1923.

Present: Jayewardene A.J.

POLICE SERGEANT, LINDULA, *v.* STEWART.

461—P. C. Nuwara Eliya, 6,802.

Vehicles Ordinance, 1916, ss. 32 and 48—Section 48 deals with six separate offences—Separate charges for each offence—Conviction for one offence and charge for another—Criminal Procedure Code, ss. 178 and 425.

The charge against the accused was that he did "rashly and negligently drive his motor car—in a manner which was likely to endanger human life, and damaged the motor car belonging to S in breach of section 32 of Ordinance No 4 of 1916," and thereby committed an offence punishable under section 48 of Ordinance No. 4 of 1916. The Magistrate in his judgment did not convict the accused of the offence with which he was charged, but of having driven his car "unreasonably fast in view of the dangerous nature of the corner, the surface of the road, and the possibility of meeting motor traffic at the spot," and found him guilty under section 48.

Held, that the charge was bad: (*a*) The offence under the section is to drive "recklessly" and not "rashly"; (*b*) driving negligently is an offence, and driving in a manner which is likely to endanger human life is a separate or distinct offence, and should not have been combined in the way it was in the charge.

"The defect is, however, not necessarily fatal to the conviction, as it is one of duplicity and not of misjoinder, and it may be cured under section 425 of the Criminal Procedure Code if the accused has not been prejudiced."

Held, further, that the conviction of the accused of an offence with which he was never charged is fatal to the conviction. The accused was charged or intended to be charged with the first, second, and fourth offences under section 48, but he has been convicted of the sixth offence created by section 48.

THE facts are set out in the judgment.

Keuneman, for the appellant.

August 21, 1923. JAYEWARDENE A.J.—

This is an appeal against a conviction under the Vehicles Ordinance, No. 4 of 1916, section 48, which deals with offences relating to the driving of motor cars. The accused was driving his car from Nuwara Eliya to Colombo, and one Mr. Smethurst was driving up from Lindula to Nuwara Eliya, when the two cars met at a corner of the road about three-quarter of a mile from the Lindula police station. Mr. Smethurst got on to a side of the road, seeing the accused's car coming along, and the accused pulled up his car, when

the back wheel skidded and the right hand mudguard struck the front portion of Mr. Smethurst's car, which was damaged. Mr. Smethurst estimates that the accused was travelling at the rate of thirty miles an hour round the corner, and he at ten or twelve miles an hour. While the accused says he was not doing more than ten or twelve miles an hour.

The police prosecuted the accused, and he was summoned to answer the following charge : That he did " rashly and negligently drive his motor car No. 3,515 on a public road in a manner which was likely to endanger human life and damaged the motor car, No. F 299, belonging to Mr. Smethurst, in breach of section 32 of the Ordinance No. 4 of 1916, and thereby committed an offence punishable under section 48 of Ordinance No. 4 of 1916." When the accused appeared in Court and the charge was read out to him from the summons, he stated the circumstances under which the " accident " happened, and added : " I deny that I was driving my car rashly and negligently." The Magistrate in his judgment does not convict the accused of the offence with which he was charged, but of having driven his car " unreasonably fast, in view of the dangerous nature of the corner, the surface of the road, and the possibility of meeting motor traffic at the spot," and finds him guilty under section 48 of the Ordinance.

Now section 48 consists of six different offences :—

1. Driving recklessly ;
2. Driving negligently ;
3. Driving at a speed ; or
4. Driving in a manner } which is likely to endanger human life, or to cause hurt or injury to any person or animal or damage to any vehicle or to goods or persons carried therein
5. Driving at a speed ; or
6. Driving in a manner } which would be otherwise than reasonable and proper having regard to all the circumstances of the case, including the nature and use of the public thoroughfare, street, or road, and to the amount of traffic which is actually on it at the time, or which may be reasonably be expected on it.

The charge attributes to the accused the commission of an offence not known to the law " of rashly and negligently driving his car in a manner which was likely to endanger human life and damaged the motor car No. F 299." What the section declares to be an offence is to drive " recklessly " not " rashly." Again, the second and fourth offences under the section have been combined in a curious way, and the accused is charged with driving " negligently in a manner

1923.

JAYEWARDENE A.J.

Police Sergeant, Lindula, v. Stewart

which was likely to endanger human life, &c." Driving "negligently" is one offence, and driving in a manner which is likely to endangor human life is a separate or distinct offence. The charge, therefore, offends against section 178 of the Criminal Procedure Code, which requires that for every distinct offence of which any person is accused there shall be a separate charge. The defect is, however, not necessarily fatal to the conviction, as it is one of "duplicity" and not of misjoinder, and it may be cured under section 425 of the Criminal Procedure Code, if the accused has not been prejudiced (*Musai Singh v. Emperor* [1]).

The other objection, that the accused has been convicted of an offence with which he was never charged, is fatal to the conviction. As I have pointed out, the accused was charged or intended to be charged with the first, second, and fourth offences under section 48, but he has been convicted of the sixth offence created by the section. The evidence relating to this offence is contradictory and insufficient, and I do not think I would be justified in altering the charge and maintaining the conviction. The learned Police Magistrate has taken into account three things : The dangerous nature of the corner, the surface of the road, and the possibility of meeting other motor traffic at the spot. Mr. Smethurst says that the road was in good condition, while the accused says the road surface was in bad condition—pebbly on top. There is no evidence as to the traffic which may be reasonably expected on the road. Thus, there is only the evidence that the corner is a dangerous one. The accused should have had an opportunity of meeting a properly framed charge setting out the offence of which he has been convicted. The conviction is set aside, but I leave it to the prosecution to take any further steps, if it thinks it desirable to do so.

I may also mention that the police report and the summons state that the accused acted in breach of section 32 of the Ordinance. This is one of a series of sections dealing with the civil liabilities of owners of vehicles, and declares that the owner is only liable for such damages as are actually proved. I fail to understand how the accused could have committed a breach of section 32, or its relevancy in a prosecution for an offence under section 48. Evidently the charge has been framed without reference to the Ordinance.

Set aside.

[1] *(1913) 41 Cal. 66.*