LIONEL

v.

OFFICER-IN-CHARGE, MEETIYAGODA POLICE STATION

SUPREME COURT.
SHARVANANDA, C.J., L. H. DE ALWIS, J. AND H. A. G. DE SILVA, J.
S.C. APPEAL No. 71/85
CA 625 – 631/78.
M.C. BALAPITIYA 62797.
OCTOBER 27, 1986.

Misjoinder of charges – Time at which it is necessary to determine whether the offences alleged were committed in the course of the same transaction – Circumstances in which a misjoinder of charges is curable under section 436 of the Code of Criminal Procedure Act No. 15 of 1979.

The six appellants, the 1st to the 6th accused, were charged by a Magistrate, who was also an Additional District Judge, on count (1) with abducting one Arnolis Silva from his house, and on count (2) six others, the 7th to the 12th accused were charged with causing mischief by damaging the house and property of Arnolis Silva. No objection to the joinder of charges was raised at that time the accused were charged, nor was an application made for separate trials. After trial, the first six accused were convicted on count (1) and each of them was sentenced to nine months' rigorous imprisonment, and the 7th accused was convicted on count (2) and fined Rs. 200.

On appeal, the Court of Appeal held that the two offences referred to in counts (1) and (2) were unconnected incidents and were not committed in the course of the same transaction, and set aside the conviction and sentence of the 7th accused on count (2), but the conviction and sentence of the 1st to the 6th accused on count (1) were affirmed.

The appellants appealed from the judgment of the Court of Appeal. Learned counsel for the appellants contended that the misjoinder of charges is an illegality which vitiates the whole charge and is not a curable irregularity.

Held – by L. H. de Alwis, J. (Sharvananda, C.J. and H. A. G. de Silva, J. agreeing)

(1) that the time at which it falls to be determined that the conditions that the offences alleged had been committed in the course of the same transaction had been fulfilled, is the time when the accusation is made, and not when the trial is concluded and the result is known.

(2) that a misjoinder of charges is curable under provisions of the Code of Criminal Procedure if there has been no actual or possible failure of justice.

(3) as the misjoinder, in the present case, has not prejudiced the appellants and occasioned a failure of justice, it amounts to an irregularity that is curable under section 436 of the Code of Criminal Procedure Act No. 15 of 1979, and the appeal, therefore, fails.

Cases referred to:

(1) *Jonklaas v. Somadasa–(1942) 43 NLR 284.*
(2) *Subramania Iyar v. The King–I.L.R. 25 Mad. 61.*
(3) *Beatrice Perera v. The Commissioner of National Housing–77 NLR 361.*
(4) *Public Prosecuter v. Kadiri Koya Haji–16C.L.J. 593.*
(5) *Abdul Rahuman v. The King Emperor–54 I.A. 96.*
(6) *King v. Dharmasena–(1950) 51 NLR 481 (P.C.)*
(7) *Babulal Choukhani v. The King Emperor–L.R. 65 I.A. 168.*
(8) *Wimalasena v. I.P. Hambantota–(1967) 74 NLR 176.*
(9) *King v. Kitchilan–(1944) 45 NLR 82.*
(10) *Madar Lebbe v. Kiri Banda–(1915) 18 NLR 376.*

APPEAL from judgment of the Court of Appeal.

Dr. Colvin R. de Silva, with *Mrs. M. Muttetuwegama* for the 1st to the 6th accused-appellants.

Asoka de Silva, S.S.C. with *S. Gamlath, S.C.* for Attorney-General.

Cur. adv. vult.

December 12, 1986.

L. H. DE ALWIS, J.

This is an appeal by the six accused-appellants, with the Special Leave of this court, from the judgment of the Court of Appeal dismissing their appeals and affirming the conviction and sentence imposed on them by the Magistrate's Court, Balapitiya.

The Inspector of Police, Meetiyagoda, filed a written Report in terms of section 148(*b*) of the Criminal Procedure Code in the Magistrate's Court of Balapitiya on 21.8.70, disclosing two offences committed, one, by the first to the sixth accused of abducting Salpadura Thuppahe Arnolis Silva, an offence punishable under section 356 read with section 32 of the Penal Code; the other, by the 7th to the 12th accused of mischief by damaging the house and property of the said Arnolis Silva to the extent of Rs. 200, an offence punishable under section 410 read with section 32 of the Penal Code.

On 31.1.71 the Magistrate who was also an Additional District Judge, recorded the evidence of Arnolis Silva and his daughter Daya Kumar, with a view to assuming jurisdiction in terms of section 152(3) of the Criminal Procedure Code, inasmuch as the offence of abduction was one triable by the District Court. Since there was no evidence against the 8th and 9th accused he discharged them and assumed jurisdiction as A.D.J. in order to try the other accused persons. They were then charged from a charge sheet dated 31.1.71 on the two counts mentioned in the Police plaint and they pleaded 'not guilty'.

Trial was postponed on several occasions on account of the absence of some of the accused. Before the trial could be taken up, the Administration of Justice Law No. 44 of 1973 came into operation on 1.1.74 and repealed the Criminal Procedure Code. On 23.8.74 the 10th accused was reported by the Meetiyagoda Police to be dead. Eventually when the rest of the accused were present on 10.3.77 the Magistrate charged them afresh from a charge sheet on the same two counts and fixed the case for trial on 11.8.77. After trial the 11th and 12th accused were found not guilty and acquitted. The 1st to 6th accused were convicted on count (1) and sentenced to 9 months' rigorous imprisonment each. They were acquitted on count (2). The 7th accused was acquitted on count (1) and convicted on count (2) and fined Rs. 200.

On appeal to the Court of Appeal the conviction and sentence of the 7th accused on count (2) was set aside, but the conviction and sentence of the 1st to 6th accused on count (1) were affirmed. The present appeal is by the 1st to 6th accused from that judgment of the Court of Appeal.

The findings of fact reached by the Magistrate against the 1st to 6th accused have not been disturbed by the Court of Appeal and are not canvassed before this court. Learned counsel for the appellants sought to have the conviction and sentence imposed on the appellants set aside on two legal grounds, one relating to a misjoinder of charges, and the other in regard to the legality of the proceedings which were taken under the provisions of the Administration of Justice Law. Neither of these matters of law appear to have been taken up either in the Magistrate's court or the Court of Appeal, although the Court of Appeal set aside the conviction and sentence of the 7th accused on count (2) on the ground of misjoinder of charges.

Both courts appear to have proceeded on the basis that all twelve accused were jointly charged on counts 1 and 2. But this, in my view is erroneous. Learned counsel for the appellants sought to support the view taken by the two courts below, on the basis that the charge sheet dated 10.3.77 contained the words "you are hereby charged, that you did..." as referring to all the twelve accused persons mentioned in a list annexed to the charge sheet. But the phrase does not stand alone. The charge sheet which is in a printed form reads as follows:

> "You are hereby charged, that you did, within the jurisdiction of this court, at Dorala, Batapola on 29th November, 1970. In that you, the above 1st, 2nd, 3rd, 4th, 5th and 6th accused kidnap Salpadura Thuppahe Arnolis Silva..an offence punishable under section 356 read with section 32 of the Penal Code, Chap. 19 NLE (2). At the same time and place aforesaid and in the course of the same transaction you, the abovenamed 7th, 8th, 9th, 10th, 11th and 12th accused...caused destruction of the property in the possession of the said S. T. Arnolis Silva...an offence punishable under section 410 read with section 32, Penal Code, Chapter 19 NLE."

Each count specifically referred to a different set of accused persons. In count (1) the 1st, 2nd, 3rd, 4th, 5th and 6th accused were charged with the first offence and in count (2) the 7th, 8th, 9th, 10th, 11th and 12th accused were charged with the second offence. The evidence in no way involved the 7th to the 12th accused, in the offence specified in count (1), nor the 1st to the 6th accused, in second count. Each of these two sets of accused persons were thus charged with a different offence in the same charge sheet.

The question now, is whether the charges so framed, are bad in law for misjoinder. To consider this question it is necessary to refer to the evidence briefly.

Arnolis Silva stated that at about 8.30 p.m. on 29.5.1970, the 1st to the 4th accused came to his boutique and called out to him saying that his boutique was being damaged. When he came out to investigate, these four accused carried him bodily and put him into a waiting car, which drove off and stopped about 50 yards away, near Romiel's house. The four accused got down and the 5th and 6th accused and another person got into the car. Arnolis Silva was blindfolded and taken to a house on an estate, where he was

assaulted and made to lie down on a bed. He was not given food while he was there and after four days he was taken by car and dropped near the Kuliyapitiya hospital.The incident occurred immediately after the elections and was motivated, according to Arnolis Silva, by election rivalry. Arnolis Silva's daughter Daya Kumar stated that about 10 minutes after her father was taken away the 7th accused and other persons threw stones at their house. They then entered it and damaged the windows and doors of the house and a bicycle, belonging to Arnolis.

The appellants were charged on 10.3.77, when the Administration of Justice Law No. 44 of 1973 (A.J.L.) was in operation, and the provisions of the law relating to joinder of accused and charges are contained in sub-sections (1) to (7) of section 111.

Section 111(1) states that:

> "For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in the next succeeding sub-sections which said sub-sections may be applied either generally or in combination."

The sub-section which is applicable to the present case is (7) and it provides as follows:

> "When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit."

Learned counsel for the appellants invited our attention to the finding of the Court of Appeal that there was a misjoinder of charges. Bandaranaike, J., stated in his judgment that as far as the 7th accused was concerned, his acquittal by the Magistrate on count (1) was indicative of the fact that he had not joined the 1st to the 6th accused in their criminal conduct, which was the subject matter of count (1), nor was there any evidence to that effect. This was a misdirection on his part because the 7th accused was not charged along with the 1st to the 6th accused on count (1). Bandaranaike, J., then stated that the second incident, which was of committing mischief by damaging

the property of Arnolis Silva and the subject of the second count, occurred about 10 minutes after Arnolis was abducted and was a separate transaction. The Court of Appeal thus came to the conclusion that the evidence was consistent with there being two unconnected incidents and that in the absence of a charge of conspiracy or unlawful assembly the second incident could not be said to be a continuation of the earlier transaction, so that the conviction of the 7th accused on count (2) could not be sustained because of the misjoinder of charges.

Learned counsel for the appellants contended that the misjoinder of charges, is an illegality which vitiates the whole charge and is not a curable irregularity. The question of whether or not prejudice was caused to the accused is irrelevant since the charge is rendered void.

In *Jonklaas v. Somadasa* (1) it was held that continuity of purpose and continuity of action are essential elements necessary to link together acts so as to form one and the same transaction within the meaning of section 184 of the Criminal Procedure Code (same as section 111(7) of the A.J.L).

It was further held in that case that disobedience to an express provision as to a mode of trial is an illegality which vitiates the conviction.

In that case six accused were charged in the Magistrate's court on–

Count (1) with committing mischief at Grandpass Road on 6.4.1941 by causing damage to the value of Rs. 50 to car No. Z/2367 and to other vehicles, in the possession of the Hon. D. S. Senanayake and others, an offence punishable under section 410 of the Penal Code.

Count (2) with having at the same time and place, as aforesaid, attempted to commit mischief by aiming stones at car No. Z/2367 and other motor vehicles belonging to Hon. D. S. Senanayake, an offence punishable under section 409 of the Penal Code.

The evidence was that about the time that Mr. Senanayake and others were going away from a meeting the accused committed the acts referred to in the charges. Some distance away from the place where the meeting was held, the 1st accused was arrested about 7 p.m. as he aimed a stone at a passing car. There was no evidence

whether the stone struck the car or as to whose car it was. About quarter of an hour later, as Mr. Senanayake was driving along Grandpass Road, the appellants and some others threw stones and some of them hit Mr. Senanayake's car. Sometime later, as Dr. Saravanamuttu, in respect of whose candidature the meeting was held, was walking down Grandpass Road, followed by his car, a constable arrested the 6th accused as he saw him "pelting a stone towards Dr. Saravanamuttu's car".

The question was whether the six persons accused had committed these offences in the same transaction. Wijewardena, J., said:

> "The evidence in this case in regard to the stone throwing by the 1st accused and 6th accused renders it impossible to regard their offences and the offences of the appellants as committed in the same transaction and it cannot be said that we have here a community of purpose and a continuity of action which are regarded as essential elements necessary to link together different acts so as to form the same transaction. There is, therefore, in this case a clear misjoinder of accused."

Wijewardena, J., further said:

> "Such a misjoinder cannot be regarded as a mere irregularity which can be cured under section 425 of the Criminal Procedure Code or section 36 of the Courts Ordinance."

His Lordship then referred to the case of *Subramania Iyar v. The King* (2) where the Privy Council stated that the disobedience to an express provision as to a mode of trial should not be considered as a mere irregularity but as an illegality, and said that the Supreme Court here had adopted and followed that principle in several cases.

Although the word "transaction" has not been defined in the Criminal Procedure Code, nor in the Indian Code of Criminal Procedure, the High Courts of India have held that the substantial test for determining whether several offences are committed in the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. Those ingredients were lacking in that case to constitute the same transaction. The facts of that case are distinguishable from the present case. There, the same six accused persons were charged on two counts which related to offences committed at different times and places, and by different accused.

Learned counsel for the appellants further contended that the misjoinder of charges denudes the court of jurisdiction over the matter, and renders the conviction void. Such want of jurisdiction is patent and no waiver of objection or acquiescence can cure it.

In the present case no objection was taken to the misjoinder of charges in the Magistrate's Court and the appellants stood their trial on the charges so framed. But it was submitted that if the court had no jurisdiction to try the case at all, the appellants could not tacitly confer jurisdiction on it by their consent. Vide *Beatrice Perera v. The Commissioner of National Housing* (3).

In *Subramania Iyar's case (supra)* (2) the appellant was tried on an indictment in which he was charged with no less than 41 acts of obtaining illegal gratification from clerks, extending over a period of two years. This was plainly in contravention of s. 234 of the Indian Code of Criminal Procedure (A.J.L., s. 111(2)) which provided that a person may only be tried for three offences of the same kind if committed within a period of 12 months. This was a case of clear disobedience, of an express provision relating to the mode of trial. Lord Chancellor Halsbury in that case stated:

> "The reason of such a provision, which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure."

It was no doubt, the multitude of offences in that case and the glaring and patent disregard of a prohibition in the joinder of charges that led the Board to strike down the charges as an illegality.

In *Public Prosecutor v. Kadiri Koya Haji* (4) the principle laid down by the Privy Council in *Subramania Aiyar's case (supra)* (2) was followed by a Full Bench of the Madras High Court. Napier, J., while concurring with the other two Judges said as follows:

"I do not however, think that the decision of the Privy Council in *Subramania Aiyar v. The King (supra),* compels us to hold that in no case can a misjoinder of charges or a failure to try the charges separately be an irregularity within the meaning of section 537 of the Code of Criminal Procedure (Section 425 of our old Criminal Procedure Code)."

In *Kadiri Koya Haji's case (supra)* (4) the Magistrate framed separate charges and numbered them as calendar cases Nos. 4 & 5 of 1914. But when the witnesses came to be cross-examined he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both charges. Under those circumstances, it was held that the trial offended against the provisions of section 233 (section 178 of our old Code) which was an illegality vitiating the trial in its entirety. That was a case where the trial itself was defective.

Subramania's case (supra) (2) was considered in a later Privy Council decision and it was held that the bare fact of failure to comply with the mandatory provisions of a section unaccompanied by a failure of justice is not enough to vitiate the proceedings which may be covered by sections 535 and 537. *Abdul Rahuman v. The King Emperor* (5). In that case, at the trial the depositions of witnesses were read over to them while the case otherwise proceeded and those of some witnesses were handed to them to read. Section 360 of the Code of Criminal Procedure provided that the deposition of each witness shall be read over to him in the presence of the accused or his pleader.

The Privy Council held that as there had been no actual or possible failure of justice the appeal failed whether the section had or had not been properly applied. Lord Phillimore said:

"To sum up, in the view which Their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, it is not enough to warrant the quashing of a conviction, which in their Lordships' view may be supported by the curative provisions of sections 535 and 537."

On the strength of *Abdul Rahaman's case (supra)* (5) the view was taken in later decisions that even what was termed an illegality, i.e., the ignoring of express and imperative provisions of law, will be covered by section 537 unless it has actually occasioned a failure of justice, and that whether it is an irregularity or illegality, the sole criterion is whether there has been actually a failure of justice. The test to be applied is whether the accused had a fair trial in spite of the transgressions of the prescribed rule or procedure (*Sarkar–Law of Criminal Procedure*–2nd Ed. 996).

Section 111(7) of the Administration of Justice Law gives the court the discretion to charge and try together or separately more persons than one who are accused of different offences committed in the same transaction.

In the present case the six accused appellants were charged on the first count with abducting Arnolis Silva, while the other six accused were charged on the second count with committing mischief to the house and property of Arnolis Silva in the course of the same transaction. No objection to the joinder of charges was raised at the time the accused were charged, nor was an application made for separate trials.

In *King v. Dharmasena* (6) the Privy Council held that in regard to joinder of charges and accused persons as provided by sections 180 and 184 of the Criminal Procedure Code (the same as section 111(2) & 111(7), A.J.L.)–

> "The time at which it fails to be determined whether the conditions that the offences alleged had been committed in the course of the same transaction had been fulfilled, is the time when the accusation is made and not when the trial is concluded and the result is known."

Lord Porter referred to the decision in *Babulal Choukhani v. The King Emperor* (7) where the same principle was laid down by the Privy Council and said that–

> "The charges have to be framed for better or worse at an early stage of the proceedings and it would be paradoxical if it could not be determined until the end of the trial whether it was legal or illegal. It was for the Judge bearing these considerations in mind to use his discretion."

Dharmasena's case (supra) (6) was in fact, one where before the trial opened, counsel for each of the two accused made an application that their respective clients should be tried separately, claiming that they would be seriously prejudiced if tried together. The application, however, was refused. See also *Wimalasena v. I. P. Hamabantota* (8) and *King v. Kitchilan* (9).

In the present case the two charges framed against the two sets of accused were simple and uncomplicated unlike in the case of *Subramania* where there were 41 acts referred to in the charge and a clear disregard of a provision of law which prohibited the trial of a person for 3 offences of the same kind, unless committed within a period of 12 months.

In *Kadiri Koyar's case (supra)* (4) the trial itself was defective. In *Jonklaas v. Somadasa (supra)* (1) several acts of stone throwing were committed by different accused at different times and places and in respect of the property of different persons. These cases are distinguishable from the facts of the present case.

In the present case there was no patent defect in the joinder of the two charges against the two sets of accused. On the first count the first six accused were charged with abducting Arnolis Silva from his house. On the second count the other six acused were charged with causing mischief in respect of the house of Arnolis Silva very shortly after he was abducted from it, the motive apparently for both acts being election rivalry. It was subsequently only that the evidence revealed that the second incident had occurred ten minutes after the first and the Court of Appeal found the evidence to be consistent with there being two separate and unconnected incidents so that the "sameness" of the transaction was not established. No prejudice however was shown to have been sustained by the appellants by reason of the joinder of the second count against the other six accused. No objection to the misjoinder was raised by them at the trial. Each set of accused was charged on separate counts. No evidence was led that one group of accused participated in the incident in which the other group was involved. There was no confusion in regard to the accused who were implicated in each count. The appellant could not in any way have been prejudiced by the evidence led of the second incident against the other six persons. In my view, the misjoinder has not prejudiced the appellants and

occasioned a failure of justice. It amounts to an irregularity that is curable under section 436 of the Code of Criminal Procedure Act No. 15 of 1979.

Section 436 of the Code of Criminal Procedure Act (which is identical with section 425 of the old Criminal Procedure Code) states:

"Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account–

(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code;

(*b*) of the want of any sanction required by section 135, unless such error, omission, irregularity or want has occasioned a failure of justice."

Learned counsel's submission that the misjoinder of charges is an illegality which vitiates the conviction of the appellants must therefore fail.

Learned counsel for the appellants next contended that the Magistrate had no jurisdiction to try the appellants under the A.J.L. for the offence of abduction (section 356 Penal Code), because the maximum punishment prescribed for the offence exceeded seven years' imprisonment and the Magistrate was precluded from trying such an offence under the proviso to section 31(1) of the A.J.L.

Section 31(1) reads as follows:–

(*a*) A Magistrate's Court shall have jurisdiction and is hereby required to hear, try and determine in the manner provided for by written law, all prosecutions instituted therein against any person in respect of any offence committed wholly or in part within its division;

Provided that no Magistrate's court shall try any offence in respect of which the maximum punishment is in excess of seven years' imprisonment or a fine of seven thousand rupees.

Sub-section (2) sets out the sentencing powers of a Magistrate's court which are:–

(a) imprisonment for a term not exceeding eighteen months;

(b) fine not exceeding one thousand five hundred rupees;

(c) whipping;

(d) any lawful sentence combining any two of the sentences aforesaid.

Section 356 of the Penal Code provides that whoever abducts any person "shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

Learned counsel submitted that since the accused were also liable to a fine under this section, it was a punishment that is additional to and in excess of the maximum of seven years' imprisonment stipulated in the proviso to section 31(1) of the A.J.L. and outside the jurisdiction of the Magistrate's court.

But section 53(4) of the A.J.L. which makes transitional provisions for cases pending at the time of the A.J.L. came into operation, states that:–

"All actions, proceedings or matters pending in Magistrates' courts established under the Courts Ordinance...on the day preceding the appointed date shall stand removed to the appropriate Magistrate's court established under this Law, and such Magistrate's court shall have jurisdiction to hear and determine or to continue and complete the same, and the judgments and orders of the aforesaid courts delivered or made before the appointed date shall have the same force and effect as if they had been delivered or made by a Magistrate's court established under this Law.

Provided that all pre-trial proceedings of a non-summary nature shall not be so removed, but shall terminate and be dealt with thereafter in the manner provided in Chapter II of this Law."

The Magistrate had charged the accused after assuming jurisdiction as an A.D.J. under section 152(3) of the repealed Criminal Procedure Code. This procedure was abolished by the A.J.L. but it did not affect the proceedings taken under section 152(3) of the old Code since the

Magistrate after assuming jurisdiction as A.D.J. still remained a Magistrate. Section 152(3) of the Criminal Procedure Code merely confers the punitive powers of a District court on the Magistrate, but he acts as a Magistrate, and not as a District Judge. *Madar Lebbe v. Kiribanda* (10).

These proceedings were therefore pending in a Magistrate's court established under the Courts Ordinance and stood removed to the appropriate Magistrate's court established under the A.J.L. by virtue of section 53(4) immediately that Law came into operation. Section 53(4) invested the Magistrate's court to which these proceedings had been transferred, with a special jurisdiction to "hear and determine" them, unrestricted by the proviso to section 31(1) of the A.J.L.

Learned counsel however contended that when the Magistrate charged the appellants again on 10.3.77, he started proceedings anew and thereby stripped himself of jurisdiction to "hear and determine" the proceedings under section 53(4) of the A.J.L. inasmuch as they were no longer pending. They were not a continuation of the proceedings that commenced with the charging of the appellants in terms of section 152(3) of the Criminal Procedure Code. It is true the appellants were charged afresh on 10.3.77 and, although the Form of the Charge Sheet used, is Summary Form 1A that was prescribed under the repealed Criminal Procedure Code, it is quite clear that the charge was framed under the A.J.L. In fact after the A.J.L. came into operation, all further proceedings had to be taken under that Law. That this was what the Magistrate did is borne out by his reference to section 168 which he had to comply with at the close of the prosecution case.

But as for Learned counsel's submission that the fresh charge constituted a new proceeding, I regret I am unable to agree. The commencement of proceedings in a Magistrate court is not the stage when the accused is charged but when they are instituted under section 148(1) of the Criminal Procedure Code. Chapter XV which lays down the procedure for this, is entitled: "Of the Commencement of Proceedings before Magistrate's Courts", and section 148(1) states that proceedings in a Magistrate's court shall be instituted in one of the several ways set out in sub-sections (*a*) to (*f*). It is at that stage that the Magistrate takes cognizance of the offence and decides whether he is to take action or not. If he decides to take action, he may record evidence with a view to issuing process in cases where the

accused is not before him, and when the accused is brought up, he charges him and records his plea under section 187(3). It is therefore manifest that the proceedings commenced when they were initiated before the Magistrate in terms of section 148(1) of the Criminal Procedure Code and not at the stage when the accused were charged. The corresponding sections in the A.J.L. relating to the institution of proceedings and the charging of the accused, are 163 and 166 respectively.

Learned counsel laid emphasis on the words "hear and determine" which suggested the stage of the trial after the accused are charged, in support of his contention. But it will be noted that provision is made for the taking of evidence even before the accused is charged. The words "hear and determine" therefore do not relate only to the stage after the accused is charged and put on trial. They apply equally to the proceedings taken prior to the charging of the accused. I am therefore of opinion that the Magistrate had jurisdiction to "hear and determine" the proceedings after charging the appellants afresh, since the proceedings that had commenced under section 148(1) of the repealed Criminal Procedure Code were still pending and stood removed to the new Magistrate's Court established under the Law. This submission of learned counsel must also fail.

The findings of fact reached by the Magistrate, were not canvassed in this court, and have been affirmed by the Court of Appeal. I see no reason to interfere with these findings. I accordingly affirm the conviction and sentence imposed on the appellants and dismiss the appeal.

SHARVANANDA, C.J. – I agree.

H. A. G. DE SILVA, J. – I agree.

Appeal dismissed.