Present : Middleton J. and Wood Renton J. *July 17, 1911*

NIKAPOTA *v.* GUNASEKERA.

417—*P. C. Matara*, 1,385.

Conviction of accused—Magistrate may inquire into the previous history and antecedents of accused before awarding punishment.

A previous conviction may be proved or admitted before a court of first instance, after the conviction of the accused, for the purpose of enabling the Court to regulate the punishment within the limits of its jurisdiction in that respect under the law.

A previous conviction should not be regarded as proved unless a properly certified copy of the conviction is put in, and evidence given to clearly identify the accused with the person mentioned in it.

Evidence of an antecedent bad character is relevant after conviction ; but no evidence to prove it should be accepted by the Court, except from persons of undeniable position and respectability, and then also only under the sanction of an oath or affirmation.

THE accused in this case was convicted of an offence under section 315 of the Penal Code with having caused hurt with a pair of scissors to her daughter. After the accused was found guilty, it was pointed out to the Magistrate that the accused had been convicted of causing hurt to her elder daughter and had been fined. The learned Magistrate (D. W. Arnott, Esq.) took the previous conviction into consideration and sentenced her to three months' imprisonment.

The accused appealed.

H. J. C. Pereira (with him *Canekeratna*), for the appellant.—The evidence of previous conviction in cases like this should not have been taken into consideration by the Magistrate. There is no law which authorizes the admission of such evidence in this case. The case does not fall within section 68 of the Penal Code. Evidence of character is inadmissible, unless the accused puts it in issue ; there are exceptions to that rule, but this case does not fall within the exceptions (see Criminal Procedure Code, sections 408 and 409). If evidence of character is irrelevant before conviction, what law makes it relevant after conviction ? Where the Legislature has deemed it necessary to lead evidence of a previous conviction, it has made special provision to enable it to be done (see Criminal Procedure Code, section 253, and Ordinance No. 7 of 1899). The Legislature has also made provision for dealing with men of good character (see Criminal Procedure Code, section 325).

July 17, 1911

Nikapota v. Gunasekera

If evidence of character after conviction were to be admitted, it would open the door to much abuse. Counsel cited *Reg. v. Alexander ;*[1] *Bastian Appu v. Davithamy ;*[2] *Seneviratne v. Dias ;*[3] *Warusavitana v. Abiweera ;*[4] *Sinnetamby v. Elayatamby ;*[5] *Encyclopaedia of the Laws of England, vol. X., pp.* 333 *and* 334.

Walter Pereira, K.C., S.-G., for the respondent.—Under the Evidence Ordinance (section 100) and the Criminal Procedure Code (section 6) the English law of evidence and procedure are introduced in matters where the Codes are silent. Under the English law the antecedents of the prisoner may be taken into consideration before passing sentence. See Halsbury's *Laws of England, vol. IX., p.* 427 ; *R. v. Weaver.*[6]

Apart from English law, even under our law the question of bad character is in issue when it comes to the question of sentence ; section 325 of the Criminal Procedure Code implies that. How is the Court to know of the antecedents of the accused unless it inquires into it ?

The evidence of character may have to be on oath or affirmation.

H. J. C. Pereira, in reply.—Section 6 of the Criminal Procedure Code provides for a *casus omissus.* This is not a *casus omissus.* The Code fully provides for all cases in which it deems it necessary to lead evidence of bad character.

Cur. adv. vult.

July 17, 1911. MIDDLETON J.—

The point reserved for two Judges in this case was whether a Police Magistrate, after his verdict on the evidence has been given, in entitled, except in cases provided for by section 68 of the Ceylon Penal Code, to take into consideration in awarding punishment the proved or admitted fact that the person he has just found guilty has been previously convicted, or is a person of bad character.

The argument for the appellant is that to do so would be to invent a procedure not warranted by the Code of Criminal Procedure, and to make evidence relevant which only becomes so in certain specified instances as laid down in section 68 of the Penal Code and Ordinance No. 7 of 1899, and thus to treat as a *casus omissus* what in fact is not so, and to engraft on our criminal system a form of procedure which the Legislature has not expressly adopted, because it is unsuitable to the country. The cases reported in 3 *N. L. R.* 11, 3 *Weerakoon* 89, 1 *Leembruggen* 34, and *Koch* 17 were referred to and relied on.

If this appellant was properly convicted under section 315 of the Penal Code, by section 7 of Ordinance No. 7 of 1899 proof of a previous conviction might clearly have been given to the Magistrate for the purpose of obtaining an order for police supervision against her.

[1] *(1898) 3 N. L. R. 165.*
[2] *(1905) 1 Leem. 34.*
[3] *(1906) 3 Weer. 89.*
[4] *(1910) 4 Weer. 89 ; Koch 17.*
[5] *(1908) 3 A. C. R. Sup. X.*
[6] *(1908) 1 Cr. App. Rep. 12.*

It is clear that a Police Court having jurisdiction to summarily try certain of the offences under chapters XII. and XVII. of the Penal Code would have power under section 68, after conviction under these chapters, to enhance the punishment within the limits of its power under section 15 of the Criminal Procedure Code.[1]

In a case of theft heard by a Magistrate, a previous conviction for theft with a view to applying section 68 of the Penal Code should be dealt with on the lines laid down in section 253 of the Criminal Procedure Code so far as applicable to a Police Court, and the previous conviction might be proved or admitted.

It is clear that the provisions of section 325 make it necessary to ascertain after conviction in every case triable by a Magistrate if a person has been previously convicted or not, in order that the Magistrate may, if he thinks it expedient, release upon probation of good conduct instead of sentencing to imprisonment. This section shows also that the antecedents of an offender may be gone into after conviction, and may be acted on for his benefit, and by parity of reasoning it seems to me to his detriment.

Under the English law, the Court in fixing the punishment for any particular crime will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation he has received if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character, and, except in the case of habitual criminals, any recommendation to mercy which the jury may have made (vide *Encyclopoedia of the Laws of England, Halsbury, vol. IX., p.* 427).

In the case of *R. v. Weaver*[2] it was held that it was the practice of criminal courts before passing sentence to inquire into the antecedents of a prisoner, and to punish habitual offenders more seriously.

In *R. v. Nuttall*[3] it was held it was not right to be guided merely by previous convictions, and if the offence for which punishment is to be awarded does not indicate a deliberate return to crime, and there are circumstances which do not show that the offence was planned beforehand, less weight is to be given to previous offences.

In *R. v. Boncher*[4] the Court said " more weight should be given to previous convictions for offences of the same character as that for which the offender is to be punished than to convictions for offences of a different character."

In *R. v. Spencer*[5] the Court said " a first offender may commit an offence of such malignity that a severe sentence should be imposed, and the absence of previous convictions may be disregarded, as only showing that the offender has not been found out before."

[1] *Rex v. Dias Sinno (1908) 1 Weer. 61.*
[2] *(1908) Cr. App. Rep. 12.*
[3] *(1908) 1 Cr. App. Rep. 189.*
[4] *(1909) Cr. App. Rep. 177.*
[5] *(1908) Cr. App. Rep. 37.*

July 17, 1911

MIDDLETON J.

Nikapota v. Gunasekera

I have cited these opinions of the Supreme Court of Criminal Appeal in England with the object of bringing home to the Magistrates of Ceylon the principles upon which that Court thinks a court of trial should act in dealing with such matters.

Besides section 325, it seems to me, as the Solicitor-General contended, that section 6 of the Criminal Procedure Code will warrant the application of the procedure in force in England in the matter of previous convictions. It is not distinctly enacted that a previous conviction in all cases may be proved after conviction by a Police Court, but it is inferable, and the law relating to criminal procedure in England prevents it. In no case should a previous conviction be proved or made known to the Magistrate before conviction, unless it is relevant (see section 54 of the Evidence Ordinance and sections 408 and 409 of the Criminal Procedure Code).

I hold, therefore, that a previous conviction may be proved or admitted before a Police Court in Ceylon, after the conviction of the accused, for the purpose of enabling the Court to regulate the punishment within the limits of its jurisdiction in that respect under the law.

A previous conviction should not be regarded as proved unless a properly certified copy of the conviction is put in, and evidence given to clearly identify the accused with the person mentioned in it. (Section 10, Ordinance No. 7 of 1899.)

As regards an antecedent bad character, I think it is made relevant after conviction by section 325 ; but in my opinion no evidence to prove it should be accepted by the Police Court, except from persons of undeniable position and respectability, and then also only under the sanction of an oath or affirmation.

As regards the conviction under section 315, the Magistrate distinctly finds that the little girl was pricked with scissors, an instrument clearly used for cutting, and which could be used for stabbing, and the formal conviction is under section 315, so that I may have been wrong in supposing his intention was to convict under section 314.

In any case I am not prepared to say that the sentence he has passed, considering the previous conviction for a similar offence, is too severe. I affirm the conviction and dismiss he appeal.

WOOD RENTON J.—

This appeal, which has been referred to a Bench of two Judges by my brother Middleton, raises the important and interesting question whether a Police Magistrate is entitled, after conviction of an accused person tried before him, to receive proof of a previous conviction for an offence not coming within the categories indicated in section 68 of the Penal Code, in considering what sentence ought to be passed on the person so convicted. The appellant was charged

with, and convicted of an assault upon her daughter, a little girl. The learned Police Magistrate, on information received by him from the Police, charged her with, and she admitted a previous conviction for, a similar offence against her elder daughter, and he thereupon sentenced her to three months' rigorous imprisonment. That sentence was one within his ordinary jurisdiction in regard to offences of this kind ; but the Police Magistrate took account of the previous conviction in fixing the amount of it. If regard may properly be had to that conviction, the sentence is by no means excessive. Indeed, if the Police Magistrate had made it one of six months' instead of three months' rigorous imprisonment, I should not myself, in view of the evidence, have been disposed to interfere. The appellant contends, however, that a Police Magistrate, or for that matter any other Judge of first instance, has no right to take account of previous convictions at all, except under the circumstances indicated in section 68 of the Penal Code. That section has no application to a case like the present, for in the first place it admits previous convictions only for offences relating to the coinage and Government stamps and offences against property, and in the next place it provides, not for the infliction of increased punishment within the ordinary limits of the jurisdiction of the Court inflicting that punishment as regards the particular offence charged, but for enhanced punishment beyond those limits. There have been various decisions of single Judges in favour of the appellant's present contention. In *Reg. v. Alexander*[1] it was held by Lawrie J. that it is irrelevant to charge or prove previous convictions in a trial for an offence not belonging to one or other of the two classes expressly indicated by section 68 of the Penal Code, except for the purpose of placing an offender, by virtue of the provisions of Ordinance No. 17 of 1894, now superseded by Ordinance No. 7 of 1899, under police supervision. That case is directly in point, for the sentence against which the appeal was brought, although increased owing to the previous convictions, was within the ordinary jurisdiction of the court of trial as regards the offence charged. *Reg. v. Alexander*[1] was followed by Pereira J. in *Bastian Appu v. Davithamy*,[2] by myself in *Seneviratne v. Dias*,[3] and by Grenier J. in *Warusavitana v. Abiweera*,[4] and an authority to the same effect will be found in a decision of Withers J. in 236—P. C. Colombo, No. 8,137.[5] In the case of *Sinnetamby v. Elayatamby*,[6] Sir Joseph Hutchinson C.J. took a contrary view, and held that there is nothing in section 68 of the Penal Code to prevent the court of first instance, after the conviction of an accused person, from taking account of any evidence which may assist it in arriving at a correct decision as to what the proper punishment should be. I have myself had to reconsider the earlier

[1] *(1898) 3 N. L. R. 165.*
[2] *(1905) 1 Leem. 34.*
[3] *(1906) 3 Weer. 89.*
[4] *(1910) 3 Weer. 89.*
[5] *(1899) Koch 17.*
[6] *(1908) 3 A. C. R. Sup. X.*

July 17, 1911

WOOD RENTON J.

Nikapota v. Gunasekera

decisions since *Sinnetamby v. Elayatamby* [1], although not in any reported cases, and have had some doubt as to whether they were right.

The question is by no means free from difficulty, and I am fully alive to the risk, on which Mr. H. J. C. Pereira insisted in his argument on the appeal, of the occurrence of irregularities, not always of a trivial character, in inquiries of this kind. It would certainly be most hazardous in this country if the Courts were to receive and act upon evidence of the bad character of accused persons supplied off-hand by a court sergeant or some subordinate police officer. On the other hand, to exclude the courts of first instance from inquiring into the character of the accused persons after conviction can have no other result than to make it very difficult for them to punish intelligently. As was pointed out by the Lord Chief Justice of England in *Weaver's case*,[2] it has been in England, in considering sentences, the invariable practice to inquire into the prisoner's history in his own interest, and if in the course of that inquiry facts come out which damage him, the Judge ought to take notice of them. On the whole, I am not satisfied that there is anything in section 68 of the Penal Code, or in any other local enactment, to prevent the courts of trial in Ceylon from instituting similar inquiries, and from acting in the same way on their results.

There is no express enactment on the subject, and consequently, alike under section 100 of the Evidence Ordinance and section 6 of the Criminal Procedure Code, we are entitled to have regard to the law of England. It may be added that section 325 of the Criminal Procedure Code, which gives the Court power to release first offenders on probation of good conduct instead of sentencing them to imprisonment, itself recognizes an inquiry into the character and antecedents of the accused as permissible. I need scarcely add that any investigation conducted by a court of trial after conviction into the character and antecedents of an accused should be an investigation according to the rules of evidence. On the grounds that I have stated I would dismiss this appeal.

Appeal dismissed.

[1] *(1908) 3 A. C. R., Sup. X.*

[2] *(1908) 1 Cr. App. Rep. 13.*