[ASSIZE COURT]

1951 *Present :* **Gratiaen J.**

THE KING *v.* MICHAEL FERNANDO

S. C. 45—M. C. Kanadulla, 4,124/4,125

Criminal procedure—Joinder of charges—Two offences of same kind committed within a year—Separate non-summary proceedings and committals—Subsequent joinder of charges in the same indictment—Propriety of such procedure—Separate trials for counts in same indictment—When permissible—Indictments Act, 1915, of England, s. 5 (3)—Indictment—Improper committal on insufficient evidence—Amendment of indictment to supply vital gaps—Not permissible—Criminal Procedure Code, ss. 172, 179.

Separate and distinct non-summary proceedings were conducted against the accused in respect of two offences of the same kind committed within twelve months and the accused was committed for trial in the Supreme Court in each case. Subsequently a single indictment was presented to the Supreme Court in the name of the Attorney-General charging the accused on two separate counts with the commission of the respective offences which had been the subject of the separate Magisterial inquiries.

Held, that while it was not illegal for the Crown to join in the same indictment, under section 179 of the Criminal Procedure Code, charges which had formed the subject of separate proceedings terminating in separate committals, such a procedure was not proper and should not be permitted by the trial Judge where the intention of the Crown was to supplement at the trial the insufficient evidence relied on in one preliminary Magisterial investigation by the evidence recorded in a different investigation. In the circumstances, the accused should be separately tried on each count in the indictment.

Held further, that although the provisions of section 172 of the Criminal Procedure Code may be regarded as empowering the Court, in the exercise of its discretion, to allow an indictment to be amended by adding to the list of witnesses and documents called or produced in the lower Court, this discretion will not be exercised so as to enable fresh evidence to be led after indictment to supplement evidence which was in the first instance inadequate to justify commitment and upon which the accused should not have been put upon his trial. A proper commitment, justified by the evidence placed before the committing Magistrate, is a condition precedent to the operation of section 172 of the Criminal Procedure Code.

ORDER made in the course of a trial before the Supreme Court.

T. S. Fernando, Crown Counsel, with *S. S. Wijesinha*, Crown Counsel, for the Attorney-General.

V. Jonklaas, with *G. B. Ellapola*, for the accused.

January 25, 1951. GRATIAEN J.—

On March 21, 1950, the Kuliyapitiya Police instituted non-summary proceedings against the accused in the Magistrate's Court of Kanadulla (Case No. 4,124) on a charge of having on December 12 of the previous year used as genuine a forged or counterfeit five-rupee note, knowing or having reason to believe the same to be forged or counterfeit, an offence punishable under section 478 (*b*) of the Penal Code.

On the same day, namely, March 21, 1950, the Kuliyapitiya Police instituted separate non-summary proceedings in the same Court (Case No. 4,125) charging the accused with the commission of a similar offence

on December 9, 1949. Had it occurred to the prosecuting authorities to apply the provisions of section 179 of the Criminal Procedure Code which enables a joinder of these two charges in a single proceeding in the Court below, all the difficulties which have ensued could have been avoided. Instead, the procedure, thoughtlessly selected, was to conduct a separate and distinct Magisterial inquiry into the alleged commission of each offence.

On April 20, 1950, the proceedings in case No. 4,124 were terminated before the learned Magistrate, Mr. G. Thomas, who committed the accused for trial in the Supreme Court on the first charge to which I have referred. In the other proceedings a different Magistrate, Mr. W. A. Walton, who had in the meantime succeeded Mr. Thomas, committed the accused for trial in this Court on the second charge, on May 31, 1950. In due course a copy of the proceedings in each case was forwarded to the Attorney-General for necessary action as required by section 165E of the Criminal Procedure Code. The delay in the preparation and forwarding of the typewritten briefs to the Attorney-General was, as usual, not inconsiderable.

On November 4, 1950, a single indictment was presented to this Court in the name of the Attorney-General charging the accused on two separate counts with the commission of the respective offences which had been the subject of the Magisterial inquiries separately conducted under the provisions of Chapter 16 of the Criminal Procedure Code.

The preliminary questions arising for my determination are (1) whether in these circumstances the joinder of the two charges in a single indictment is permissible in law; (2) what would be the effect of such joinder if permissible; and (3) whether I should, in the exercise of my discretion as presiding Judge, permit the trial of the accused on both counts to proceed before the same jury in a single proceeding.

On the first question I have formed the view that the provisions of section 179 are sufficiently wide to sanction within certain circumscribed limits the action taken by the Crown. The charges framed against the accused are of the same kind, and both offences are alleged to have been committed within the requisite period of twelve months. Undoubtedly both charges could have been framed and investigated in the same non-summary proceedings; and, although this was not done, the language of the section does not appear to preclude such charges, after the accused had been committed for trial on separate occasions, being " included in one and the same indictment " for the purpose of a single trial before a higher Court. Learned Counsel have not been able to discover any precedent either in Ceylon or in England for such an amalgamation of charges *after* an accused person has been committed for trial at the conclusion of separate and distinct proceedings in the court below. Nevertheless, I do not see how I would be justified in quashing the indictment which is on the face of it regular and authorised by the provisions of the Code. I accordingly over-rule the first objection raised by the defence. I hold that the joinder of the charges at this stage is not precluded by law, subject of course to the over-riding discretion vested in the presiding Judge to direct a separate trial on each

count in the indictment if in his opinion the accused may be prejudiced or embarrassed in his defence by reason of being charged with both offences in the same indictment. Mr. Fernando indicated that should I so direct in the present case, the Crown desired the trial to proceed in the first instance with the count in which the commission of an offence on the later date, namely, December 12, 1949, is alleged.

Before I proceed to consider the other questions of law which were discussed, it is convenient to examine the underlying reason for the anxiety of the Crown to include both charges in a single indictment.

The commission of an offence punishable under section 478 (*b*) of the Penal Code cannot be established unless the prosecution proves that the accused "*knew or had reason to believe*" that the forged or counterfeit currency note uttered by him on the date specified was *in fact* a forged or counterfeit note. For the purpose of establishing the guilty mind which is an essential ingredient of this offence, evidence that the accused person had on other occasions reasonably proximate in time uttered similar counterfeit notes is admissible and relevant (though not, of course, conclusive) under section 14 of the Evidence Ordinance. *R. v. Johnson* [1], *R. v. Bond* [2]; *R. v. Boyle and Merchant* [3]; (vide also *Archbold, 32nd Ed. page 356*).

I have closely examined the evidence led against the accused in each of the separate non-summary proceedings on the respective charges which are now included in the single indictment under consideration. In regard to neither charge was any evidence justifying the inference of guilty knowledge, admissible under section 14 of the Evidence Ordinance or any other provision of law, placed before the Magistrate *in the proceedings in which that particular charge was under investigation.* The evidence led in the course of the proceedings in case No. 4,124 on the charge of uttering a counterfeit note was quite inadequate to justify the commitment of the accused by the Magistrate; similarly there was no evidence to justify commitment on the other charge which was investigated by the Magistrate in case No. 4,125.

Learned Crown Counsel very frankly conceded during the argument that when the records of each of the two proceedings were received and examined in the Attorney-General's Office, it was realised that there was probably insufficient evidence in either case, separately considered, to justify the commitment of the accused on either charge; it was felt, however, that *if* the evidence of the alleged commission of one offence had been led as proof of the commission of the other, committal on both charges would have been justified. In other words, the pooling of the evidence led in the separate and distinct non-summary proceedings in the lower Court would have furnished sufficient evidence to place before a jury for the purpose of securing a conviction on both charges. Otherwise, the trial of the accused upon indictment, with the evidence on each respective count restricted to what had been placed before the committing Magistrate, would almost inevitably have resulted in an acquittal.

Learned Crown Counsel admits that the normal procedure available to the Attorney-General in the circumstances which I have set out was to return both proceedings to the Magistrate with directions under

[1] *3 Cr. A. R. 168.* [2] *(1906) 2 K. B. 389.*

[3] *(1914) 3 K. B. 339.*

section 389 that the evidence led in case No. 4,125 should be led as additional evidence in support of the charge framed in case No. 4,124, and *vice versa*. If that were done, a fresh committal on each charge would have been based on sufficient evidence to justify a trial upon indictment in the higher Court, and in that event the joinder of both charges in a single indictment would have been entirely unobjectionable. The Crown decided, however, to attempt the speedier, though admittedly novel, procedure of including these charges in one indictment, without recourse to the preliminary steps which I have indicated and thereby condoning, in a sense, the irregular orders of commitments made by the Magistrates concerned. In other words, the Crown's intention is not merely to join the charges in one indictment but to amalgamate at this late stage the evidence in both proceedings for the purpose of proving the commission of both offences in the course of a single trial. This, to my mind, seems objectionable in principle and I do not find myself disposed to sanction it unless the law of criminal procedure compels me to do so.

Learned Crown Counsel has argued that the objection is merely technical because, in his submission, the accused can suffer no prejudice by the procedure which the Crown proposes to adopt. I cannot agree that this is so. No doubt the accused was aware in the lower Court of each item of the evidence which the Crown now desires to amalgamate at the trial, but this does not conclude the matter, as the extent to which this fresh evidence is relied on has now been substantially altered. The purpose of conducting non-summary proceedings for the investigation of charges relating to indictable offences is to provide the accused person with certain fundamental safeguards before he can properly be committed for trial. No person can or should be indicted for an offence unless the prosecution has placed before the committing Magistrate sufficient *prima facie* evidence in support of that charge. Here, the accused had no notice before commitment that the prosecution relied on the alleged commission of one offence as proof of the alleged commission of the other offence. Had he received notice of such intention, it would have been open to him, by the cross-examination of witnesses or by leading evidence in the lower Court, to attempt to satisfy the Magistrate that he should not be committed for trial on either count. The novel procedure adopted by the Crown in the present cases has deprived him of this fundamental right, and, assuming as I must do at this stage that he is innocent of both charges, I feel bound to hold that prejudice might well have been caused to him. It is therefore too late now to supplement the evidence which in its original content was insufficient to justify his commitment in either case. Had there been *some* evidence led before each committing Magistrate to prove the charge under investigation, the present procedure might have been less indefensible. In the present state of things, however, I regard the objection raised by the defence as one of substance and not merely of form.

The view I have taken is that while it is not illegal for the Crown to join in the same indictment charges which had formed the subject of separate proceedings terminating in separate committals, such a procedure is not proper and should not be permitted by the

trial Judge where the avowed intention of the Crown is to supplement at the trial the insufficient evidence relied on in one preliminary Magisterial investigation by the evidence recorded in a different investigation. This procedure would have the result not only of joining the charges in one indictment but also of pooling and amalgamating the evidence of separate non-summary proceedings. It must be remembered that " each count in an indictment is *for the purposes of evidence and judgment* a separate indictment ". *Archbold, 32nd Ed., page 54; R. v. Latham, 5 B. and S. 635* and *R. v. Bailey (1924) 2 K.B. 300.* I accordingly direct that, on the facts of the present case, the accused should be separately tried on each count in the indictment. The principle which I propose to follow in exercising my discretion in the matter is that laid down in section 5 (3) of the Indictments Act, 1915, of England which provides that " Where . . . . the Court is of opinion that a person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment ". It follows from my order in the present case that, *for the purposes of each separate trial, the indictment must be regarded as containing a list of only those witnesses who were examined and those productions which were relied on by the prosecution in the particular non-summary proceedings in which the accused was charged and committed for trial.* In the present state of the law in this country, the Crown is not entitled *as of right* to rely on any other evidence than what was tendered against the accused in the lower Court in support of each charge.

I agree with learned Crown Counsel that, on the authority of *King v. Manual Cooray* [1], and *King v. Aron Appuhamy* [2], (followed recently by Gunasekara J. in an unreported case) the provisions of section 172 of the Criminal Procedure Code may be regarded as empowering this Court, *in the exercise of its discretion,* to allow an indictment to be amended by adding to the list of witnesses and documents called or produced in the lower Court. This discretion may properly be exercised, for instance, where fresh evidence has been discovered by the prosecution after the accused had been committed for trial, or where admissible evidence was led in the lower Court, but in an incomplete form. I have not been referred, however, to any authority here or in England where fresh evidence has been permitted to be led after indictment *to supplement evidence which was in the first instance inadequate to justify his commitment* and upon which the accused should not have been put upon his trial. Section 172 was never intended, in my opinion, to authorise the Crown to supply vital gaps in the case against a person who had been improperly committed for trial on insufficient evidence. Section 165F of the Code empowers the Attorney-General to present an indictment against an accused " if, after the receipt by him of the certified copy of the record of the inquiry (under Chapter 16) he is of opinion that *the case is one which should be tried upon* indictment . . . . " This can only mean that the Attorney-General must be satisfied that the evidence led *at the preliminary inquiry* was sufficient to warrant trial

[1] *(1946) 33 C. L. W. 104.* [2] *(1949) 51 N. L. R. 358.*

upon indictment. The existence of other evidence which was not led at the inquiry to support the charge cannot be taken into account for the purpose of his decision. A proper commitment, justified by the evidence placed before the committing Magistrate, is a condition precedent to the operation of section 172 of the Criminal Procedure Code.

I appreciate that the desire of the Crown in this case was to avoid the delay which would have been occasioned by ordering the proceedings in cases Nos. 4,124 and 4,125 to be re-opened for the purpose of leading in each case the minimum evidence which would have justified commitment on each charge. Had there already been on record sufficient evidence to put the accused on trial on each of the charges, the proposed " short-cut " (if I may use that term) would perhaps have been open to less objection. In the present case, for the reasons which I have given, the " short-cut " leads nowhere.

It now remains for the Crown to decide whether any useful purpose would be served by proceeding against the accused *in accordance with and subject to the restrictions imposed by my directions in this order*. Let the case be called on February 1 for this purpose. The accused must be produced in Court on that date, and the cases fixed for trial if the Crown so desires.

I had given careful consideration to the question whether I should reserve these questions for the consideration of a fuller Bench in terms of section 48 of the Courts Ordinance. In my opinion such a step would not be justified. My ruling does not seem to me to be in conflict with any earlier decisions of this Court, and I can hardly think that many occasions would arise in the future for the Crown to be confronted with a situation where fresh evidence is available to support a charge on which an accused has been committed for trial on insufficient material. Should such occasions arise, justice demands that the normal procedure available to the Attorney-General should not be side-tracked. Besides, in the present cases the accused has already, through inability to furnish bail, been on remand for over 10 months awaiting his trial and it is not right that a final decision should be further delayed pending the determination of academic questions of law. If the accused is in fact guilty of the serious offences alleged against him, the case affords yet another illustration of the necessity for the prosecuting authorities to obtain the advice of the law officers of the Crown *at the proper time*—that is, at a stage when the case against the accused is still under preparation for the purposes of the non-summary proceedings in the Court below. Had this been done, the trial of the accused would long since have been concluded.

Joinder of charges disallowed.
Accused to be separately tried on each count in the indictment.

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