
Present: Pereira J.

FERNANDO *v.* FERNANDO *et al.*

8,023—P. C. Negombo, 20,391.

Joinder of accused—Theft of bull—Receiving stolen bull.

A is accused of the theft of a bull, and B of dishonestly receiving the animal from A.

Held, that the two could not be charged and tried together at one trial unless it could be shown that they were acting in concert.

THE facts appear from the judgment.

E. W. Jayewardene, for first accused, appellant.

H. J. C. Pereira, for the second accused, appellant.

Cur. adv. vult.

November 12, 1913. PEREIRA J.—

In this case objection has been taken to the proceedings on the ground of misjoinder of accused parties, that is to say, on the ground that the two accused have been tried together at one trial, each for a distinct and separate offence. The first accused is alleged to have stolen a bull on October 1, and the second accused is alleged to have dishonestly received the animal from the first on October 2. These are two distinct and separate offences. True, the evidence against the first accused is largely the fact of possession by him of the bull at the time of the sale of the animal by him to the second accused on October 2; but that fact is presumptive evidence of theft on October 1, and the first accused has been convicted of theft on October 1. The two offences are distinct, and the joinder in the present instance of the two accused in one trial is not justified by section 184 of the Criminal Procedure Code. If the two accused

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were acting in concert, the second accused should have been charged with abetting the theft, but if the idea of concert is eliminated, the two acts of stealing and receiving are separate acts committed by separate persons. The position is clearly explained by Dr. Gour in his work on the *Penal Law of India* (vol. II., p. 1510, para 2961), and this Court has repeatedly held that the misjoinder of accused parties is an illegality that vitiated the proceedings. This very case affords a striking example of the possible prejudice to either of the two accused by reason of their being tried together, because, as observed by the Magistrate in convicting the first accused, it is necessary for one, in considering the case against him, to exclude carefully from his mind the statements made by the second accused in his own defence, and to weigh as against the other accused only the evidence led by the prosecution. This is but too often a mental operation on the success of which much reliance cannot be placed. I quash the convictions and the proceedings *ab inito*. If the accused are re-charged, it would be but fair that the trials should not take place before the Magistrate who has tried this case.

Quashed.
