1960 *Present :* **T. S. Fernando, J.**

THE ATTORNEY-GENERAL, Applicant, *and* P. KARUNARATNE and another, Respondents

S. C. 204—Application in Revision in M. C. Matale, 6,402

Appeal—Revision—Charge of causing hurt to a public servant to deter him from discharging his duty—Conduct of public servant without lawful authority—Acquittal of accused although guilty of minor offence of causing hurt—Failure of Magistrate to exercise his discretionary power to convict of minor offence—Remedy of prosecution—" Error in law or in fact "—Penal Code, ss. 323, 344, 314, 343—Criminal Procedure Code, ss. 129 (1), 183, 330 (1), 338, 357 (3).

By section 193 (1) of the Criminal Procedure Code—

> " When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence though he was not charged with it."

Held, that, if a Magistrate acquits the accused without exercising the discretionary power vested in him under section 183 (1) to convict the accused of the minor offence, the Attorney-General is not entitled to appeal from the order of acquittal, inasmuch as the failure to exercise a discretion vested in the Court does not constitute an " error in law or in fact " within the meaning of section 338 (1) of the Criminal Procedure Code. In such a case, however, the Supreme Court may exercise its revisionary jurisdiction.

APPLICATION to revise an order of the Magistrate's Court, Matale.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

S. B. Lekamge, for the accused-respondents.

Cur. adv. vult.

August 2, 1960. T. S. FERNANDO, J.—

This application by the Attorney-General to revise the order made in this case in the Magistrate's Court came to be made in the following circumstances.

The two persons accused were charged in the Magistrate's Court with the commission of the offences described below :—

(1) The 1st accused, for causing hurt to one R. W. Bandaranayake, the Village Headman of Attipola when the latter was engaged in the discharge of his duty—section 323 of the Penal Code ;

(2) The 2nd accused, for abetting the 1st accused in the commission of the offence above described—section 323 read with section 102 of the Penal Code ;

(3) Both accused, for using criminal force on the said Headman when the latter was engaged in the discharge of his duty—section 344 of the Penal Code.

The facts as accepted by the learned Magistrate were as follows :—

Bandarayake is the Village Headman of Attipola, and on 3rd September 1959 at about 6.30 p.m. a complaint was made to him by one Asoka Aluvihare that the 1st accused had abused him and that later the 2nd accused who is the brother-in-law of the 1st accused had come to his house and threatened him. After recording this complaint, the Headman in the company of Aluvihare, the complainant and another person, a villager, went along to the house of the 1st accused who happens to be a relative of the Headman. The latter went up to the 1st accused who was in the garden—the time was about 7 p.m. then—and explained to him the nature of the complaint. The 1st accused thereupon abused the Headman, calling him a son of a whore, and inquired whether he had taken sides in the matter. The abuse was followed up with blows aimed by the 1st accused on the back and right shoulder of the Headman. The 2nd accused who had been with the 1st accused at the time held the Headman in such a way that he was unable to retaliate or defend himself, and, while so held by the 2nd accused, the 1st accused dealt more blows on the headman. At a certain stage all three persons (the headman and the two accused) fell on the ground at which moment the 1st accused caused an injury to the sexual organ of the Headman.

In spite of the acceptance of the evidence of the witnesses for the prosecution and the rejection of the evidence of the accused persons, the learned Magistrate acquitted the accused of the charges on the ground that the Headman purported to investigate a non-cognizable offence and to do so lawfully he should have received an order from a Magistrate in terms of section 129 (1) of the Criminal Procedure Code. In doing so he followed the ruling contained in the old case of *Mudalihamy v. Isma* [1]. Learned Crown Counsel appearing before me did not question the correctness of the application by the Magistrate of the ruling of this court in *Mudalihamy's case* (*supra*). In answer to my inquiry why the procedure by way of appeal was not resorted to in the circumstances of this case, Crown Counsel submitted that an appeal was not competent as the Magistrate was correct in holding that the Headman had no lawful authority to investigate the offence. He argued that an appeal against a judgment of a Magistrate's Court being competent, in terms of section 338 of the Criminal Procedure Code, only in respect of any error in law or in fact, this case fell within the ruling of the Privy Council in the case of *Mohindar Singh v. The King* [2]. In that case Their Lordships of the Judicial Committee, interpreting the words "error in law or in fact" appearing in the corresponding section of the Code of Criminal Procedure of the Colony of Singapore, were of opinion that there was not sufficient justification for an interpretation of those words in any but the natural sense that they convey to one familiar with legal phraseology. Basing his

[1] *(1916) 19 N. L. R. 286.* [2] *(1950) A. C. 345.*

argument on this case Crown Counsel submitted that, as it is implicit in the learned Magistrate's findings of fact that the accused have committed an offence clearly calling for punishment, the Magistrate should have exercised the discretionary power vested in him by section 183 of the Criminal Procedure Code and convicted the accused of the minor offences of causing hurt, the abetting of the causing of hurt and of using criminal force respectively. I agree with the argument that the failure to exercise a discretion vested in the Court does not constitute an error in law or in fact, and that therefore no appeal was competent in this case. It follows therefore that no exception can be taken to the procedure of revision which was the only remedy available to the prosecution being invoked by the Attorney-General in the circumstances of this case.

Turning now to the question of the powers of the Supreme Court in the exercise of its revisionary jurisdiction, it has to be observed that section 357 (3) of the Criminal Procedure Code debars the conversion of a finding of acquittal into one of conviction. It is therefore necessary in the first place to consider what the acquittal by the learned Magistrate in this case implies. There can be no doubt whatsoever that the accused persons have been acquitted of the offences punishable under sections 323, 323/102, and 344 of the Penal Code respectively. Crown Counsel contends that they have not been acquitted of the minor offences of causing hurt (section 314), the abetting of the causing of hurt (sections 314/102) and of using criminal force (section 343) as the Magistrate never gave his mind to the question either of convicting or of acquitting them of these minor offences, and urges further that if he had given his mind to that question he would, in view of his findings of fact, without doubt have convicted them of the minor offences in the exercise of his discretion under section 183 of the Criminal Procedure Code.

I called Crown Counsel's attention to section 330 (1) of the Code which declares that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the *same offence* nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted under section 182. This subsection as reproduced above is capable of the interpretation that an acquittal on a charge of committing an offence is no bar to a prosecution for a minor offence as is referred to in section 183 of the Criminal Procedure Code, but I am deterred in placing such an interpretation (1) by the existence of illustration (*a*) to section 330 which recognises that an acquittal on a charge of committing a "major" offence implies also that the person concerned cannot later be proceeded against in respect of a minor offence which is considered as having been included in the "major" offence,

(2) by the practice of our courts and

(3) by certain decisions of the Indian Courts on the corresponding sections in the Indian Criminal Procedure Code. It may be useful in this

connection to quote from the judgment of one such case, *Bombay Government v. Abdul Wahab* [1], a decision of three judges of the Bombay High Court, in the course of which Chagla J. stated :—

> " The learned judge seems to take the view that section 403 (our section 330) only affords protection against the accused being tried for the *same offence* or for offences with which he might have been charged under section 237 (our section 182), but the section affords no protection against a new trial in respect of a minor offence under section 238 (our section 183). As we have pointed out, minor offences are included in the major offence, and if the accused is sought to be tried at a new trial on a minor offence, he would be tried for the *same offence* as provided by section 403, and the new trial would be barred by section 403. Therefore the protection given under section 403 does not merely apply to cases falling under section 237, but also to cases falling under section 238."

I agree with the argument of Crown Counsel that an illustration to a section must give way to the section itself if it is inconsistent with the latter, but as I have attempted to point out above there is doubt as to whether there is any inconsistency at all between the section and its illustration. One solution, however, of the problem I am confronted with on this application may lie in the view that what an accused person who has been acquitted of a " major " offence claims is not that he has been acquitted also of the minor offence, but that the law has placed a statutory bar to his further prosecution for the minor offence so long as the acquittal remains in force.

Whatever the correct view may be, i.e. whether it be that the acquittals entered by the Magistrate here include or imply also acquittals in respect of each of the three minor offences or whether it be that on a subsequent prosecution in respect of these minor offences the accused can plead a statutory bar, it seems to me that so long as the order actually entered stands subsequent prosecution is not competent.

As I am satisfied that the learned Magistrate did not give his mind to the question of convicting or acquitting the accused on the minor charges, and as I have already held that an appeal by the prosecution was not competent, there being no error in law or in fact but merely a non-exercise of a discretion vested in the Magistrate, I have arrived at the conclusion that the interests of public justice require that effect should be given to the Magistrate's findings of fact on the real cause of complaint in this case, viz. the assault, by exercising this Court's power of interference in revision. I am quite conscious of the need to exercise sparingly the jurisdiction of this Court to interfere with an acquittal by way of revision. However, as it is plain that the lower court for reasons outside the merits of the case in respect of the assault has really declined to decide the controversy and has dealt with matters which really do not dispose of the

[1] *A. I. R. (1946) Bomb. 38.*

complaint before it, I am satisfied that interference by way of revision will be proper in this case, the more so as the prosecution would otherwise be left without any remedy.

In spite of the findings of fact reached by the learned Magistrate, section 357 (3) of the Criminal Procedure Code debars this Court from converting the order of acquittal to one of conviction. In the circumstances I set aside the order complained against in so far as it may be said to affect the minor charges referred to above and direct that the proceedings in this case be continued by the two accused persons being tried before another Magistrate on the charges indicated below :—

(1) *1st accused*—on a charge of voluntarily causing hurt to Bandaranayake, Village Headman . . . . punishable under section 314 of the Penal Code.

(2) *2nd accused*—on a charge of abetting the 1st accused in the commission of the above offence . . . . punishable under section 314 read with section 102 of the Penal Code.

(3) *1st and 2nd accused*—on a charge of using criminal force on the aforesaid Bandaranayake, Village Headman . . . . punishable under section 343 of the Penal Code.

Order varied.