Present : Mr. Justice Wendt.

1909.
March 25.

SABOOR UMMA *v.* COOS KANNY.

P. C., Colombo (Addl.), 8,713.

Maintenance Ordinance, s. 3—Discharge of defendant owing to absence of complainant—Cause of absence—Criminal Procedure Code, s. 194.

Where the complainant in a maintenance case being absent on the day of trial (May 9) the defendant was discharged, and the complainant subsequently (December 17) instituted another complaint, and explained her absence on the previous occasion by stating that the defendant fraudulently promised to marry her and to pay her Rs. 100 and thereby induced her to absent herself,—

Held that the order of discharge must be considered as an acquittal.

Held, further, that the reason given by the complainant for her absence on May 9 being satisfactory, the Magistrate had power to set aside the order of discharge of that date and to regard the present proceedings as a renewal of the former application.

APPEAL by the defendant from an order condemning him to pay Rs. 4 per mensem for the maintenance of his illegitimate child. The facts and arguments sufficiently appear in the judgment.

Bawa, for the defendant, appellant.

Tisseveresinghe, for the complainant, respondent.

Cur. adv. vult.

March 25, 1909. WENDT J.—

The defendant appeals against an order under "The Maintenance Ordinance, 1889," directing him to pay a sum of Rs. 4 a month for the maintenance of his illegitimate child by the complainant. Besides the question of fact as to the paternity of the child, as to which I see no reason for disagreeing with the Magistrate's finding against the appellant, two questions were argued before me in appeal, viz., first, the question whether the order made upon the previous application made by the complainant was a bar to the present application; and secondly, whether there was proof that the application was within twelve months of the child's birth, or that the child had been maintained by the appellant within that period. On the first of these questions the facts are that on April 23, 1908, complainant made her application, in which she stated that the child was six months old, and that for six months the defendant had neglected to maintain it. When examined by the Court, she stated that appellant had failed to maintain it for ten months (which

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would put the date of birth back to June, 1907). Upon appearing to the summons on the application the appellant denied the paternity of the child. The trial was fixed for May 9, and the parties issued subpœnas for a number of witnesses on both sides, but on the 9th both parties were absent, and the Magistrate made order "Case struck off." It is argued by appellant that this order was equivalent to a dismissal of the complaint, and that the Magistrate ought properly to have "acquitted the accused." No doubt, as pointed out in cases like *Eina v. Eraneris*[1] and *Subaliya v. Kannangara*,[2] the Police Court in proceeding under the Maintenance Ordinance is not dealing with a strictly criminal matter, but it is clear from sections 15, 16, and 17 among others of the Ordinance that its procedure should be regulated by the provisions of the Criminal Procedure Code. Section 194 of that Code enacts that "If the summons has been issued on complaint under section 148 (1) (*a*), and upon the day and hour appointed for the appearance of the accused, or at any time to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other hour or day.....Provided that if the complainant appears in reasonable time and satisfies the Magistrate that his absence was due to sickness, accident, or some other cause over which he had no control, then the Magistrate shall cancel any order made under this section." With the exception of the proviso, this section is a re-enactment of section 228 of the Criminal Procedure Code of 1883, as amended by Ordinance No. 22 of 1890, under which it was held in *Ukku Rala v. David Singho*[3] that where a Magistrate "discharged" an accused party on the day fixed for trial, the complainant being absent, his order amounted to an "acquittal," which, as the law then stood, could not afterwards be set aside by the Magistrate himself. "The Magistrate," said Withers J., "had only the alternatives open to him of acquitting the accused or adjourning the hearing of the case for some other day for some reason he thought proper. He did not adjourn the case that day, but discharged the accused, seeing no reason for adjourning the case to some other day. He should have acquitted the accused, and I am bound to act as if the order which the law required had been made, and to treat the discharge as an acquittal." In the case of the analogous section 190 of the present Criminal Procedure Code, where a Magistrate disbelieving the evidence led for the prosecution "discharged" the accused, it was held in *Eliatamby v. Sinnatamby*[4] that the discharge was tantamount to an acquittal. I hold therefore that as the Magistrate in the present case did not see fit to adjourn the hearing, but "struck off" the case, his order

[1] (*1900*) *4 N. L. R. 4.*
[2] (*1899*) *4 N. L. R. 121.*
[3] (*1895*) *1 N. L. R. 339.*
[4] (*1905*) *2 Bal. 20.*

would have amounted to an acquittal in an ordinary criminal case, and that in the present instance the charge being what it is, his order amounted to a final determination of it, which, however, he would have the power himself to set aside upon the grounds stated in the proviso to section 194.

When the present complaint was presented on December 17, the Magistrate was not asked to set aside his order of May 9. No allusion whatever was made to the former proceedings, but the application for maintenance, and the Magistrate treating it as such issued a new summons to the defendant, who upon his appearance pleaded the former order as a bar. His counsel stated that the reason of the non-appearance of the parties on May 9 was that they had settled the matter out of Court, and he produced a document D 1 bearing that date, whereby the complainant acknowledged that she was unable to prove her case and had therefore not appeared in Court, and she undertook not to " put the defendant into any difficulties." The Magistrate recorded that he did not agree with defendant's counsel and would give his reasons later, and he proceeded to hear evidence on behalf of the complainant. In his judgment he held that the defendant by fraudulently promising to marry the applicant and to pay her Rs. 100 induced her to absent herself on May 9, although he had no intention of carrying out either promise. He also held that the order " struck off " was not a final order. On this point, as I have already indicated, I think he was wrong ; but his finding as to the cause of complainant's absence on the day of trial affords good ground for setting aside the final order and had he taken a different view as to the effect of that order, he would no doubt have set it aside. That order being out of the way, there is nothing to prevent the Magistrate regarding the present proceedings (as he has in fact regarded them) as a renewal of the former application. The delay of seven months in commencing the present proceedings is explained, as the Magistrate finds, by the deceit practised by the defendant upon the complainant. I hold therefore that the application is maintainable, and I agree with the Magistrate in deciding against the defendant on the question of paternity. The appeal is dismissed with costs (Rs. 21).

Appeal dismissed.