1947 *Present :* **Dias J.**

VARGHEES, Petitioner, *and* WIJESINGHE (S. I., Police), Respondent

164—In revision, M. C. Colombo, 26,317

Plea of autrefois convict—*Scope of Criminal Procedure Code, s. 330 (4).*

The accused was charged, under section 315 of the Penal Code, with causing hurt, and was convicted and sentenced. Thereafter, after he had served his sentence, a fresh plaint was filed on the self-same facts charging him, under section 300 of the Penal Code, with attempt to murder.

Held, that the plea of *autrefois convict* was available to the accused and that the case fell under section 330 (1), and not under section 330 (4), of the Criminal Procedure Code.

APPLICATION, in revision, to quash certain proceedings in the Magistrate's Court, Colombo.

Mahesa Ratnam, for the accused, petitioner.

J. G. T. Weeraratne, C.C., for the Attorney-General.

Cur. adv. vult.

May 16, 1947. DIAS J.—

The material facts are as follows :—

On August 5, 1946, the police produced the petitioner before the Magistrate alleging that he had stabbed one D. A. Pedris with a knife and asked for a remand pending the report of the Judicial Medical Officer in regard to the injuries. The evidence shows that Dr. Mendis operated on the injured man on August 3, 1946, when it was discovered that he had sustained an incised wound on the neck going through the floor of the mouth and cutting the tongue. It was a very serious injury because the doctor stated that had not the bleeding been arrested, it is possible that the injured man might have died. Therefore before the plaint was filed the authorities knew or should have known that the injury endangered life and was at least an offence under section 317 of the Penal Code and not summarily triable by a Magistrate.

The Police filed a plaint in M. C. Colombo, case No. 19,263, against the petitioner on August 8, 1946, charging the petitioner with causing simple hurt (section 315). The petitioner on being charged pleaded guilty and was remanded for identification and sentence.

Counsel appearing with the Police then moved that the sentence be stayed until the doctor could be examined. On September 2, 1946, the doctor gave evidence and the petitioner was sentenced to undergo rigorous imprisonment for a term of six months and to pay a fine of Rs. 100. I was informed that this sentence the petitioner has served and that the fine has been paid.

No application was made by the prosecutor to the Supreme Court to revise the proceedings in case No. 19,263, on the ground that the evidence disclosed a graver offence than one under section 315.

Thereafter in M. C. Colombo, case No. 26,317, the police on March 17, 1947, filed a fresh plaint on the self-same facts charging the petitioner with attempting to murder D. A. Pedris—section 300 of the Penal Code. When the petitioner appeared he raised the plea of *autrefois convict*. The Magistrate rejected that plea on the ground that under section 330 (4) of the Criminal Procedure Code such a plea was not available to the petitioner. It is from that order that the present application is made.

Section 330 of the Criminal Procedure Code is identical with the provisions of sections 403 of the Indian Criminal Procedure Code, except that certain illustrations appended to the Indian enactment have been omitted from the Ceylon enactment.

Section 330 (1) lays down the general rule—*Nemo debet bis pro eadem culpa puniri*. Therefore, a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence is not liable to be tried again either (*a*) for the same offence, or (*b*) on the same facts (i) for any other offence for which a different charge from the one made against him might have been made under section 181, or (ii) for which he might have been convicted under section 182. *Illustrations* (*a*), (*d*) and (*e*) exemplify this general rule. Then follow three exceptions to the general principle. A person acquitted or convicted of any offence may be afterwards tried for any " distinct " offence for which a separate charge might have been made against him on the

former trial under section 180 (i). *Illustration* (b) shows the working of this exception. *A robs his victim and murders him. A is charged for* murder and acquitted. He can thereafter be charged for the "distinct" offence of robbery. As one's experience of the Assize Court shows, the offence of voluntarily causing hurt with a knife under section 315 of the Penal Code is not a "distinct offence" from murder in this sense, as juries are frequently charged and often find a person charged with murder guilty of the "lesser offence" of voluntarily causing hurt. I do not think that the offence of voluntarily causing hurt is a "distinct" offence from the offence of attempted murder, but is included within it as a minor offence. The second exception to the general rule is contained in section 330 (3) and is exemplified by *illustrations* (c) and (e). A is charged for causing grievous hurt to B and is convicted. B thereafter dies in consequence of the injury caused to him. A can thereafter be charged for murder. The reason for this exception is that new consequences had transpired or *were not known to have happened* at the time when A was convicted. It follows that if the consequences had happened or were known to the Court or *should have been known to the Court at the time when A was convicted*, the case will not fall within the exception, but would be caught up under the general rule, and a plea of *autrefois convict* would prevail--see *Illustration* (e). In the case under consideration, at the time this petitioner was convicted by the Magistrate all the consequences of the petitioner's acts had ensued, and the Court and the prosecutor were well aware of them. It was quite clear that the act of the petitioner amounted, not to the offence of voluntarily causing simple hurt under section 315 of the Penal Code, but the more serious offence of causing grievous hurt (section 317) or possibly attempted murder (section 300). If the authorities considered that the Magistrate had no jurisdiction to try and sentence the offender, an application might have been made to this Court to revise the proceedings by quashing all the proceedings and ordering the Magistrate to commence non-summary proceedings against the petitioner. This was not done.

It is now sought to bring the case under the provisions of the third exception under section 330 (4). This sub-section reads :

> "A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for *any other offence* constituted by the same acts which he may have committed, *if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.*"

There are no illustrations exemplifying this exception. The illustrations in the Indian Criminal Procedure Code under this sub-section have been omitted because they are inappropriate.

Under section 403 of the Indian Criminal Procedure Code there are two illustrations numbered (*f*) and (*g*) which exemplify the exception created by sub-section 4. They read as follows :—

> (*f*) A is charged by a Magistrate of the second class with, and convicted by him of theft of, property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(*g*) A, B and C are charged by a Magistrate of the first class with, and convicted by himself of, robbing D., A., B and C may afterwards be charged with, and tried for, dacoity on the same facts.

Certain Indian cases have been cited to me, but no case has been cited where an accused who was *convicted* was allowed to be retired *on the same facts* for a graver charge. It appears that in India there are Judges with "first class powers" and Judges with "second class powers" and frequently the latter assumed jurisdiction and tried offenders who should have been dealt with by the former. In the case of *In re Josier*[1] a Judge with second class powers acquitted the accused. He was then recharged before a Judge with first class powers. It was held that *illustrations* (*f*) and (*g*) to section 403 of the Indian Criminal Procedure Code made it clear that if the second charge is in regard to an offence which the first trial Judge could not try, the acquittal or conviction of the accused in regard to a minor offence was no bar to the subsequent charge. In *R. v. Hakim Khan*[2] the Magistrate acquitted the accused of the offence of forgery. He was then committed for trial before the Court of Sessions for the forgery of a valuable security. On the plea of *autrefois acquit* being raised, it was held that the illustrations to section 403 of the Indian Code show that a person acquitted or convicted in the circumstances of the case may be charged with and tried for the more serious offence. In *Viran Kutti v. Chiyamu*[3] the Magistrate "split up" a charge of dacoity and convicted the accused of rioting, using criminal force and misappropriation. The Court of Sessions quashed this conviction holding that the offence disclosed was dacoity. The Court of Sessions also held that the evidence for the prosecution was incredible. Thereupon the complainant filed a fresh plaint charging the accused with dacoity. On the plea of *autrefois acquit* being raised, it was held that *illustration* (*g*) to section 403 was conclusive, and that the Magistrate could entertain the plaint. In *R. v. Singh*[4] the accused was charged under section 498 of the Indian Penal Code for taking away a girl from the custody of a certain person with the intention of committing illicit intercourse with her and was detaining her in his house. He was acquitted of this charge. He was later charged on the same facts under sections 363 and 366 of the Indian Penal Code (local—kidnapping—section 354, and kidnapping to compel a girl to marry—section 357). The Magistrate who acquitted the prisoner was not competent to try the charge under section 366 of the Indian Penal Code, but he had jurisdiction to try the charge under section 363. It was held that the plea of *autrefois acquit* availed the prisoner in regard to the charge under section 363 but that it did not avail him in regard to the charge under section 366. In *R. v. Dankarji*[5] the accused was charged with the offence of forgery and was acquitted. He was subsequently charged for uttering a forged document on the same facts. It was held that the case fell within the provisions of section 403 (2) of the Indian Code, and this is the *ratio decidendi*. It was stated that the case also fell under the provisions of section 403 (4) as the acquitting Court had no jurisdiction.

[1] *(1917) 18 Cr. L. J. 643*
[2] *(1918) 19 Cr. L. J. 388*
[3] *(1884) 7 Mad 557*
[4] *(1928) 29 Cr. L. J. 760*
[5] *(1915) 40 Bom 97*

The only local case which has a bearing on the question raised is *R. v. Fernando*[1]. In that case the Attorney-General committed the accused to the District Court for the offence of robbery (section 380, Penal Code). The evidence disclosed that the accused had committed the more serious offence of robbery with hurt (section 382) which at that date was punishable only by the Supreme Court. The prisoner was convicted by the District Judge, and in appeal the question was raised whether the Attorney-General could pick out for trial a lesser offence when the evidence disclosed a greater. It was held that the Attorney-General had wide powers, and that it was the duty of the District Judge to try the Attorney-General's indictment. That was the *ratio decidendi.* In the course of his judgment Wendt J. said "As to the argument that the graver offence committed would thus escape punishment altogether, it may be pointed out that under section 330 (4) of the Procedure Code, the accused would be liable to be tried again for the offence under section 382 of the Penal Code". In my opinion this was an *obiter dictum* which was not necessary for the decision of the question before the Court. Furthermore, the law has since been amended and while it is not illegal to convict an accused under each of two counts charging him with offences under sections 380 and 382 of the Penal Code, it is improper to impose *consecutive* sentences because the offence under section 380 is included in the offence under section 382—*In Revision D. C. Criminal Colombo, No. 4,427*[2]

It is clear that unless the present case can be brought within the ambit of ection 330 (4) of the Criminal Procedure Code, the general rule will apply and the plea of *autrefois convict* must prevail. Can it be said that the case fairly falls within the provisions of section 330 (4) ?

It has been held in a series of cases that a Magistrate may not choose a lesser offence for summary trial when the facts disclose the commission of a graver offence—*Nagamma v. Themis Singho*[3]. If the Magistrate cannot do this, *a fortiori* the prosecutor cannot do so either.

At the date the first plaint was filed and before the petitioner was sentenced, the prosecutor knew or should have known, had he been diligent, that the medical evidence showed that the offence committed by the petitioner was one graver than the offence with which he was, in fact, charged. The prosecutor should have known that the offence "constituted" by the acts of the petitioner was not that of voluntarily causing simple hurt with a knife under section 315 of the Penal Code, but the graver one of voluntarily causing grievous hurt under section 317 of the Penal Code, and possibly might even amount to the offence of attempted murder under section 300 of the Penal Code. Neither of the latter offences is summarily triable by the Magistrate. Therefore, the prosecutor by his own conduct misled the Magistrate into assuming a summary jurisdiction which, in fact, he dd not possess to deal with this case. The Magistrate has wrongly assumed that summary jurisdiction and convicted the

[1] *(1905) 8 N. L. R. at p. 357.*
[2] *Supreme Court Minutes of October 27, 1916.*
[3] *(1911) 1 Court of Appeal Cases 56 (Two Judges)* and see *Baiya v. Nikulas (1906) 1 A. C. R. 49, Gaffoor v. Carolis 1 Browne 108, Nadan v. Assari (1916) 2 C. W. R. 104, Samaranayaka v. Thabrew (1917) 4 C. W. R. 331, Sirinaris v. James (1901) 5 N. L. R. 93, &c.*

petitioner who has served his sentence, when all the time the evidence clearly showed that the offence "constituted" by the petitioner's acts was a graver non-summary offence. I do not think it now lies in the mouth of the prosecutor to say that some other offence is constituted by the acts of the petitioner, and put him in peril for a second time.

I hold that on the facts of this case, the applicability of section 330 (4) is ousted. The case comes under the general principle enunciated in section 330 (1), and the plea of *autrefois convict* is entitled to prevail. I, therefore, quash all the proceedings in M. C., Colombo, case No. 26,317 and direct that the petitioner should be forthwith discharged from these proceedings.

Proceedings quashed.