1954 *Present :* **K. D. de Silva J.**

S. BOTEJU *et al.*, Appellants, *and* MOORTHY (S. I. Police), Respondent

S. C. 19-20—M. C. Colombo, 33,453

Criminal Procedure Code—Joinder of charges—Different offences committed in same transaction—Splitting up of charges—Indictable offence—Assumption of summary jurisdication by Magistrate—Adequate material a condition precedent for forming necessary opinion—Sections 152 (3), 178, 180.

Under section 180 of the Criminal Procedure Code it is not obligatory that all the offences committed by a person in the course of the same transaction should be tried at one single trial. The word " may " in the section renders possible, unless substantial prejudice is caused to the accused, the institution of separate cases in accordance with the general rule in section 178 which provides for separate trials for distinct offences.

Before a Magistrate assumes summary jurisdiction under section 152 (3) of the Criminal Procedure Code in respect of a non-summary case, there must be adequate material available to him to form the opinion that the case is one which may properly be tried summarily.

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

Colvin R. de Silva, with *P. B. Thampoe*, for the accused appellants.

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

Cur. adv. vult.

January 28, 1954. K. D. DE SILVA J.—

The two accused-appellants are brothers. Between them and one Dharmadasa, who is also called " Navaloka Mudalali " there was considerable animosity. Shortly after 8.30 p.m. on November 12, 1952, Dharmadasa was driving his car along the Negombo road. Two other persons, namely, Simon and Julis were also travelling in the same car. When the vehicle approached the house of the appellants at Peliyagoda, it is alleged, the appellants rushed on to the road in front of the car each carrying a bomb or dashing-cracker. Then, according to the prosecution, the 1st appellant saying " ado Navalokaya, this is to kill you " flung the explosive at the car. Almost simultaneously the 2nd appellant did likewise. In the resulting explosion all the three occupants of the car were injured. Both Dharmadasa and Simon sustained injuries which endangered life while Julis received some minor abrasions and superficial punctures.

The two appellants were arrested by the Police the same night and they were produced before the Chief Magistrate, Colombo, on the following day. It would appear from the report furnished by the Chief Magistrate at the request of this Court that the appellants were produced before him as suspects on a report under Section 131 of the Criminal Procedure Code filed in M. C. Colombo case No. 33,293. The Magistrate remanded the appellants till 18.11.52 and on that day the Police filed a plaint against them, in this case charging them under Sections 317 and 315 of the Ceylon Penal Code in respect of the injuries caused to Simon and Julis. On 25.11.52 the Magistrate recorded the evidence of the sub-Inspector of Police, Peliyagoda, and decided to try this case summarily in terms of Section 152 (3) of the Criminal Procedure Code. On that occasion he was informed by the Police that a plaint would be filed in case No. 33,293 charging the appellants with the attempted murder of Dharmadasa and accordingly he sent that case before an Additional Magistrate to record non-summary proceedings. The plaint in that case was filed on 4.12.52.

The trial of the present case was concluded on December 23, 1952, and the learned Magistrate convicted both the appellants and sentenced them to two years' rigorous imprisonment on the charge under Section 317 of the Ceylon Penal Code and to six months' rigorous imprisonment on each of the 2 counts under Section 315 of the Ceylon Penal Code, the sentences to run concurrently. This appeal is from that conviction.

The non-summary case in which the appellants were charged with the attempted murder of Dharmadasa came up for trial before the Supreme Court on November 30, 1953, and the jury brought in a verdict of not guilty and the appellants were accordingly acquitted and discharged.

At the argument of this appeal Dr. Colvin R. de Silva, the learned Counsel for the appellants, raised the following two points :—

(1) The appellants should not have been charged in two cases but they should have been prosecuted on one indictment.

(2) The Magistrate should not have assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code as there was no material before him at that stage for the assumption of such jurisdiction.

In regard to the first point raised by him, Dr. de Silva conceded that it was not illegal to charge the appellants in two cases but he contended that to do so was unjust as the appellants were prejudiced in their defence. The general rule laid down in Section 178 of the Criminal Procedure Code is that for each distinct offence there should be a separate charge and every such charge should be tried separately. That section, however, makes provision for the joinder of charges mentioned, *inter alia*, in Section 180. According to Section 180, if in the course of 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. The words used in this Section are " may be charged " and therefore it is clear that it is not obligatory that all the offences committed by a person in the course of the same transaction should be tried at one trial. That the injuries caused to Dharmadasa, Simon and Julis constitute distinct and separate offences cannot be denied. Therefore the institution of two cases in respect of these offences is in accordance with the general rule, making provision for separate trials for distinct offences, appearing in Section 178, and it also does not offend the terms of Section 180 which enable more offences than one committed in the course of the same transaction being tried together. It is true that it was this one act of throwing the explosives which caused the injuries on all the three persons. The evidence in support of all the charges would be the same. That the appellants could have been charged in respect of all the offences on one indictment must be conceded. That procedure would have been more convenient and less expensive to both parties. It would certainly have been more desirable in the circumstances of this particular transaction if the appellants were charged in respect of all the offences on one indictment. But I am not prepared to hold that the institution of two proceedings was unjust or caused prejudice to the appellants in their defence as submitted by their Counsel. In both cases the defence put forward and, in my view, the only defence available was one of mistaken identity. It was suggested by their Counsel that if the appellants had to stand their trial before a higher court after a non-summary inquiry, they had a better opportunity of knowing how the case stood against them, which would be a distinct advantage in the preparation of their defence. Assuming, but not conceding, that the summary trial placed the appellants at a disadvantage in the matter of their defence,

any such disadvantage, in my view, is not one which could not have been overcome by due care and vigilance on the part of the appellants and their legal advisers.

On 25.11.52, when the Magistrate decided to try this case summarily, the appellants were represented by a Proctor. On that day no objection was taken either to a separate plaint being filed in respect of the injuries to Simon and Julis or to the assumption of summary jurisdiction by the Magistrate to try those offences. If any such objection had been taken, the Magistrate would, no doubt, have given his careful consideration to it. It was only in the address of the defence Counsel at the conclusion of the trial that any reference was made to two plaints being filed. Before that stage was reached, probably, it did not enter the minds of those who were in charge of the defence that separate trials would in any way be prejudicial to the appellants. An acquittal by the Magistrate in this case is likely to have strengthened the defence in the Supreme Court trial. That may probably have been the reason why no objection was taken to the splitting up of the charges or to the assumption of summary jurisdiction by the Magistrate. The prosecution was entitled in law either to file two plaints or to charge the appellants in one proceeding. Where two alternative procedures are available in law to the prosecution and one of them is more desirable than the other, the adoption of the latter cannot be held to be irregular unless substantial prejudice was caused to the accused as a result. As no such prejudice arises in this case, I hold that the first point raised by the appellants' Counsel fails.

The second submission made by the appellants' Counsel, that at the stage the Magistrate assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code there was no material before him to hold that the facts were not complicated, merits serious consideration.

It is true that Section 152 (3) does not say on what material the Magistrate is to base his opinion that the case may properly be tried summarily, but it is undeniable that unless there is adequate material before him he cannot correctly form that opinion. Indeed, it is very desirable that when a Magistrate proceeds to act under Section 152 (3) he should state in writing on what material he decides to take that step. That would facilitate this Court, where the assumption of summary jurisdiction by the Magistrate is questioned, in deciding whether or not the Magistrate's opinion is well-founded. In the Divisional Bench Case of *Silva v. Silva* [1], the applicability of Section 152 (3) came up for consideration. There, in dealing with cases in which this section should not be resorted to, Middleton J. said " Any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, a very difficult question of intention or identity or in which the punishment ought really to exceed two years, is one that is not properly triable summarily ".

Apart from the question of the suitability or otherwise of the application of Section 152 (3) in the circumstances of this case, I have come to the conclusion that there was no adequate material available to the Magistrate —at least the record does not show it—at the time he assumed summary

[1] *(1904) 7 N. L. R. 182.*

jurisdiction, to form the opinion that the case is one which may properly be tried summarily. The Magistrate proceeded to record the evidence of the Sub-Inspector of Police and immediately thereafter he decided to assume jurisdiction under Section 152 (3). Obviously it is on this evidence of the Sub-Inspector of Police that he formed the opinion that the case was one which may properly be tried summarily. That evidence runs to only six lines and is entirely colourless. It is not possible to say on that evidence that any complicated question of fact would not arise in the case. It was held in the case of *Simon Wijeratne v. Ratnayake* [1] that a Magistrate was entitled to take proceedings under Section 152 (3) on a perusal of a Police report (B report) furnished in terms of Section 121 (2) of the Criminal Procedure Code. In the present case there is no reference to such a report, nor is one filed of record. Therefore, I hold that there was not sufficient material before the Magistrate to enable him to assume summary jurisdiction under Section 152 (3). Nor can it be rightly said that the facts are not complicated. Indeed, the verdict of the Jury in the non-summary case supports the contrary view. In these circumstances, the most desirable course to follow is to direct the Magistrate to take non-summary proceedings in the case. I set aside the convictions and sentence and order the Magistrate to take non-summary proceedings against the appellants.

Sent back for non-summary proceedings.