Present: Wood Renton C.J.

1917

THE KING *v.* SENANAYAKE.

251—D. C. (Crim.) Kurunegala, 3,859.

Joinder of charges—Rioting—House-breaking—Entering the boutiques of three men—Evidence of subsequent conduct of accused—Criminal Procedure Code, ss. 179, 180—Evidence Ordinance, s. 8.

Accused was charged with having committed house-breaking on June 4, 1915, during the riots by entering into the boutiques of three men, with the intention, in each case, of committing theft.

Held, that the joinder of three distinct charges of offences committed against three different persons was not wrong.

"It is always open to the Court, on the application of an accused person against whom that section is being applied, to order that the trial should be separate, and any possible hardship may be obviated in that way."

In this case the District Judge admitted the evidence of certain witnesses, who said that the accused was at the head of a mob two days after the house-breaking.

Held, that, in the circumstances of this case, the evidence was not inadmissible.

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THE facts appear from the judgment.

H. J. C Pereira (with him *J. W. de Silva*), for accused, appellant.

Grenier, C.C., for the Crown.

Cur. adv. vult.

November 3, 1917. WOOD RENTON C.J.—

This appeal was argued before me mainly on certain questions of law, which are of considerable interest and importance. The accused, Isaac Peter Senanayake, was charged with the commission of three distinct offences in the early days of the riots, namely, on June 4, 1915, at Dambadeniya, in the division of Dandagamuwa. The case for the prosecution was that on that day he had committed house-breaking by entering successively into the boutiques of three Moormen, Slema Lebbe Ibrahim Lebbe, Segu Lebbe Shena Mohamadu Ally, and Segu Lebbe Sena Mohamadu Lebbe, with the intention, in each case, of committing theft. The learned District Judge, after trial, convicted him on each count of the indictment. But in view of the facts that the accused had been in hiding for a period of about eighteen months after the offences were committed and that the exciting period, in the course of which the house-breakings had taken place, had now happily passed away, he imposed a sentence of only twelve months' rigorous imprisonment in respect of each conviction. The sentences are concurrent. The accused's counsel admitted, in effect, that he could not ask me to differ from the findings of the learned District Judge upon the evidence. The main point that seems to have been urged in the Court below was that it was stereotyped. But the evidence in cases of this kind is stereotyped only because the operations of the malefactors are stereotyped also. The sentences passed are by no means severe. I come now to consider the points of law that were argued before me in support of the appeal. It was contended, in the first place, that the joinder of three distinct charges of offences committed against three different persons could not be justified under section 179 (1) of the Criminal Procedure Code; in the second place, that this joinder was equally incapable of being upheld under section 180 (1) of the Code, which provides that if in one series of acts so 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; and, in the last place, that in any event, the learned District Judge had improperly admitted evidence prejudicial to the character of the accused. I propose to deal with each of these objections in turn. Section 179 (1) of the Criminal Procedure Code is identical in its language with section 452 of the Indian Code of Criminal Procedure, 1872.[1] It was held by

[1] *Act X. of 1872, ss. 452 and 453.*

Straight J. and Tyrrell J. in *Empress of India v. Murari*[1] that the combination of three offences of the same kind for the purpose of one trial can only be made where they have been committed in respect of one and the same person, and not against different prosecutors. This case was decided under the Code of 1872,[2] and it would constitute an authority of some weight if it had been followed in subsequent decisions. But in 1882 Field J. and Norris J., in *Manu Miya v. Empress of India*,[3] expressly dissented from it, and held that the words "offences of the same kind" in the section above cited were not limited to offences against the same person. The question came up again in 1884 before a Full Bench of the High Court of Allahabad in *Queen Empress v. Juala Prasad.*[4] In that case a postmaster was accused of having, on three different occasions within a year, dishonestly misappropriated moneys paid to him by different persons for money orders. It was held that the offences were "offences of the same kind" within the meaning of sction 234 of the Criminal Procedure Code, 1882,[5] and that the accused was liable to be charged and tried at one trial for all three offences, although the persons whose money had been dishonestly misappropriated were in each case different. It appears to me that the later Indian authorities ought to be followed in the construction of section 179 (1) of our own Criminal Procedure Code. It is always open to the Courts, on the application of an accused person against whom that section is being applied, to order that the trials should be separate, and any possible hardship may be obviated in that way. To insert in section 179 (1) the words "against the same person" when the Legislature has omitted them would be a stretch of judicial interpretation closely approximating to actual legislation itself. The first objection in support of the appeal fails. If the witnesses for the prosecution are speaking the truth, the accused was a ringleader of a large mob which, on the day in question, appeared in Dambedeniya; he incited the mob to loot the Moorish boutiques in the villages, and they proceeded to do so successively in pursuance of his advice. We are in these circumstances in presence of a series of acts constituting one and the same transaction.

The last point urged by counsel for the accused is the most important of all. The leraned District Judge admitted the evidence of certain Sinhalese witnesses, who said that the accused was at the head of a mob two days after the house-breakings at Dambadeniya, namely, on June 6. It was contended that this evidence was prejudicial to the character of the accused, and ought to have been excluded. It does not appear to me that the evidence just mentioned would be admissible under section 8 of the Evidence Ordinance, which makes the conduct of accused persons admissible

[1] *(1881) I. L. R. 4 All. 147.*
[2] *Act X. of 1872, ss. 452 and 453.*
[3] *(1882) I. L. R. 9 Cal. 371.*
[4] *(1884) I. L. R. 7 All. 174.*
[5] *Act of 1882.*

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in certain circumstances. It could scarcely be alleged that the conduct of the accused in acting as the ringleader of a mob on June 6 had either influenced or been influenced by the main fact in issue, namely, his conduct on June 4. But section 8 of the Evidence Ordinance does not exhaust the possibilities of the situation. The conduct of the accused on June 6 could be proved by the prosecution if it was part of the same transaction as the events of June 4. It could also be proved for the purpose of rebutting any defence which he had put in issue in the case. Now, here again, the evidence of the witnesses for the prosecution, if true, shows that the accused and the mob, of which he was the head, were operating steadily and systematically in the looting of Moorish boutiques for several days. Their proceedings may fairly be regarded as one and the same transaction. Moreover, the case for the accused was that he had taken no part in the looting at all, but had been living quietly on his estate or on the property of some of his friends when the looting was going on. To each of the eye witnesses for the prosecution questions were put throwing doubt on their identification of the accused, and indicating that they had named him merely because some of his relatives were supposed to have had a share in the riots. It appears to me that that defence brings the case directly within the historical language used by Lord Herschell in the case of *Makin v. Attorney-General of New South Wales.*[1] I propose to quote the passage in its entirety, for it lays down the general rule which is so easily stated, but is so difficult to apply correctly to particular sets of facts: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The meaning of that possage has been considered in two recent English cases. In *King v. Rodney* [2] the facts were shortly these. The accused was charged with having in the night-time broken into and entered a dwelling-house with the intention of committing rape. The prosecutrix gave affirmative evidence as to his conduct. The accused admitted that he had, in fact, been in the house on the night in question, but said that he had gone there at the invitation, or at least with the consent of the woman on whom the attempted rape was alleged to have been committed; that he offered her no

[1] *(1894) A. C. 57 and*

[2] *(1913) 3 K. B. 468.*

violence; and that he was simply "courting" her, presumably with a view to marrying her. The Crown adduced evidence showing that the accused immediately after he had left this woman's house went straight to the house of another woman, with whom he had formerly been on terms of intimacy, gained access to it by the unusual method of going down the chimney, and gratified his passion upon her. The Judge who tried that case, Lord Coleridge, held that the evidence was admissible for the purpose of showing the state of the accused's mind and body on the night in question. He put the point to the jury in the following language: "Then the accused goes away, and the next thing that is heard is that hardly a stone's throw from the farm lives a woman with whom he has already had immoral intercourse. The suggestion of the prosecution is that he was raging with lust, and that, being foiled as regards the prosecutrix, he immediately went to gratify his passion upon the woman who he knew would not be unwilling to yield."

The jury convicted the accused, and he appealed to the Court of Criminal Appeal. The Court held that the evidence ought not to have been admitted, inasmuch as no question of the intention of the accused was involved in his defence. His case was, not that he had attempted to have intercourse with the prosecutrix with her consent, but that he had made no such attempt, and had visited her simply for the purpose of seeking her hand in marriage in an ordinary and honourable way. The conviction and sentence were quashed, and the accused was acquitted. How far this decision is consistent with that of the House of Lords in *King v. Ball* [1] it is unnecessary in the present case to inquire. In any event it is obvious that the evidence in dispute in *King v. Rodney* [2] was of a somewhat remote character, and could only have thrown an uncertain light on the mental condition of the accused at the time of the commission of the offence. The other case to which I have referred is *King v. Ball*.[1] It was a prosecution under the Incest Act, 1908.[3] The accused and his sister had admittedly lived together under the name of Mr. and Mrs. Ball. They had occupied the same room and the same bed, and there are circumstances in the case, apart from the evidence with which I am about to deal, that went to show that their relations were those of husband and wife, and not of brother and sister. But, on the other hand, as one of the Judges in the case pointed out, there might be circumstances from which the jury would decline to draw an inference that incest had been committed from the mere fact that a brother and sister were occuping the same room or even the same couch. "In the administration of this Act," said Lord Alverstone C.J., "there is an additional reason which enforces the argument (at the Bar), namely, in the case of poor people in crowded dwellings; it is sometimes impossible for

[1] *(1911) A. C. 47.* [2] *(1913) 3 K. B. 468.*
[3] *8 Edw. 7, c. 45.*

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them to avoid sleeping together, and it would be wrong to assume in some cases that there must have been incestuous intercourse because persons of different sexes were in the same bed."

The prosecution proposed to negative this possible defence on the part of the accused by extrinsic proof of the existence of guilty passion between his sister and himself. For that purpose evidence was tendered showing that while they had been living together the sister had become pregnant and had given birth to a child, and that she registered the birth, describing herself as the mother and the male defendant as the father. It is obvious that this evidence constituted proof of the commission by the accused of an offence other than that with which he was charged on the indictment. Scrutton J., who tried the case, admitted the evidence. The accused was convicted, he appealed to the Court of Criminal Appeal, the conviction and sentence were set aside, and the Crown then appealed to the House of Lords. After elaborate argument, the House of Lords reversed the decision of the Court of Criminal Appeal, and held that the evidence was admissible for the purpose of showing what the real relations between the accused and his sister were, and of negativing any defence on his part that those relations were innocent. It appears to me that the evidence tendered in the present case comes well within the *ratio decidendi* stated by Lord Herschell in *Makin v. Attorney-General of New South Wales*,[1] and applied, with different results, according to the circumstances, in the later cases above mentioned. The accused's defence in the present case was a denial that he had taken any part in the rioting whatever. It was, in my opinion, open to the prosecution to show that he had been at the head of a band of rioters, not only on June 4, but, by way of corroborating the witnesses who deposed to what had happened on June 4 and breaking down his defence, on June 6 also. In the last place, even if I had thought that the evidence here in question was inadmissible, I should have felt bound, in the circumstances of the present case, to give effect to the provisions of section 167 of the Evidence Ordinance, which enacts that " the improper admission or rejection of evidence shall not be a ground by itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before whom such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision." The ordinary rule no doubt is that where an appellate tribunal finds that evidence against the character of an accused person has been improperly admitted, the proceedings should not be allowed to stand. The reason for that rule is obvious. The Judges who hear the appeal are not in a position to say what effect the evidence illegally admitted may have had on the mind of the Court of trial. But we have no right to strike section 167 out of the statute altogether. In the present case it was open to the

[1] *(1894) A. C. 57 and 65.*

prosecution to prove, and the fact was proved, that on the morning of June 4 the accused was the ringleader of a riotous gang engaged at his bidding in looting Moorish boutiques. The evidence proved against him with regard to June 6 carried the case no further, and could not have produced such an effect on the mind of the Court as to lead to a wrong conclusion. I have thought it right to deal with this case at length, in view of the importance of the points involved in it, and the frequency with which, in one form or another, they come up before the Courts of law in this Colony.

The appeal is dismissed.

Appeal dismissed.