1946 *Present :* **Dias J.**

PERERA, Appellant, *and* JOHORAN (S. I., Police), Respondent.

1,203—M. C. Panadure, 34,759A.

Autrefois acquit—*Accused charged under repealed Regulation—Conviction quashed in appeal—Liability to be prosecuted again under the proper Regulation—Criminal Procedure Code, ss. 330, 331.*

A conviction was quashed by the Appeal Court on the ground that the accused had been charged under a Regulation which had been repealed. The accused was subsequently prosecuted again under the proper Regulation in respect of the same act.

Held, that the plea of *autrefois acquit* could not be raised.

[1] *(1901) 2 Browne 230.*
[2] *(1942) 20 Cey. L. Rec. lviii., 2 C. L. W. 418.*
[3] *(1919) 6 C. W. R. 319.*
[4] *(1934) 12 T. L. R. 22.*
[5] *(1930) 32 N. L. R. 115.*

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

N. Nadarajah, K.C. (with him *V. Arulambalam*), for the accused, appellant.

A. C. M. Ameer, C.C., for the Attorney-General.

Cur. adv. vult.

November 12, 1946. DIAS J.—

In M. C., Panadure No. 34,759 this appellant was charged with precisely the same offence with which he was charged and convicted in the present case.

In the earlier case the accused appealed against his conviction and the judgment of the Supreme Court is reported in *46 N. L. R. 333*. Canekeratne J. held that the accused had been charged under a Regulation which had been repealed and that the effect of that repeal was to obliterate the Regulation as completely as if it had never been brought into force. He said : " The accused, Perera, has not been properly charged and *the proceedings are a nullity*. I quash the conviction and leave it to the authorities, if so advised, to take any action against the accused."

Thereupon, in the present case, the appellant was again charged under the proper Regulation published in *Government Gazette* No. 9,274, dated May 26, 1944. The charge is that the appellant on December 6, 1944, at Wadduwa did sell *half a pound* of dried sprats (" Haal-messas ") at fifty cents whereas the controlled price of *a pound* of this comestible was only forty-nine cents.

Both at the trial as well as in this appeal, the appellant raised the plea of *autrefois acquit* under sections 330 and 331 of the Criminal Procedure Code.

Counsel for the appellant takes his stand on the judgment of Reading L.C.J. in *R. v. Barron* [1]. " The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, *i.e.*, found to be not guilty of the offence by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offences actually charged, but to any offence of which he could have been properly convicted on the trial of the first indictment." If I may say so with respect, that ruling is also the law of Ceylon. The language of section 330 of the Criminal Procedure Code and the illustrations appended to it indicate that our law is precisely the same as indicated by Lord Reading. I cannot, however, agree with the extended application which counsel for the appellant endeavours to give to the language of the Lord Chief

[1] *(1914) 10 Crim. App. R. at p. 87.*

Justice of England. His submission is that because the Magistrate in the earlier case might by amending the charge have convicted the appellant, and because the Judge in appeal might have done the same thing, therefore the doctrine of *autrefois acquit* applies as a bar to the subsequent charge. I am unable to agree with that contention.

In the earlier trial the accused was never in peril of conviction because, as was judicially declared by Canekeratne J., it was a nullity. Therefore the accused did not stand in jeopardy of conviction in that case. In *747 M. C. Colombo, No. 23,921 (S. C. Min., October 15, 1919)* the accused was charged under the wrong section of an Ordinance and was acquitted. The Supreme Court held that the earlier acquittal did not bar a subsequent charge under the correct section. The principle is that he was never in peril at the first trial. In *Rosemalecocq v. Kaluwa*[1] Abrahams C.J. said : " In my opinion any illegal trial is no trial at all, and, therefore, an acquittal either by the trial Court or an Appellate Court would be ineffective." The learned Chief Justice in that case set aside the conviction and ordered that appellant to be discharged. An accused who is discharged and not acquitted cannot raise the plea of *autrefois acquit* when he is recharged. See *Senaratne v. Lenohamy*[2] and *R. v. William*[3]. In my opinion the order of Canekeratne J. in the earlier case amounted to a discharge and was not an acquittal. Therefore the subsequent charge is not barred.

The case of *R. v. McMinn*[4] cited by the appellant is distinguishable from the facts of the present case. There the accused was charged with larceny at the Petty Sessions. He consented to be tried summarily (Cf. section 166 of the Criminal Procedure Code) and was convicted. The accused then asked " that an outstanding offence for obtaining a cheque by false pretences in respect of which he had signed the usual ' other offences ' form should be taken into consideration." The Justices agreed and passed a sentence of six months' imprisonment. The accused appealed to the Quarter Sessions against the conviction for larceny and the appeal was allowed and the conviction was quashed. The accused was then committed to the Assizes for the offence of false pretences. On a plea of *autrefois convict* having been raised, the trial Judge upheld it. This decision rested on the direction of the trial Judge that the earlier proceeding *amounted to a conviction* of the accused for the offence of false pretences. That is not the case here. 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. I hold that the plea fails.

I see no reason to differ from the finding of fact as found by the Magistrate. The question of sentence has been pressed. I am unable to hold that the sentence is excessive. The appeal is dismissed.

Appeal dismissed.

[1] *(1936) 38 N. L. R. at p. 373.*
[2] *(1917) 20 N. L. R. 44 (Div. Ct.).*
[3] *(1942) 44 N. L. R. 73 (C.C.A.).*
[4] *(1945) 30 Crim. App. R. 138.*