[COURT OF CRIMINAL APPEAL.]

1950 *Present:* **Nagalingam J. (President), Gratiaen J. and Gunasekara J.**

THE KING *v.* M. E. A. COORAY *et al.*

APPEALS No. 1 OF 1950 AND No. 69 OF 1949 WITH APPLICATIONS No. 180 AND No. 181 OF 1949

S. C. 4—M. C. Colombo, 43,770

Court of Criminal Appeal—Conspiracy—Ingredients of offence—Agreement of accused prior to commission of intended criminal act—Essential ingredient—Abetment by conspiracy—Element of agreement is necessary—Abetment, by facilitation, of criminal breach of trust—Joinder of charges—Criminal Procedure Code, ss. 168 (2), 179, 184—Penal Code, ss. 100, 113A.

(i) Two accused were jointly indicted that they "did act together with a common purpose for or in committing an offence, to wit, criminal breach of trust . . . . .". The indictment did not, however, allege an "agreement" between them to "act together" in the manner and for the purpose specified in the indictment.

Held, that the indictment was bad in law. The commission of the offence of conspiracy is established within the meaning of section 113A of the Penal Code in one or the other of the following circumstances :—

(*a*) if two or more persons agree, with or without any previous concert or deliberation, to commit an offence or to abet an offence, or

(*b*) if two or more persons agree, with or without any previous concert or deliberation, to act together with a common purpose for or in committing or abetting an offence.

In either set of circumstances conspiracy consists in the agreement or confederacy to do some criminal act, whether it is done or not.

In order that persons may conspire together it is not necessary to prove that there should be direct communication between each and all. The words "with or without previous concert or deliberation" were advisedly introduced into the language of section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of "agreement" which needs to be proved is an agreement with a common design.

(ii) In order to establish the offence of "abetment of conspiracy" under section 100 of the Penal Code, *an agreement* is an essential prerequisite.

(iii) In regard to abetment, by facilitation, of the offence of criminal breach of trust, the liability of the alleged abettor to be jointly tried, under section 184 of the Criminal Procedure Code, with the principal offender is subject to his right to claim, under section 179, that not more than three charges of the same kind may be laid against him in the course of a single trial. This right, as far as the abettor is concerned, is not affected by the provisions of section 168 (2) of the Criminal Procedure Code.

APPEALS, with applications for leave to appeal, against two convictions in a trial before a Judge and Jury.

H. V. Perera, K.C., with *Colvin R. de Silva*, *M. M. Kumarakulasingham* and *G. Rajapakse*, for first accused appellant.

M. M. Kumarakulasingham, with *H. W. Jayewardene* and *K. C. de Silva*, for second accused appellant.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *R. A. Kannangara*, Crown Counsel, and *S. S. Wijesinha*, Crown Counsel, for the Crown.

Cur. adv. vult.

1—J. N. A 99093-1,041 (7/50)

May 25, 1950. GRATIAEN J.—

There are two accused in this case. They have appealed against convictions on charges of having committed serious offences in their respective capacities as officers holding key positions in the organisation of the Co-operative Movement in this country.

It is convenient at the outset to describe the procedure relating to the financing of the business of one particular Co-operative Society—namely, the Salpiti Korale Stores Societies Union Ltd.—in so far as is necessary for the purposes of the present appeal. This Union carried on its activities through the agency of three wholesale depots, including the Moratuwa Depot (of which D. S. Ranatunge was manager during the relevant period) and the Piliyandala Depot (of which the first accused's brother, Leo Cooray, was manager). The first accused was the President of the Working Committees of both these depots. He was also President of the Salpiti Korale Union which was the central organisation.

The Salpiti Korale Union (to which I shall hereafter refer as "the Union") required funds for the purpose of purchasing rice, currystuffs and other commodities for sale and distribution to its members through the depots. These funds were obtained from the Co-operative Central Bank (of which the second accused was the manager), a loan to the Union from this Bank (up to a sanctioned maximum of Rs. 75,000 at any point of time) on what is described as a "cash credit basis" having been arranged with the Directors of the Bank. The first accused was, at all relevant times, in addition to his other functions previously described, Vice-President of the Board of Directors of the Bank.

In order to meet the requirements of the Union and of similar institutions, the Bank operated on a special account, with overdraft facilities, in the Bank of Ceylon. Sums required by each Union from time to time would be advanced up to a sanctioned amount; the Union would utilise these advances to purchase stocks for its various Depots; these stocks would be sold to members at the Depots; and in due course the proceeds of sale would be paid in to the credit of the Union's "loan account" with the Co-operative Central Bank. The arrangement was that such payments should be made as far as possible in the form of cheques and money orders; cash deposits in excess of a total of Rs. 100 per day were apparently refused or, at any rate, discouraged owing to the inadequate facilities in the Bank for handling cash.

In or about April, 1948, it was discovered that thirty-five cheques which had been deposited with the Bank to the credit of the Union by or on behalf of the Moratuwa and the Piliyandala Depots on various dates between 23rd September, 1947, and 28th February, 1948, had either never been presented for payment at the Bank of Ceylon or (having been dishonoured on one or two occasions shortly after they had been deposited) not been re-presented for payment. Thirty-two cheques, all of them belonging to the former category, were "cash" cheques, drawn on the Pettah branch of the Bank of Ceylon by the first accused. The three remaining cheques, belonging to the second category, had been drawn by a man named E. J. Cooray who, like the Manager of the Piliyandala Depot, was a brother of the first accused. The aggregate

sum represented by these thirty-five cheques amounted to Rs. 161,576·93. After the discovery of the alleged fraud, all thirty-five cheques were presented for payment at the Bank of Ceylon but were dishonoured. In the meantime it was discovered that the books of the Co-operative Central Bank had been balanced on the assumption that the "value" of each of these allegedly worthless cheques had been properly credited in liquidation of the Union's indebtedness to the Bank.

The case for the Crown was that the transactions which I have described were all part of a scheme whereby the first accused, in his capacity as the President of the Union and of the two Depots which belonged to its organisation, had dishonestly converted to his own use cash collected from time to time by their respective Managers and intended to be credited to the Union's account with the Central Bank; that he had dishonestly substituted in the place of those sums of money a number of worthless cheques; and that he had procured the dishonest connivance of the second accused, as Manager of the Bank, to facilitate the commission of his fraud by "holding-up" these cheques instead of presenting them for payment in the ordinary way.

On the basis of these allegations both accused were jointly indicted before the Supreme Court and a special jury on the following counts:—

"1. That between the 1st May, 1947, and 30th April, 1948, at Colombo, both accused did act together with a common purpose for or in committing an offence, to wit, criminal breach of trust in respect of Rs. 161,576·93 belonging to the Salpiti Korale Stores Societies Union Ltd., which was entrusted to the first accused by D. S. Ranatunga and M. S. Leo Cooray, Managers of the Moratuwa and Piliyandala Wholesale Depots, respectively of the said Union, in the way of his business as Agent, to be deposited to the credit of the said Union at the Colombo Co-operative Central Bank, and thereby committed the offence of conspiracy in consequence of which conspiracy the said offence of criminal breach of trust was committed; and that both accused had thereby committed an offence punishable under section 113B read with sections 392 and 102 of the Penal Code.

"2. That at the time and place aforesaid and in the course of the same transaction, the first accused being entrusted with the said sum of Rs. 161,576·93 by D. S. Ranatunga and M. S. Leo Cooray, Managers of the Moratuwa and Piliyandala Co-operative Wholesale Depots of the said Union, in the way of his business as an Agent, to be deposited to the credit of the said Union at the Colombo Co-operative Central Bank, did commit criminal breach of trust in respect of the said sum of Rs. 161,576·93 and that he had thereby committed an offence punishable under section 392 of the Penal Code.

"3. That at the time and place aforesaid and in the course of the same transaction the second accused did abet the first accused in the commission of the offence of criminal breach of trust in respect of Rs. 161,576·93 as set out in count 2 above, which said offence was committed in consequence of such abetment; and that he had thereby committed an offence punishable under section 392 of the Penal Code read with section 102 of the said Code".

After a trial which continued for several days the Jury found both accused guilty on the first count; they also found the first accused guilty on the second count, and the second accused guilty on the third count. The learned Judge passed sentences of six years rigorous imprisonment, to run concurrently, on the first accused; and sentences of two years' rigorous imprisonment, to run concurrently, on the second accused. The present appeals are from these convictions.

Substantially, the defence raised on behalf of each accused at the trial was that he should be acquitted because he had not acted "dishonestly" in the transactions to which the various counts in the indictment relate. On this aspect of the case the directions of the learned Judge to the Jury were, in our opinion, adequate. In appeal, however, the convictions were attacked upon other legal grounds which had apparently been lost sight of in the course of the trial. We regret that on these questions of law we have failed to reach unanimity, and the conclusions which I now proceed to record represent in each case the views of the majority of the members of the Court.

It was argued on behalf of both accused, as a first ground of appeal, that the first count in the indictment, charging them with the offence of "conspiracy", was bad in law, in that it did not allege an "agreement" between them to "act together" in the manner and for the purpose specified. The case for the Crown, on the other hand, is that although an agreement is the gist of the offence of conspiracy in cases falling under section 113A of the Penal Code *where an agreement "to commit or abet" an offence is alleged*, no such agreement need be proved, even inferentially, when two or more persons are alleged to have "*acted together with a common purpose for or in committing or abetting an offence*". It was on this view of the law that the indictment was advisedly framed against the appellants; and it was on this basis that the case was presented to the Jury by the prosecution and in due course by the learned presiding Judge. The question which arises for our decision is therefore a fundamental one depending upon the proper interpretation of the language of section 113A.

It is pertinent to recall the circumstances under which section 113A was enacted. Until 1924, "criminal conspiracy" was not penalised in this country except, to a limited extent, as a species of the offence of abetment under section 100 of the Code. This defect in the law received some prominence by reason of the acquittal of one of the accused persons in *The King v. Silva*[1]. Accordingly, Ordinance No. 5 of 1924 was passed to amend the Penal Code by introducing sections 113A and 113B which read as follows:—

"113A (1) If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.

(2) A person within Ceylon can be guilty of conspiracy by agreeing with another person who is beyond Ceylon for the commission or abetment of any offence to be committed by them or either of them,

[1] *(1923) 24 N. L. R. 493.*

or by any other person, either within or beyond Ceylon ; and for the purposes of this sub-section as to an offence to be committed beyond Ceylon, " offence " means any act which if done within Ceylon would be an offence under this Code or any other law.

Exception.—This section shall not extend to the case in which the conspiracy is between a husband and his wife.

" 113B. If two or more persons are guilty of the offence of conspiracy for the commission or abetment of any offence, each of them shall be punished in the same manner as if he had abetted such offence ".

Mr. H. V. Perera's contention is that section 113A must be interpreted so as to establish the commission of the offence of " conspiracy " in one or the other of the following circumstances :—

(1) if two or more persons *agree*, with or without any previous concert or deliberation, *to commit* an offence *or to abet* an offence ; or
(2) if two or more persons *agree*, with or without any previous concert or deliberation, *to act together with a common purpose for or in committing or abetting* an offence.

If this interpretation be correct, conspiracy consists in either set of circumstances " in the agreement or confederacy to do some act, whether it is done or not "—*The King v. Hibbert* [1].

The learned Solicitor-General argued, on the other hand, that the offence of " conspiracy " is established within the meaning of the section either (1) if two or more persons *agree* to commit or to abet an offence ; or (2) if two or more persons *act together*, with or without any previous concert or deliberation, with a common purpose for or in committing or abetting an offence.

This latter interpretation was favoured by Soertsz J. in *The King v. Andree* [2]. The question did not directly arise, however, for consideration in that case, the indictment for conspiracy having expressly alleged and the prosecution having led satisfactory evidence to prove " *an agreement to act together* " on the basis that Mr. H. V. Perera's present submission is correct. Nevertheless, the *obiter dictum* of this very distinguished Judge is entitled to considerable respect.

We have had benefit of a full argument on the question which has arisen, and the view which we have formed is that the interpretation of section 113A contended for by Mr. H. V. Perera is correct. Apart from other considerations, this conclusion is to be preferred upon an analysis of the grammatical elements of the sentence under consideration. Moreover, under the common law of England, " conspiracy " is regarded as differing from other offences in that it penalises an agreement or confederacy, *simpliciter*, to do some act—and not the act itself (which may or may not have been performed in pursuance of such agreement). The position is the same under chapter 5A of the Indian Penal Code in so far as the offence of conspiring to commit criminal acts is concerned. Indeed, evidence of earlier recognition in Ceylon of this fundamental idea is to be found in the language of section 100 of the Penal Code. One should therefore hesitate, in the absence of compelling words which would

[1] *13 Cox C. C. 82 at p. 86.* [2] *(1941) 42 N.L.R. 495.*

justify such an assumption, to hold that the Legislature could have intended in 1924 not only to make "conspiracy", in the sense in which the term had previously been understood, a criminal offence, but also to penalise *under the same name* conduct which introduces an entirely different concept.

If the offence of "criminal conspiracy" as defined by section 113A of the Penal Code be compared with the corresponding offence which has been either defined by statute in India or judicially interpreted as a common law offence in England, it emerges that the vital respect in which the Ceylon Legislature had departed from the existing models was by restricting the offence in this country to agreements designed to further the commission or the abetment *of criminal acts*—and that agreements to commit unlawful acts which are not offences, or to perform by illegal means acts which are themselves lawful, were not caught up in the new section. Subject to this, as Howard C.J. seems to suggest in *The King v. Andree* [1], the elements of the English law of criminal "conspiracy" have been substantially introduced into the Penal Code, and, if this be so, it is agreements *per se* in respect of criminal offences which, from the moment of their formation, are intended to be penalised. Lord Brampton has pointed out in *Quinn v. Leatham* [2] that "the overt acts which follow a conspiracy form of themselves no part of the conspiracy". Similarly, we would hold that "to act . . . . for or in committing or abetting an offence" (though punishable if such acts should offend against other provisions of the criminal law) cannot by itself constitute the offence of criminal conspiracy under section 113A in the absence of proof (by direct evidence or inferentially) of a prior agreement to act in furtherance of that end. Indeed, even if the interpretation sought by the Crown for section 113A be correct, it is strongly arguable that persons cannot be held to "act together *with a common purpose*" unless there is evidence from which a Court may legitimately infer a *pre-arranged plan* for such concerted action—vide *Mahbub Shah v. Emperor* [3] regarding the prerequisite of acting "with a *common intention*". It is "*the concurrence of minds*" which constitutes the offence (per Cockburn J. in *Regina v. Roulton* [4]). Nor is it necessary in order to complete the offence of "conspiracy", that anything should be done beyond the agreement. "The conspirators may repent and stop; or they may have no opportunity, or may be prevented, or may fail; nevertheless, the crime is complete and was completed *when they agreed*"—*The Queen v. Aspinall* [5]. In other words, if acts are committed in pursuance of the agreement which preceded them, proof of such acts is, on a charge of conspiracy, relevant only in so far as they furnish evidence from which the prior agreement, which is the essential ingredient of the offence concerned, may legitimately be inferred—*R. v. Mulcahy* [6].

It is necessary to consider an argument which was strongly urged before us by the learned Solicitor-General. While conceding that *prima facie* the words "with or without previous concert or deliberation" seem to relate to all the words "agree to act or abet or act together . . . . ."

[1] *(1941) 42 N. L. R. 495.*
[2] *(1901) A. C. 495.*
[3] *A. I. R. (1945) P. C. 118.*
[4] *12 Cox C. C. 87 at p. 95.*
[5] *(1872) 2 Q. B. D. 48.*
[6] *L. R. 3 H. L. 306.*

which have gone before, he suggested that logically, and in order to avoid an interpretation which would lead to absurdity, they should be regarded as qualifying only the later words " act together . . . . ". An " agreement ", he argued, necessarily presupposes some degree of " previous concert and deliberation " ; and it is therefore " nonsensical " (to use his own words) to suggest that two or more persons can " agree" to do something " without previous concert and deliberation". With respect, we cannot agree. The common law offence of " conspiracy " in England has from time to time been developed and clarified by high judicial authority, and it is now well established that the kind of " agreement " which is regarded in England as forming the gist of this offence does not necessarily mean that the alleged conspirators " actually met and laid their heads together, and then and there actually agreed to carry out the common purpose "—*The Queen v. Parnell*[1]. In that judgment Fitzgerald J. made reference by way of illustration to an unusual case of two guilty " conspirators " who never saw each other until they stood face to face in the dock ; " It may be " said the learned Judge " that the alleged conspirators have never seen each other and have never corresponded. One may have never heard the name of the other, *and yet by the law they may be parties to the same common criminal agreement* ". Similarly, in *R. v. Meyrick*[2] Lord Hewart said, " In order that persons may conspire together it is not necessary to prove that there should be direct communication between each and all . . . . It is necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other or directly consulting together, *but that they entered into an agreement with a common design*. Such agreements might be made in various ways. There may be one person . . . . round whom the rest revolve. The metaphor is the metaphor of the centre of the circle and the circumference. There may be a conspiracy of another kind, when the metaphor would rather be that of a chain. A communicates with B, B with C, C with D, and so on, to the end of the list of conspirators ".

It seems to us that the words " with or without previous concert or deliberation " were advisedly introduced into the language of section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of " agreement " which needs to be proved is an " agreement with a common design " as explained in the judgments to which I have referred.

Another argument which was addressed to us was that, if " agreement " be the vital ingredient of every form of conspiracy contemplated by section 113A, the words " agree to . . . . act together with a common purpose for or in committing or abetting an offence " would be redundant because they are in effect synonymous with the earlier words " agree to commit or abet an offence ". We are not convinced that the meaning of these phrases is necessarily identical. One can conceive, for instance, of an agreement between A and B to commit acts (of preparation) which, though designed to further the commission of an offence by C, might possibly fall short of the actual abetment of a criminal act.

[1] *14 Cox C. C. at p. 515.* [2] *21 Cr. A. R. 94.*

In any event, the mere circumstance that redundant words have been introduced into a statute out of an abundance of caution would not justify an attempt to attribute to the sentence in which those words appear some meaning which, though eliminating redundancy, was not intended by the draftsman.

In the result, the majority of the Court hold that the first count in the indictment is bad in law because it did not allege and was not intended to allege a prior "agreement" between the accused which is essential to the commission of any species of the offence of criminal conspiracy within the meaning of section 113A of the Penal Code. The learned Solicitor-General very properly stated that, having regard to the manner in which the case for the prosecution was presented to the Jury at the trial, he would not invite us to hold, under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, that no substantial miscarriage of justice had actually occurred. The jury was at no time invited, as they should have been, to consider whether, upon the evidence, they were satisfied that the accused had entered into a conspiracy in consequence of which they are alleged to have acted in furtherance of a plan to procure the commission by the first accused of the offence of criminal breach of trust. A single count in an indictment on a "conspiracy" charge can properly allege only *one* conspiracy and not a series of separate conspiracies. It was therefore essential to ensure that the Jury, adequately and specifically directed on the point, should have realised that it was not competent for them to return a verdict against the accused unless they were satisfied upon the evidence that there was one single conspiracy which preceded and motivated the consequential acts which each accused was alleged to have committed—*vide* the observations of Humphreys J. in *R. v. West* [1]. For the reasons which I have given we quash the convictions of both accused on the charge of conspiracy.

It is convenient at this stage to record the conclusions arrived at by the majority of the members of the Court in regard to the charge of "abetment" framed against the second accused in the third count of the indictment. The allegation is that between 1st May, 1947, and 30th April, 1948, he did abet the first accused in the commission of the offence of criminal breach of trust of Rs. 161,576·93 (i.e., the sum represented by the thirty-five cheques to which I have referred).

It is not alleged by the Crown that the second accused "instigated" the first accused to commit criminal breach of trust. The Jury could not properly convict him, therefore, unless, after adequate direction, they took the view that he had *either* "engaged in a conspiracy" for the commission of the offence or "intentionally aided" . . . . its commission (*vide* section 100 of the Penal Code). I shall deal with each of these alternative positions in turn.

Even if two views were possible as to the proper interpretation of section 113A of the Code, there can be no question that, in order to establish the offence of "abetment by conspiracy" under section 100, *an agreement* is an essential prerequisite. Indeed, the second explanation to section 100 makes it clear that "a conspiracy for the doing of a

[1] *(1948) 1 K. B. 709.*

thing is when two or more persons *agree* to do that thing or to cause or procure that thing to be done". It follows that, in having failed to distinguish between the interpretation which was wrongly placed upon section 113A and the interpretation which admittedly must be placed in that part of section 100 dealing with abetment by conspiracy, the learned Judge had misdirected the Jury. All the infirmities in the direction on the first count in the indictment necessarily attach therefore to the direction on the third count. For instance, the learned Judge told the Jury, " if you find that there was a conspiracy on the first count you may very well find that the conspiracy constituted a form of abetment under the third count". We have already taken the view that there was misdirection on the first count in not pointing out that an agreement was the gist of the offence. *A fortiori*, failure to make this clear on the third count was a misdirection. In another portion of this charge on the issue of conspiracy, the learned Judge said, " conspiracy means to act together with a common purpose, the direct act (of the second accused) being to hold up the cheques. The act on the part of the second accused is admitted. It is guilty knowledge which is denied". We think that this was an inadequate direction, because even though the *acts* alleged against the second accused were not in dispute, the vital question for the Jury to decide was " *whether there was a previous conspiracy* " in pursuance of which the acts complained of were committed—*R. v. Kohn* [1].

Admittedly, the Jury were also invited to consider whether the second accused was, in the alternative, guilty of abetment by " intentionally aiding ", that is, by facilitating the commission of the offence of criminal breach of trust by the first accused. As we read the learned Judge's charge, however, the Jury might well have thought that this question need not be considered by them unless they returned a verdict of acquittal on the charge of conspiracy. It is therefore not possible to hold that, in view of the Jury's finding on the first count, the verdict against the second accused on the third count was arrived at by finding that there had been abetment by facilitation. The majority of the Court accordingly hold that the conviction of the second accused on the charge of abetment must be quashed. After hearing the evidence of the witnesses for the prosecution, the learned Judge had expressed the view that the case against the second accused was " what could be called a thin one ". In that state of things we are not disposed to say that it would be appropriate to order a re-trial of the second accused on the third count in the indictment. We accordingly make order acquitting the second accused on the third count. Whether or not the evidence against him, if true, established the commission of some other offence than that with which he was charged, does not arise for our consideration.

Before we proceed to deal with the outstanding charge against the first accused, namely, on the charge of criminal breach of trust, I consider it desirable that I should record the conclusions arrived at by the majority of the Court on a further point which was raised in connection with the charge of abetment. In so far as the third count in the indictment can be understood to allege abetment by conspiracy, we think that it

[1] *176 E. R. 470.*

can properly be interpreted to involve a charge of having engaged in a *single* conspiracy which preceded the alleged commission of criminal breach of trust by the first accused. If, on the other hand, abetment by facilitation be regarded as forming the gist of the offence, it seems to us that, upon an analysis of the evidence for the prosecution in the presen case, a number of separate abetments was in effect involved. Section 168 (2) of the Criminal Procedure Code, read with section 179, admittedly permits an accused person to be charged and tried at one trial for the commission of any number of offences of criminal breach of trust (if alleged to have been committed in the course of a period not exceeding one year). We can find nothing in the Criminal Procedure Code, however, which sanctions the trial of an accused person on more than three charges of *abetment* in the same proceedings. The liability of an alleged abettor, under section 184, to be jointly tried with the principal offender is, in our opinion, subject to his right, under section 179, to claim that not more than three charges of the same kind may be laid against him in the course of a single trial. That right is, as far as the abettor is concerned, not affected by the provisions of section 168 (2).

It now remains to consider the charge against the first accused on the second count in the indictment. Having in the first instance been charged jointly with the second accused on the " conspiracy " count, he was on this count charged with having by himself committed criminal breach of trust of Rs. 161,576·93 during the relevant period. It is clear enough that, according to the case for the prosecution against the first accused, the proof relied on to establish his guilt on the charge of conspiracy amounted also to proof of the actual commission of the offence specified in the second count. The charge of conspiracy has in our opinion failed ; in the meantime, a great deal of evidence had been led at the trial on that count which might or might not have been admissible against the first accused if he had been separately tried on the second count. In such circumstances, as Sankey J. points out in *R. v. Luberg* [1], great care is called for in the Judge who sums up the case to the Jury *to keep the separate issues on the two charges perfectly clear*. We are satisfied that insufficient care was exercised at the trial in this respect.

The trial and conviction of the first accused on the second count was unsatisfactory for another reason which is in our opinion substantial. Whether or not criminal breach of trust of sums amounting to Rs.161,576·93 was alleged to have been committed *in pursuance of a single design* (as the prosecution suggests), the fact remains that the charge against the accused, according to evidence, involves the alleged commission not of one offence of criminal breach of trust but of *a number of such offences during the period covered by the indictment*. To include all these offences in a single count was, of course, permissible under section 168 (2) of the Criminal Procedure Code. It was essential however that the Jury's attention should have been directed to the specific evidence on which the Crown alleged that each separate offence had been committed. This was not adequately done in the present case. No doubt the error into which the learned Judge has fallen was due to the circumstance that, at the trial, the defence concentrated its attention more particularly

[1] *19 Cr. A. R. 133.*

on the issue of "dishonesty". Nevertheless, it was necessary that the Jury should have received adequate directions so as to enable them to decide whether, in regard to each alleged offence of criminal breach of trust, all the ingredients of that offence were established to their satisfaction. We set aside the conviction of the first accused on the second count in the indictment, and order that he be re-tried on this count in fresh proceedings.

Conviction of 1st accused on count 1 set aside and re-trial ordered on count 2.

Appeal of 2nd accused allowed.

1950 *Present:* **Jayetileke C.J., Gunasekara J. and Swan J.**

JOHN *et al.*, Appellants, *and* CHARLES DE SILVA, Respondent

S. C. 22—D. C. Galle (Inty.), X 247

Civil Procedure Code—Execution of bond by surety—Circumstances in which section 348 is applicable.

Section 348 of the Civil Procedure Code applies only where a liability was incurred as surety for the performance of a decree after the institution of the action and before the entering of the decree. Its application is limited to security taken before the Court under the provisions of the Code.

APPEAL from an order of the District Court, Galle. This case was referred by Dias and Pulle JJ. for consideration by a fuller Bench, under section 48A of the Courts Ordinance (as amended by the Courts (Amendment) Act, No. 52 of 1949).

D. S. Jayawickrama, with *Rienzie Wijeratne*, for the sureties appellants.

G. P. J. Kurukulasuriya, with *D. W. F. Jayesekera* and *B. S. Dias*, for plaintiff respondent.

Cur. adv. vult.

July 26, 1950. JAYETILEKE C.J.—

In action No. 40,699 of the Magistrate's Court of Galle the defendants charged the respondents and five others with theft of certain articles enumerated in a list marked A, criminal trespass and hurt.

On the date of trial it was agreed between the parties as follows:—

(1) That the respondents should institute an action against the defendants for a declaration of title to the goods referred to in the list marked A.

(2) That the 1st defendant should give security in a sum of Rs. 4,000, take charge of the said goods, and keep them in his custody till the said action was decided.