1950 *Present:* **Nagalingam J.**

GUNARATNE (Inspector of Police, Horana), Appellant, *and* HENDRICK APPUHAMY, Respondent

S. C. 705—M. C. Horana, 8,899

Autrefois acquit—*First charge framed under repealed Ordinance—Plea of previous acquittal to second charge—Meaning of "same offence"—Criminal Procedure Code, Section 330 (1).*

Where the accused, who had been acquitted on the ground that the charge against him was laid under a repealed Ordinance, was subsequently charged again, upon the same facts, under the proper enactment—

Held, that the plea of *autrefois acquit* was entitled to succeed.

[1] *(1949) 33 Cr. App. R. at p. 195.*

APPEAL against an order of acquittal from the Magistrate's Court, Horana.

T. S. Fernando, Crown Counsel, with *A. C. Alles*, Crown Counsel, for the complainant appellant.

N. E. Weerasooria, K.C., with *Tissa Gooneratna*, for accused respondent.

Cur. adv. vult.

October 18, 1950, NAGALINGAM J.—

A plea of *autrefois acquit* raised by the accused-respondent in this case and upheld by the learned Magistrate is challenged by the Attorney-General on this appeal. The facts are not in dispute. The accused-respondent was charged in Case No. 7,851, which will sometimes hereinafter be referred to as the former case, on the following charge:—

> "You are hereby charged, that you did, within the jurisdiction of this Court, at Pokunuwita, on 21. 8. 1949, being a licensed Pawn Broker take as profit a sum of 24 cts. in respect of a loan of Rs. 8 on a pledge of a gold ring, a sum exceeding the amount specified in Schedule 2, to wit, 16 cts. and thereby committed an offence punishable under section 8 (2) of Chapter 75 N.L.E."

To this charge the accused-respondent pleaded "not guilty". The case went to trial and after the case for the prosecution had been closed Counsel for the accused contended that Chapter 75 of the Legislative Enactments had been repealed more than seven years anterior to the date of the commission of the offence by Ordinance 13 of 1942. Thereupon the learned Magistrate entered a verdict of acquittal against the respondent.

The complainant thereafter filed the present case against the respondent upon the following charge:—

> "That you did within the jurisdiction of this Court at Pokunuwita on the 21st August, 1949, being an area in which Ordinance No. 13 of 1942 is in operation as proclaimed in *Government Gazette* No. 8,918 of 22. 4. 1942, being the licensed Pawn Broker in an area charge 24 cts. in respect of a loan of Rs. 8 on a pledge of a gold ring for one month which rate is exceeding the amount specified in Schedule 3 of Ordinance No. 13 of 1942, to wit, 8 cts. as for the said period for the said amount in breach of section 17 of the said Ordinance and thereby committed an offence punishable under section 41 of Ordinance No. 13 of 1942."

The accused pleaded "not guilty" to this charge and at the trial his Counsel raised the plea of *autrefois acquit* and produced in evidence a certified copy of the proceedings in the former case. The learned Magistrate upheld this plea and the Attorney-General appeals therefrom.

The question for decision is whether the plea of *autrefois acquit* or, as the Criminal Procedure Code says, the plea of previous acquittal, is entitled to succeed. It is conceded by learned Crown Counsel who

appeared in support of the appeal that the present charge is based upon the same facts as those upon which the former charge was based. The section of the Criminal Procedure Code which deals with this question is section 330, sub-section (1) of which runs as follows:—

> A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquited of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted under section 182.

It is argued on behalf of the respondent that the offence with which the accused is now charged is the same offence as that with which he was charged in the former case. Learned Crown Counsel contends that though the facts are the same in the two cases, the offence in the former case was laid under section 8 (2) of Cap. 75 L.E. while in the present the charge is laid under section 41 of Ordinance No. 13 of 1942, and the offences are therefore not the same.

The term "offence" is defined in the Criminal Procedure Code itself, in section 2 thereof, as meaning any *act or omission* made punishable by any law for the time being in force in this Island. The act which the accused is alleged to have committed is that he charged a sum by way of interest in excess of that permitted by law. This act of the accused at the date he committed it was a breach of section 17 of the Pawn Brokers Ordinance, No. 13 of 1942, and was made punishable by section 41 of the same Ordinance; so that when the former charge was framed against the accused, it was in respect of an act committed by him in violation of and made punishable by law, and constituted the offence.

Does the fact that the prosecutor lays the charge under an incorrect or inapplicable provision of the law as that which has been violated or specifies a wrong penal section of the law as that under which the offender is liable to be punished have a bearing on the question whether the accused has committed the offence if in fact the act constitutes in reality a breach of a law in force at the date of its commission? Can it be said that the wrong understanding on the part of the prosecutor of the provisions of the law under which the accused could be punished has the slightest effect on the offence committed by the accused person? The answer to both these questions, I have little doubt, should be in the negative.

The offence consists in the act of the accused constituting a breach of the law and has no reference to and is independent of any idea or view entertained by the prosecutor in regard to the correctness or otherwise of the provision of the law of which there has been a breach. I think it is fallacious to regard an offence as made up not only of the act of the offender but also of the proper appreciation on the part of the prosecutor of the true provision of the law constituting the offence. The offence committed stands by itself unaffected by any understanding of the prosecutor in regard to the law contravened.

In this view of the true meaning to be attached to the term " offence " in section 330 (1) of the Criminal Procedure Code, there can be little doubt that the respondent is charged in the present case with having committed the same act which he was alleged to have committed on the former charge. The section, therefore, debars the trial of the accused again on the present charge as it is the same offence as the one of which he was previously acquitted.

Learned Counsel for the Crown, however, has pressed upon me the case of *Perera v. Johoran* [1]. That case, if I may say so with respect, was properly decided having regard to its facts and is distinguishable from the present case. In that case, the conviction in the earlier case was quashed by this Court and the authorities were left, if so advised, " to take any action against the accused". My brother Dias J. made the following very opposite observation in refusing to uphold the plea of *autrefois acquit* in that case:—

> " This appellant has not been convicted or acquitted in the earlier proceedings. He was merely discharged, and in such circumstances a subsequent prosecution is not barred."

It will be seen that in the case before me the accused was not discharged in the former case but acquitted in the strict sense of the term as used in the Code.

An unreported case too was relied upon by Mr. Fernando [2]. In that case too, that eminent Judge, de Sampayo J., held:—

> " At the outside the Magistrate's order (the earlier order) amounts to a discharge of the accused for a defect in the plaint which was never inquired into,"

and refused to uphold the plea of *autrefois acquit.*

Based on certain principles of common law recognised by the English Courts and which are to be found set out in the cases of *Q. v. John Drury et al* [3], *Regina v. Green* [4], *R. v. Marshan* [5] and epitomised in the following words by Reading L.C.J. in *R. v. Baron* [6] that the " law does not permit a man to be twice in peril of being convicted of the same offence", Mr. Fernando contended that the respondent was never in peril of being convicted in the former case as the charge that was laid against him was under a non-existent statute and therefore the proceedings must be regarded as a nullity and the present case cannot therefore be regarded as one in respect of the same offence for, according to him, there was no previous offence in respect of which the accused was put in peril of being convicted. But I do not think very much assistance can be derived from the principles underlying the English common law and, if I may say so, I agree respectfully with the dictum of my brother Basnayake J. in the case of *Solicitor-General v. Aradiel* [7]:—

> " Section 330 (1) is self-contained and the question whether a plea under that section is sound or not has to be determined on an interpretation of its language."

[1] *(1946) 47 N. L. R. 568.*
[2] *747 M. C. Colombo 23,921 S. C. Min. October 15, 1919.*
[3] *(1849) 18 L. J., M. C. 189.*
[4] *(1856) 7 Cox 186.*
[5] *(1912) 2 K. B. 362.*
[6] *(1914) 10 C. A. R. at 87.*
[7] *(1948) 50 N. L. R. 233.*

For one reason, I do not think the question whether the respondent was in peril of being convicted in the former case arises at all under our law, for the question to be determined for a proper decision of the plea is whether the respondent was charged in the former case with the same offence as in the present case or not. For another, even applying the test whether the respondent had been in jeopardy in the former case, I must unhesitatingly say that he was in peril of being convicted in the former case. The fact that had he been convicted the conviction would have been illegal makes little difference to the answer to the question whether the respondent was or was not in peril at the former trial. Besides, there was nothing to prevent the prosecutor when he became aware, as undoubtedly he would have when the new provision was referred to by Counsel for the accused, from having made an application to Court under section 172 of the Criminal Procedure Code to alter the charge before conviction. Had he done so and had the Court acceded to the application, the accused may very well have been properly convicted.

The position under the English Law is not dissimilar; said Lawrence J. in *Halsted v. Clark* [1] where, after the case for the prosecution had been closed and on the defence taking the plea that the charge was defective, the prosecutor moved to amend the charge but was disallowed by the Magistrates who thereupon acquitted the accused, and the prosecutor thereafter filed a second information on the same facts but rectifying the defect contained in the first information:—

> "In my opinion, upon the facts as stated in this case, it is clear that the magistrates really refused leave to amend the summons on the ground which had been argued before them, namely, that it was useless to amend the summons having regard to the evidence which had been given for the prosecution which did not satisfy them that any offence had been committed. If that is the true view of the Magistrates' decision on the first information, it follows that the respondent had been in peril, because the Magistrates might have taken the opposite view and have held that there was evidence that the respondent had recklessly made a false statement in connection with these rubber tyres."

For these reasons, I am of opinion that the order of the Magistrate is right and should be affirmed.

Appeal dismissed.