[IN THE COURT OF CRIMINAL APPEAL]

58 *Present:* **Basnayake, C.J. (President), Pulle, J., and Sansoni, J.**

THE QUEEN *v.* B. RUPASINGHE PERERA *et al.*

Appeals Nos. 76, 78, 79, with Applications Nos. 100, 102, 103

S. C. 1—M. C., Colombo, 19,177

Joinder of charges—Offer to supply opium and exportation of opium—"Same transaction"—Significance of wording of charge—Date of offence—Charge must contain particulars thereof—Summing-up—Direction as regards validity of joinder of charges not necessary—Poisons, Opium and Dangerous Drugs Ordinance, ss. 31 (3), 33, 76 (1) (a), 76 (3), 76 (5)—Criminal Procedure Code, ss. 168 (1), 178, 179, 180 (1), 184.

An offer to supply opium (in breach of section 33 of the Poisons, Opium and Dangerous Drugs Ordinance) and exportation of opium (in breach of section 31 (3)) may be so connected together as to form the same transaction within the meaning of section 180 (1) of the Criminal Procedure Code.

The question whether an allegation in the form of a single charge contains in reality a plurality of charges must be determined by the language in which the charge is expressed and not by considering what the prosecution thinks it means or the evidence by which it is sought to be proved. Deficiency in the particulars of the charge or the admission of irrelevant evidence in support of it may be a ground for setting aside the conviction on the charge but not for holding that it was improperly joined with other charges.

Where there is a proper joinder of charges in an indictment, acquittal on one count cannot by itself affect the validity of the convictions on the remaining counts.

A charge should, in compliance with section 168 (1) of the Criminal Procedure Code, contain such particulars as to the time of the alleged offence as is reasonably sufficient to give the accused notice of the matter with which he is charged.

Obiter: It is not the function of the jury to decide the question of the legal validity of a joinder of charges.

APPEALS against three convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *Sam. P. C. Fernando* and *M. L. de Silva*, for the 1st accused-appellant.

M. L. de Silva, with *R. D. B. Jayasekera*, for the 2nd accused-appellant.

Colvin R. de Silva, with *W. P. N. de Silva* and *D. G. Jayalath*, for the 3rd accused-appellant.

Douglas Jansze, Q.C., Acting Attorney-General, with *A. C. M. Ameer*, Deputy Solicitor-General, and *V. S. A. Pullenayegum*, Crown Counsel, for the Crown.

Cur. adv. vult.

2—J. N. B 3420—1,593 (8/59).

November 17, 1958. PULLE, J.—

The three appellants, after a trial lasting 53 days, were convicted of offences punishable under the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172). The 3rd appellant, Atukoralage Eddie Perera, was on the indictment named as the 1st accused and the 1st appellant was named as the 3rd accused. The first, second and fourth counts of the indictment alleged, respectively, as only against the 1st accused,

(*a*) that between 31st December, 1953, and 11th June, 1955, he offered at Colombo to supply 1,780 pounds of opium to one Lim Peng Koi of Singapore,

(*b*) that on 3rd November, 1954, he exported from Ceylon 900 pounds of opium, and

(*c*) that on 11th June, 1955, he attempted to export from Ceylon 850 pounds of opium.

The 2nd accused who is the second appellant was charged, on the third count, with abetting the 1st accused to commit the offence set out in (*b*) above and both the 2nd and 3rd accused were charged, on the fifth count, with abetting the 1st accused to commit the offence set out in (*c*) above. The jury found unanimous verdicts on all counts and the appellants were sentenced to various terms of imprisonment.

At the hearing of the appeal it was not contested, for the evidence was overwhelming, that the 1st accused was a party to negotiations to export from Ceylon to Singapore a large quantity of opium which he had smuggled into Ceylon. A consignment of 900 pounds reached Singapore but it was intercepted by the Customs officials in that port and a second consignment of 850 pounds packed in an electric generator was seized at the port of Colombo. The evidence on which the convictions of the 2nd and 3rd accused for abetment were based was not challenged.

The main submission on behalf of all the appellants was that the trial was an illegality owing to a misjoinder of charges. To sustain this submission the first count of the indictment was the principal target of the attack. It was also argued that the fourth count as framed which related to the 850 pounds of opium found concealed in the generator did not disclose any offence. It was said that there was no such offence as attempting to export opium and that, therefore, the conviction on the 4th count was bad and, if so, the conviction on the 5th count for the abetment of that offence was necessarily bad.

Before examining the charges which will presently be set out in full it would be helpful to consider the wording of the relevant provisions in the Poisons, Opium and Dangerous Drugs Ordinance. Section 33 reads,

> "No person shall supply or procure, or offer to supply or procure, raw or prepared opium to or for any person, whether in Ceylon or elsewhere, except as permitted by or otherwise than in accordance with the provisions of this Ordinance or any regulation."

The exportation of opium is prohibited by section 31 (3) which states,

"No person shall export any raw or prepared opium from Ceylon".

Section 76 (1) (*a*) provides that every person who contravenes or fails to comply with any provision of the Ordinance "shall be guilty of an offence against this Ordinance".

Section 76 (3) reads,

"Every person who attempts to commit or abets the commission of an offence against this Ordinance shall himself be guilty of the *same* offence."

Penalties are imposed by sub-section 5 of section 76. The provision in respect of a conviction in the Supreme Court is in these terms:

"Every person guilty of an offence against this Ordinance shall for each offence be liable—

(*a*) .....

(*b*) .....

(*c*) on conviction before the Supreme Court, to a fine not exceeding ten thousand rupees or to imprisonment of either description for a period not exceeding ten years, or to both such fine and imprisonment."

The allegation in each count of the indictment is that the appellants had committed offences punishable under section 76 (5).

The five charges in the indictment are worded as follows:—

1. That you the first accused abovenamed did between the 31st day of December, 1953, and the 11th day of June, 1955, at Colombo within the jurisdiction of this Court, in contravention of section 33 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by section 9 of Ordinance No. 12 of 1939, offer to one Lim Peng Koi of Singapore approximately 1,780 pounds of raw or prepared opium and that you are thereby guilty of an offence under section 76 (1) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance, punishable under section 76 (5) of the said Ordinance.

2. That on or about the 3rd day of November, 1954, at Colombo, in the course of the transaction set out above, you the first accused abovenamed did, in contravention of section 31(3) of the Poisons, Opium and Dangerous Drugs Ordinance export approximately 900 pounds of raw opium from Ceylon and that you are thereby guilty of an offence under section 76 (1) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance, punishable under section 76 (5) of the said Ordinance.

3. That at the time and place aforesaid and in the course of the same transaction as set out in count 2 above, you the second accused abovenamed, did abet the commission of the offence set out in count 2 above which offence was committed in consequence of

such abetment, and that you are thereby guilty of an offence under section 76 (1) (*a*) read with section 76 (3) of the Poisons, Opium and Dangerous Drugs Ordinance, punishable under section 76 (5) of the said Ordinance.

4. That on or about the 11th day of June, 1955, at Colombo in the course of the same transaction set out in count 1 above, you the first accused abovenamed, did attempt to commit an offence against the Poisons, Opium and Dangerous Drugs Ordinance, to wit, export, in contravention of section 31 (3) of the said Ordinance, approximately 850 pounds of raw opium from Ceylon, and that you are thereby guilty of an offence under section 76 (1) (*a*) read with section 76 (3) of the Poisons, Opium and Dangerous Drugs Ordinance, punishable under section 76 (5) of the said Ordinance.

5. That at the time and place aforesaid and in the course of the same transaction as set out in count 4 above, you the second and third accused abovenamed did abet the commission of the offence set out in count 4 above which offence was committed in consequence of such abetment, and that you are thereby guilty of an offence under section 76 (1) (*a*) read with section 76 (3) of the Poisons, Opium and Dangerous Drugs Ordinance, punishable under section 76 (5) of the said Ordinance.

Before analysing the submissions directed against the charges a few preliminary observations are called for. Whether the joinder of the first charge was permissible or not, whether it amounted to an allegation of the offering at Colombo to supply opium on one single occasion or on a number of occasions, or whether, as contended by the Crown, the first charge meant that there was a " continuous " offer spread over a period of months, the events which commenced with the smuggling of opium into Ceylon and ending with the seizure on the 11th June, 1955, of the generator in which the opium was concealed could in law be regarded as constituting a single transaction. Although the indictment does not expressly allege that the offences in the counts charged were committed in the course of the same transaction, it has said so by implication and was understood in that sense, as appears from the 11th paragraph of the grounds of appeal of the 1st accused. The novel point that was apparently stressed on behalf of the defence at the trial was that the jury had to be directed that if they were not satisfied that the offences charged were committed in the course of the same transaction they had to find a verdict of acquittal on all the charges.

If the offence charged in the first count is not taken into consideration, it cannot be disputed that the joinder of the remaining charges was in conformity with the provisions of the Criminal Procedure Code. Counts two and four charged the first accused with committing two offences of the same kind in the space of twelve months within the meaning of section 179. The joinder of these charges along with charges of abetment of those offences is permitted by the combined effect of the provisions of sections 184 and 178.

Before the indictment was read out to the appellants submissions were made to the trial Judge that the first count was imprecise in that it alleged an offer to sell opium between dates as wide apart as 31st December, 1953, and 11th June, 1955. It was attacked on the ground of vagueness. Secondly it was submitted that the joinder of counts two to five with the first count was bad on the face of the indictment itself because of the use of the words, in counts two and four, " in the course of the transaction set out " in count one. It was said that there could not be an exporting or attempted exporting of opium in the course of an offer to supply the drug, because, of necessity, the transaction of an offer would end with the offer and that the export or attempted export would be a new and different transaction. We are not prepared to take the view that the expression " in the course of the transaction set out " in count 1 is insufficient for the purpose of justifying the joinder of all the counts as disclosing offences constituting a series of acts so connected together as to form the same transaction within the meaning of section 180 (1) of the Criminal Procedure Code. An offer to supply can indeed be called one transaction and the supply itself can, in one sense, be called a different transaction but, none the less, the act of offering and the act of supplying can be so connected together as to form the same transaction. As stated earlier the 1st accused has taken only the point that the prosecution having failed to *prove* that all the offences charged were committed in the course of the same transaction, he was entitled to a verdict of acquittal.

In reply to the preliminary objection to count one the Crown took up the position that during the period stated in that count the 1st accused held out a continuous offer which remained open until the attempt made on 11th June, 1955, to export the quantity of opium mentioned in the fourth count.

Apart from the alleged infirmities in the first count, as for example, its vagueness and its reticence as to the actual date on or about which the 1st accused at Colombo offered to supply 1,780 pounds of opium to Lim Peng Koi of Singapore, on the issue of misjoinder it has been submitted that the position taken up by the Crown of a " continuous offer " in effect introduced into the first count a multiplicity of charges. It seems to us that the question whether an allegation in the form of a single charge contains in reality a plurality of charges must be determined by the language in which the charge is expressed and not by considering what the prosecution thinks it means or the evidence by which it is sought to be proved. Neither the lack of precise particulars nor an erroneous concept of what the charge means is relevant to the topic of misjoinder. It refers to one offence of an offer at Colombo to supply 1,780 pounds of opium to one Lim Peng Koi of Singapore. If, as we think, the charge amounts only to an allegation of a single act by which an offer to supply when intimated to a prospective receiver became an offence, there is no ground for the contention that there is a multiplicity of charges because the prosecution thought that it had the right to lead evidence of a number of offers each capable of being regarded as part of a

" continuous " offer. The character of a charge is not altered according to the mode adopted to establish it. Deficiency in the particulars of a charge or the admission of irrelevant evidence to support it may be a ground for setting aside a conviction on the charge but not for holding that it was improperly joined with other charges.

A good deal of discussion centred round two well known decisions of the Privy Council on appeals from convictions taken on the ground of misjoinder of charges and accused persons. The first is *Subrahmaniya Ayyar v. King-Emperor* [1]. There were two accused persons charged on seven counts. The appellant was charged on the first, second, fourth and sixth counts with having committed in a period of more than two and a half years as many as 41 acts amounting to offences. The first count alleged the commission of numerous offences committed during a period exceeding one year. Convictions on the first, second and sixth counts were brought up in appeal on a case certified when it was held that the indictment was bad for misjoinder but that it was open to the appeal court to strike out the first count, examine the evidence and sustain the conviction on any one of the remaining counts. By this process they upheld the conviction on one of the remaining counts. The Privy Council set aside that conviction on the ground that they were unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. They added,

> " Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. "

The second case is *Babulal Chaukhani v. King-Emperor* [2] in which the appellant and eleven others were charged on the first count with conspiracy to commit theft of electric energy and with committing theft. On a separate count the appellant was charged with having between April, 1934, and 16th January, 1935, committed theft of electricity. Upon the appellant being convicted of both conspiracy and theft he appealed and the High Court of Calcutta set aside the conviction on the charge of conspiracy but affirmed the conviction for theft holding that the trial as a whole was not vitiated by reason of misjoinder of persons and charges. The argument on behalf of the appellant was that once the offence of conspiracy charged in count one failed, offences said to arise out of the overt acts alleged to have been committed by the appellant and others in pursuance of the conspiracy could not be joined. The Privy Council rejected this argument holding that the point of time at which the legality of the charges from the point of view of joinder had to be judged was not at the end of the trial but at the time of the accusation.

In the view we take that count one in the present case does not contain a multiplicity of charges spread over the period of 31st December, 1953, to 11th June, 1955, the judgment of the Privy Council in *Subrahmaniya Ayyar's* case [1] cannot be called in aid to support the submission that the trial of the appellants was held in violation of an express prohibition

[1] *I. L. R. 25 Madras 61.* [2] *(1938) A. I. R. P. C. 130.*

of law and rendering it illegal. The case of *Babulal Chaukhani* (*supra*) is of any relevance only in the event of the conviction on the first count being set aside. If the first count is the foundation on which the sameness of the transaction of all the counts depends, the decision in *Chaukhani's* case is a complete answer to the argument that, if the conviction on the first count is set aside, it is a necessary consequence that the convictions on counts two to five must also be set aside.

Now the grounds, other than that of misjoinder, on which the conviction on the first count was attacked are stated as follows :

" (*a*) The defence was irretrievably prejudiced by reason of the submission of the Crown, which was acted upon throughout the trial by the learned trial Judge that there was a ' continuous offer ' covered by count one inasmuch as this enables (*i*) the admission of a large volume of otherwise inadmissible evidence, (ii) the jury to construct out of the evidence separate offers.

" (*b*) The failure of the learned trial Judge to direct the jury that if the Crown failed to satisfy them that there was the ' continuous offer ' alleged, they were not entitled to construct or infer or find any separate offers not stated in any of the charges, amounted in the circumstances of the case to a misdirection and resulted in a miscarriage of justice.

" (*c*) The direction given by the learned trial judge to the jury that they could look to particular letters as containing an offer was a misdirection and it resulted in a miscarriage of justice. "

The case for the Crown was that there were negotiations with Lim Peng Koi, the first of which was on 9th March, 1954, at Singapore to send from Ceylon a quantity of 1,780 pounds of opium. This was followed by correspondence between the 1st accused and Lim Peng Koi. It would be sufficient to refer to only two letters out of this correspondence. One is P28 of 25th March, 1954, sent from Colombo in which the 1st accused informed Lim Peng Koi to collect a sample of the opium which he had despatched to a certain address at Singapore. He requested him to send a note approving the sample and an undertaking to buy 10 cwts. at 800 dollars per pound. P33 dated the 1st April, 1954, is obviously the reply to P28 by which the buyer expressed his willingness to buy 10 cwts. in two shipments at the price mentioned in P28. The prosecution alleges that P38 dated 16th April, 1954, was sent by the 1st accused from Colombo to the buyer. It reads as follows :

P. O. Box 684,
Colombo, 16.4.1954.

Dear Friend,

Received your registered letter of the 1st April.

I note that you are willing to buy 10 cwts. in 2 deliveries at 15 day interval. The gentleman I came along with the other night is the owner of the goods and he has just received from Iran 16 cwts. He wants to ship the whole lot in one shipment to Singapore to his place there and deliver it to you from that place. He wants me to ask you

whether you can arrange to pay him cash down for 8 cwts. before he gives you delivery of the whole 16 cwts. and also give him 4 post-dated cheques to be presented to the bank on the 10th, 14th, 18th and 20th day after delivery.

Please write to me at once telling me whether you are agreeable to this method of payment. If so, please let me know by return the name of your bank as he wants to get your bank references.

Your business friend.

At the trial the defence had submitted to the jury that there could not be a continuous offer between the dates 31st December, 1953, and 11th June, 1955, because up to 9th March, 1954, even the existence of Lim Peng Koi was not known to the witness A. C. Perera who had been deputed by the 1st accused to find a buyer at Singapore. By the 3rd November, 1954, 900 pounds of opium had already been shipped. It could not, therefore, be said that after 3rd November there was still an offer to supply 1,780 pounds to Lim Peng Koi. It was submitted to us that the figure " 1780 " could only have been taken from the document P50-B1 which contains a calculation of the price of 1,700 pounds at 800 dollars per pound. Admittedly P50-B1 was a document made in Singapore and if the offer evidenced by this document was the one contemplated by the first count, there was a complete answer to the charge, namely, that the offer to Lim Peng Koi was made not in Colombo but in Singapore. That the shipment on 3rd November, 1954, and the attempted shipment on 11th June, 1955, must have been in pursuance of a single offer or of a number of offers admits of no doubt. The crucial point was whether there was one offer made at Colombo and, if so, on what date, but the indictment did not specify that date, because the Crown erroneously assumed that if an offer made at Colombo is left open it becomes what is called a continuous offer which persists until the contract originating in the offer is performed by shipping the last consignment of opium.

In the early part of his charge the learned trial Judge while dealing with the first count said,

' So that the purpose of giving an approximate date when an offence was committed is to give an indication to the accused of the charge he has to meet and, in putting the terminal dates, it is not the position of the Crown nor has the Crown to establish that during the whole period the offer was kept open. Normally, of course, an offer could be made in a matter of moments. A man can say, ' I will offer to sell you 1,000 pounds of opium '. As soon as that statement is made this offence is committed provided the other ingredients are proved. Sometimes an offer may be the subject of negotiation and that may take some time, especially if people have to correspond over the matter and agree about it. Sometimes an offer may be made and the original offer may have to be amended and various things can take place and that can take time."

This passage appears to suggest that in the process of conducting negotiations there may be a series of separate offers which taken in the aggregate would constitute a " continuous " offer resulting in the commission of a single offence. A direction to the jury having this effect cannot in law be supported. It would have been wiser had the Crown given particulars of a single act of an offer to supply opium as the charge under count one and specified the approximate date on which such offer was made. It is true that count one, on the face of it, charges the 1st accused not with making " offers " to supply opium but with one offence of offering punishable under section 76 (5) of the Ordinance but the defence was left to speculate, on a right understanding of what constituted the offence of offering to supply opium, which of the numerous acts imputed to the 1st accused would be asserted as the offence of which he was guilty under the first count.

In the course of analysing the evidence the trial Judge had occasion to refer to the letter P38 of 16th April, 1954, which has already been quoted in full. This letter was typed and not signed. The cover in which it was enclosed, P38A, gave the sender's name as one Bek Tok Choi of 212 Norris Road, Pettah. There was no such person at that address. The Judge dealt with the contents of P38 and the surrounding circumstances and the contention of the Crown that, though it was disguised as a communication sent by A. C. Perera to Lim Peng Koi, the 1st accused was really the author and the sender and said,

> " This letter is purported to have been sent by A. C. Perera. You will note in P38 there is a reference to this letter about 10 cwt., that delivery will be taken. If you hold that this letter P38 was in fact sent by the 1st accused, then it is a very important letter . . . Even if you accept that the 1st accused had commissioned A. C. Perera to sell the opium and to find a buyer and the offer of 1,000 pounds was made at Singapore, this letter P38 was sent from Colombo and here the offer was 16 cwt. That is important from the point of view of the first count, that is, 12 pounds more than what is mentioned in the first count of the indictment. Here is an offer to supply 16 cwt. of opium coming from Colombo. If you hold that the 1st accused had sent this letter it is sufficient to satisfy the first count of the indictment. There is very little difference between 1780 and 1792. "

This is a definite direction that, apart from any question of a continuous offer, it was open to the jury to convict the 1st accused on count one if they were satisfied that on or about 16th April, 1954, he sent the letter P38 to Lim Peng Koi. If P38 was the act of offering opium constituting the offence charged in count one, then that count ought to have been amended in order to give the accused notice of the specific act of offering. The failure to do so must have prejudiced the 1st accused for he was left in the dark in regard to the weapon that was to be used to strike him down. That the 1st accused knew that P38 was going to be used against him is clear. Its relevancy to all the counts is beyond dispute, but the

serious question does arise whether the 1st accused had any reason to anticipate that P38 was going to be used as the very substance of a fact in issue. Had P38 been an isolated document different considerations might have applied but it is just one out of numerous documents which were admitted as relevant and bearing on all the counts. It is not known on what view of the case the jury convicted on the first count. If they did convict on the basis of a " continuous offer ", the conviction was bad as no legal content can be assigned to the expression " continuous offer ". If the conviction was on the ground that P38 constituted the offer which was made in breach of section 33 and that that offence was completed on the 1st accused posting the letter, we think that the conviction should not be allowed to stand because the charge did not, in compliance with section 168 (1) of the Criminal Procedure Code, contain such particulars as to the time of the alleged offence as were reasonably sufficient to give the 1st accused notice of the matter with which he was charged. The conviction on the first count and the sentence are, therefore, set aside. We have held that there is no misjoinder of charges with the result that the acquittal on the first count cannot by itself affect the validity of the convictions on the remaining counts.

The objection against the fourth count is that it does not disclose an offence. It was argued that there is no offence known to the Ordinance as an " attempt to export opium " because the act of attempting to export opium is the offence of exporting opium. In our opinion there is no substance in this contention. Exporting opium is an offence against the Ordinance and in terms of section 76 (3), count four alleges expressly that the 1st accused attempted to commit the offence of exporting in breach of section 31 (3). The penal section referred to in the count is the one which provides for the punishment of exporting. For similar reasons the argument against count five also fails.

In the result we acquit the 1st accused on the first count and affirm the convictions and sentences on the remaining counts. Subject to our decision on the first count the application of the 1st accused is refused and his appeal is dismissed. The applications of the 2nd and 3rd accused are refused and their appeals are dismissed.

Before parting with this case there is one topic on which some observations are called for. It appears from the summing up that learned counsel who appeared for the 1st accused addressed submissions to the jury that if they came to a finding that, if the offences charged in the indictment had not been committed in the course of the same transaction, the appellants had to be acquitted. The validity of the indictment was ruled upon at the commencement of the trial and it was not open to counsel thereafter to address the jury on this point as it was entirely outside their province to determine whether or not the charges were properly joined. The learned Judge did tell the jury that

they had to find a verdict on each of the counts, irrespective of whether they thought that the offences had not been committed in the course of the same transaction, but he did so after reading the sections of the Code pertaining to joinder and after referring to the case law governing the subject. We are of the opinion that the Judge need not have said anything more than that the jury were not concerned with the validity of the joinder, the more so as, after an exceptionally long trial, it was essential that their minds should not be distracted by legal arguments, accompanied by citation of authority, on matters outside the scope of their functions. Laymen not versed in the niceties of the law should not under any circumstances be burdened with arguments for or against a proposition of law. It is sufficient, where necessary, to convey a statement of law in language simple enough to be understood by the class of men from whom jurymen are drawn.

After dealing with the law affecting joinder the learned Judge said,

> " So that I hold that the legal objection raised by counsel for the 1st accused has failed with reference to this question of offences having been committed in the course of the same transaction as set out in count one. But in view of the importance of this point and in view of the fact that we have no decisions of our own on this point I would ask you, when you return your verdict, to specifically bring a finding as to whether counts 2 and 3 have been committed in the course of the same transaction as set out in count one and also whether counts four and five have been committed in the course of the same transaction as set out in count one ; that is, in spite of the direction of law I have given you that it does not matter to you whether they are committed in the course of the same transaction or not, you are entitled to find the accused guilty on those particular counts, provided the other ingredients are established : still in view of the importance of this point I want you to specifically bring, along with your verdict, a finding of fact on that question. Please keep in mind that it is important for you to give your full consideration to that aspect of the matter, as to whether the offences mentioned in counts two and three which go together, because one is the actual act and the other the act of abetting and in counts four and five which refer to the second attempt of export of this generator, have been committed in the course of the same transaction as set out in count one. "

The invitation to the jury to express a finding in the terms set out above cannot at all be justified. Apart from their being no legal warrant for such a course, the number and complexity of the questions of fact that they had to decide indicated that they should not have been burdened with any matters extraneous to their office. When they returned with their verdicts they brought no finding in regard to the sameness

of the transaction referred to in the various counts. After they had been discharged they were recalled and apparently questioned as to what their finding on the point was. The finding is recorded as follows :

> " *Later.*
>
> The unanimous finding of the Jurors is also that counts Nos. 2 and 3 form part of the same transaction set out in count 1 and counts Nos. 4 and 5 also form part of the same transaction as set out in count 1 of the indictment. "

It is hardly necessary to point out that this procedure was manifestly illegal as the jury, after they were discharged, had no further functions to perform in the case.

Conviction on first count set aside.

Conviction on remaining counts affirmed.