1939

Present : **Nihill J.**

ABDUL MAJEED *v.* CASSIM.

520—M. C. Badulla, 28,485.

Criminal procedure—Proceedings on written report of headman—Discharge of accused—Power of Magistrate to reopen case—Criminal Procedure Code, s. 191 (Cap. 16).

A Magistrate has no power to reopen proceedings in a case where the accused has been discharged under section 191 of the Criminal Procedure Code or by an order which in its legal effect is an order under that section.

APPEAL from a conviction by the Magistrate of Badulla.

W. E. Abeykoon, for accused, appellant.

No appearance for respondent.

Cur. adv. vult.

December 19, 1939. NIHILL J.—

In this case proceedings started on a written report dated November 7, 1938, by a Headman in terms of section 148 (1) (*b*) of the Criminal Procedure Code. On the same day the Magistrate recorded as follows:— "Arachchi not proceeding, accused discharged, cite compliant for 21.11.38."

I do not follow why the learned Magistrate thought it necessary to cite the complainant to appear. Since these proceedings did not begin by way of summons issued on a compliant, the Magistrate's discharge order was not an acquittal under section 194 of the Code, that is to say pursuant to section 148 (1) (*a*), but in its legal effect was an order under

[1] *(1938) 12 C. L. W. 162.*

[2] *(1938) 18 C. L. Rec. 120.*

section 191. This being so, the Magistrate had no power to reopen the proceedings when the complainant, on whose complaint the Headman's report had been based, did put in an appearance.

On this ground alone the conviction cannot stand, for there is ample authority to show that whilst an order of discharge cannot be availed of for the plea of *outrefois acquit* in the event of a fresh prosecution, a Magistrate has no power to reopen proceedings in a case where the accused has been discharged under section 191 of the Criminal Procedure Code, or by an order which in its legal effect is an order under that section. (*Sethu Caruppen v. Odaiyar* [1].)

I have also been urged by Counsel for the appellant to acquit the accused on the grounds that the facts put before the Magistrate for the prosecution, even if taken at their highest, fail to prove a charge of theft. It is submitted that even if the rice was taken by the accused out of the complainant's possession, it was not taken "dishonestly" within the meaning of sections 366 of the Penal Code, since it was taken to satisfy a debt admittedly due to the accused from the complainant.

I do not think however that the facts in this case entitle me to reach this conclusion. It was clearly established that the complainant did owe Rs. 12 odd to the accused, and that the accused warned him that if he did not pay at once he was going to his store to remove the paddy. But if the prosecution evidence is true, the accused took advantage of the complainant's absence from town to go to his store and remove twenty bushels of paddy which at the then current price of Re. 1.50 per bushel was a quantity much in excess of the debt due to him.

Putting this at its best, this was a most high-handed exercise of a mistaken right to enforce payment and in view of the quantity alleged to have been taken, I do not think it is possible to conclude that there was clearly no dishonest intent in the accused's mind. He may have seized the occasion to inflict a wrongful loss on the complainant and a wrongful gain to himself. Furthermore, the accused's defence does nothing to allay this suspicion.

The facts are clearly distinguishable from the case of *Ponnu v. Sinnatambi* [2], which was cited to me, for there the accused removed the complainant's cattle from a gazing ground of which they were the renters because the complainant owed them grazing fees. The cattle were not even in the complainant's possession at the time. Indeed in that case it appears to me that it might have been shown that the accused merely removed the animals from a place they had no right to be in.

For these reasons although I allow the appeal and set aside the conviction, I make no order which would put the accused beyond the jeopardy of another trial. At the same time I do not go so far as to say that the ends of justice demand a further prosecution in this case. In its origin the matter arose over the matter of a debt between two traders and certainly justice will not be outraged if the two now come together and make an amicable settlement. In the event however of a fresh prosecution being instituted, the case should go before another Magistrate.

Set aside.

[1] *11 C. L. W. 110.*

[2] *24 N. L. R. 248.*