1947 *Present :* **Dias J.**

MANSOOR, Appellant, *and* JAYATILEKE (S. I., Police), Respondent.

1,778—M. C. Colombo, 20,573.

Loitering about by reputed thief—Ingredients of the offence—Burden on prosecution—Meaning of " loitering "—Penal Code, s. 451.

In a prosecution under section 451 of the Penal Code—

Held (i.) that the burden is on the complainant to show that at the time the accused loitered or lurked about a public place, he had the reputation of being a thief. The prosecution does not discharge that burden by first arresting the accused on suspicion and then *ex post facto* establishing that he was a thief, a fact which was unknown at the time the alleged offence was committed.

(ii.) that it should be established that the conduct of the accused amounted to loitering.

[1] See *Rosaline Nona v. Perera (1946) 47 N. L. R. at p. 526.*

APPEAL against a conviction from the Magistrate's Court, Colombo.

Ivor Misso, for the accused, appellant.

Boyd Jayasuriya, C.C., for the Attorney-General.

Cur. adv. vult.

January 13, 1947. DIAS J.—

The appellant was convicted of committing an offence under section 451 of the Penal Code. In order to secure a conviction under that section, the prosecution has to establish the following ingredients beyond all reasonable doubt;

(*a*) that the appellant "being a reputed thief".
(*b*) "loitered" or "lurked" about a "public place"
(*c*) with intent to commit theft or any other unlawful act.

The evidence for the prosecution is that at about 1 A.M. on September 18, 1946, two patrol constables observed the appellant emerging from Maulanawatta in First Division, Maradana, and that as he proceeded he "peeped" through the plank shutters of two houses. The constables arrested the appellant "on suspicion". They admit that at that time they did not know that the appellant was "a reputed thief". On the same day the police produced the appellant before the Magistrate who was requested to remand the appellant "pending the report of the Registrar of Finger Prints." It is, therefore, clear that the police were unable to formulate any charge against the appellant when he was first produced before the Magistrate. After the report of the Finger Print expert had been received, it was discovered that the appellant was a reconvicted criminal with a long list of previous convictions. Thereupon the appellant was charged as follows: "That you did at First Division, Maradana, on the 18th of September, 1946, being a reputed thief, did loiter about a public place, to wit, First Division, Maradana, with intent to commit theft, and thereby committed an offence punishable under section 451 of the Penal Code." He has been convicted and sentenced to undergo two years' rigorous imprisonment, two years' police supervision, to pay a fine of Rs. 10 and in default of payment of the fine to undergo a further term of rigorous imprisonment for one week.

In my opinion this conviction cannot stand, as the prosecution has failed to establish beyond reasonable doubt the ingredients which constitute the offence charged.

In the first place, the words of section 451 are "being a reputed thief"—that is to say the burden is on the prosecution to show that *at the time the accused loitered or lurked about a public place*, he had the reputation of being a thief. The prosecution does not discharge that burden by first arresting the accused on suspicion and then *ex post facto* establishing that he was a thief, a fact which was unknown at the time the alleged offence was committed. My view is supported by the *dictum* of my brother de Silva J. in *Perera v. The Police*[1] where he held that it is not open to the prosecution to lead evidence of the previous convictions of the accused to establish the fact that he is a "reputed thief". The

[1] *(1946) 32 C. L. W. 108.*

evidence available to the prosecution should be evidence of the reputation of the accused apart from his previous convictions. The police witnesses in this case admit that at the time they arrested the appellant they did not know he was a "reputed thief". That reputation attached to him only after his finger prints had been taken and the expert had made his report. On this ground alone this conviction cannot stand.

In the second place, it is not an unlawful act for a reconvicted criminal to walk abroad at 1 a.m. or to relieve his monotony by peeping through the plank shutters of the houses he passes. Such conduct may be reprehensible, or even suspicious—but can it be said that this appellant was loitering"?

In *Nair v. Velupillai*[1] the word "loiter" was defined to mean "to linger on the way, hang about, or travel indolently and with frequent pauses". It is doubtful whether the conduct of this appellant can be said to amount to loitering.

In the third place there are no circumstances to show that the intention of the appellant in acting in this manner was to commit theft. When circumstances are capable of an innocent explanation, there is no warrant for attributing to them a sinister significance. It may be the prosecution has established a strong case of suspicion against the appellant, but it has failed to establish beyond reasonable doubt the necessary ingredients of the offence charged.

I, therefore, set aside the conviction and acquit the accused.

Appeal allowed.