1947 *Present :* **Dias J.**

KARUNARATNE, Appellant, *and* INSPECTOR OF POLICE, Bambalapitiya, Respondent.

S. C. 378—M. C. Colombo South, 8,959.

Joinder of charges—Theft—Assisting in concealment of stolen property—No irregularity—Penal Code, ss. 367, 396.

It is not irregular to join a charge of theft under section 367 of the Penal Code with a charge of assisting in the concealment of stolen property under section 396.

***Rahim v. Silva (1934) 2 C. L. W. 476*, not followed.**

APPEAL against a conviction from the Magistrate's Court, Colombo South.

No appearance for the accused, appellant.

J. G. T. Weeraratne, C.C., for the Attorney-General.

Cur. adv. vult.

June 20, 1947. DIAS J.—

The appellant and one Edwin were jointly charged as follows :—(1) that on October 22, 1946, they committed theft of an "electro magnetine fertilizing machine", the property of the Colombo Municipal Council, an offence punishable under section 367 of the Penal Code, and (2) in the alternative that they dishonestly disposed of that machine to one Jainul Abdeen of Skinner's Road knowing or having reason to believe that it was stolen property, an offence punishable under section 396 of the Penal Code.

Edwin has not been arrested. He is a proclaimed offender for whose arrest an open warrant has been issued.

The appellant was acquitted under count 1, but was convicted under section 396 and sentenced to undergo six months' rigorous imprisonment.

Although there was no appearance for the appellant, Crown Counsel quite properly brought to my notice certain authorities which, in his opinion, merited consideration.

I find it difficult to follow the reasoning of the Magistrate for not convicting the appellant under section 367 on the facts which he accepted.

The machine in question is supposed to fertilize paddy more quickly than nature. The inventor, who is a Municipal engineer, had constructed three such machines. The exhibit P 1 is one of them. It was painted green. P 3, P 4 and P 5 have all been identified as being parts of the machine P 1. At the material date P 1 was in use at the Jawatte Experimental Station. In spite of the presence of the watcher Pabilis Gomis a thief or thieves succeeded in stealing the machine P 1 on the night of October 22, 1946. The loss was discovered and the watcher reported the loss to his superior officer.

On October 26, *i.e.*, four days after the theft, on information received the machine P 1 was found in the shop of one Jainul Abdeen at Skinner's Road South. He is a dealer in scrap metal. Abdeen at once produced

the receipt P 6. His evidence is that on October 26 the appellant and another man sold him P 1 for Rs. 25.00. Abdeen offered to point out the vendors. He was taken to Thimbirigasyaya Road junction and there pointed out the appellant who was in a motor car. Manatunga has proved that the car is his and he had given it to the appellant for hiring. Attached to the engine of that car were the exhibits P 3 and P 4 which are parts of the machine P 1. The Government Analyst proved that the paint on P 3 and P 4 are the same as that on P 1.

The prosecution, therefore, has established that this appellant on October 26, was in possession of the recently stolen machine P 1, and in the absence of a reasonable explanation from him, the Court would be justified not only in inferring that he was in possession of stolen property, but also that he was the actual thief.

The evidence of the appellant is that an unknown man hired his car and put P 1 into it. That unknown man sold him the coil P 4 for Rs. 5.00 and the machine was sold to Abdeen. He admitted that P 3 was affixed to his car, but he does not explain how P 3 came into his possession. The evidence of Abdeen, however, is that this appellant and the other man both spoke to him in regard to this sale, and it was this appellant who said "Buy this, mudalali. If you turn this, it acts like a dynamo". It is clear that the explanation of the appellant was unsatisfactory and was rightly rejected. What inference should be drawn in cases of this kind was pointed out by the Court of Criminal Appeal in *R. v. William Perera*[1]. In my opinion the proper inference flowing from all the circumstances of the case is that the appellant was a thief.

Crown Counsel however has drawn my attention to the case of *Rahim v. Silva*[2] where Drieberg J. held that it was a fatal irregularity to join charges of theft (section 367) and assisting in the concealment of stolen property in respect of the same article (section 396). There was no appearance for the respondent in that case, and the attention of the learned Judge does not appear to have been drawn to the three Judge decision of *R. v. Thambipillai*[3] where it was laid down that it was not a misjoinder of charges to join a count for murder with one under section 198 of the Penal Code for causing evidence of the offence to disappear by hiding or secreting the murdered body. If such a joinder of charge is justified, it seems to follow that a charge of theft and a charge of assisting in the concealment or disposal of that stolen property may also be joined. In *Rahim v. Silva* (*supra*) Drieberg J. said "It is not possible to charge the same person with theft and with assisting in the concealment of stolen property in respect of the same article. The latter is an offence in which dishonesty is not necessarily an ingredient. It is intended only to punish those acts of assistance which are calculated to thwart the detection of the crime by making away with the *corpus delicti*". Equally, the offence of murder is the killing of a person with a murderous intention, while the offence under section 198 consists in causing evidence of an offence to disappear, knowing or having reason to believe that an offence has been committed. They are as distinct offences as are offences under section 367 and section 396. In the circumstances, I prefer to follow

[1] *(1944) 45 N. L. R. 433.* [2] *(1934) 2 C. L. W. 476.*
[3] *(1920) 21 N. L. R. 455.*

the case of *R. v. Thambipillai* (*supra*) and hold that there is no misjoinder in charging offences under sections 367 and 396 in the same charge or indictment. Two other cases have to be considered. In *R. v. Piyasena* [1] the *only* charge against the accused both at the non-summary inquiry and in the indictment was theft, and he was convicted of that offence. In appeal it was held that the charge of theft had not been established. The Crown then asked that he may be convicted under section 396 under section 181 of the Criminal Procedure Code. This application was refused. In *Mariyanayagam v. Basnayake* [2] the accused had originally been charged with theft. The prosecution then added counts under sections 394 and 396 *but no new charges were framed.* The Crown attempted to justify the conviction under section 396 under section 182 of the Criminal Procedure Code. This the Supreme Court refused to accept. These cases have no application to the facts of this case.

What has happened here is that the Magistrate ought, on his findings, to have convicted the appellant under the first count of the charge. The evidence also justified a conviction under the second count of the charge. The two counts were alternatives. No injustice or prejudice has been caused to the appellant.

I therefore affirm the conviction and dismiss the appeal.

Appeal dismissed.