1896.
*September 28.*

## THE QUEEN *v.* GABRIEL APPU.

*D. C. (Criminal), Kandy, 870.*

*Conviction of offence not included in the charge—Procedure thereon—Procedure in case of doubt as to offence indicated by the evidence—Extortion—Robbery—Cheating—Criminal Procedure Code, ss. 211 and 271.*

The complainant was bringing some cattle to Mátalé. Appellant, an officer of the Local Board of Mátalé, who had nothing to do with cattle, accosted complainant and asked him for his cattle vouchers. Complainant, believing appellant to be an officer who had the right to demand the cattle vouchers, gave them to him. Having got the vouchers, appellant demanded money, and refused to allow complainant to take away the cattle until he was paid ; and complainant thereupon paid him one rupee. Appellant was charged with and tried for extortion under section 373 of the Ceylon Penal Code.

At the close of the prosecution appellant called no evidence in defence, as he contended that the evidence failed to establish the offence of extortion. The District Judge reserved judgment until the next day, and then sustained the objection as to want of evidence on the charge of extortion, but, purporting to act under section 211 of the Criminal Procedure Code, convicted appellant of robbery, being of opinion that the facts proved made out a case for that offence—

*Held*, that the procedure adopted was neither fair to appellant nor consistent with section 271 of the Criminal Procedure Code, and that before appellant was convicted of robbery, he should have been given an opportunity of defending himself with reference to that offence.

In cases falling under section 211 of the Criminal Procedure Code, if the Judge or Magistrate be of opinion that the evidence fails to establish the charge on which the accused was indicted, he must acquit him on that charge ; but if he were of opinion that it was difficult for him to say whether the evidence established the charge in the indictment or a cognate charge, he should so inform the accused, and call upon him to answer the facts disclosed in the evidence generally.

*Held* further, that the facts of the case as stated above constituted the offence of cheating, and not of robbery.

*Quære*, whether section 211 of the Criminal Procedure Code applied to such offences as extortion and robbery.

THE facts of the case appear in the judgment.

*Bawa*, for appellant.

*De Saram, A.C.C.*, for respondent.

28th September, 1896. BONSER, C.J.—

In this case the accused was indicted on this charge :—" That he " did, on or about the 26th day of July, 1896, at Mátalé, within the " jurisdiction of this Court, intentionally put Nugu Lebbe in fear " of injury to him in respect of certain cattle vouchers, the property

" of the said Nugu Lebbe, wrongfully obtained from him, and " thereby dishonestly induced the said Nugu Lebbe to deliver to " him (the accused) the sum of one rupee." * * *

It seems to me that the words of the indictment are too vague. " In fear of injury to him in respect of certain cattle vouchers " is not a precise enough statement of the injury. The facts appear to be these. The complainant was bringing some cattle into Mátalé. The appellant is an officer of the Local Board of Mátalé. He had nothing to do with cattle. He accosted the complainant and asked him for his cattle vouchers, and the complainant, at his request, and believing him to be an officer, as he represented, having the right to demand them, gave them to him. Having got the vouchers the appellant demanded money and refused to let the cattle go. There is no evidence that he attempted to stop the complainant himself. At the trial the evidence for the prosecution established the fact I have mentioned, and the prosecution was closed. The appellant's proctor then addressed the Court and pointed out that the evidence failed to establish the offence of extortion, and called no evidence.

The Judge did not give a decision then and there, but reserved judgment till the next day. The next day, in the presence of the accused, but, as it would appear, in the absence of his proctor, he delivered a judgment, in which he sustained the objections of accused's proctor, and found the charge of extortion was not made out. But he went on to say that in his opinion the facts disclosed made out a case of robbery, and he forthwith convicted the appellant of robbery and sentenced him to one year's rigorous imprisonment. He purported to do this under section 211 of the Criminal Procedure Code, which provides that " if, in the case mentioned in section 210, " the accused is charged with one offence, and it appears in evidence " that he committed a different offence for which he might have " been charged under the provisions of that section, he may be " convicted of the offence which he is shown to have committed, " although he was not charged with it." Assuming for the moment that section 211 applies to the present case, I am yet of opinion that the procedure adopted was not fair to the accused, nor is it consistent with the provisions of section 271 of the Code. Section 271 provides that " when the examination of the witnesses for the " prosecution is concluded, if the Court wholly discredit the evidence " on the part of the prosecution, or is of opinion that such evidence " fails to establish the commission of the offence charged against " the accused in the indictment, then the Court shall return a verdict " of acquittal." * * *

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It seems to me, therefore, that in a case which falls under section 211 the Judge or Magistrate, if he is of opinion that the evidence fails to establish the charge on which the man was indicted, must acquit him of the charge. But if he were of opinion that it was difficult for him to say whether the evidence established the charge in the indictment or a cognate charge, he should so inform the accused and call upon him to answer the facts disclosed in the evidence generally. In the present case it would seem as though the counsel for the appellant merely rested his defence on the deficiency of the evidence for the prosecution to establish the charge contained in the indictment. Had he been told that the Judge was going to consider another charge, he might have called evidence to meet that charge. But I have some doubt whether section 211 applies to a case like the present. The instances given in the illustration are instances of offences of much the same character—theft, receiving stolen property, criminal breach of trust, and cheating—offences which it is often exceedingly difficult to distinguish, and which are punishable by much the same punishment. In the present case the appellant was tried for an offence for which the maximum punishment is three years' rigorous imprisonment, and convicted of another offence which is punishable with fourteen years' rigorous imprisoment and whipping in addition. Surely it would not be competent for a jury on a charge of culpable homicide or grievous hurt to bring in a verdict of murder.

But in my opinion the offence of robbery of which the appellant has been found guilty, has not been made out. Mr. De Saram, who represented the Solicitor-General, declared himself unable to support the conviction for robbery. But it seems to me that if the evidence is to be believed, the appellant was guilty of cheating by falsely representing himself to have authority to examine cattle vouchers, and on that false pretence inducing the complainant to deliver to him the cattle vouchers. The proper order to make will be—that the finding and conviction of the District Judge are quashed, and the case remitted in order that the appellant may be charged with cheating, and given an opportunity of adducing evidence to meet that charge.

It seems to me that it will be unnecessary to try the appellant again. I simply quash the conviction, and give the appellant an opportunity of meeting the charge of cheating.