra), where six accused were accused of committing mischief on two counts, Wijeyewardene, J. held on the facts of the case that the two offences were not committed in the course of the same transaction. In *Cooray v. Dias*[1] the two accused were charged with offences under the Excise Ordinance, the first accused with the sale of arrack, and both accused jointly with unlawful possession of arrack. The first accused was the proprietor of a hotel, and the Police sent a decoy with instructions to buy arrack. The decoy bought the arrack from the first accused, giving him a marked note, and the sale was witnessed by the Police officers. Shortly afterwards, the Sub-Inspector entered the hotel through a back door and saw the first accused seated on a bed and the second accused standing close by ; the decoy was standing there with a glass containing arrack, and there was a bottle containing arrack on a teapoy in the room. Under the bed there was another bottle containing arrack. The second accused admitted that he lived in the hotel and that he was a servant of the first accused. The Magistrate convicted both accused of possession on the footing that they were in joint possession of the bottle under the bed. In appeal it was held that, as the first accused was the chief occupier of the premises, it was he alone who, in the circumstances of the case, can be said to have been in possession of the bottle.

In the above cases, there were more than one accused and the joinder was sought to be supported under section 184 of the Criminal Procedure Code, but the principles applicable would be identical whether a series of acts are so connected as to form part of the same transaction under section 180 (1) of the Code in the case of one accused or whether more than one accused can be jointly charged with having committed offences in the course of the same transaction under section 184.

Counsel for the appellant submitted that on the facts of the present case it could not be established that the two offences were committed in the course of the same transaction. According to the evidence that has been accepted by the Magistrate, the injured boy, Cyril Anthony, was walking with one Michael Tissera, along the Chilaw-Negombo road towards Chilaw on the right side of the road. When they came near the Pambala tavern, bus No. IC 3490 driven by the accused at a fast speed had overtaken a car and in doing so had knocked against Anthony's left hand and the accused proceeded without stopping the bus. After this impact, Anthony had been thrown into a ditch. Since the accused did not stop after the accident, it was obviously never his intention to inform the authorities about the accident. In Counsel's submission, after the accident occurred in the course of which the boy, Cyril Anthony, was injured as a result of certain negligent acts of the accused, that transaction was complete and there was no connection between that transaction and the obligation cast on the driver of the motor vehicle to report the accident to the nearest Police Station in compliance with section 161 (*a*) (iv) of the Motor Traffic Act. Counsel further stressed

[1] *(1952) 56 N. L. R. 234.*

the fact that whereas section 151 relates to the culpability of the driver of a motor vehicle who drives such vehicle either under the influence of liquor or recklessly or negligently, section 161 only relates to the duty that is cast upon the driver of a motor vehicle to report to the nearest Police Station when an accident occurs and injury is caused to any person, animal, or property. There is no reference in section 161 to any culpability on the part of the driver and an accident may occur without any culpability being attributed to the driver at all. It is possible, however, to envisage a situation where there is a nexus between the negligent acts in consequence of which an accident occurs resulting in injury to person, animal, or property, and the obligation that is cast upon the driver of the vehicle to report to the nearest Police Station that such an accident had occured. The question, therefore, arises as to whether, in such circumstances, it could be said that both offences were committed by the same person in one series of acts so connected together as to form the same transaction. The wording of section 180 (1) is significant. There must be a series of acts (or omissions) and there must be a nexus between these various acts which would result in a completed transaction being presented as part of the prosecution case. It seems to me that on the facts of the present case, the joinder of the two offences can be justified under the provisions of section 180 (1) of the Code when the prosecution established the following facts :—

(*a*) that the accused was the driver of the motor vehicle ;
(*b*) that he was guilty of certain negligent acts ;
(*c*) that in consequence of his negligence, injury was caused to the boy, Cyril Anthony ;
(*d*) that an accident had taken place in the course of which such injury was caused ;
(*e*) that the accused did not stop his vehicle and drove off without informing the authorities ; and
(*f*) that the accused failed to give information of that accident to the nearest Police Station.

Mr. Mahendrarajah placed considerable reliance on the decision of the Court of Criminal Appeal in *Queen v. Wilegoda* [1], in support of his contention that in this case the offences were not committed in the course of the same transaction. In *Queen v. Wilegoda*, the two accused, husband and wife, were jointly charged with murder, and on the second count the husband alone was charged under section 198 of the Penal Code, in the course of the same transaction, with giving false evidence to the authorities about the alleged murder with the intention of screening the offender from legal punishment. The Court of Criminal Appeal held that on the facts as accepted by the Jury, the two offences were not committed in the course of the same transaction. By analogous reasoning, Counsel submitted that after the negligent acts which resulted in the injury to the boy were committed, the transaction was complete and that there was no nexus between these acts and the obligation cast on the driver to

[1] *(1957) 60 N. L. R. 246.*

inform the nearest Police Station of the accident. A close examination of the decision in *Queen v. Wilegoda* seems to indicate that the learned Chief Justice, in coming to the conclusion that the two offences were not committed in the course of the same transaction, was considerably influenced by an alleged concession on the part of the Crown at the trial that the two offences were separato transactions but could be properly joined. In the course of the judgment, tho learned Chief Justice says that "the learned Deputy Solicitor-General does not appear to have claimed that they were the same transaction . . . . . , In fact he appears to have stated to the trial Judge in the course of the argument that the acts charged in count 1 and the acts charged in count 2 constituted separate transactions, but that they could be joined." The learned Chief Justice then continues to say, quite rightly, that such a joinder is not warranted by the provisions of either section 180 (1) or section 184 of the Criminal Procedure Code.

According to the transcript of the argument in *Queen v. Wilegoda*, to which my attention has been drawn by Crown Counsel, it reads as follows :—

Court : Is it your position that the charges 1 and 2 are in the alternative ?

Counsel : In this particular case, having regard to the facts, there are *two separate transactions :* the causing of the death of the woman in the house and the carrying of the body or the disposal of the body into the lavatory 25 yards away.

Court : Should they not be charged in two separate cases if they are not in the same transaction ?

Counsel : My submission is they are *two offences* committed in the same transaction.

The reference therefore to two separate transactions earlier is obviously an error for two separate offences. Indeed, the Crown could not have maintained that the two offences were separate transactions because it was only on the basis of the same transaction that the two offences could properly be joined. Furthermore, at the trial, Counsel for the Crown supported his argument by citing authority for the proposition that the offence of murder and the offence of concealing evidence to screen an offender could properly be joined to form the same transaction— *Public Prosecutor v. Venkatamma* [1] ; *Ajog Narain v. Emperor* [2] ; and *Ghulam Mohammad v. Emperor* [3]. It is not clear whether these decisions were brought to the notice of the Court by Counsel who appeared at the hearing of the appeal, for, had this been done, the learned Chief Justice would not have been unaware of the true position advanced by the Crown at the argument before the trial Judge.

[1] *33 Cr. L. J. 814.* [2] *38 Cr. L. J. 193.*

[3] *44 Cr. L. J. 77.*

It is therefore difficult to resist the conclusion that, had the view of the Court of Criminal Appeal not been coloured by this erroneous submission on the part of the Crown, they might have held that the two offences were committed in the course of the same transaction. This was the view put forward by the Crown and accepted by the learned trial Judge when he allowed the application to amend the indictment.

In view of the above observations, with all respect to the eminent Judges who sat on the Court of Criminal Appeal, it is not out of place to consider whether one could take a view different to that taken by the Court of Criminal Appeal. The facts established in *Queen v. Wilegoda* were to the following effect :—

The deceased was employed as a cook for about two years under the two appellants and had about a month prior to her death left for her village about three miles away. On the evening of 21st January, she came to the house of one Loku Menike and informed her that she had been asked by the first appellant to return but she did not wish to go to the house at that time because the second appellant would reprimand her. On the following day, after her morning tea, she went to the house of the two appellants. The deceased was pregnant, and had told her mother that the first appellant was the father of the child. She was seen in the house of the appellants who were the only occupants of the house, at about 10 a.m. by a neighbour called Punchi Menike. At about 3 p.m. the same witness, Punchi Menike, heard the second appellant asking the first appellant to drag the deceased out. The second appellant was at that time armed with something similar to a rice-pounder. The second appellant then entered the kitchen and Punchi Menike heard her say, "Thota enna kivve kavda". To that the deceased replied, "I came because the master sent me a message." The witness then heard the sound of blows. Thereafter there was silence. It was the case for the prosecution that the injury which ultimately resulted in the death of the deceased took place at that time. The following morning the dead body of the deceased was found in the cadjan enclosure adjoining the lavatory of the appellants. There was a ligature around her neck; she had two injuries—one external, and the other internal. The former injury was post-mortem, and the latter was ante-mortem. The external injury was a constriction mark of a ligature round the neck, the internal injury was a contusion over the fundus of the uterus in front. She was carrying a foetus of seven months gestation. Death was due to shock from a contusion of a gravid uterus of seven months gestation. This injury was sufficient in the ordinary course of nature to cause death. At about 6.30 a.m. the first appellant made a statement to the Village Headman of Kuttapitiya that the deceased, who was told not to come to the house, had come there the previous evening at about 4 or 5 p.m. Although she was asked to go away, she sat on the bench in the firewood shed outside the kitchen. During the night too, she was in the shed. When the first appellant went to the lavatory in the morning, he saw her dead body near the lavatory with a rope round her neck. The first

appellant further suggested that the deceased had committed suicide because she was pregnant and because they were unwilling to take her into the house. It was the case for the prosecution, that after the deceased was assaulted in the kitchen, the two appellants had removed the body close to the lavatory and simulated a case of suicide ; that thereafter, the first appellant had gone to the Village Headman and made a false complaint with the object of screening the offenders.

On a consideration of the above facts, it seems to me that it was open to a Court to come to a conclusion that the series of acts commencing with the arrival of the deceased from the village on the 21st of January and culminating in the false statement made by the first appellant to the Village Headman on the morning of the 23rd of January were so connected together as to form the same transaction. In that view of the matter the joinder of the two charges at the time of the accusation, could not have been open to objection. It may turn out later in the course of the trial that the offences were not committed in the course of the same transaction, but where the accusation in the indictment was that they did, the joinder would be regular, for, the relevant point of time is that of the accusation, and not of the eventual verdict (vide the observations of Sansoni, J. in *Cooray v. Dias* (supra) at p. 237). As was stated by Baker J., in *Gopal Raghunath v. Emperor* [1],

> "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."

Applying that test to the facts in *Queen v. Wilegoda*, it seems to me that the accusation against the appellants was that they intended to carry out the single scheme of causing the death of the deceased and giving a false account to the authorities of the circumstances under which the deceased met with her death.

I am therefore of the view that the case of *Queen v. Wilegoda* does not support the submission of Counsel for the appellant that the two offences in the present case were not so connected together as to form part of the same transaction.

Since I have held in this case, that the two offences were committed in the course of the same transaction, the question whether a misjoinder of such charges amounts to an illegality and not an irregularity in accordance with the principle laid down in the Privy Council case of *Subramnia Ayyar v. Emperor* [2] is only of academic interest.

Finally, Crown Counsel brought to my notice the decision of the Privy Council in the case of *Queen v. Dharmasena* [3], where, following the decision in *Choukhani v. Emperor* (supra), it was held that

> ". . . . the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of

[1] *(1929) A. I. R. Bombay 128.* [2] *I. L. R. 25 Madras 61.*

[3] *(1950) 51 N. L. R. 481.*

the same transaction has been fulfilled is the time when the accusation is made and not when the trial is concluded and the result known. The charges . . . . have to be framed for better or worse at an early stage of the proceedings and would be paradoxical if it could not be determined until the end of the trial whether it was legal or illegal."

The question of misjoinder has been raised for the first time only in appeal. I am therefore of the view that the submission of Counsel for the appellant that there has been a misjoinder of charges is not tenable, and the appeal is dismissed.

Appeal dismissed.