1953 *Present :* **Gratiaen J. and Gunasekara J.**

K. VAITILINGAM *et al.*, Appellants, *and* THE QUEEN, Respondent

*S. C. 63–70—D. C. Point Pedro (Criminal), 23*

*Indictment—Charges contained therein—Should not be different from those that were the subject of the proceedings in the Magistrate's Court—Criminal Procedure Code, s. 165F.*

An indictment can charge the accused only with offences alleged in the charges upon which he has been committed for trial or offences of which he can be lawfully convicted upon a trial of those charges.

APPEAL from a judgment of the District Court, Point Pedro.

*H. W. Tambiah*, with *Thanabalasingham*, for the 1st, 3rd and 4th accused appellants.

*M. M. Kumarakulasingham*, for the 5th and 6th accused appellants.

*K. C. Nadarajah*, for the 7th, 8th and 10th accused appellants.

*Ananda Pereira*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

[1] *De Zilva v. Auwardt (1 S. C. C. 28).*
[2] *Usoof v. Bawa (2 Leader Law Reports 49).*

March 18, 1953. GUNASEKARA J.—

The eight appellants were, each of them, convicted on six counts of an indictment on which they were tried before the District Court of Point Pedro. It is contended for them that their convictions are bad for the reason that the offences charged in these six counts, and of which they have been convicted, are not offences that were alleged in the charges upon which they were committed for trial or those in respect of which the committing magistrate had held an inquiry, and that they are not offences of which they could have been lawfully convicted upon the trial of any of those charges.

The counts in question allege an offence of unlawful assembly punishable under section 140 of the Penal Code and five other offences committed in prosecution of " the common objects " of the assembly ; these five offences being rioting punishable under section 144, criminal intimidation punishable under section 486 read with section 146, two offences of mischief by fire punishable under section 419 read with section 146, voluntarily causing hurt punishable under section 314 read with section 146.

The count of unlawful assembly alleges that the accused had

" one or more of the following common objects :

(*a*) to commit criminal intimidation by threatening to cause injury to the person and property of Kethar Kethapper and other members of the Palla community,

(*b*) to commit mischief by setting on fire the houses of Kethar Kethapper and other members of the Palla community,

(*c*) to cause hurt to members of the Palla community ".

Thus an essential ingredient of each of the offences charged in the six counts is that the accused contemplated the commission of certain offences against members of the Palla community as such. (It could only be upon this view that it was contended by the prosecuting counsel at the trial, in reply to an objection to the admission of medical evidence about injuries found on a man who according to the Crown case had been wounded in the alleged riot, that although the indictment contained no charge of an offence committed against this man the evidence was admissible for the reason that he was a member of the Palla community.) No magisterial inquiry was held, and there was no commitment of the accused for trial, in respect of any charge alleging that they had a common object of committing any offence against members of the Palla community. The charges in respect of which the magistrate held an inquiry and committed the accused for trial did allege offences of unlawful assembly and rioting, but they alleged a different common object, namely, that of committing certain offences against twelve individuals, one of whom was Kethar Kethapper, and there was no reference to the Palla community in any of the charges that were framed in the Magistrate's Court. According to these charges too, the offences which formed the common object of the assembly were offences of criminal intimidation, mischief by fire, and hurt, but they are not for that reason the same as the offences alleged in the indictment to have been the

common objects of the assembly. Thus there has been no magisterial inquiry, or commitment for trial, in respect of the charges of unlawful assembly and rioting upon which the appellants were tried and convicted. Furthermore, there was no inquiry or commitment in respect of a charge of any other offence at all an ingredient of which is membership of an unlawful assembly : charges laid under section 146 of the Penal Code appear for the first time in the indictment and do not appear in the proceedings before the magistrate. In other respects too the charges set out in the indictment are essentially different from those that were the subject of the proceedings in the Magistrate's Court. The offence of criminal intimidation charged in the indictment is alleged to have been committed against " Kethar Kethapper and other members of the Palla community " ; but there has been no magisterial inquiry or commitment in respect of any charges of intimidation framed against the appellants, except charges against the 3rd and 4th accused alleging criminal intimidation of one Sandanam and against the 4th and 6th accused alleging criminal intimidation of one Eliyavan. The two counts of mischief upon which the appellants have been convicted allege the destruction of the houses of two persons named Swaminather and Paruwathy, but none of the appellants were charged with either of these offences before the magistrate : in the Magistrate's Court the 1st, 6th, 7th, and 10th accused were charged with other offences of mischief punishable under section 419 of the Penal Code, and the 1st and 8th with abetment of similar offences, and against the 3rd, 4th and 5th accused there were no charges at all of mischief or abetment of mischief. The count of voluntarily causing hurt alleges an offence committed against one Paruwathy, but in the Magistrate's Court there was no charge in respect of that offence against any of the appellants except the 3rd accused, and, as I have already indicated, the charge against him was not laid under section 146. I agree with the contention of the learned counsel for the appellants that the offences alleged in the six counts in question are not offences with which the appellants were charged in the Magistrate's Court. Nor are they offences of which they could have been lawfully convicted upon a trial of the charges that were inquired into by the magistrate and upon which they were committed for trial.

The question then arises whether it was not open to the Attorney-General, nevertheless, to include in the indictment the six counts upon which the appellants were convicted.

The Criminal Procedure Code provides that a commitment must be preceded by an inquiry, and by section 165E, requires the committing magistrate " to forward to the Attorney-General a copy of the record of the inquiry certified under his hand ". It then provides, by section 165F, for the presentment of an indictment " if after the receipt by him of the certified copy of the record of an inquiry, the Attorney-General is of opinion that the case is one which should be tried before the Supreme Court or a District Court ". The inquiry that precedes the commitment may in a given case consist in a proceeding under chapter XVI or in one under chapter XVIII. In either case, the magistrate must at the commencement of the proceeding read to the accused the charge in

respect of which it is being held (sections 156, 187 (3) ), and before the accused can be committed for trial he must be given an opportunity of cross-examining the witnesses called on behalf of the prosecution (sections 157 (2), 189 (2) ) and of adducing evidence for the defence (sections 161, 189 (1) ), and he must also be given an opportunity of making a statement in answer to the charge (sections 160 (1), 188 (2) ). It is obvious that this procedure is designed to secure for the accused, among other advantages, an opportunity of showing that the evidence against him does not warrant his commitment for trial before a higher court for the offence alleged in the charge that is the subject of the inquiry or any other offence of which he may be lawfully convicted upon a trial of that charge. Thus section 161 (3) requires the magistrate, in an inquiry under chapter XVI, to take the evidence of any witness called for the defence who knows anything tending to prove " the innocence of the accused ", which can only mean innocence of the offence charged in those proceedings or an offence of which he may be lawfully convicted upon a trial of that charge. In the case of a preliminary inquiry under chapter XVI it is provided by section 162 (1) that " if the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith order him to be discharged as to *the particular charge under inquiry* ", and by section 163 (1) that " if the Magistrate considers the evidence sufficient to put the accused on his trial, the Magistrate shall commit him for trial ". In the case of a proceeding under chapter XVIII it is provided, by section 192 (1), that " if the Magistrate after taking the evidence adduced for the prosecution and the defence is of opinion that the accused is guilty of an offence which cannot be adequately punished by a Magistrate's Court, he shall not convict the accused but shall commit the accused for trial to the Supreme Court or to the District Court, as to him may seem fit, and shall follow the procedure prescribed in Chapter XVI in regard to the steps to be taken after the commitment of an accused for trial ". In each case the context implies that the accused can be committed for trial only upon a charge that he has had an opportunity of meeting at the inquiry or trial before the magistrate. No purpose would be served by this restriction of the scope of the commitment, or by the accused being given a right to defend himself against a formal charge before he can be committed for trial, if the scope of the indictment upon which he is to be tried is not determined by the commitment. The Code also requires that at a trial on indictment, whether before the Supreme Court (section 233) or a District Court (section 209), " all statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ", and the object of this provision would be defeated if the accused could be tried on a charge in answer to which he was given no opportunity of making a statement in the Magistrate's Court. It appears also to be implied in the provisions relating respectively to the summoning and the binding over of witnesses for the defence to give evidence at the trial, which are contained in sections 165 and 165A, that the indictment can allege only an offence of which the accused can be convicted upon the trial of a charge in

respect of which he has been committed for trial. Section 165 (1) provides that " the Magistrate shall at the time of committing the accused for trial require the accused to state orally there and then the names of persons (if any) whom he wishes to be required to give evidence at his trial " ; and section 165 (2) requires the magistrate to prepare a list of such of the witnesses named by the accused as have not already given evidence before him and to cause them to be summoned to appear before the court of trial, " provided however that the Magistrate may exclude from such list the name of any witness if he is of opinion that there are no reasonable grounds for believing that the evidence of such witness is material ". Under section 165A (1) the magistrate must, when he commits the accused for trial, require " every material witness for the prosecution or defence " who has appeared before him and given evidence, and who has not already been bound over, to execute a bond for his appearance to give evidence at the trial. It can only be in reference to the charges upon which the accused is committed for trial that at that stage the accused can say whom he may need as witnesses at the trial and the magistrate can decide whether they are material witnesses.

Section 165F of the Code is the only source of the Attorney-General's power to present an indictment. It seems to me that when the provisions of this section are read in the light of those relating to the proceedings that must be taken before the copy of the record is forwarded to the Attorney-General, it is clear that the indictment can charge the accused only with offences alleged in the charges upon which he has been committed for trial or offences of which he can be convicted upon a trial of those charges.

In support of his argument for a contrary view the learned Crown Counsel cited the case of *R. v. Vallayan Sittambaram* [1], where it was held by Bertram C.J. and Ennis J. (Shaw J. *dissentiente*) that it was open to the Attorney-General to include in the indictment a charge in respect of any offence disclosed at the magisterial inquiry under Chapter XVI of the Criminal Procedure Code though particulars of that offence had not been explained to the accused at the commencement of the inquiry. Since the decision of that case in 1918, however, Ordinance No. 13 of 1938 has made sweeping amendments in the Code, particularly in Chapter XVI, which have taken away the basis of that decision. Under the law as it stood before the amendment it was in the indictment that a charge was for the first time framed against the accused, and it was after the indictment had been settled by the Attorney-General and upon a charge or charges so framed that the accused was committed for trial. It was in respect of an accusation merely, and not as now a formal charge which could be the basis of a trial, that the preliminary inquiry was held ; and what the magistrate was required to do at the beginning of the inquiry was to state to the accused person the nature of the offence of which he was accused, giving such particulars as were necessary to explain it, while now he is required to read over to him the charge in respect of which the inquiry is being held. The commitment

[1] *(1918) 20 N. L. R. 257.*

of the accused for trial was a ministerial act done by the magistrate in compliance with a direction given by the Attorney-General if he decided at the conclusion of the Magistrate's inquiry into the accusation that the accused should be committed for trial upon a charge of any offence that the inquiry disclosed. The law was amended in other important respects, too, but the amendments to which I have referred are sufficient to show that the present procedure is fundamentally different from the old. Under the old procedure there could not arise a situation in which the charges contained in the indictment were different from those upon which the accused was committed for trial. The decision in *Vallayan Sittambaram's Case* furnishes no support for the view advanced on behalf of the Crown.

The convictions under appeal must be quashed and the sentences passed on the appellants must be set aside.

GRATIAEN J.—I agree.

*Convictions quashed.*