The Queen V. Wijepala

344/1962

Present: H. N. G. Fernando, J., and Herat, J.

THE QUEEN v. W. WIJEPALA

S. C. 1/1962—D. C. Crim. Gampola 90/M. C. 4104

Indictment—Joinder of charges of theft with charges of retention and disposal of stolen property—Legality—Criminal Procedure Code, ss. 179, 180 (1), 181.

The accused-appellant was charged in the same indictment with the commission of the offence of theft of certain articles and, in the alternative, of retention and disposal, at least one year later, of stolen property.

Held, that the alleged alternative offences were not "of the same kind" as the offence of theft and, therefore, could not properly be joined under section 179 of the Criminal Procedure Code. Not being "in the course of the same transaction", they could not be joined under section 180 (1). Nor could section 181 be applied, for the evidence relevant to the two alternative counts was quite distinct from that which related to the charge of theft. In the result there was an illegal joinder of charges.

APPEAL from a judgment of the District Court, Gampola.

Colvin R. de Silva, with *M. L. de Silva*, for accused-appellant.

E. H. G. Jayetileke, Crown Counsel, for Attorney-General.

Cur. adv. vult.

September 17, 1962. H. N. G. FERNANDO, J.—

The indictment in this case charged the appellant on three counts. In the first count the charge was that between August 1956 and 25th November 1957 at Panwilatenne the appellant committed theft

of gold jewellery including a gold necklace and ring, of an electric table lamp and of a National Bank Cheque Book, property in the possession of one Kirimetiyawa Dissave.

Although the matter is not entirely free from doubt the manner in which the indictment has been typed indicates that the second and the third counts were both alternatives to the first count. The second charge was that on or about 29th November 1957 the appellant dishonestly retained stolen property, to wit, a gold necklace; and the third count charged that on or about 10th August 1957 at Gampola, the appellant in the course of the same transaction voluntarily assisted in disposing of stolen property, to wit, National Bank Cheque Book No. 60211, which he knew or had reason to believe to be stolen property.

The evidence for the prosecution was to the effect that Kirimetiyawe Dissave had not been in permanent occupation of his house at Panwilatenne during the relevant period but that the house had been left in the care of Punchi Banda. On coming to his house on 25th November 1957, Kirimetiyawe Dissave found on opening an almirah in the house that all the jewellery alleged to have been kept in that almirah was missing. On questioning Punchi Banda the latter explained that at about August 1956 the appellant who lived near by had come to the house one afternoon and inserted a key in the almirah and tried to open it. Thereafter he had come at night and treated Punchi Banda to meat and arrack and had slept that night in the house. According to Punchi Banda's evidence the appellant did not actually open the almirah at the time when he inserted the key in the lock. Punchi Banda himself testified to the appellant's visit at night on the same day, to his having provided beef and arrack and to his having slept in the house until about 5.30 next morning. This evidence of Punchi Banda was the only evidence which might lead to any inference as to the time when the appellant is alleged to have stolen the property which was the subject of the charge in count 1. There was no evidence from Punchi Banda to indicate that the accused had visited the house on subsequent occasions or that he would have had the opportunity subsequently to enter the premises in order to open the almirah. That being so, in all

probability the prosecution case was that the accused committed the alleged theft on some night in the month of August 1956.

A possible explanation for the length of the period specified in the first count can however be gathered from the other evidence which was more directly relevant to the 2nd and 3rd counts. There was evidence that on 29th November 1957, after a complaint had been made to the police by Kirimetiyawe Dissave, the appellant was found to be in possession of a gold necklace, alleged to have previously belonged to Kirimetiyawe Dissave, and there was also evidence that the appellant had in August 1957 participated in certain transactions involving the use of one of the cheque leaves alleged to have previously been in Kirimetiyawe Dissave's almirah. Perhaps because of these two matters it was thought that the totality of the evidence might lead to a view that if the property was not stolen in August 1956 it must have been stolen sometime thereafter, in the case of the cheque before August 1957, and in the case of the necklace before November 1957. But if this was the view which the prosecution sought to establish it will be seen that on such a basis there could have been two or three offences of the same kind although it would not be clear that all such offences were committed within the space of twelve months. It is at least doubtful therefore whether, unless the prosecution expected to establish one theft on one and the same occasion and that in August 1956, the 1st count was duly framed.

Turning now to the alternative charges, counsel for the appellant has submitted that the charge of assisting in the disposal of the cheque, an offence alleged to have been committed in August 1957, could not have been combined with the charge of theft of the cheque except on the basis that there was a series of acts so connected together as to form the same transaction. This point I now find does not arise for consideration for as stated above the intention was to prove this charge in the alternative to count 1. In regard, however, to both counts 2 and 3 the question arises whether they could properly have been framed in the alternative to count 1, namely whether they are properly referable to section 181 of the Criminal Procedure Code.

As already stated, the evidence relating to the alleged theft referred to the appellant's conduct in August 1956, and could if at all, establish theft by him at that time, but not later. On the other hand, the counts of retention and disposal of stolen property were based on possession of certain articles at least one year later. The alleged alternative offences are not "of the same kind" as that charged in count one, and therefore could not properly be joined under Section 179. Not being "in the course of the same transaction", they could not be joined under Section 180 (1). Nor can it be said that Section 181 applies, for the evidence relevant to the two alternative counts is quite distinct from that which relates to the first count, and no doubt could exist as to the particular offences disclosed by the distinct parts of the evidence. In the result there has been an illegal joinder of charges. This defect has obviously prejudiced the defence, since, but for the joinder, evidence concerning the alternative counts may not have been admissible on the first charge. Moreover, the learned Judge has altogether failed to realise that the principal prosecution witnesses were accomplices. In all the circumstances, I do not consider that the appellant need face a fresh trial.

The appeal is allowed and the conviction and sentences are quashed.

HERAT, J.— I agree.

Appeal allowed.