[ASSIZE COURT]

1955 *Present :* Gratiaen, J.

THE QUEEN *v.* THIAGARAJAH *et al.*

2ND NORTHERN CIRCUIT

S. C. 9—M. C. Mallakam, 1,408

Indictment—Charges contained therein—Must not be different from those inquired into by Magistrate—Scope of Attorney-General's power to re-open Magisterial inquiry—Criminal Procedure Code, ss. 156, 159, 160, 161, 162 (1), 163, 389, 390 (2), 391, 393.

Penal Code—Unlawful assembly—Sections, 138, 140.

An accused person can in no circumstances be committed for trial or tried upon indictment under Chapter 16 of the Criminal Procedure Code except upon the basis of the charges which had been read out to him under section 156 and to which he was later called upon to answer in terms of sections 159 and 160. The power of a Magistrate to commit under section 163 and the powers of the Attorney-General to direct a committal under section 391 are both determined by the scope of the particular charges which formed the subject matter of the Magisterial inquiry ; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

If the Attorney-General takes the view that an accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed) he may instruct the Magistrate under section 390 (2) to reopen the proceedings by formulating an amended charge under section 156, and thereafter to take all the steps prescribed by Chapter 16. It is not permissible to give a direction that the accused person should be committed for trial upon an amended charge after complying only with the requirements of sections 159, 160 and 161.

A person cannot be convicted of the offence of being a member of an unlawful assembly except in association with four others.

PRELIMINARY objection raised against the validity of the indictment in a trial before the Supreme Court.

M. Balasunderam, with *S. Gurunathan*, for the 1st accused.

A. Amirthalingam, for the 2nd accused.

N. T. D. Kanakaratne, Crown Counsel, for the Crown.

Cur. adv. vult.

August 1, 1955. GRATIAEN, J.—

A retired post-master named Kadiresu Sambandar (of the Vellala community) lived with his wife in the village of Urelu, where he cultivated a plantain garden adjoining the compound of his house. The adjoining allotment of land, similarly cultivated, belonged to Thevasi Kanavathy (a Palla man).

Mr. Sambandar also owned some cattle. At about 2 a.m., on 21st October, 1953, he woke up and went into his compound to tether a cow-calf. Shortly afterwards, his wife heard some suspicious noises and, as her husband had not yet returned, she and their immediate neighbours (the Thambidurais) went in search of him. A few moments later they heard the sound of a gun being fired, and of people running away. Mr. Sambandar was found lying, with bleeding injuries, near the entrance to Thevasi Kanavathy's land. He was not in a fit condition to make a dying declaration before he died. He had sustained a blow on the head with a heavy, sharp cutting instrument and had also been shot in the stomach from a very close range. Each injury was necessarily fatal. It was also discovered that 135 plantain trees standing on Thevasi Kanavathy's land had been wantonly destroyed. Obviously more than one person had been concerned in the commission of these crimes.

The Police were unable for some time to discover any clue to the mystery. There had admittedly been caste ill-feeling in the locality, and Mrs. Sambandar suspected that her husband had been murdered by members of the Palla community. Thevasi Kanavathy, on the other hand, was equally convinced that Vellalas were responsible for the mischief committed on his land. The most likely theory, of course, is that a number of people entered Thevasi Kanavathy's land with the primary object of causing damage to it, and, in order to escape detection, murdered Mr. Sambandar when he unexpectedly arrived on the scene.

A few Palla men were from time to time arrested on suspicion, but they were released after the Police contacted a motor-car driver named V. Krishnasamy on 12th November, 1953. He was detained (perhaps illegally) in Police custody for about four days, and eventually told them a remarkable story in consequence of which the three prisoners who appeared before this Court were eventually prosecuted upon the following indictment dated 25th June, 1955 :

"(1) That on or about the 21st day of October, 1953, at Urelu, in the division of Jaffna, within the jurisdiction of this Court, you *with one Swaminathan Thiagarajah and another person unknown to the prosecution* were members of an unlawful assembly the common object of which was to commit mischief by cutting down the plantain trees standing on a land at Urelu cultivated by one Thevasi Kanavathy ; and that you have thereby committed an offence punishable under section 140 of the Penal Code.

(2) That at the time and place aforesaid and in the course of the same transaction one or more of the members of the said unlawful assembly did use force or violence in prosecution of the common

object of the said unlawful assembly ; and that you have thereby committed an offence punishable under section 144 of the Penal Code.

(3) That at the time and place aforesaid and in the course of the same transaction one or more members of the said unlawful assembly did commit murder by causing the death of one Kadiresu Sambandar, which offence was committed in prosecution of the said common object, or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object, and that you being members of the said unlawful assembly at the time of the committing of the said offence of murder have thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(4) That at the time and place aforesaid and in the course of the same transaction *you Kandiah Thiagarajah, the 1st accused, and a person unknown to the prosecution* did commit murder by causing the death of the said Kadiresu Sambandar ; and that you Kandiah Thiagarajah, the 1st accused, have thereby committed an offence punishable under section 296 of the Penal Code. "

A preliminary objection was raised on behalf of all three prisoners to the effect that they had been improperly committed for trial upon these counts, and that the indictment should be quashed.

It was argued that each count in this indictment is fundamentally at variance with the charges which formed the basis of the Magisterial inquiry ; that the Magistrate, in the exercise of his judicial discretion under section 162 (1) of the Criminal Procedure Code, had discharged all three prisoners and their (then) co-accused, four in number, on " the particular charges under inquiry " ; and that the Attorney-General's subsequent directions (which had been obeyed by the Magistrate) requiring him to commit the prisoners for trial upon substantially different charges (now contained in the indictment) were *ultra vires*. I upheld the objection and quashed the indictment, ordering the prisoners to be released from Fiscal's custody.

The proceedings against the three prisoners and their co-accused under Chapter 16 of the Code had commenced on 30th November, 1953, by the Magistrate reading out the charges which formed the subject matter of the inquiry. These charges were later amended in minor respects on the instructions of the legal adviser of the Police. Accordingly, the inquiry commenced afresh on 10th February, 1954, when it was duly explained to the three prisoners and their co-accused under section 156 of the Code that they stood charged with the commission of 12 offences :

(1) the first charge alleged that 5 persons consisting of *the three prisoners and two named co-accused* had been members of an unlawful assembly the common object of which was to commit mischief

by cutting down the plantain trees on Thevasi Kanavathy's land; and it was not alleged that any person besides these 5 persons had been a member of the unlawful assembly;

(2) the second charge alleged that the same 5 persons were guilty of rioting in prosecution of their common object;

(3) the third charge alleged that mischief had been committed by one or more members of the said unlawful assembly in prosecution of their common object;

(4) the fourth charge similarly alleged that the murder of Mr. Sambandar had been committed by one or more members of the unlawful assembly in prosecution of their common object;

(5) the fifth charge alleged that the three prisoners and *two named co-accused* had committed mischief;

(6) the sixth charge alleged that one of the other accused (not himself an active member of the unlawful assembly) had abetted the commission of the offence of mischief;

(7) the seventh charge alleged that yet another co-accused (also not a member of the unlawful assembly) had abetted the commission of the same offence;

(8) the eighth charge alleged that the 1st prisoner and *one of his co-accused named Murugesu Sinnadurai* (who had since been discharged) had committed the murder of Mr. Sambandar;
(the additional charges numbered 9 to 12 are not material to the present discussion).

It will be observed generally that the case for the prosecution was to the effect that *the unlawful assembly consisted of precisely 5 named accused persons, instigated by 2 other named co-accused.* In support of all 12 charges, the prosecution relied almost entirely on the evidence of the motor-car driver Krishnasamy, and on certain statements of a confessional character alleged to have been made by some (but not all) of the 7 accused persons.

The witness Krishnasamy was, according to his own version, a most disreputable character who claimed to have been engaged on the night in question in transporting illicit immigrants by motor-car and thereafter in conveying a number of persons to Thevasi Kanavathy's land where the murder was committed.

On 12th August, 1954, the learned Magistrate decided that there was insufficient evidence to put any of the accused persons on trial. Accordingly, they were all discharged under the provisions of section 162 (1) of the Code.

So matters stood until about three months later, when the Law Officers of the Crown intervened. On 24th November, 1954, the Solicitor-General (acting under the authority of the Attorney-General in terms of section 393) issued a direction to the Magistrate under section 391 to re-open the

inquiry *into "the charges" preferred against the 1st, 2nd and 3rd prisoners and against one of their co-accused named Swaminathan Thiagarajah,* but not against the three other persons previously accused. The specific directions were that the Magistrate should (*a*) record any further evidence adduced by the prosecution, (*b*) read "*the said charges*" to the accused as required by section 159, (*c*) comply with the provisions of sections 160 and 161, and (*d*) commit the 3 prisoners and Swaminathan Thiagarajah for trial to the Supreme Court upon "the said charges".

The 3 prisoners were re-arrested and produced before the Court, and further evidence was recorded in their presence. Efforts to trace the whereabouts of Swaminathan Thiagarajah, however, proved of no avail. The prosecution therefore decided to proceed for the time being against only the 3 prisoners, the case against Swaminathan Thiagarajah being left in abeyance.

The case against the prisoners still rested largely on the evidence which the Magistrate had previously considered insufficient to justify a committal. But, being bound by the Solicitor-General's directions, he made a brave attempt to comply with them. He discovered, however, that strict obedience would produce a most incongruous result. The reason was that, whereas 5 persons (no more, no less) were alleged in "the said charges" to have formed themselves into an unlawful assembly, one of them (Murugesu Sinnadurai) had already been discharged, and the Solicitor-General had given no direction that the order in his favour should be vacated. In these circumstances it was felt that the prosecution of the remaining 4 members of the alleged unlawful assembly would rest on an illegal foundation—there being an insufficient quorum of allegedly guilty persons to constitute an unlawful assembly as defined by section 138 of the Penal Code. Finding himself in this predicament, the Magistrate invited the Attorney-General's department to clarify the earlier directions received by him. In reply, he received a fresh communication, dated 2nd March, 1955, and signed by a Crown Counsel, directing the Magistrate to amend the charges based on the alleged formation of an unlawful assembly by substituting the name of Duraisamy Velupillai for that of Murugesu Sinnadurai against whom the case has not been re-opened.

These new directions, purporting to have been given on behalf of the Attorney-General *under section 389 of the Criminal Procedure Code,* were clearly *ultra vires.* In the first place, section 389 only empowers the Attorney-General to order fresh evidence to be recorded *after committal* if in his opinion the earlier evidence forming the basis of the committal was "not sufficient to afford a foundation for a full and proper trial". In the second place, it had never been alleged in "the particular charges" read out to the prisoners at the commencement of the inquiry under Chapter 16 that Duraisamy Velupillai had in fact been a member of the unlawful assembly; on the contrary, the implied suggestion at that time was that he had not. And finally, Duraisamy had already been discharged from the proceedings and there was no direction that the case against him should be re-opened for any purpose whatsoever.

All or some of these difficulties seem to have been realised 10 days later by the Department, and on 12th March, 1955, a further communication was sent to the Magistrate cancelling the letter dated 2nd March, 1955: Instead, Crown Counsel purported to give fresh directions in the name of the Attorney-General (*also under the provisions of section 389 which was inappropriate*) requiring the Magistrate to take action as follows :—

(A) to read out to the 3 prisoners *under section 159* of the Code certain amended charges alleging (1) that they, together with Swaminathan Thiagarajah "*and another person unknown to the prosecution*" had in truth been the members of the alleged unlawful assembly, and (2) that the murder of Mr. Sambandar had been committed by the 1st prisoner and this "unknown person";

(B) to commit the prisoners for trial on these amended charges.

It must here be observed that no direction was given that the amended charges should be read out to the prisoners under section 156 and that fresh proceedings under Chapter 16 should be taken from that earlier stage.

The defence very naturally protested against this further change of front on the part of the prosecution. The learned Magistrate, however, considered himself under a statutory obligation to obey the Attorney-General's directions. Accordingly, but without enthusiasm, the charges (amended as directed) were formally read out and explained under section 159 to the prisoners, each of whom, while protesting his innocence, truthfully replied as follows in answer to the statutory question addressed to him under section 160 :

"I am not guilty. There is no inquiry in respect of these charges".

I am satisfied that in the circumstances described by me the order of committal and the subsequent indictment embodying the charges so amended were invalid and contrary to the provisions of the Criminal Procedure Code.

In England, "*when a person charged has been committed for trial*, the indictment presented against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment". *Administration of Justice (Miscellaneous) Provisions Act, 1933, section 2 (2) (8) proviso 1.* Indeed even when the justices have refused to commit on any particular charge a man who has been committed on other charges, the prosecution may include in the indictment a count based on that charge subject to the power of the presiding Judge, upon objection, to rule that there was no evidence to support the allegations. *R. v. Morry* [1].

In Ceylon, however, the powers of the prosecution in this respect have become narrower since Chapter 16 of the Criminal Procedure

[1] *(1915) K. B. 153.*

Code was subjected to the sweeping amendments contained in Ordinance No. 13 of 1948. Apart from an exception to which I shall shortly refer, an accused person can in no circumstances be committed for trial or tried upon indictment except upon the basis of the charges which had been read out to him under section 156 and to which he was later called upon to answer in terms of section 159 and 160. In other words, the power of a Magistrate to commit under section 163 and the powers of the Attorney-General to direct a committal under section 391 are both determined by the scope of the particular charges which formed the subject matter of the Magisterial inquiry; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into. All this has been very clearly explained in the judgment of Gunasekara J. in *Vaithilingam v. The Queen* [1].

The Ceylon procedure is admittedly far from satisfactory in this respect, because it involves an unprofitable expenditure of time in framing amended charges followed by the commencement of what are virtually fresh proceedings under Chapter 16. But this is still the law, and recommendations for simplifying the procedure have not yet received the attention of Parliament.

On the other hand, the Attorney-General in Ceylon is vested with certain extra-ordinary powers (unknown in the English system) whenever a Magistrate, at the conclusion of the inquiry under Chapter 16, has discharged an accused person in terms of section 162 (1) of the Code. Section 391 then authorises the Attorney-General, if he considers that the accused should not have been discharged, to over-ride the Magistrate's discretion by directing a committal, and the Magistrate in that event has no option but "to re-open the inquiry" and comply with "such instructions as to (the Attorney-General) shall appear requisite". But the Attorney-General's powers are themselves controlled by the requirements of Chapter 16. Section 391 must clearly be read in the context of section 162, so that a direction to commit must necessarily be confined to "the particular charges under inquiry" in respect of which the Magistrate had discharged an accused person. In other words, the Attorney-General can only direct a Magistrate to enter an order of committal on charges in respect of which the Magistrate himself was previously vested with power to commit.

If the Attorney-General takes the view that an accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed) a different procedure must be resorted to. He is authorised to instruct the Magistrate *under section 390 (2)* to reopen the proceedings by formulating an amended charge, and thereafter to take all the steps prescribed by Chapter 16. It is certainly not permissible to give a direction that the accused person should be committed for trial upon an amended charge after complying only with the requirements of sections 159, 160 and 161—because, if that were

[1] *(1953) 54 N. L. R. 345.*

done, the accused would be deprived of a fundamental right which the Legislature has (under the present Code) conferred on him. *Moreover, where such directions have been given under section 390 (2), it is for the Magistrate alone to decide in the first instance whether or not a committal on the amended charge would be justified.* The residual powers of the Attorney-General under section 391 only come into operation at a later stage—that is to say, if he considers that the Magistrate has wrongly exercised his discretion in favour of the accused on this vital issue.

Let us consider, in the light of these principles, the steps which were taken in the present case after the Magistrate had lawfully discharged the prisoners on 12th August, 1954. The original directions issued to the Magistrate on 25th November, 1954, in terms of sections 391 and 393 of the Code were (for what they were worth) *intra vires* the Solicitor-General because they ordered a committal, after certain formalities had been complied with, on the "particular charges" which had in fact been "under inquiry". But these instructions were subsequently cancelled by implication, if not expressly, and are not relied on as having any bearing on the objections now under consideration.

The second set of instructions issued in the name of the Attorney-General on 2nd March, 1955, call for no discussion because they too were cancelled before they were obeyed. The order of committal made in compliance with the final instructions issued on 12th March, 1955, was contrary to law for the following reasons :

(1) the instructions went far beyond the particular powers vested in the Attorney-General under section 389 ;

(2) even if they had been given under section 391, they would have been equally *ultra vires* because they directed a committal on charges substantially different from those which formed the subject matter of the inquiry under Chapter 16 ;

(3) if, again, the intention had been merely to instruct the Magistrate in terms of section 390 (2) to hold a fresh inquiry upon the charges as finally amended, the direction to commit the prisoners *automatically* upon those charges would also have been *ultra vires* because they would in that event have purported to relieve the Magistrate of his duty to decide judicially whether or not an order of committal was justified by the evidence.

The offences punishable under sections 140, 144 and 146 of the Penal Code on which the Magistrate committed the prisoners for trial in obedience to the Attorney-General's final instructions were clearly different from those which were originally "under inquiry". An allegation that a man was a member of an unlawful assembly of 5 consisting of himself and four named persons is not the same as an allegation that he was a member of an unlawful assembly of 5 consisting of himself, three named persons and "a person unknown to the prosecution". Just as it requires at least two persons to form a criminal conspiracy punishable under section 113B of the Penal Code, the offence of being a member of

an unlawful assembly cannot be committed except in association with 4 others. The acquittal of one of two accused persons on a conspiracy charge therefore necessarily results in the acquittal of the other unless the indictment or charge specifically alleged (and it is proved) that someone else, known or unknown, had also participated in the crime. *The King v. Dharmasena*[1]. The same principle applies, *mutatis mutandis*, to an indictment or charge alleging participation in an unlawful assembly.

In this case, the scope of the inquiry under Chapter 16 was confined to the issue whether the prisoners had joined an unlawful assembly of 5 persons in association with Murugesu Sinnadurai (the original 2nd accused) and Swaminathan Thiagarajah (the original 4th accused); but there was no inquiry at any time into the later allegation that "a person unknown to the prosecution" had been a member of any such assembly. Accordingly, counts 1, 2 and 3 in the indictment cannot be allowed to stand.

The 4th count in the indictment now alleges that the 1st prisoner "*and a person unknown to the prosecution*" committed the murder of Sambandar, whereas the relevant charge "under inquiry" under Chapter 16 alleged that he and *Murugesu Sinnadurai* (a named person) had committed the offence. Mr. Kanakaratne invited me during the argument to cure any objectionable features in this count by permitting the words "and a person unknown to the prosecution" to be deleted. I declined to do so. It is no doubt correct to say that, if two persons are properly committed for trial for an offence punishable under section 296 of the Penal Code, one of them may be convicted even though the other is acquitted. But in the present case the 1st prisoner has in his favour the earlier order of discharge validly entered by the Magistrate on 12th August, 1954, and that order has not been validly superseded.

As far as can be gathered from the record of the inquiry held by the Magistrate under Chapter 16, and also from the subsequent directions issued by the Attorney-General's department, the prosecution had considered it essential at every stage to call in aid the provisions of section 32 of the Penal Code in order to establish that either the 1st prisoner or a guilty associate had killed Mr. Sambandar in furtherance of the common intention of both. There is certainly no indication that the Law Officers of the Crown had specially addressed their minds to the question of preferring against the 1st prisoner a charge of murder based solely on his individual acts. In these circumstances, the order of discharge entered by the Magistrate on 12th August, 1954, stands in the way of an indictment for murder against the 1st prisoner alone until it is supplemented by an overriding decision unequivocally made in the exercise of the extra-ordinary powers vested in the Attorney-General under section 391 of the Code.

Preliminary objection upheld.

Indictment quashed.

[1] *(1950) 52 N. L. R. 481.*