EKANAYAKE

v.

THE ATTORNEY-GENERAL

COURT OF APPEAL.
ABEYWARDENA, J., JAYALATH, J. AND RAMANATHAN, J.
C.A. 132/84.
H.C. COLOMBO 2023/83.
MARCH 10, 11, 12, 13, 14, 24, 26, 1986, APRIL 28, 29, 30, 1986, MAY 12, 13, 14, 15, 16, 26, 27, AND 28, 1986.

Criminal Procedure–Offences Against Aircraft Act No. 24 of 1982–Charges under s.17(1)(a) read with s.19(1) and (3) of the Act and s.394 of the Penal Code–Section 20 of the Offences Against Aircraft Act–Convention on offences and certain other acts committed on board aircraft signed at Tokyo on 14.9.1963–Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on 16.9.1970 and Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed at Montreal on 23.9.1971–Conviction and sentence on two charges–S.203, 279 and 175 of Code of Criminal Procedure Act–Failure to give reasons for conviction and deliver judgment in open court–Retrospective anc retroactive legislation–Jurisdiction–Defects in Charges–Misjoinder.

There were two charges against the accused-appellant in the indictment served on him The first was that between 29.6.1982 and 01.7.1982 between Delhi and Bangkok the accused while being on board a foreign aircraft whilst in flight unlawfully intimidated the pilot with threats to blow up the aircraft if his demands were not met and thereby committed an offence under section 17(1)(*a*) read with section 19(1) and 19(3)(*d*) of the Offences Against Aircraft Act No. 24 of 1982. The second was that between 01.7.1982 and 03.7.1982 in the course of the same transaction the accused-appellant dishonestly retained at Colombo U.S. $299,700 knowing or having reason to believe the money was stolen property and thereby committed an offence punishable under s.394 of the Penal Code. Trial was before the High Court Judge but without a jury. The accused was convicted and sentenced to simple imprisonment for life on count 1 and 3 years' rigorous imprisonment on count 2–sentences to run concurrently. Objection was taken that the Aircraft Act being retroactive or retrospective legislation was bad as it offended Article 13(6) of the Constitution, that the offence alleged having being committed outside Sri Lanka on a foreign aircraft was not triable in Sri Lanka, that the judge had failed to comply with s.203 of the Code of Criminal Procedure Act as he did not give his reasons for the conviction nor deliver judgment in open court, and that no preliminary inquiry had been held by the Director of Civil Aviation as required by s.20 of the Offences Against Aircraft Act.

Further the first charge did not refer to the jurisdiction of the High Court insofar as to where the offence was committed and the second charge was bad as no charge had been framed for committing theft or extortion. The pilot who had been threatened did not hand over the money to the accused. There was a misjoinder of charges.

Held–

(1) By virtue of s. 17(1) of the Offences Against Aircraft Act and s. 9 of the Judicature Act the High Court of Colombo had jurisdiction to try any person who is a Sri Lankan for any offence *wherever* committed including "any place outside the territory of Sri Lanka or on board or in relation to any ship or aircraft of whatever category." The act which the accused is alleged to have committed has now been recognised as an offence under the Act. Hence the High Court of Colombo had jurisdiction to try count 1.

(2) Charge No. 2 was a cognizable offence under the Penal Code and the High Court has jurisdiction to try it.

(3) A judgment dated 29.6.83 signed by the judge is filed of record. The circumstance that the appellant appealed against the judgment and findings shows that the judge did deliver judgment. There is also the presumption that an official act had been done correctly. Sections 203 and 279 have been complied with.

(4) The omission of the words "within the jurisdiction of the High Court" in charge 1 is not a fatal irregularity.

(5) The demand for money cannot be separated or isolated from the threat if the demand was not complied with. The intimidation and threat formed the subject-matter of the 1st count and the money thereby received the subject-matter of the 2nd count. Though the dates of the offences are separated by a short period the two charges formed one transaction. The American dollars come within the meaning of stolen property. There was no misjoinder under s. 175(1) of the Code of Criminal Procedure Act.

(6) The inquiry in terms of s. 20 of the Aircraft Act is an administrative inquiry and not an essential prerequisite to a prosecution under the Act.

(7) Sentences of simple imprisonment and rigorous imprisonment cannot run concurrently.

(8) A sentence of life imprisonment is not mandatory under the Offences Against Aircraft Act.

Case referred to:

Jonklaas v. Somadasa – (1942) 43 NLR 284.

APPEAL from judgment of High Court of Colombo.

Dr. Colvin R. de Silva with *Ranbanda Seneviratne* and *Miss Saumya de Silva* for the accused-appellant.

Upawansa Yapa, Deputy Solicitor-General with *N. G. Amaratunga, State Counsel* for the Attorney-General.

August 7, 1986.

ABEYWARDENA, J.

The indictment served on the accused-appellant was in the Sinhala language and the accused-appellant was indicted on two charges, the first being under the Offences Against Aircraft Act No. 24 of 1982 and the other under the Penal Code.

The first charge against him was–

"that between the 29th of June 1982 and the 1st of July 1982 between New Delhi and Bangkok, being on board a foreign aircraft, to wit, Al Italia (Boeing) whilst in flight, unlawfully by threat did intimidate the pilot of that aircraft, that if the demands made by the appellant were not satisfied, that he will blow up the aircraft, and committed an offence under section 17(1)(*a*) read with section 19(1) and 19(3)(*d*) of the Offences Against Aircraft Act No. 24 of 1982".

The second charge against him was

"that between 1st July 1982 and 3rd July 1982 at Colombo within the jurisdiction of this court and in the course of the same transaction, as in count 1, the appellant dishonestly did retain 299,700 U.S. Dollars, stolen property knowing or having reason to believe the same to be stolen property, an offence punishable under section 394 of the Penal Code"

After trial in the High Court of Colombo without a jury the accused-appellant was found guilty of both charges and after conviction was sentenced to serve a term of simple imprisonment for life on the first charge and a term of three years' rigorous imprisonment on the second charge, both sentences were to run concurrently. The money recovered from the appellant was ordered to be returned to the Al Italia Air Company on a bond with a specified undertaking. It is against this conviction and sentence that this appeal has been filed.

Learned counsel for the appellant submitted that the Offences Against Aircraft Act came into force on 26th July 1982 after the alleged offence has been committed and that this was retrospective or

retroactive legislation, since the act committed by the appellant was not an offence at the time it was committed. He referred to Article 13(6) of the Constitution of Sri Lanka wherein it is enacted that–

> "No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence."

However, in terms of the proviso that–

> "Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations."

and because the Offences Against Aircraft Act, No. 24 of 1982 was–

> "to give effect to certain conventions relating to the safety of aircraft to which Sri Lanka has become a party, namely, the Convention of Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14th September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on 16th December 1970 and the Convention for the Suppression of Unlawful Acts Against the Safety of Civi Aviation signed at Montreal on 23rd September 1971,"

we are of the opinion that no court can invalidate the Act or inquire into the validity of this law.

The learned counsel for the appellant submitted that the learned High Court Judge has failed to comply with the requirement in terms of section 203 of the Code of Criminal Procedure Act, in that he has failed to give his reasons having recorded a verdict of conviction and passed sentence on the accused, and has failed to deliver the judgment in open court and to communicate it to the accused-appellant. Learned counsel further submitted that the learned High Court Judge has failed to comply in terms of section 283 of the Code of Criminal Procedure Act, more specially sub-section 5 of section 283 which provides that the judgment shall be explained to the accused-appellant and a copy thereof shall be given to him without delay if he applies for it and the original shall be filed with the record of

Learned counsel for the appellant drew the attention of this court to the journal entry dated 29.6.83 in the record of proceedings in the High Court where the two words, "verdict and sentence" have been recorded. He also referred to a marginal entry in the same record dated 8.7.83 where the words, "Received Judgment original" appears. It is not known who has made this entry as no signature is attached to this entry. Learned counsel for the appellant submitted that there is no entry anywhere in the proceedings to the effect that the judgment has been delivered. The application for bail after conviction, by the accused-appellant which has been filed on 5.7.83, has been subsequently withdrawn by the appellant as a copy of the judgment applied for has not been made available to him. In the second application for bail filed on 6.9.83 an averment has been made that the learned High Court Judge has failed to give reasons for the conviction and that the judgment was not pronounced in open court, nor has the learned judge assigned any reasons to the appellant when he appeared in court on 29.6.83, for finding him guilty. He submitted that on the face of the record the judgment has not been delivered and the reasons for conviction has not been explained. The learned counsel for the appellant submitted that the judgment has been subsequent to the verdict and is not one delivered in terms of the provisions of the Criminal Procedure Act, and that this irregularity makes the conviction and sentence invalid according to law.

It was also the contention of the learned counsel for the appellant that the normally adopted procedure dealing with the joinder of charges has not been followed; that, though the appellant pleaded not guilty to the two charges at that stage, the counsel appearing for him raised legal objections regarding the jurisdiction, in that the first charge in the indictment does not refer to the jurisdiction of the High Court in so far as to where this offence has been committed. He further argued that the appellant has not submitted to the jurisdiction of court by reason of his pleading not guilty to the indictment and that by agreement, jurisdiction cannot be conferred according to law, as it has not been conferred by legislature.

It was strongly urged by counsel for the appellant that count one of the indictment does not conform to the provisions of the Aircraft Act. He submitted that section 17(1) refers only to Sri Lanka Aircraft in flight which has been seized or over which control has been exercised, and that section 19(1) refers to foreign aircraft outside Sri Lanka and section 19(3)(*d*) refers to an act that has been committed in relation

to a foreign aircraft "if the person *committing* such an act in relation to such foreign aircraft is present in Sri Lanka" and that the appellant who is alleged to have committed the act was not in Sri Lanka at the time of the commission; that one has to give careful consideration when considering section 19(3)(*d*), the proviso to section 19(3) which enacts–

> "No court in Sri Lanka shall have jurisdiction to try an offence under this section;"

that the act alleged to have been committed did not fall within section 19(3)(*d*) of the Act and the court that heard the case had no jurisdiction. No court in Sri Lanka has jurisdiction to try any offence in relation to a foreign aircraft unless such offence comes within section 19(3)(*a*), (*b*), (*c*), (*d*) or (*e*) of the Act. Section 19(3)(*a*), (*b*) and (*c*) refer to acts committed in Sri Lanka in relation to foreign aircraft, whereas section 19(3)(*d*) refers to an act committed outside Sri Lanka by any person who is a citizen or not of Sri Lanka in relation to a foreign aircraft, "if the person committing such act is present in Sri Lanka". It was submitted that the act alleged against the appellant was one in relation to a foreign aircraft committed outside Sri Lanka in which the person committing the act was on board that aircraft and not in Sri Lanka and hence falls outside the scope of section 19(3)(*d*) of the Act. In support of his interpretation of section 19(3)(*d*) he referred to the same Act, Sinhala version, wherein the words "එම වරද සිදු කරණ තැනැත්තා ශ්‍රී ලංකාව තුල සිටින්නේ නම්" appear and submitted that in terms of article 23(1) of the Constitution in the event of any inconsistency between the two texts, the Official Language will prevail.

It was also submitted that in terms of section 20 of the Act, "where any person is arrested for an offence under any part of this Act, the competent authority", who is the Director of Civil Aviation, in terms of section 2, "shall make a preliminary inquiry into the facts" and that such an inquiry has not been held in this case; that the first charge in the indictment is not an offence referred to in the Schedule of the Code of Criminal Procedure Act, or the Judicature Act, but has been deemed to be included in the First Schedule so long as the Criminal Procedure (Special Provisions) Law No. 15 of 1978 is in force, in terms of section 18 of the Aircraft Act which has made such offence cognizable and non-bailable. For these reasons it was urged that a non-summary inquiry should have been held prior to the indictment being presented in terms of the Code of Criminal Procedure Act which

The second charge was under section 394 of the Penal Code triable summarily by a Magistrate. The preamble to the Offences Against Aircraft Act refers to providing matters connected with the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague among other conventions in relation to acts committed against the safety and on board aircraft signed at Tokyo and at Montreal. Articles 6 and 7 of the Convention signed at The Hague for the suppression of unlawful seizure of aircraft has made provisions "without exception whatsoever and whether or not the offence was committed in its territory to submit the case to its competent authorities for the purpose of prosecution". It was submitted that without such preliminary inquiry being held that the appellant has not been tried and convicted according to law. Learned counsel for the appellant also submitted that the joinder of counts 1 and 2 in the indictment was a misjoinder; that there were two distinct offences, the first count being an offence committed between New Delhi and Bangkok between 29th of June 1982 and 1st July 1982 and the other count was for an offence committed in Colombo between 1st July and 3rd July 1982, whereas the 1st charge was an offence under the Offences Against Aircraft Act, the 2nd charge was an offence under section 394 of the Penal Code, for dishonestly retaining stolen property, knowing or having reason to believe that the same was stolen property. The case for the prosecution was that the money in American Dollars, the subject matter of this charge, has been got at by extortion. Counsel for the appellant strongly urged that there has been no charge framed against the appellant for committing the offence of extortion or theft and, this being so, a charge for retention of stolen property cannot be proved. It has not been proved that this money was the proceeds of a threat or a theft committed. The pilot of the Al Italia aircraft who has been threatened, has not handed over this money to him. He submitted that the 2nd count was not a part of the same transaction alleged in count 1 which amounts to "hijacking" an aircraft and not to extortion as the two counts have no relationship to each other in purpose or in object–vide *Jonklaas v. Somadasa*. There has been no community of purpose or continuity of acts to link together different acts, so as to form one transaction and when the appellant left Bangkok the transaction regarding the first count was completed and the object accomplished.

Learned Deputy Solicitor-General referred to the three conventions mentioned earlier to which Sri Lanka has been a contracting party and referred to The Hague Convention Article 1 which made exercising

control of or seizing of an aircraft unlawfully, by force or threat or by any form of intimidation by any person on board an aircraft in flight, an offence. Though this is not an international crime as in the case of genocide, there was an obligation on the part of Sri Lanka as a contracting party to make such an act a crime according to our law and hence the Offences Against Aircraft Act has been enacted. Before it was enacted, this Bill was considered by the Supreme Court on a reference made under the provisions of the Constitution and a Full Court held that its provisions were not inconsistent with the Constitution and, therefore, this court has no jurisdiction to inquire into the validity of this law.

Section 17(1) of the Offences Against Aircraft Act enacts that an offence under the Act shall be tried before the High Court holden in Colombo. Section 9 of the Judicature Act, grants the High Court jurisdiction to hear "any offence *wherever* committed by any person who is a citizen of Sri Lanka, in any place outside the territory of Sri Lanka or on board or in relation to any ship or aircraft of whatever category". Section 128(3) of the Code of Criminal Procedure Act grants jurisdiction to the High Court on indictment to try an offence committed on the high seas, or on board any ship or upon any aircraft. The High Court takes cognizance only when an offence known to our law has been committed under such circumstances. The offence as found in count 1 of the indictment was not known to our law prior to the Offences Against Aircraft Act of 1982. Once the Act alleged to have been committed by the appellant was by this Act recognized as an offence, according to the law, the High Court had jurisdiction notwithstanding the jurisdiction confirmed on it by section 17 of the Offences Against Aircraft Act, by virtue of the Judicature Act and the Code of Criminal Procedure Act. Section 17 of the Offences Against Aircraft Act has limited the jurisdiction to the High Court holden in Colombo. The High Court holden in Colombo had the jurisdiction to try count 1 of the indictment. Count 2 is an offence under the Penal Code triable summarily by a Magistrate's Court within the jurisdiction the offence was committed or by the High Court on indictment as has been done in this case, and hence, I am of the opinion that the High Court had the jurisdiction to hear count 2 of the indictment and arrive at a verdict.

This court has been called upon to determine whether the learned High Court Judge has passed judgment in terms of sections 203 and 279 of the Code of Criminal Procedure Act. At the conclusion of the

trial, counsel for the prosecution has addressed court on 20th, 21st, and 22nd June 1983. The prosecution and the defence have submitted Written Submissions to court on 26.6.83. The verdict and sentence have been fixed for 29.6.83. The journal entry dated 29.6.83 signed by the learned judge only bears two words, "Verdict and Sentence". There is filed of record a handwritten judgment by the High Court Judge dated 29.6.83 and signed by him. An appeal has been filed on behalf of the accused-appellant and the learned judge has on 30.6.83 made an endorsement to forward record to the Court of Appeal. This petition of appeal states, "Being aggrieved with the *judgment*" and the prayer is to 'quash the *findings* of the trial judge'. If a judgment was not, in fact, delivered I am of the opinion that the petition of appeal against the verdict and sentence would not have stated the aforementioned. The petition of appeal filed was not on the grounds that no judgment has been delivered. There has been also an application on behalf of the appellant for the vindication of his fundamental rights subsequent to the conviction and sentence and in this application, too, no allegation has been made that the judgment has not been delivered according to law by the learned Judge. In terms of section 114 of the Evidence Ordinance, the presumption that an official act has been done according to how it should be done applies in the event if no evidence is adduced to the contrary.

The handwritten judgment dated 29.6.83 which runs into many pages and signed by the learned judge would have been delivered to the Record Keeper on 8.7.83 by the learned judge, who went on retirement soon after, and hence the marginal unsigned entry dated 8.7.83 in the journal entry of the court record, "Received Judgment original". This entry does not, in any way, mean that the judgment has not been delivered on the day fixed for its delivery. The appellant has been represented by counsel on this day in court and there is no affidavit filed from him regarding the failure to comply with the provisions of section 283 of the Code of Criminal Procedure Act by the learned judge. For these reasons I am of the opinion that the learned judge has complied with the provisions of section 283 of the Code of Criminal Procedure Act.

Section 19(3) of the Offences Against Aircraft Act enacts,–

"No court in Sri Lanka shall have jurisdiction to try an offence under this section *except* in the following cases".

and section 19(3)(*d*) enacts,–

> "Where the act constituting such offence is an act referred to in paragraph (*a*) or (*b*) or (*c*) or (*d*) or (*e*) of sub-section (1) of section 17, committed in relation to *foreign aircraft* (Section 17 being offences committed in relation to Sri Lanka aircraft) or the attempt to commit or the abetment of the commission of any such act, if the person *committing* such an act is in Sri Lanka".

As I have stated earlier, learned counsel for the appellant vehemently argued that the ingredients of this offence has not been proved. The appellant was, in fact, on board the foreign aircraft Al Italia at the time he is alleged to have committed the act and it cannot be said that "the person" (meaning the appellant) "committing such act is" (was) "present in Sri Lanka".

The learned Deputy Solicitor-General submitted that section 19(3)(*d*) has made no reference to (*f*) and (*g*) of section 17(1) of the Offences Against Aircraft Act and includes only (*a*), (*b*), (*c*), (*d*) and (*e*) of section 17(1), as this Act has been enacted in compliance with the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16th December 1970 and that the word *Committing* has been used as a "verbal adjective" that though the offence has been committed outside the territorial limits of the court's jurisdiction, by a legal fiction it is presumed that the offence has been committed within its jurisdiction. He submitted that the Legislature has clearly indicated its intentions and that it is a well nigh impossibility for a person to commit an act in relation to a foreign aircraft being on board such foreign aircraft in flight unlawfully by force or threat or intimidation, seize or exercise control of that aircraft, and be present in Sri Lanka when *committing* such act.

It is the duty of the court, in construing a Statute, to ascertain and implement the intention of Parliament as can be gathered from such Statute and the general object for which that statute has been enacted. As stated earlier, the object of the Offences Against Aircraft Act has been to give effect to the three Conventions in relation to aircraft signed at Tokyo, The Hague and at Montreal, all of which are to enable the safety of aircraft to which Sri Lanka became a party. Section 19 of the Offences Against Aircraft Act is sub-divided into three parts: (1), (2) and (3). Section 19(1) enacts–

"Any person who is a *Sri Lankan or not*, who *commits* on board or in relation to *a foreign aircraft outside Sri Lanka* any act referred to....."

Section 19(2) deals with attempts to commit or abets the commission which is not relevant to this appeal. Section 19(3) enacts–

"No court in Sri Lanka shall have jurisdiction to try an offence except in the following cases".

Thus, it is only under exceptional circumstances that the High Courts have jurisdiction to try offences committed by persons whether citizens of Sri Lanka or not in relation to foreign aircraft outside Sri Lanka. These offences are subdivided into five categories: (*a*), (*b*, (*c*), (*d*) and (*e*). Sub-section (*d*) of section 19(3) which is section 19(3)(*d*) enacts–

"Where the act constituting such offence is an act referred to in paragraphs (*a*) or (*b*) or (*c*) or (*d*) or (*e*) of sub-section (1) of section 17 committed in relation to foreign aircraft, or attempt to commit, or the abetment of the commission of, any such act, *if the person committing such act is present in Sri Lanka*".

Section 19(3)(*d*) includes two distinct offences or has two limbs to it:

(*a*) The acts referred to in paragraphs (*a*), (*b*, (*c*), (*d*) and (*e*) of sub-section (1) of section 17(1); and

(*b*) Attempt to commit or abet the commission of any such act.

I am of the view that the first limb has to be read with section 19(1) thus:

"Any person whether he is a citizen of Sri Lanka or not who commits"

and the second limb which refers to attempt to commit or the abetment of the commission of any such act with–

"if the person committing such act is present in Sri Lanka."

There the words, "If the person committing such act is present in Sri Lanka" is referable only to the offence of attempt and abetment of the commission of the offence and not to the first limb of this section dealing with the actual commission of the act. The word 'committing' is the present participle of the verb 'to commit' and its meaning is "at the time the act is being committed" and is referable to the second limb of section 19(3)(*d*) which is the offence of attempt or abetment of the commission of acts constituting such offences as in paragraphs (*a*), (*b*), (*c*), (*d*) and (*e*) of section 19(1) of the Offences Against Aircraft Act. I am unable to agree with the submission of the learned counsel for the appellant that at the time of the commission of the offence on board or in relation to a foreign aircraft outside Sri Lanka, the person so commiting the act should be present in Sri Lanka.

Count 1 in the indictment is an offence in terms of Offences Against Aircraft Act, and count 2 in the indictment is an offence under the Penal Code. The first count refers to an act committed between New Delhi and Bangkok and the 2nd count at Colombo, Sri Lanka. The first count refers to an act committed between 29th of June and the 1st of July and the 2nd count, between the 1st of July and the 3rd of July. The 1st count does not state that the offence has been committed within the jurisdiction of the High Court holden in Colombo, though the 2nd count states that the offence has been committed within the jurisdiction of the High Court. I am, therefore, of the opinion that the omission of the words "within the jurisdiction of this court" in count 1, is not a fatal irregularity.

I have already held that the High Court had the jurisdiction to hear both counts. I have now to consider whether the indictment is valid in law or not, due to misjoinder of charges. It was the submission of learned counsel for the appellant that the second count was not a part of the same transaction as the offence alleged in count one, due to the absence of "community of purpose and continuity of action"; that the offence stated in count one of the indictment was concluded with the accused-appellant realizing his object of getting down his wife and child from Italy and receiving the money he demanded to cover the expenses he has incurred in his attempt to visit them in Italy and meet them which was denied to him. It was submitted that count one and count two are distinct offences and each such offence should be tried separately.

Section 175(1) of the Code of Criminal Procedure Act enacts–

> "If in one series of acts as 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".

According to the evidence led at the trial, there was a threat and intimidation that the aircraft will be blown out unless the demand made by the appellant is satisfied. There was a demand made among others, for money in American Dollars. This demand cannot be separated or isolated from the threat as to what the appellant would do, if the demand was not satisfied which formed the subject matter of the first count. The appellant who made a lengthy statement from the dock admitted that he planned to "hyjack" the aircraft with the corporation of his wife and admitted that he made three demands, one of which was in respect of 300,000 American Dollars from the pilot of the aircraft, which demands were met. He admitted that he wrote P1, the letter threatening and making the demands which was given by him to the air hostess to be delivered to the pilot who obeyed his command. It was a part of this money in American Dollars recovered from him and produced in court that formed the subject matter of the second count in the indictment. There was a community of object in that the threat made to blow up the aircraft was to achieve the fulfilment of the demands, one of which was the money. The pilot was made to believe that the threat will be carried out by the appellant and this made him to send a note to the appellant pleading with him not to carry out the threat since women and children will be killed and to consider that the appellant's own son was in that aircraft. The intimidation and threat to blow up the aircraft was related to the demand for the money. The intimidation and threat formed the subject matter of the 1st count and the money thereby received, the subject matter of the 2nd count. I am of the opinion that the two counts in the indictment formed one transaction though the dates regarding the commission of the offences in the two counts are separated by a short period of time.

Count two of the indictment is for retention of stolen property, knowing or having reasons to believe that it was stolen property. The sum of money in American Dollars came within the meaning of stolen property as they were obtained by extortion. It was the contention of learned counsel for the appellant that the first count had nothing to do

with extortion and that appellant has not been charged for committing the offence of extortion. An offence is "an act or ommission made punishable in law in Sri Lanka" and the court had no jurisdiction to try the appellant for committing the offence of extortion committed in a foreign country. It was his contention that if the appellant cannot be found guilty of committing the offence of extortion, he cannot be found guilty of retention of the extorted money, the stolen property. It was also submitted that the person who has been dishonestly induced to pay the money was the pilot and no money has been paid to the appellant by the pilot, but that the money was paid by the Government of Italy.

Property, the possession whereof has been transferred by theft, or by extortion or by robbery, or by forgery, etc. is designated "stolen property" whether the transfer has been made within or without Sri Lanka. The transfer in this case has been made outside Sri Lanka, but nevertheless, it is stolen property and the retention of this money knowing or having reasons to believe that this was stolen property, is an act made punishable by law for the time being in force and is an offence triable in Sri Lanka by a court of competent jurisdiction.

I am, therefore, of the view that the second count was a cognizable offence known to our law and that the High Court had the jurisdiction to try the appellant on this count. I am also of the view that the offences in counts one and two were offences committed in the course of the same transaction and that there was no misjoinder of charges by including them in one and the same indictment. I am further of the view that the appellant was not misdirected or misled, nor was there any injustice or prejudice caused to the appellant by the joinder of the two counts in the one and same indictment. Though the money was not given to the appellant by the pilot who was by threats induced to give it to him but by the Italian government, I hold the view that it was money obtained by extortion and even if it was handed over to him, by a passenger, yet the act of handing over was due to the threat not only made to the pilot, but involved all the passengers on board and the aircraft itself. Section 20 of the Offences Against Aircraft Act enacts–

> "Where any person is arrested for an offence under this part of this Act, the Competent Authority shall make a preliminary inquiry into the facts.....".

Learned counsel for the appellant submitted that at the time of the commission of the act that this was not considered an offence according to Sri Lanka law and hence, no police investigation would have been conducted in terms of the provisions of the Code of Criminal Procedure Act. Learned counsel's contention was that the holding of an inquiry in terms of the Act by the Competent Authority who, according to the Act, is the Director of Civil Aviation, was a prerequisite and was mandatory and that this has not been done and the trial without holding this preliminary inquiry makes the trial ineffective and void. The preliminary inquiry contemplated under the Aircraft Act is a different type of inquiry to the preliminary inquiry referred to in section 145 of the Code of Criminal Procedure Act. The preliminary inquiry under the Code of Criminal Procedure is conducted by a judicial officer, a Magistrate, who at the commencement of the inquiry has to read over to the accused the charges in respect of which the inquiry is being held. At the conclusion of such inquiry, at which evidence of witnesses and of the accused, if he so desires to give evidence, has been recorded, the Magistrate for reasons to be recorded by him has to discharge the accused if the evidence is not sufficient to put him on trial or if the evidence recorded is sufficient to put the accused on trial, shall commit him for trial before the High Court. Such an inquiry is a judicial inquiry and has to be held in terms of section 145 (*a*) or (*b*) of the Code of Criminal Procedure Act.

The inquiry in terms of section 20 of the Aircraft Act is not a judicial inquiry, but an administrative inquiry and is not held by a judicial officer. The purpose in holding this inquiry is stated in section 12(2) of the Act–

> "Upon the conclusion of the preliminary inquiry the Competent Authority shall report the finding to the State in which such aircraft is registered and shall indicate to them whether Sri Lanka intends to exercise jurisdiction over the offence",

or in terms of section 21(2) of the Act. The Competent Authority is not by the Act bound, after holding the inquiry, to inform the Attorney-General or the High Court, but to act in terms of sections 12(2) and 21(2) of the Offences Against Aircraft Act. Therefore, I am of the opinion that the holding of a preliminary inquiry is not an essential prerequisite to a prosecution for an offence under this Act.

The learned High Court Judge when sentencing the appellant has stated that imprisonment for life on conviction regarding count one of the indictment was mandatory, and that his hands were tied and has, therefore, sentenced the appellant to a term of *simple* imprisonment for life. He has convicted the appellant on the second count and sentenced him to three years' *rigorous* imprisonment, both sentences to run concurrently. It was submitted by the learned counsel for the appellant that a term of rigorous imprisonment cannot run concurrently with a term of simple imprisonment, since they belong to two different classes of punishment and the sentence of imprisonment imposed on each one of the counts, one being of a different kind to the other, to run concurrently is bad in law. It was also strongly urged by the counsel for the appellant that a sentence of imprisonment for life was not mandatory or imperative in terms of section 19(1) of the Offences Against Aircraft Act, and that the learned High Court Judge has misdirected himself when he passed sentence on the appellant regarding count one of the indictment.

Section 19(1) of the Act enacts–

"Shall be liable on conviction after trial before the High Court, to imprisonment for life".

The Penal Code dealing with the offences under "hurt" section 314 to section 329 enacts–

"Shall be punished with imprisonment".

The Penal Code under the heading, 'Criminal Force and Assault', section 343 to section 364 enacts–

"Shall be punished with imprisonment".

Even section 296 of the Penal Code dealing with punishment for murder enacts–

"Shall be punished with death",

thereby making it imperative or mandatory the jail sentence or the sentence of punishment with death to be passed. Nowhere is it stated–

> "Shall be *liable to imprisonment* or *liable to be sentenced to death.*

The word *LIABLE* in my view means *EXPOSED TO* and, therefore, a term of life imprisonment is not mandatory for the commission of an offence in terms of the Offences Against Aircraft Act. On conviction for an offence under the Act the accused exposes himself and could be made responsible to serve a term of life imprisonment at the discretion of court. I am also of the view that a term of rigorous imprisonment which belongs to a different category to a term of simple imprisonment cannot run concurrently and is bad in law.

The learned High Court Judge when passing sentence has expressed the view that in so much as he feels sympathetic towards the accused-appellant, he has no alternative but to sentence the appellant to life imprisonment on the first count under the Aircraft Act. The accused-appellant has made a lengthy statement from the dock and has made an unqualified admission of the commission of the act, which has been subsequently made an offence according to Sri Lanka Law. He has given the reasons which motivated him to act in that manner, though such reasons are in no way a justification in law for the commission of the offence. The main reason was that he was a victim of injustice and harassment by the officials of the Italian Embassy who refused to extend his visa to Italy in spite of many visits to the Italian Embassy both in Sri Lanka and elsewhere, for this purpose and his pressing desire to see his son by his wife, an Italian citizen then living in Italy. His demands, according to the note he sent the pilot of the aircraft threatening to blow up the aircraft, was to get down his wife and son and a demand for 300,000 American Dollars, which he said, was the expenses incurred by him in his futile attempt to obtain the visa to Italy. He has in his statement from the dock stated that the refusal to issue the visa to him was due to the ill-feeling resulting from a brawl in a liquor bar with the son of a senior police

officer in Italy. It appears that the appellant acted in desparation to see his son in Italy in which country he has lived for many years and also contracted a marriage.

The appellant has at no time ever contemplated to commit the heinous crime endangering human life causing a colossal loss to property which he threatened to do. He never possessed the wherewithal to cause an explosion on board the aircraft. All what he had with him were some torchlight batteries connected to an electric wire hung round his neck. No doubt he has been a very clever actor to make the pilot, the crew on board and the passengers to get into a state of panic, alarm and fear so much so as to obtain all the demands made by threat and intimidation and to exercise control of the aircraft.

Of the 300,000 American Dollars given to him as a result of extortion by the representative of the Government of Italy, a sum of 299,700 American Dollars have been recovered, the balance 300 Dollars has been incidental expenses incurred by him as hotel expenses. The appellant has not enriched himself with this money.

Taking all these matters into consideration, I am of the opinion that the ends of justice will be satisfied by varying the sentence passed on the appellant by the learned High Court Judge. The appellant has been on remand from the date of conviction amounting to a period of over three years. I, accordingly, sentence the appellant to a term of five years' rigorous imprisonment on the 1st count and to a term of two years' rigorous imprisonment on the 2nd count in the indictment. The sentences are to run concurrently.

The convictions on the two counts in the indictment are affirmed. Subject to the variation in the sentence on each of the two counts, I dismiss the appeal.

JAYALATH, J. – I agree.

RAMANATHAN, J. – I agree.

Conviction affirmed.
Sentences varied.