

1950

Present: Swan J.

PREMADASA, Appellant, and COOKE, Respondent

S. C. 377—M. C. Anuradhapura, 2,531

Autrefois acquit—First charge framed for offence under Penal Code—Second charge, on same facts, for offence under Motor Car Ordinance—Criminal Procedure Code (Cap. 16) S. 330—Interpretation Ordinance (Cap. 2) S. 9.

The acquittal of an accused person in a prosecution for causing hurt by a rash or negligent act punishable under Sections 328 and 329 of the Penal Code is not a bar to the subsequent trial of the accused, on the same facts, for reckless and negligent driving in contravention of section 88 of the Motor Car Ordinance.

**A**PPEAL from a judgment of the Magistrate's Court, Anuradhapura.

*H. W. Tambiah*, with *J. C. Thurairatnam*, for the accused appellant.

*Ananda Pereira*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

September 20, 1950. SWAN J.—

The accused in this case was charged under the Motor Car Ordinance with having driven Motor Bus Z 3321 (a) *recklessly*, or in a *dangerous manner*, in breach of Section 88 (2) and (b) *negligently*, in breach of Section 88 (3). He was convicted and sentenced to pay a fine of Rs. 200 on each count and his certificate of competence was suspended for two years.

The accused had been previously charged in respect of the same incident in case No. 1533 of the same Court under Sections 328 and 329 of the Penal Code with:—

- (1) causing grievous hurt to one A. Leelawathie by doing an act so rash as to endanger human life, to wit, by driving bus Z 3321 (a) *recklessly*, and (b) *at an excessive speed* ;

- (2) *alternatively* causing grievous hurt to A. Leelawathie by doing an act so negligent as to endanger human life, to wit, by driving bus Z 3321 (a) *without due care and precaution*, (b) *at a speed which was excessive in the circumstances* ;
- (3) causing hurt to one K. G. G. Martin in the same circumstances as set out in (1);
- (4) *alternatively* causing hurt to K. G. G. Martin in the same circumstances as set out in (2).

After trial he was acquitted and discharged. Mr. Thambiah submits that, in these circumstances, the plea of *autrefois acquit* which was taken on behalf of the accused at this trial should have succeeded.

Mr. Thambiah's argument is that under Section 180 the accused could have been charged with an offence under the Motor Car Ordinance at the first trial. Even if that charge had not been specifically framed it was open to the Magistrate at that trial under Section 182 to have convicted the accused "of the offence which he is shown to have committed although he was not charged with it". In these circumstances Section 330 (1) would apply.

Section 330 (1) of the Criminal Procedure Code reads as follows:—

" 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.* "

I think it would be best to reproduce Sections 181 and 182. Section 181 says:—

" If a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with all or any one or more of such offences, and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment, or he may be charged with having committed one of the said offences without specifying which one. "

And Section 182 says:—

" If in the case mentioned in the last preceding section the accused is charged with an offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section he may be convicted of the offence which he is shown to have committed although he was not charged with it. "

Superficially it may appear that the accused might have, at the previous trial, been charged with an offence under the Motor Car Ordinance. But when one examines Section 178 of the Criminal Procedure Code one begins to doubt whether the joinder of charges was possible, for section 178 provides that "for every *distinct* offence of which any person is accused there shall be a separate charge and every such charge shall be separately tried except in the cases mentioned in sections 179, 180, 181 and 184.

In my opinion, an offence contravening certain regulations of the Motor Car Ordinance could not have been tried with an offence of causing hurt by a rash or negligent act punishable under Sections 328 and 329 of the Penal Code. The former offence is not merely *different* but *distinct* from the latter, and joinder of such charges is clearly contrary to Section 178. In these circumstances, the section that governs the matter would be 330 (2) which provides that "a person acquitted or convicted of an 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 sub-section (1) of section 180."

There is also Section 9 of the Interpretation Ordinance to be considered. It provides that "where any act or omission constitutes an offence under two or more laws, whether either or any of such laws came into force before or after the commencement of this Ordinance, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws, but shall not be liable to be punished twice for the *same* offence." Here, too, the emphasis is on the word *same*; if the offence is *distinct* a second charge can be framed.

I regret I am unable to agree with the decision in *Maksudan Mistry v. King Emperor*<sup>1</sup>. There Jwala Prasad J. held that an acquittal of an accused person under Section 338 (= our 328) of the Indian Penal Code was a bar to the trial of the accused on the same facts under Section 16 of the Motor Car Act. I agree with the learned Judge that the availability of fresh evidence can in no way affect a plea of *autrefois acquit or convict*, but I cannot agree that an offence under the Motor Car Act is not a distinct offence for which a separate charge might have been made.

Dealing with the facts I do not think the learned Magistrate could, on the evidence, have convicted the accused of reckless or dangerous driving under count (1). The evidence, however, justifies the conviction of the accused on count (2). In view of the fact that the evidence did not support the charge of reckless or dangerous driving I do not think that the suspension of the accused's certificate could be justified. In the result I set aside the conviction and sentence on count (1), as well as the order suspending the accused's certificate of competence. The conviction and sentence on count (2) are affirmed.

*Conviction on count (1) set aside.*

*Conviction on count (2) affirmed.*

<sup>1</sup> (1921) A. I. R. Patna 22.