1963 *Present:* H. N. G. Fernando, J., and T. S. Fernando, J.

THE QUEEN *v.* M. I. M. IBRALEBBE and others

S. C. 14-17/1963—D. C. (Crim.) Batticaloa, 126

Indictment—Joinder of charges based on unlawful assembly with charges based on common intention—Validity—Penal Code, ss. 32, 140, 146, 296—Criminal Procedure Code, ss. 173, 180, 184, 425—Court of Criminal Appeal Ordinance, s. 5 (1), proviso.

Wh re several accused were indicted on 13 charges, 7 of which were based on the allegation that they were members of an unlawful assembly, and the remainder of which could have resulted in a conviction of two or more of the accused only if the offences charged had been committed in pursuance of a common intention—

***Held*, that the joinder of the two sets of charges was lawful.**

***The Queen v. Don Marthelis and others (1963) 65 N. L. R. 19* not followed.**

APPEALS from a judgment of the District Court, Batticaloa.

Colvin R. de Silva, with *A. R. Mansoor*, for the Accused-Appellants.

P. Colin Thome, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 7, 1963. H. N. G. FERNANDO, J.—

Several accused were indicted in this case on 13 charges, 7 of which were based on the allegation that they were members of an unlawful assembly, and the remainder of which could have resulted in a conviction of two or more of the accused only if the offences charged had been committed in pursuance of a common intention. Counsel for the accused argued at the appeal that there had been a misjoinder of these two sets of charges, relying upon the unreported judgment of two Judges of this Court (Abeyesundere, J., with Herat, J., agreeing) in the case of *The Queen v. Don Marthelis and others* [1] (S.C. 5–10 of 1962, S. C. M. of 19th March 1963). In a brief judgment, the point was thus decided :—

". . . Counts (1) to (5) were based on the allegation of unlawful assembly and counts (6) to (9) which related to the offences of causing simple hurt and committing mischief were based on common intention. Section 178 of the Criminal Procedure Code requires every charge to be tried separately except in the cases mentioned in sections 179, 180, 181 and 184 of that Code. Crown Counsel who appeared for the Attorney-General conceded that none of the four last-mentioned sections applied to the counts in the indictment in this case. The joinder of the two sets of charges referred to above is therefore not according to law. Consequently the indictment is invalid . . ."

Counsel who argued the present appeal had himself argued the case of *Don Marthelis*, and was therefore able to explain why the unreported judgment does not set out reasons and contains no examination of the provisions of the Criminal Procedure Code which are or may be relevant to the question of misjoinder. It appears from Counsel's statement to us that the same question was argued in the Court of Criminal Appeal within recent months, in an appeal in which the appellants were acquitted by that Court upon the conclusion of arguments, and that it is anticipated that the reasons for that acquittal when delivered by the Court of Criminal Appeal will constitute or include a decision that it is illegal to join together in an indictment two sets of charges depending respectively on section 146 and section 32 of the Penal Code. Nevertheless, until reasons are in fact delivered in that appeal, there is yet no judgment of the Court of Criminal Appeal to which I can refer for guidance or which precludes me from considering the validity of Counsel's arguments.

[1] *See 65 N. L. R. 19.—Ed.*

In view also of the lack of a statement of reasons in the judgment in *Don Marthelis'* case, I feel free as a member of a bench of two judges to re-consider the point there decided. The fact that my brother Fernando, whose familiarity with questions of this nature is well known, has disagreed with that decision (vide S. C. M. of 6th may 1963, *Khan v. Ariyadasa*[1] S. C. Nos. 707–11 of 1962) is another reason why the point appears to me worthy of re-consideration.

In my own attempt to decide whether or not the joinder in the present case was legal, I find it convenient to consider the relevant provisions of law in the same way as would a Crown Counsel engaged in the task of framing an indictment upon facts which are at first simple and which become complex only in stages.

Suppose that the evidence in non-summary proceedings discloses—

(1) that A shot at X with a gun at close range,

(2) that the gun-shot injury resulted in X's death, and

(3) that a Jury may reasonably infer a " murderous intention " on the part of A.

On these facts there must undoubtedly be framed a count that A committed murder by causing the death of X.

If in addition the evidence also discloses—

(4) that, at the time of the shooting, A had been a member of an assembly together with five or more other persons of unknown identity having the common object of causing the death of X, and

(5) that A in all probability fired at X in prosecution of that common object,

can there be properly added a second count charging A with an offence under section 146 of the Penal Code ?

Firstly, there would be no doubt that an offence under section 146 had been committed, for, in terms of the requirements in section 146

(*a*) an offence was committed by a member of the unlawful assembly

(*b*) the offence was committed in prosecution of the common object, and

(*c*) A was at the time of the commission of that offence a member of the assembly.

A is therefore guilty of " that offence ", namely the offence of murder, and the appropriate count against him on this score would be under section 146 and section 296 read together. The appropriate charge would then be one under section 296, read with section 146.

[1] *See 65 N. L. R. 29.—Ed.*

Secondly, will section 180 of the Criminal Procedure Code permit the joinder of the two charges against A in one indictment ? Under sub-section (1), the joinder would be valid, if (a) the series of acts formed the same transaction, a matter on which there would be no room for doubt, and (*b*) more offences than one were committed by A in the course of that transaction. Under sub-section (3) of section 180, the joinder would be valid if *some of the acts* constitute an offence, and *all the acts* taken in combination constitute a different offence. The Crown Counsel would therefore ask himself whether A did indeed commit two different offences, i.e. whether the offence under section 146 is distinct from the offence under section 296. This question is affirmatively answered by the Privy Council in *Barendra Kumar v. Emperor*[1] and by our Court of Criminal Appeal in *Heen Baba's* case[2] in opinions cited by my brother Fernando in *Khan v. Ariyadasa*. It is nevertheless useful to understand for oneself why that answer is correct. It is technically correct that, on the facts as assumed, the charge which may be framed against A under section 146 of the Penal Code would be one of murder. But in truth the acts which render A guilty of the offence under section 146 are distinct from the acts which constitute murder within the definition in sections 293 and 294 of the Penal Code. The offence under section 146 consists in A's having been a member of an unlawful assembly, having the common object of causing X's death, at a time when some member of that assembly actually caused the death in prosecution of that common object. The ingredients of this offence are surely different from those involved in the offence of murder under section 296. The ingredients which I have numbered (1), (2) and (3) earlier in this judgment completely satisfy the definition of murder : it is only because of the existence, *in addition*, of the ingredients (4) and (5) that A becomes guilty of the offence created by section 146. If I may try to state the distinction quite simply : A person is guilty of the offence of murder defined in section 294 *because HE caused death with the requisite intention*, but a person is guilty of the offence (of murder) created by section 146 for an entirely different reason, the principal reason with reference to himself being *because he was a member of a particular unlawful assembly* at a time when murder was committed in prosecution of the common object.

It seems to me then that two different offences were in fact committed, and that sub-sections (1) and (3) of section 180 of the Criminal Procedure Code, if not also sub-section (2), render perfectly legal the joinder of two charges, under section 296, and section 146 with section 296 respectively, against A upon the supposed facts. I realise of course that in such a case where only one person is to be charged, such a joinder would not be made in practice, upon grounds of redundance or superfluity. But we are here concerned only with the argument as to legality, and both precedent and reason lead me to the conclusion that the joinder of the two charges against A is authorised by the Criminal Procedure Code.

[1] *1925 A. I. R. (P. C.) 1.* [2] *(1950) 51 N. L. R. 265.*

The opinion has often been expressed that section 149 of the Indian Penal Code (which is equivalent to our section 146) creates a *vicarious* or *constructive* liability ; and a joinder of a count charging A with murder against section 296 with a count charging B, C, D and E and *A himself* with the offence against section 146 read with section 296 may appear to be inconsistent with that opinion. But the commonest case of the application of section 146 is one where the very member who commits the offence of murder in prosecution of the common object of an unlawful assembly is charged and convicted of the offence under section 146 read with section 296. Thus where an unlawful assembly is alleged to have consisted only of five named persons, and all five are charged with the offence under section 146 read with section 296, the very basis of the charge is that *one of the five* did commit the murder. The ground for his conviction is not the fact that HE committed murder and is not different from the ground for the conviction of the other four members : the ground in each case being membership of the assembly at a time when *some member* committed the murder in prosecution of the common object.

In *Renzaddi v. Emperor*[1] it was recognised as " settled law that when a person is charged by implication under section 149 he cannot be convicted of the substantial offence ". In considering and accepting this proposition, our Court of Criminal Appeal[2] observed that when a person is acquitted of the offence under section 149 " he cannot be convicted of having committed the offence by his own acts *in the absence of a charge that he did so* " thus implying, not only that the two charges are distinct, but also that if the substantive charge is framed in addition to the charge under section 149, there may be a due conviction on the former, despite an acquittal on the latter charge.

I do not doubt, therefore, that a count charging A with murder under section 146 can be lawfully joined with a count charging him directly with murder under section 296.

Let me now introduce into the supposed facts before the Crown Counsel one further element, namely, that according to the evidence, B, C, D, and E are also identified as having been members of the unlawful assembly at the time when A caused the death of X. Can Crown Counsel now add, in an indictment charging A with the murder of X under section 296, a second count charging A, B, C, D and E with murder under section 146 ? It will now be necessary to examine section 184 of the Criminal Procedure Code. In the same transaction, A, B, C, D and E all committed an offence (under section 140 of the Penal Code) of being members of an unlawful assembly ; so also they committed the offence under section 146 of being members of that assembly at the time when one of its members committed murder in prosecution of the common object. They are thus *accused of jointly committing the same offence*, as contemplated in section 184, and they may be charged together for offences under section 140 and section 146 of the Penal Code. But in addition, in the course of the same transaction, A alone committed

[1] *1912, 13 Cr. L. J. 502.* [2] *(1950) 51 N. L. R. 265 at 271.*

the offence of murder defined in section 294 of the Penal Code, which has been shown above to be different from the offence he himself committed under section 146.

Section 184 of the Criminal Procedure Code authorises joinder of persons "when more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction". This language may at first sight give the impression that the words "jointly committing" govern both "the same offence" as well as "different offences". But a closer reading shows that two different cases are here contemplated :—

(*a*) Where more persons than one are accused *of jointly committing the same offence* ; and

(*b*) Where more persons than one are accused *of different offences committed in the same transaction*. (There is here no requirement of *joint* commission.)

Under the first head are cases in which persons jointly commit the same offence ; under the second are cases such as those mentioned in illustrations (*b*) and (*c*) to the section, in which several persons may have committed different offences, but in the same transaction. Upon the facts which I am supposing, the charges against A, B, C, D and E for the offences against sections 140 and 146 of the Penal Code would fall under the first head. Those charges may be tried together with the charge against A alone for the offence against section 296, because, under the second head, that was a different offence committed by him in the same transaction.

I have tried thus far to explain why in my opinion it would be legal, upon appropriate facts, to join together a charge against one person for an offence against section 296 with charges against the same person and others for offences against sections 140 and 146. If such joinder is legal, it follows quite reasonably that a charge against two or more persons for the offence against section 296 may be joined to charges under sections 140 and 146 against the same persons.

In a single count of an indictment charging five persons with the murder of X, the joinder of persons is authorised by section 184 of the Criminal Procedure Code because all five are *accused of jointly committing the same offence* in pursuance of a common intention. If in addition there is evidence that the same five were in the course of the same transaction members of an unlawful assembly, a second count may be added for the offence against section 140 of the Penal Code for the reason that the joinder of persons is authorised by section 184 and the joinder of charges authorised by section 180 (the two sections can apply in combination, cf. section 173). For the same reason, i.e. the application of sections 184 and 180 in combination, a third count for the distinct offence against section 146 read with section 296 of the Penal Code may be added against all five persons, for all are here *jointly accused of committing the same offence* (section 184), and *more offences than one were committed by the same*

persons in the course of the same transaction **(section 180 (1)). Indeed, a further application of section 184 would authorise a fourth count charging only one of the five with some *different offence* such as theft or indecent assault *committed in the same transaction.***

In *Heen Baba's* case [1] the Court of Criminal Appeal decided that where an indictment charges several persons with an offence alleged to have been committed on the basis of their membership of an unlawful assembly, it is illegal for the Jury to convict them of that offence on the basis of a common intention. The opinion that the two offences are distinct was fundamental to the decision, and, with respect, my own consideration of the matter has led me to the same opinion. But even if it can be thought that the two offences are not distinct but are the same, then all that is unusual in an indictment containing both the charges is that the same persons are twice charged in one indictment with the same offence. If then they are convicted, whether on one such charge or on both of them, is any failure of justice involved, or rather is there merely a technical irregularity which has no prejudicial consequence? If both offences are the same, then both charges are also the same, and the indictment is only as defective as an indictment in which there are quite accidentally two counts each in identical terms charging one person with the identical offence. Even, therefore, in this contrary view which I consider untenable, section 425 of the Criminal Procedure Code must be applied. It is important to bear in mind the somewhat peremptory terms of section 425 :—

"No judgment passed by a court of competent jurisdiction *shall* be reversed . . . on appeal. . . on account of any error. . . or irregularity . . . . in the charge. . . . unless such error . . . has occasioned a failure of justice."

Again, why in such circumstances should not the Proviso to section 5 (1) of the Court of Criminal Appeal Ordinance be applied? Even if the point raised in the appeal must succeed, can it be said that any "*substantial* miscarriage of justice has actually occurred"?

For the reasons stated, I must disagree with the decision in the recent case of *Don Marthelis* and I hold that the indictment in the present case was lawful. On the facts, I see no reason to interfere with the convictions and sentences. I would therefore dismiss the appeals.

T. S. FERNANDO, J.—

As I have recently expressed my own opinion on the question of law raised on these appeals, I have nothing to add. I agree with my brother that the appeals fail both on the question of law and on the facts.

Appeals dismissed.

[1] *(1950) 51 N. L. R. 265.*