1950 *Present :* **Nagalingam J.**

JOHN PERERA, Appellant, *and* WEERASINGHE, Respondent

S. C. 930—M. C. Gampaha, 51,038

Charge—Application for amendment—Principle underlying grant or refusal—Discretion vested in Court—Must be properly exercised—Criminal Procedure Code, S. 172.

Where, owing to misjoinder and uncertainty of the charges, an application to amend the charges was made but was refused on the mere ground that the defence strongly objected to the amendment—

Held, that an amendment of a charge should not be refused by the Judge unless it is likely to do substantial injustice to the accused. Section 172 of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more counts or charges in an indictment or complaint.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

R. S. Wanasundera, for the complainant appellant.

L. F. Ekanayake, for the accused respondent.

Cur. adv. vult.

October 16, 1950. NAGALINGAM J.—

This is an appeal from an order of the learned Magistrate of Gampaha refusing an application of the complainant to amend the charges against the accused person by withdrawing one of three charges framed against him and by interpolating certain words in the other two charges in order to bring them in conformity with the provisions of the law.

The prosecution against the accused person was founded under the Village Communities Ordinance, Cap. 198 L.E., and consisted in the allegation that the accused who was Chairman of a Village Committee had failed in his duty to report the absence of certain members from Village Committee meetings and thereby had incurred liability to punishment.

When the case came up for trial on the first occasion, objection was taken to the prosecution on the ground that the provision of the law under which the accused person was sought to be punished had been abrogated. The learned Magistrate upheld this contention and discharged the accused. The complainant appealed from the order and this Court set aside the learned Magistrate's order and directed the case to be tried on its merits. When the case went back to the Magistrate's Court the prosecutor discovered that there was firstly a misjoinder of charges and secondly that the charges as framed did not disclose adequately the offence with the commission of which the accused was charged.

Of the three offences with which the accused was charged, the first was said to have been committed between 23rd July, 1948, and 15th February, 1949, while the other two offences were said to have been committed between 6th September, 1946, and 23rd December, 1946. It would thus be seen that these charges could not have been joined as there was a violation of the provisions of section 179 of the Criminal Procedure Code in that all these offences had not been committed within a space of twelve months from the first to the last of such offences. The prosecutor therefore moved that he be permitted to withdraw the first charge. The learned Magistrate does not specifically deal with this in his order.

The prosecutor having also discovered that the other two charges as framed alleged that the respondent had wilfully neglected to report to the Government Agent that members had absented themselves " on three consecutive meetings of the Village Committee " while the offence created by the enactment consisted not in neglecting to report the absence of a member from three consecutive meetings but in neglecting to report the absence of a member without leave of the Committee *from more than* three consecutive meetings, application was also made to amend the other two charges by the addition of the necessary words in order to specify the charges accurately.

The written application that was made for amendment also suffered from infirmities and application was made *ore tenus* to make further amendments.

That the prosecutor has been careless and negligent in the extreme there can be little doubt. The question, however, is whether the learned Magistrate was right in refusing to accede to the application to amend the charges. No reasons have been given, except that the defence strongly objects to the amendment. Under section 172 of the Criminal Procedure Code, power is vested in a Court to alter a charge at any time before judgment is pronounced. There can be little doubt that this is a discretionary power that is vested in the Court but such a discretion must be exercised judicially. Had the learned Magistrate given any reasons save that the defence strongly objects, it would have been possible to test whether the discretion has in fact been properly exercised. In the present state of the record it is not possible to do so and I have to consider the question anew.

The principle underlying the grant or refusal of an application to amend was laid down in a very early judgment of this Court in the case of *The Queen v. Sinno Appu* [1] in which Fleming A. C. J. laid down the proposition that an amendment should not be refused by the Judge unless it is likely to do substantial injustice to an accused. In the same case Lawrie J. expressed the view that the " Judge should be ready to listen to and willing to adopt any amendment which will have the effect of convicting the guilty or of acquitting the innocent ". I have had no arguments addressed to me on behalf of the respondent to indicate that any substantial injustice or prejudice other than legitimate is likely to be caused to him by reason of the amendment being allowed. Furthermore, when I consider that the charges relate to the commission of offences by a person holding a public office, I am the less reluctant to refuse the amendment.

The case of *King v. Emanis* [2] is an authority for the proposition that section 172 of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more counts or charges in an indictment or complaint. I think this is a fit case where the learned Magistrate should have exercised his discretion in favour of the complainant and allowed the amendments.

I therefore set aside the order of the learned Magistrate and allow the complainant to withdraw the first charge in the complaint and to set out the complaint in respect of the other charges in manner following:—

1. The complainant abovenamed complains to this Court that the accused abovenamed being the Chairman of the Village Committee of Egodapatha Village area did between the 6th September, 1946, and 23rd December, 1946, wilfully neglect to send within seven days of the absence without leave of the said Committee of D. P. Ranatunga, member for Dematadenikanda of the said Village Committee, from more than three consecutive meetings of the said Committee, written information to the Government Agent, Western Province, that the said D. P. Ranatunga had absented himself without leave of the said

[1] 7 S. C. C. 51.

[2] (1940) 41 N. L. R. 529.

Committee from more than three consecutive meetings of the said Committee and thereby committed an offence punishable under section 19 (5) of the Village Communities Ordinance, Cap. 198, as amended by the Village Communities (Amendment) Ordinance, No. 54 of 1942.

2. At the same place aforesaid and within the said dates the said accused did wilfully neglect to send within seven days of the absence without leave of the said Committee of R. T. Don Rajapaksa, member for Udammita of the said Village Committee, from more than three consecutive meetings of the said Committee, written information to the Government Agent, Western Province, that the said R. T. Don Rajapaksa had absented himself without leave of the said Committee from more than three consecutive meetings of the said Committee and thereby committed an offence punishable under section 19 (5) of the Village Communities Ordinance, Cap. 198, as amended by the Village Communities (Amendment) Ordinance, No. 54 of 1942,

and direct the trial of the accused on these charges.

Appeal allowed.