1930

Present: Jayewardene A.J.

SUB-INSPECTOR OF POLICE, CHILAW *v.* EREBINU.

332—P. C. Chilaw, 30,042.

Charge—Several offences committed in course of same transaction—Charge pending for major offence—Conviction for minor offence—Regularity.

Where in the course of one transaction an accused person has committed several acts, directed towards the same end, which when combined amount to a more serious offence, and he is charged with that offence, he should not be tried separately for any of the subsidiary acts.

APPEAL from a conviction by the Police Magistrate of Chilaw.

Ranawaka, for accused, appellant.

Crossette Thambiah, C.C., for respondent.

June 18, 1930. JAYEWARDENE A.J.—

The accused was charged with having in his possession a jemmy, an instrument for housebreaking, with intent to commit an offence under section 449 of the Penal Code, and convicted and sentenced to six months' rigorous imprisonment. The evidence was that on information that a gang of robbers was going to break into the house of one Abraham, the police with two-sub-inspectors watched the house and at about 1 A.M. on February 27 arrested the accused with four others in the verandah as they were about to break into the house. Sub-Inspector Sivasampu arrested this accused who had the jemmy. The others were similarly armed, and one had a sword. The accused is also charged with the others with attempting to commit housebreaking by night, under sections 443 and 490 of

[1] *(1927) 5 T. L. R. 70.*

the Penal Code, in P. C. Chilaw, No. 30,039. For the accused it was argued that the possession of the implement of housebreaking was only an ingredient of the major offence of attempting to commit housebreaking, and that it was illegal to convict the accused of the minor offence and punish him for it while the major offence was still untried. Under section 180 of the Criminal Procedure Code, 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, or if several acts of which some constitute one offence but when combined constitute a different offence, he may be charged with and tried at one trial for any offence constituted by any one or more of such acts. It is not illegal to try the accused for different offences separately, although the prosecution is entitled to ask the Court to go into the whole matter at a single trial. The provisions of this section are not imperative but enabling (*Sohoni: Code of Criminal Procedure, p. 576, 12th ed.*). Where persons were charged with rioting and also with causing hurt at the time of the riot, it was held that. although they may have been tried as for one offence, it was not illegal to try them for both offences separately (*Ameruddin v. Sarkar* [1]).

However, it has been pointed out by the Madras High Court that this course, though not illegal, was undesirable (*Mad. H. C. Pro. 19th Aug., 1886, Sohini, p. 574*). Where, as in this casé, the same evidence could be called in support of both charges, one trial would save both time and labour. Where in the course of one and the same transaction, an accused appears to have done several acts, directed to one end, but when combined together amount to a more serious offence, although for purposes of trial it may not be illegal to charge the accused with not only the principal but also the subsidiary offences, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence.

In *R. v. Ajudhia* [2] Straight J. observed that conviction could only be recorded on the count for the most serious offence proved, which would dispose of or include all those subordinate and negative the others inferior to it and for formal purposes he ordered that judgment of acquittal be entered upon the minor charge. This decision was in 1882, when concurrent sentences could not be imposed. It is thought that the passing of concurrent sentences would obviate all difficulties. In the present case the sentences cannot be concurrent because there will be two trials. The Calcutta High Court has expressly prohibited the splitting up of one aggravated offence into separate minor offences (*R. v. Kairi* [3]).

[1] *(1882) 8 Cal. 481.*
[2] *(1882) 2 All. 644.*
[3] *(1866) 6 N. R. 38, Ratanlal 69 (4th ed.).*

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JAYEWARDENE A.J.

Sub-Inspector of Police, Chilaw v. Erebinu

The charge against the accused of attempting to commit housebreaking has not yet been tried. The evidence will be the same—that he was caught on the verandah with the jemmy, or very much to the same effect. The principle underlying section 67 of the Penal Code is that where the intention was to commit an offence, the commission of which involves the perpetration of acts by themselves punishable, the offender should not be punished for them separately, as his object was to commit one crime, not many. The rule has been followed in many cases under the English law. It is the Legislative recognition of the maxim of the Roman law—'*Nemo debet bis puniri pro uno delicto*' (*2 Gour, p. 383, 4th ed.*). The accused has still to be tried and may yet be punished for the major offence. I think two separate trials on two such counts are contrary to the spirit of our criminal law and undesirable. I would for formal purposes quash the conviction. The Magistrate may, if he thinks fit, add the present charge to the charge of attempting to commit housebreaking in P. C. Chilaw, 30,039, but the sentence, in the event of a conviction, will not be cumulative.

Conviction quashed.