1946 [COURT OF CRIMINAL APPEAL.]

Present: **Howard C.J. (President), Cannon and Jayetileke JJ.**

THE KING *v.* PEDRICK SINGHO.

APPLICATION 73 OF 1946.

S. C. 3—M. C. Panadure, 3,620.

Joinder of three charges of murder in one indictment—Offences committed in same transaction—Separate trials not necessary where no prejudice is caused to accused—Criminal Procedure Code, ss. 179 (1), 180 (1).

Where three charges of murder were joined in one indictment and the facts of the three murders were so interwoven as to constitute a series of facts forming one transaction—

Held, that the accused was not prejudiced by the joinder of more than one charge of murder in the same indictment.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

Mackenzie Pereira (with him *K. A. P. Rajakaruna*), for applicant.—Three charges of murder were included in one indictment. The Crown sought to justify the joinder (*a*) under Section 179, (*b*) under Section 180 of the Criminal Procedure Code.

Section 180 does not apply because neither continuity of action nor community of purpose so as to make the alleged series of acts one transaction has been established. Joinder should not have been permitted under Section 179 (1) as the accused was prejudiced. Further, joinder of more than one murder charge in one indictment is undesirable. See *King v. Senanayake* [1], *Rex v. Davies* [2], *Rex v. Large* [3], *Emperor v. Sherufath Allibuoy* [4], *Rex v. Jones* [5].

Cause of death of the deceased Lucihamy has not been satisfactorily established.

In view of the evidence of Guneris in certain particulars, *e.g.*, his being handcuffed, &c., the question whether Guneris was an accomplice should have been placed before the Jury.

[1] *(1917) 20 N. L. R. 83.*
[2] *(1937) 26 Cr. App. R. 95.*
[3] *(1939) 27 Cr. App. R. 65.*
[4] *(1902) 1. L. R. 27 Bombay 135 at p. 138.*
[5] *(1918) 13 Cr. App. R. 6.*

The evidence of Peter with respect to (*a*) the purpose of the visit of deceased Oderis, (*b*) undertaking of deceased Themis to return to the estate on a specified date, was irrelevant in that such evidence relates to facts prior to the transactions which resulted in their respective deaths and should not have been allowed to be led in the case. See *Rex v. Arnolis Perera* [1].

Section 178 of Criminal Procedure Code is imperative that every charge shall be tried separately except in certain cases. Sections 179 (1) and 180 (1) are the only sections which permit joinder of charges. Where joinders though permissible are not desirable recourse may be had to the English Criminal Procedure under Section 6 of our Criminal Procedure Code.

Counsel also cited *Rex v. Southern* [2], Archibold's *Criminal Pleadings, Evidence and Procedure p. 50 (1944 Edition)*, Woodroffe and Ameer Ali on Evidence, p. 159 (1941 Edition).

H. H. Basnayake, Acting Solicitor-General (with him *T. S. Fernando, Crown Counsel*), for the Crown—

[The Court intimated that it was satisfied that the joinder of the charges was permissible under section 179 (1) of the Criminal Procedure Code, and desired to be addressed only on the question whether prejudice had been caused to the accused by the joinder.]

Where a Presiding Judge is of opinion that separate charges against an accused person should be tried separately, it has always been and still is the practice of the Crown to withdraw from the indictment such charges as may be necessary in the circumstances of the case. Apart from that practice there is no provision in the Criminal Procedure Code empowering a Judge to order separate trials in a case where only one accused is charged. The position is different where more than one accused is charged—*vide* section 184 of the Criminal Procedure Code. In the latter case the accused person " may be charged and tried together or separately as the Court thinks fit ". Sections 179 (1) and 180 (1) confer an option on the Crown to add more than one charge. The omission in these two sections to refer to the discretion of the Court to order separate trials is deliberate. Hence the English practice should not be invoked as section 6 of the Criminal Procedure Code does not apply in the circumstances.

In *The King v. Senanayake* [3] the Court definitely held that the joinder of three charges at one trial in respect of offences committed against three different persons was in order under section 179 (1).

Where the Presiding Judge has exercised his discretion and refused to order separate trials, this Court will not interfere unless the Presiding Judge's discretion has not been exercised judicially.

Further, all three murders in this case were committed in the course of one transaction. The joinder is therefore permitted under section 180 (1) as well.

Even if there had been separate trials all the material evidence would have been relevant at each trial in view of sections 6 and 8 of the Evidence Ordinance. Therefore any prejudice that may have been caused to the accused would have been inevitable.

[1] *(1927) 28 N. L. R. 481.* [3] *(1930) 22 Cr. App. R. 6.*
[2] *(1917) 20 N. L. R. 33.*

[Cannon J.—What you say is that prejudice may have been caused, but not undue prejudice ?]

If the evidence was admissible, it is not open to the accused to say he has been prejudiced by the admission of relevant evidence.

Counsel then cited the cases of *Fauja v. The Emperor* [1] and *Emperor v. Afsaruddi Haseraddi* [2] where more than one charge of murder were joined in one indictment.

The case of *King v. Arnolis Perera* [3] must be deemed to have been overruled in view of the Privy Council decision in *Narayana Swami v. King Emperor* [4]. In fact, it was so held in a recent case, *King v. Mudalihamy* [5]. Therefore the evidence of Peter in regard to statements made to him by Odiris and Themis is relevant and admissible.

Mackenzie Perera, in reply.—The Court has the power to order separate trials even where only one person is charged ; see *King v. Wickramasinghe* [6].

At the conclusion of the argument, the Court made order dismissing the application but stated that the reasons for the dismissal would be given later.

June 10, 1946. HOWARD C.J.—

The appellant appeals from his conviction on three charges of murder. These three charges were included in one indictment. Before the trial commenced Counsel for the appellant objected to the joinder of three charges of murder in one indictment. After hearing argument on both sides the trial Judge made the following order :—

> " Crown Counsel states that the evidence in the case is so interwoven that it is difficult to separate the charge of homicide in respect of one person from the other charges, principally because the question of motive is centred round the man Odiris and the finding of bloodstains in the shed of the accused and on the hammer cannot be so dissociated so as to prove that the blood found there was the blood of the first person killed, or the second person killed, or of the third person. I was trying to find whether it was possible to have the trial confined to the charge of murder of one person, but in these circumstances I think I ought to allow the Crown to proceed with the trial on the indictment framed ".

On appeal Counsel for the appellant has taken the point that such joinder is not permissible and, if permissible, should not have been allowed in this particular case as it caused prejudice to the appellant. Reference has been made to the cases of *Rex v. Davis* [7] and *Rex v. Large* [8]. In the first of these cases Lord Hewart L.C.J. in giving the judgment of the Court at pages 95 and 96 stated as follows :—

> " In our opinion it is not accurate to say that the joinder of the two counts in this case was fatal, and, indeed, when one looks at the

[1] *(1919) 20 Criminal Law Journal of India 353.*
[2] *(1939) 40 Criminal Law Journal of India 290.*
[3] *(1927) 28 N. L. R. 481.*
[4] *(1939) 1 All England Reporter 396.*
[5] *(1946) 47 N. L. R. 139.*
[6] *(1934) 36 N. L. R. 135.*
[7] *(1937) 26 Criminal Appeal Reports 95.*
[8] *(1939) 27 Criminal Appeal Reports 65.*

facts of the two charges, it is apparent that together they may well be regarded as substantially one transaction. If there had been two separate indictments it would have been easy and proper for the prosecution on the trial of one indictment only to tender evidence relating to the whole of the matter. None the less I repeat that in the opinion of the Court the joinder of two murders in one indictment is undesirable. The matter is one for judicial discretion, and the fact that there were two counts in the indictment in the present case does not in the least invalidate the conviction ".

In the second case it was held that no other count ought to be included in an indictment for manslaughter. It will be observed that, although the practice of joining more than one charge of murder in the same indictment was deprecated, it was not held to be illegal. Moreover Lord Hewart stated that it was one for judicial discretion. In that particular case the two charges together were regarded by the Lord Chief Justice as substantially one transaction and he stated that, if there had been two separate indictments, it would have been easy and proper for the prosecution on the trial of one indictment only to tender evidence relating to the whole matter. In our opinion the principle formulated by Lord Hewart applies to the present case. The practice of including more than one charge in an indictment for murder is not a desirable one. If one charge only had been included the Crown might, as the three charges were substantially one transaction, have tendered evidence relating to the whole matter. Section 179 (1) of the Criminal Procedure Code however permits the joinder on the ground that the offences were of the same kind and had been committed by the same person within a space of twelve months and were not more than three in number. Authority for this is to be found in the case of *King v. Senanayake* [1]. The corresponding section in the Indian Criminal Procedure Code, section 234, is worded similarly to section 179 (1) of our Code. In *Emperor v. Afsaruddi Haseraddi* [2] it was held that two charges of murder may be legally tried together under section 234 of the Criminal Procedure Code. *Fauja v. Emperor* [3] is a decision to the same effect. Section 180 (1) of the Criminal Procedure Code also permits the joinder on the ground that the offence constituted one series of acts so connected together as to form the same transaction. We think that these murders did form one transaction.

The next question that arises is whether the appellant was in fact prejudiced by the joinder of these three charges and the learned Judge should have directed that only one charge should be included in the indictment. It has been contended by the Solicitor-General that a Judge has no power to direct separate trials. We cannot accept that contention. In the *King v. Senanayake* (*supra*) it was held by Wood Renton C.J. that it is always open to the Court, on the application of an accused person against whom section 179 (1) of the Criminal Procedure Code is being applied, to order that the trials should be separate, and any possible hardship may be obviated in that way. The use of the

[1] *(1917) 20 N. L. R. 83.*
[2] *(1939) 40 Criminal Law Journal of India 1939 290.*
[3] *(1919) 20 Criminal Law Journal of India 353.*

word "may" and not "should" in both sections 179 (1) and 180 (1) is an indication that such a discretionary power exists. The power of a Judge to order separate trials and the exercise of his discretion in so doing was also considered in the case of the *King v. Wickremasinghe*[1]. In his judgment in that case Maartensz J. at p. 136 stated as follows :—

> "It was held by Ennis A.C.J. and Wood Renton C.J. in the cases referred to that it was always open to the Courts on the application of an accused person to direct separate trials. But I do not think separate trials should be ordered merely because of the possibility that a Judge or Jury might suspect each of them must be true. Such an argument could be addressed to this Court in every case in which three charges are combined at one trial in pursuance of the provisions of section 179 of the Code. And there would be no purpose in retaining the section in the Statute Book. In my judgment there must be more substantial grounds for directing separate trials than that contained in the argument I have dealt with. I have read through the depositions and I am of opinion that accused will not be prejudiced by the three charges being tried together".

In the present case the facts of the three murders were so interwoven as to constitute a series of facts forming one transaction. If the trials had been separate, evidence of the murders not forming part of the indictment would have been admissible. It is true that the Jury might suspect each of them to be true, but that as pointed out by Maartensz J. in *The King v. Wickremasinghe* (*supra*) is not a substantial reason for ordering separate trials. The fact that the accused person is charged with more than one murder is certainly a factor which will be present to the minds of the Jury. But as that evidence was admissible, it cannot be said that the accused was prejudiced.

Various other points have been raised by Mr. Mackenzie Pereira on behalf of the appellant. He has contended that the Crown have not established the cause of death in the case of the deceased, Lucihamy. We think that the finding of the canvas tied round the neck of the deceased coupled with the doctor's evidence establishes the cause of death.

Mr. Pereira has also maintained that the attention of the Jury should have been invited to the question as to whether the witness Guneris was an accomplice. Inasmuch as there was no evidence that Guneris was an accomplice, we think that this contention is without substance.

Mr. Pereira has also argued that the learned Judge ought not to have allowed the witness Peter to depose to (*a*) the purpose of the visit of the deceased Oderis, (*b*) the undertaking of the deceased Themis to return to the witness on a specified date. Both relate to facts prior to the transaction which resulted in their respective deaths. Accordingly it is submitted that the direction to the Jury on this aspect of the case cannot be supported. In this connection Mr. Pereira referred to *Rex v. Arnolis Perera*[2]. Having regard, however, to the decision of the Privy Council in *Pakala Narayana Swami v. King Emperor*[3], the decision in

[1] *(1934) 36 N. L. R. 135.* [2] *(1927) 28 N. L. R. 481.*

[3] *(1939) 1 All England Reports 396.*

Arnolis Perera can no longer be regarded as good law. The evidence of Peter with regard to the purpose of the movements of Oderis and Themis was therefore admissible.

No point of substance arises in regard to the other questions raised by Mr. Pereira.

For the reasons I have given the application for leave to appeal is dismissed.

Application dismissed.