1932

Present : **Akbar J.**

FERNANDO *v.* DE JONG.

179—P. C. Colombo, 36,771.

Appeal—Complainant not served with notice—Acquittal of accused—No Order to prejudice of Complainant—Criminal Procedure Code, s. 345.

The acquittal of an accused person upon an appeal of which the complainant has not received notice is not an order to the prejudice of the latter within the meaning of section 345 of the Criminal Procedure Code.

APPEAL from a conviction by the Police Magistrate of Colombo.

E. F. N. Gratiaen, for accused-appellant.

May 30, 1932. AKBAR J.—

The only difficulty I had in hearing this appeal was the fact that no notice of this appeal has been served on the complainant, the Fiscal's return showing that the complaintant had gone to England. I decided, however, to hear the appeal because under secion 345 of the Criminal Procedure Code in a case of this kind where the complainant has not been served with notice of the appeal the only limitation is that I can make no order to the prejudice of the complainant, which I interpret as meaning some order by which he has to pay money or by which he suffers some damage. Therefore, under this section I think I can hear this appeal and an acquittal of the accused would not be an order to the prejudice of the complainant as contemplated by the section.

The accused was charged with the offence of criminal intimidation on the night of February 18 this year at 11 P.M. An affidavit has been submitted to me which is borne out by what appears on the record showing that the accused's counsel, Mr. Weerakoon, who had appeared for him the day before and had got a postponement of the case to enable him to bring about a settlement, at the last minute stated to the Court that he withdrew from the case because his client refused to listen to his advice. I think this was an improper statement to make to the Court because it can only mean that the accused's counsel had advised him to plead guilty and that he had refused to take his advice ; such a statement would at once prejudice the mind of the Court against the accused. However that may be, the accused asked for time to retain counsel, and his affidavit states that he asked for two hours' time to retain and instruct another lawyer. His petition of appeal states as follows :—

> " When my proctors, Messrs. Weerakoon and Georgez, let me down at the last moment, I asked the Magistrate two hours' time to secure another counsel, and also stated that I hadn't a minute's sleep nor a morsel of food since the night, previous, and this was denied me."

It was in my opinion a very reasonable request because the Magistrate must have seen for himself that Mr. Weerakoon had thrown

up his brief at the last moment in a criminal case. The postponement was refused by the Magistrate who made order as follows :—

"The case was fixed for 11 A.M. to-day and moreover witnesses are present."

In a criminal case it is not so much the convenience of witnesses that should be kept in mind as the prejudice to the accused because every accused must be presumed to be innocent until the charge is proved. If the statement made in the petition of appeal is correct, namely, that he mentioned to the Court that he had not a minute's sleep nor a morsel of food since the night previous, it must have been obvious to the Magistrate that the accused was distraught at the moment and that it was not reasonable to ask him to conduct his own defence. That this was what happened is proved from the record. The accused has put questions which appear to be outside the issues involved in the case and which show that he must have been very much put out at the turn which the case had taken. I need not specify the very irrelevant sometimes foolish, questions, which the accused put to witnesses apparently because he had not full control of himself at the time.

When the case for the prosecution was closed section 296 of the Criminal Procedure Code is specific, namely, that when the Court calls upon an accused for his defence, if he is not represented by counsel, it is the duty of the Court to inform him of his right to give evidence on his own behalf and if he wishes to give evidence on his own behalf it is the duty of the Court to call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them. The affidavit submitted by the accused shows that this was not done by the Court and that is corroborated by the record because it is a rule of this Court that such a course if taken by the Court must be indicated on the record. The record is silent on the point and, therefore, I must presume that the Magistrate has not carried out the imperative provisions of section 296 of the Criminal Procedure Code. So that the accused not knowing the specific points against him and having nobody to advise him on the law has, if I may say so, contributed to a waste of the Court's time by calling evidence haphazard and irrelevant, which time might have been saved if the Magistrate had given him the two hours postponement. He called ten witnesses besides giving evidence himself. The Court Inspector was suddenly pounced upon by him and put into the witness-box. An undertaker has given evidence, his chauffeur has given evidence, and even the wife of the complainant and the brother of the complainant were called.

It is quite apparent to me from the record that the accused was in a highly tense state of feeling at the time judging from the questions put by him and the evidence given by him. In one place he says: "I hope that my mines have brought me colossal fortune by the help of the Almighty." The learned Magistrate in his judgment states that the case for the prosecution is proved by the evidence of these random witnesses whom the accused himself put into the witness-box, namely, Inspector South, who testified to the fear which the accused had caused in the complainant just before the trial. The learned Magistrate

has forgotten that the charge was not in regard to what took place in the Police Court before the trial, but in regard to what took place on the night of February 18. Further, the learned Magistrate says as follows :—

"In addition accused in Court to-day said to the complainant, 'If you had come near me you would not have been alive to-day.'"

The learned Magistrate regards this as an inevitable confession of guilt showing the guilt of the accused on the night in question I do not think this is a fair test because, to take an extreme case, the accused's mind may have been unhinged by the mere fact that he was charged in Court and yet the charge may be false or exaggerated.

I think I have stated enough to prove that the accused should be given another chance to prove his defence with the aid of competent lawyers, who will know how to put their questions and call the proper witnesses.

I do not think the complainant will be prejudiced by the order I am going to make, namely, that the conviction and sentence be set aside and the case sent back for a retrial before another Magistrate if the complainant at any time within the prescriptive period provided by the Criminal Procedure Code decides to proceed with the charge.

sent back.