

1913.

Præsent: Pereira J.

SAMUEL *v.* BRITO *et al.*

706 and 707—P. C. Negombo, 20,057.

Unlawful assembly being armed with deadly weapons—Summary trial—Magistrate should not charge accused with a lesser offence when evidence discloses an offence beyond his jurisdiction—Security for good behaviour—Criminal Procedure Code, s. 80.

Where in the case of a charge of being a member of an unlawful assembly it was proved to the satisfaction of the Magistrate that the accused were armed with deadly weapons, it was not open to the Magistrate to overlook this fact and frame a charge under section 140 of the Penal Code and try the accused summarily. Similarly, when in the case of a charge of criminal intimidation, it was proved that the threat was to cause grievous hurt to the complainant, it was not competent to the Magistrate to try the accused summarily for the act penalized in the earlier part of section 486 of the Penal Code.

An order to give security for good behaviour could be made under section 80 of the Criminal Procedure Code, and no order for security for any purpose whatever could be made under that section unless it was preceded by an order passing sentence on the accused.

THE facts appear sufficiently from the judgment.

H. A. Jayewardene, for accused, appellants.—The accused are charged with being members of an unlawful assembly. The evidence clearly shows that they were armed with deadly weapons. The offence was therefore one beyond the jurisdiction of the Magistrate.

He should not have assumed jurisdiction by ignoring a portion of the evidence. *Sineris v. James*,¹ *Nagamma v. Themis Sinno*² The charge should have been under section 141 of the Penal Code.

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The order to give security to be of good behaviour is wrong. The accused were not called upon to show cause against the order. If the order is one under section 80 of the Criminal Procedure Code, there is no sentence in this case. Without passing a sentence an order should not be made under section 80.

H. J. C. Pereira, for the respondent.—The accused was not convicted of being a member of an unlawful assembly. The conviction is for criminal tres

Cur. adv. vult

October 3, 1913. PEREIRA, J.—

In this case objection has been taken and strenuously pressed by the appellants' counsel that the Magistrate has assumed jurisdiction to try the accused on at least the first charge framed by overlooking a material fact accepted by himself in his judgment as fully established by the evidence, the fact being that the accused were armed with a revolver and a gun. There is no question that this fact was accepted by the Magistrate as proved, because the fact is set forth in the conviction of the accused for criminal trespass. This being so, it was not open to the Magistrate to ignore the fact and frame a charge under section 140 of the Penal Code in order to give himself jurisdiction to try the accused. At the time that the Magistrate framed the charge there were presumably facts established to his satisfaction indicating a *prima facie* case against the accused of unlawful assembly, and, inasmuch as the evidence also established the fact that the accused were armed with a revolver and a gun, the unlawful assembly that the accused were guilty of was an offence that fell under section 141 of the Penal Code—an offence beyond the summary jurisdiction of the Magistrate, and not under section 140; and it was a gross irregularity for the Magistrate to frame a charge under section 140 and try the accused thereon summarily. The fact that the accused were eventually acquitted on this charge makes no difference. They were on their trial on it for what no doubt must have been regarded as the principal of the offences of those with which they were charged.

The same remarks apply to the third charge, although counsel for the accused has not alluded to it. That is a charge of criminal intimidation under section 486 of the Penal Code, but the threat deposed to is a threat to shoot the complainant Samuel with a revolver. That being so, the offence, if any, was an offence under the latter part of section 486 of the Penal Code, which also was an offence beyond the summary jurisdiction of the Magistrate.

¹ (1901) 5 N. L. R. 93.

² (1911) 1 C. A. C. 56.

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The proceedings are irregular in other respects also. The Magistrate has passed no sentence on the accused. He has ordered the accused to give security for good behaviour under, I presume, section 80 of the Criminal Procedure Code. In the first place, the order under that section should be one for security to keep the peace and not for good behaviour, as under section 82. In the next place, an order for security under section 80 can only be made at the time of (not for) passing sentence.

The section presupposes the passing of a sentence to pave the way for an order for security.

This Court has held that an order such as that appealed from is not a final order, and is therefore not an order from which an appeal lies. (*See Colantaivalu v. Somasundram*.¹)

I therefore deal with the case in revision, and for the reasons given above quash the proceedings since the filing of his plaint by the complainant, and remit the case for non-summary proceedings.

Proceedings quashed.