1921.

Present : Shaw J.

SILVA *v.* SIMON.

170—P. C. Balapitiya, 48,956.

Penal Code, s. 449—Being armed with dangerous weapon with intent to commit an unlawful act—Charge.

When a person is charged under section 449 of the Penal Code with being armed with a dangerous weapon with intent to commit an unlawful act, the charge should allege what unlawful act he was intending to commit. The Magistrate should also find when he convicts what unlawful act the accused was about to commit.

THE facts appear from the judgment.

Ameresekera, for second accused, appellant.—Section 449, as amended by section 2 of Ordinance No. 12 of 1906, provides for the punishment of two offences. The appellant is charged with being armed with a dangerous weapon, to wit, a sword, with intent to commit an unlawful act.

In the first place, the charge is defective, in that it does not disclose what particular unlawful act the appellant intended to commit. In the second place, the burden of establishing the appellant's special intention to use the sword for the purpose of committing a particular unlawful act is on the prosecution. That burden has not been discharged, and the Magistrate has not found that the appellant had any special intention to commit a particular unlawful act.

The law as stated in *Silva v. Charles* [1] in regard to the offence with which the accused is charged is unaffected by the amending Ordinance, and it is now well-established law that in order to sustain a conviction under this charge there must be proof of a special intent to do a particular illegal act (*vide* also *16 N. L. R. 456*).

February 22, 1921. SHAW J.—

In this case the second accused was charged under section 449 of the Penal Code with being armed with an offensive weapon, to wit, a sword, with intent to commit an unlawful act. He was convicted and sentenced to six months' rigorous imprisonment and to a fine of Rs. 100 or further six weeks' rigorous imprisonment. It appears from the evidence, which has been believed by the

[1] *(1896) 2 N. L. R. 164.*

Magistrate, that the police at about 11 o'clock at night made a raid upon a *wadiya*, where they suspected that a certain man named Cornelis, who was an absconder from justice, was concealed. At the *wadiya* they found a man named Anis Silva, the accused, and the absconder. The absconder ran away, and has not been arrested. Anis Silva was arrested, and in his waist was found a jemmy. The appellant was arrested, and before he was arrested he threw away a sword which was in his possession. The appeal, in so far as it relates to the facts, must, in my opinion, fail. There is sufficient evidence to enable the Magistrate to come to the conclusion that he did, that the sword was in the possession of the appellant, but there appears to me to be two objections to this conviction on a point of law. The section provides for the punishment as "Whoever is found having in his custody or possession without lawful excuse, the proof of which lies on him, any instrument for house-breaking, or being armed with a dangerous or offensive weapon with intent to commit any unlawful act."

There are two offences in that section, namely, the one being in possession of house-breaking implements without lawful excuse, and the other of being armed with a dangerous or offensive weapon with intent to commit an unlawful act. It is this second offence that this accused is charged with. In my opinion the charge in the present case is not a good one. It is necessary in framing the charge to give information to the accused of the offence which he is said to have committed, and it is necessary, in my view, that when a person is charged under this part of this section, the charge should allege what unlawful act he was intending to commit. There is another objection to the present case, namely, that the Magistrate has not found what unlawful act the appellant was about to commit. It seems to me that it is necessary in a charge under this part of the section for it not only to be alleged in the charge, but that it should be found by the Magistrate that the accused was about to commit some unlawful act, either house-breaking or rioting or an attack upon some other person or some other unlawful act. This view seems to me to be supported by the case of *Silva v. Charles*[1] and the decision in *The King v. Perera*.[2] That case, although it shows that the law as stated in *Silva v. Charles*[1] is now different with regard to house-breaking instruments, the law stated in the earlier case is still good with regard to the second offence in section 449 of the Code, the offence of being armed with a dangerous weapon with intent to commit an unlawful act.

The conviction of the appellant must, in my opinion, be set aside.

Set aside.

[1] *(1896) 2 N. L. R. 164.*

[2] *(1913) 16 N. L. R. 456.*