1936 *Present :* **Soertsz J.**

GUNASEKERE *v.* DIAS BANDARANAIKE.

277—P. C. Colombo, 41,494.

Mistake of fact—Meaning of plea—Ignorance and mistake—Plying on a prohibited route—Penal Code, s. 72.

Where the driver of an omnibus was charged with plying his bus on a route not approved by the licensing authority and it was established that the accused was unaware that the licensing authority had withdrawn his approval of a section of the route,—

Held, that the accused's plea came within the exception created by section 72 of the Penal Code, viz., nothing is an offence which is done by a person, who by reason of a mistake of fact in good faith believes himself justified in doing it.

Weerakoon v. Ranhamy (*23 N. L. R. 33*) referred to.

APPEAL from a conviction by the Police Magistrate of Colombo.

de Jong for accused, appellant.

June 15, 1936. SOERTSZ J.—

The accused-appellant was charged as follows:—"That he did on the 4th of February, 1936, being the driver of omnibus No. X 8130 ply the said omnibus on a route not approved by the licensing authority . . . in breach of regulation 1 (1) of the regulations made under Ordinance No. 20 of 1927 and published in the *Government Gazette* No. 8,160 of October 25, 1935, and thereby committed an offence punishable under sections 80, 82, and 84 of Ordinance No. 20 of 1927".

The facts upon which this charge was based are these. This omnibus had originally been licensed to operate on the route in question in this case. But, on the 3rd of February last, the licensing authority acting under "regulation 1 (4) (*b*) of the Fourth Schedule to Ordinance No. 20 of 1927, dated 24th October, 1935, and published in the *Government Gazette* of 25th October, 1935" served a notice on the owner of this omnibus withdrawing his approval of a certain section of the route for which the omnibus had been licensed. This notice was served on the owner on the 3rd of February. In the early hours of the morning of the 4th of February, the accused who was the driver of this omnibus, in the usual course of his duties, drove it from the garage in Maradana to Yakkala Junction in order to ply it for hire between Yakkala and Colombo, the usual route on which this omnibus operated. It was on its first trip from Yakkala to Colombo that the omnibus was stopped.

The accused has given evidence and his defence is that he had not been informed, and he was not aware that the licensing authority had withdrawn his approval of a section of the route. There is no reason whatever for rejecting the accused's evidence on this point. The only question is whether his defence is good in law. I am of opinion it is. In *Weerakoon v. Ranhamy*[1], a Bench of four Judges considered the question of *mens rea* in relation to our law. They held that section 72 of the Penal Code which enacts that "nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it" applies to all enactments alike, including those enactments which impose absolute obligations. The English law drew a distinction and made the plea of absence of *mens rea* inoperative in the case of charges framed under "certain exceptional enactments containing prohibitions which are interpreted as unqualified". Our law knows no such distinction. The only other question then is whether the accused comes within the exception created by section 72 of the Penal Code. Is he entitled to say that he did what is now alleged to constitute his offence, "by reason of a *mistake* of fact . . . . . in good faith believing himself justified by law in doing it"? Bertram C.J. in the case I have referred to took the view that "ignorance is not the same as mistake.

[1] *(1921) 23 N. L. R. 33*

Mistake . . . . implies a positive and conscious conception which is, in fact, a misconception". If that is a correct discrimination, is the accused's plea one of "ignorance" or of a "mistake" of fact in this case? In my opinion, it falls to be described by both these words. As Ennis J. said in that case "The distinction between ignorance and mistake is very fine. To say 'I did not know the land was at the disposal of the Crown' is an admission of ignorance. To say 'I thought this land was not land at the disposal of the Crown' is a plea of mistake, but it involves the corollary, 'therefore I did not know it was land at the disposal of the Crown'". In this case the accused is entitled to say "I thought that this route was as usual available to me"—a clear plea of a mistake of fact involving as a corollary "I did not know it had been withdrawn in fact"—an admission of ignorance. Schneider J. took the view that in section 72 "the word mistake must be taken to include ignorance". That interpretation affords an easy solution of the difficulty. In this case, however, I think that even if the fine distinction between ignorance and mistake is sustained for the purpose of interpreting section 72 of the Penal Code, the accused's plea falls within the words "by reason of a mistake of fact . . . . in good faith believes himself to be justified by law in doing it".

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

Set aside.