1942

Present : **Wijeyewardene J.**

JONKLAAS *v.* SOMADASA *et al.*

570-2—M. C. Colombo, 20,832.

Joint trial—Offences committed in the course of same transaction—Criminal Procedure Code, s. 185—Illegality.

Community of purpose and continuity of action are essential elements necessary to link together different acts so as to form one and the same transaction within the meaning of section 184 of the Criminal Procedure Code.

Disobedience to an express provision as to a mode of trial is an illegality which vitiates the connection.

APPEAL from a conviction by the Magistrate of Colombo.

E. D. Cosme (with him *J. de V. Fernando Pulle*), for appellant..

H. W. R. Weerasooriya, C.C., for respondent.

Cur. adv. vult.

January 29, 1942. WIJEYEWARDENE J.—

Six accused were charged in the Magistrate's Court—

(*a*) with having committed mischief at Grandpass road on April 6, 1941, by causing damage to the value of Rs. 50 to car No. Z 2367 and to other motor vehicles, property in the possession of the Hon. Mr. D. S. Senanayake and others, with intent to cause wrongful loss or damage to the said Hon. Mr. Senanayake and others and thereby committed an offence punishable under section 410 of the Penal Code ;

(*b*) 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. Mr. D. S. Senanayake and others and thereby committed an offence punishable under sections 509 and 490 of the Penal Code.

The accused pleaded not guilty. No evidence was called for the defence but the proctors appearing for the defence stated at the close of the case for the prosecution that all the accused should not have been tried together. The Magistrate acquitted the 1st and 6th accused but convicted the remaining accused—the appellants on the present appeal—on count (*a*) and sentenced each of them to a term of 2 months' rigorous imprisonment.

At the hearing of the appeal the Counsel for the appellants raised a number of points but it is sufficient for the purposes of this appeal to consider his objection regarding the joint trial of the accused.

The evidence led by the prosecution was to the effect that on April 6, 1941, a meeting was held at Grandpass in support of Dr. R. Saravanamuttu, a candidate for the Colombo North seat, at a State Council Election, some time later. It was alleged that he belonged to the Congress Party while his opponent was a candidate put forward by the Labour Party. The Hon. Mr. D. S. Senanayake attended that meeting to support the candidature of Dr. Saravanamuttu. It was about the time that

Mr. Senanayake and others were going away from the meeting that the accused are alleged to have committed the acts referred to in the charges. Some distance away from the place were the meeting was held, the 1st accused was arrested about 7 P.M. as he aimed a stone at a car passing along the road. The prosecution is unable to state that the stone hit the car and cannot say whose car it was. There is no evidence to show that any one who attended the meeting or espoused the cause of Dr. Saravanamuttu was interested in that car. About quarter of an hour later, as Mr. Senanayake was driving along the Grandpass road, the appellants and some others threw stones and some of them hit Mr. Senanayake's car. Sometime later, as Dr. Saravanamuttu was walking down the Grandpass road, followed by his car, a constable arrested the 6th accused as he saw him "pelting a stone towards Dr. Saravanamuttl's car". Referring to this incident, Dr. Saravanamuttu stated :—

> "I do not think the affair was put up by the opposing party. I think these rowdies had been put up by some person. It was personal opposition. The men used for the purpose naturally belonged to the opposite party. . . . . He (6th accused) aimed the stone at the passers-by. I can't say at what else he aimed the stone. He may probably have tried to get me with the stone. I can't say if he wanted to get the car . . . . My impression at the time was that the 6th accused threw the stone to injure one of my party."

Major Saravanamuttu, a supporter of Dr. Saravanamuttu, was not prepared to say that this stone-throwing incident had anything to do with the conflict between the Labour Party and the Congress Party over the particular election. He stated further that the stone thrown by the 6th accused hit a man who was by him.

Now the principle that each accused should have been tried separately could have been disregarded in the present case only if the appellants and the other two persons were "accused of jointly committing the same offence or of different offences committed in the same transaction". (*Vide* section 184 of the Criminal Procedure Code). These six persons did not certainly commit the same offence nor is there even an allegation in the charge that they acted jointly. Could it be said that these six persons were accused of different offences committed in the same transaction. This involves a consideration of the meaning of the word "transaction", which has not been defined in the Criminal Procedure Code. In discussing the meaning of this word in the corresponding section of 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. While the fact that offences are committed at different times and places need not necessarily show that the offences are not committed in the same transaction, yet these are matters which cannot be ignored altogether. The evidence in this case with 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 one and the same transaction. There is, therefore, in this case, a clear misjoinder of accused. Such a misjoinder cannot be regarded as a mere irregularity which can be cured either under section 425 of the Criminal Procedure Code or section 36 of the Courts Ordinance. In the case of *Subbramania Iyer v. The King Emperor* [1] 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. In delivering the judgment of the Privy Council the Lord Chancellor said :

> "The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the Criminal Law to say that when the code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity."

The Supreme Court has adopted and followed in several cases the principle laid down in the Privy Council decision (vide *The King v. Mendis* [2], *Weerakoon v. Mendis* [3]). Following the decisions, I quash the convictions and the proceedings *ab initio*. If the accused are charged again, it would be fair that such trial should take place before another Magistrate.

Quashed.