

1948

*Present : Nagalingam J.*

RICHARD COSTA, Appellant, and A. S. P. (C.I.D.), COLOMBO.  
Respondent

*S. C. 590—M. C. Colombo, 40,335*

*Criminal Procedure Code, section 17—Conviction for distinct offences—Consecutive sentences—Provision in Penal Code, section 67—Conflict of provision in statutes—When section 17 of the Criminal Procedure Code applies.*

The provisions of section 17 of the Criminal Procedure Code apply where the distinct offences of which the accused is found guilty are such that the acts which constitute one or more of those offences in combination do not constitute the other offence or offences. In the latter event the provisions of section 67 of the Penal Code would apply.

# APPEAL from a judgment of the Magistrate, Colombo.

*H. W. Jayewardene*, for the accused appellant.

*R. A. Kannangara*, *Crown Counsel*, for the Attorney-General.

*Cur. adv. vult.*

July 23, 1948. NAGALINGAM J.—

I see no reason to interfere with the conviction of the appellant in this case as the evidence irresistibly and conclusively establishes his guilt.

It has been contended that the sentence imposed by the learned Magistrate upon the appellant is an illegal one. The prisoner was convicted upon three separate charges, the first being that he was a member of an unlawful assembly the common object of which was to commit housebreaking by night and robbery, the second that he was armed with a deadly weapon or weapons while being a member of the said unlawful assembly and the third that he had in his possession without lawful excuse instruments of housebreaking and offensive weapons. In respect of each of these offences the appellant was sentenced to a term of 6 months' rigorous imprisonment; the sentences in regard to the first and second offences were to be consecutive while the sentence in regard to the third offence was to be concurrent with the sentence on the first. The contention advanced on behalf of the appellant is that the order directing that the sentences on the first and second charges should run consecutively is contrary to law.

The foundation for this contention is section 67 of the Penal Code which, *inter alia*, provides that where several acts of which one or more than one would by itself or themselves constitute when combined a different offence the offender shall not be punished with a *more severe punishment* than the Court which tries him could award for *any one of such offences*. The second count which charges the appellant with having been armed with deadly weapons while being a member of an unlawful assembly, an offence punishable under section 141 of the Penal Code, is an offence constituted by a combination of the acts which constitute the offence of unlawful assembly, the subject of the first charge, and of the offence of being found having in his possession instruments of housebreaking, an offence punishable under section 449 of the Code, the subject of the third charge. The appellant, therefore, should not be punished with a more severe punishment than that which the Magistrate could have awarded for any one of such offences, namely, a term of 6 months' rigorous imprisonment.

But it is pointed out by learned Crown Counsel that the learned Magistrate acted under section 17 of the Criminal Procedure Code which provides that where a person is convicted at one trial of any two or more distinct offences the Court may sentence him for such offences to the several punishments prescribed therefor which such Court is competent to inflict, and that such punishments when consisting of imprisonment should commence to run one after the expiration of the other in such order as the Court may direct, unless, of course, the Court orders them or any of them

to run concurrently. This section further provides that where the case is tried by a District Court or Magistrate's Court the aggregate punishment shall not exceed twice the amount of punishment which such Court in the exercise of its ordinary jurisdiction is competent to inflict. It is therefore urged that in pursuance of the provisions of this section of the Criminal Procedure Code it was competent for the Magistrate to impose separate punishments in respect of the three distinct offences of which the accused has been found guilty and to direct that the terms of imprisonment should in respect of two of them run consecutively.

There can be little doubt that each of the three offences of which the accused has been found guilty is a distinct offence and that the appellant was rightly sentenced to separate terms of imprisonment in respect of each of them; there can be equally little doubt that the Magistrate had jurisdiction under this section to direct that the sentences in respect of two or more offences should run consecutively. But the Court cannot give effect solely to section 17 of the Criminal Procedure Code and ignore the provisions of section 67 of the Penal Code. There is an apparent conflict between these two provisions of our penal statutes. The conflict should, if possible, be harmonised and the two provisions read in such a manner as to give effect to both provisions without any conflict resulting therefrom. This object can be achieved, to my mind, by excluding from the operation of section 17 of the Criminal Procedure Code those cases which would fall within the ambit of section 67 of the Penal Code. Read in this way the two sections are perfectly complementary and lead to no conflict. The position, therefore, is that, where the distinct offences of which the accused person is found guilty are such that the acts which constitute one or more of those offences in combination do not constitute the other offence or offences, the provisions of section 17 of the Criminal Procedure Code would be applicable, but not otherwise; and in the latter event the provisions of section 67 of the Penal Code would govern that case. The appellant's case falls in this view of the matter under section 67 of the Penal Code, and he should not have had his sentences directed to run consecutively in respect of the first and second charges of which he was convicted.

The order of the learned Magistrate directing that the sentences of imprisonment on the first and second counts to run consecutively is therefore set aside and the sentences on these two counts will also run concurrently. The appellant, in the result, will suffer rigorous imprisonment for a term of six months in all.

The 1st, 2nd, 3rd, 5th, and 6th prisoners in this case have not appealed. The punishment imposed on the 5th prisoner is in accordance with law and needs no interference in revision; but in regard to the 1st, 2nd, 3rd and 6th prisoners, for the reasons given above, I would, acting in revision, direct that their sentences too in regard to the first and second counts should run concurrently and not consecutively, and the sentences of imprisonment imposed on these prisoners will be modified to this extent only.

*Sentence varied.*