

Present : Mr. Justice Wendt.

1909.
June 22.

FERNANDO v. MATHES PULLE.

P. C., Negombo, 11,939.

Appealable order—Fine of Rs. 20 and order to find security for good behaviour—Offence of mischief—Criminal Procedure Code, ss. 80, 335.

Where the accused was convicted of the offence of mischief, in that he uprooted a fence, and was ordered to pay a fine of Rs. 20, and also to enter into a bond to keep the peace and to be of good behaviour for six months under section 80 of the Criminal Procedure Code, and the accused appealed from the conviction and sentence on the point of law that the order to give security was made without jurisdiction,—

Held (on objection taken), that the appeal was well founded, and that the appeal was entitled to be heard.

Held, also, that the order to give security was made without jurisdiction, inasmuch as no breach of the peace was involved in the accused's act of uprooting a fence.

*Karamanis v. Arnolis*¹ followed.

A PPEAL from a conviction by the Police Magistrate (V. P. Redlich, Esq.). The facts sufficiently appear in the judgment.

E. W. Jayewardene (with him *B. Koch*), for the accused, appellant.

Wadsworth, for the complainant, respondent.

Counsel for the respondent objected to the appeal being entertained on the ground that the order was not an appealable one.

Cur. adv. vult.

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The appellant was convicted of committing the offence of mischief (section 409, Penal Code) by uprooting a fence, and was sentenced to pay a fine of Rs. 20, with the alternative of two weeks' imprisonment, and to enter into a bond to keep the peace and be of good behaviour for six months. Respondent's counsel took the objection that no appeal lay. Certainly, the case of *Cassim v. Kandappa*,² approved by the Full Court in *Culantavalu v. Somasundram*,³ establishes that where the punishment inflicted by a Magistrate is a fine of Rs. 25 or less there is no appeal against the conviction. That is to say, no appeal upon the facts. But section 335 (2) of the Criminal Procedure Code expressly allows "an appeal upon a matter

¹ (1900) 2 App. C. R. 98 (Note).

² (1901) 5 N. L. R. 311.

³ (1904) 2 Bal. 122.

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of law " in such a case. There is nothing in sub-section (2) which restricts the matter of law to one which affects the conviction. It may be one which affects the legality of the sentence. The explanation to section 335 appears to sum up the provisions of sub-section (1) as regulating appeals from " sentences." The only point of law taken in the petition of appeal and certified by the appellant's proctor is that the Magistrate had no jurisdiction under section 80 of the Criminal Procedure Code to require appellant to execute a bond, because the offence of which he was convicted did not " involve a breach of the peace " and was not criminal intimidation, or being a member of an unlawful assembly. I see no reason why the appeal on that matter of law should not be admitted. No decision holding it inadmissible has been cited to me. On the contrary, Mr. Jayewardene relied upon *Karamanis v. Arnolis*,¹ in which Bonser C.J. entertained an appeal and set aside the order for security where the sentence was only a fine of Rs. 15. In *The King v. Jayewardene*² the substantive sentence is not stated in the report, nor is it in *Lebbe v. Hamid*,³ but I find from my notes of the argument in the latter case that the first accused had been fined Rs. 100 and the second and third Rs. 10 each. In the latest case cited by appellant, however, viz., *Graham v. Alagie*,⁴ dealt with by my brother Wood Renton, the substantive sentence was only a fine of Rs. 10. In none of these cases, however, was the point as to the competency of the appeal expressly taken.

I proceed to consider the point of law. The Magistrate found there was much bad feeling between the parties, and the evidence showed that at about 8 or 9 A.M. the accused in the presence of the complainant uprooted about 3 or 4 fathoms of the fence which had been put up five days before and had as yet no cross sticks tied on. It is quite clear that no breach of the peace was involved in appellant's act, and there was therefore no jurisdiction to make an order under section 80 of the Criminal Procedure Code. The tendency has been to require strict proof of a breach of the peace being involved. See the cases already cited, especially that of *Karamanis v. Arnolis*.¹

I direct that the judgment be amended by striking out the order for security.

Sentence varied.

¹ (1900) 2 App. C. R. 98 (Note).

² (1907) 2 App. C. R. 97.

³ (1903) 2 App. C. R. 99 (Note).

⁴ (1908) 1 Weerakoon 86.