1948 *Present :* Nagalingam J.

DANIEL SILVA, Appellant, *and* VANDEN DRIESEN (Inspector of Police), Respondent

S. C. 786—M. C. Nuwara Eliya, 2,646

Penal Code—Mischief—Damage to car as a result of intoxication—Section 408.

Where damage is caused to a car as a result of its being driven by a person in a state of intoxication, such person cannot be said to have committed mischief.

APPEAL from a judgment of the Magistrate, Nuwara Eliya.

U. A. Jayasundera, for the accused, appellant.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 31, 1948. NAGALINGAM J.—

The appellant in this case was charged with having committed theft of a motor car or in the alternative with having committed mischief in respect of it. After trial, the learned Magistrate acquitted him of the charge of theft but convicted him of having caused mischief. Counsel appearing for him takes the point that, on the facts as found by the learned Magistrate, the offence of mischief is not disclosed.

The conclusion reached by the learned Magistrate on the facts may be summarised very briefly as follows :—The appellant and the driver of the car in regard to which the offence was alleged to have been committed appear to have had drinks earlier in the day, and later the appellant drove the car from where it was halted in the direction of a tavern in order to obtain further supplies, and in the course of his driving the car he met with an accident due to the circumstance that as a result of the liquor he had imbibed he was not in a condition to drive the car with reasonable care. In this state of facts the question, then, is : Has the offence of mischief been made out ?

There are two essentials requisite to constitute the offence of mischief under our law. One is *mens rea*, and the second is an act which causes the destruction of property. In regard to the first requisite, which is the mental element, the section enacts one of two alternatives, either an intent to cause wrongful loss or damage, or knowledge that the offender is likely to cause wrongful loss or damage. It is conceded on behalf of the prosecution that the element of any intent to cause loss or damage is lacking but it has been argued that the appellant must be held to have known that he was likely to cause loss or damage. It is urged that where a man, the worse for liquor, although not so far gone as to make him incapable of knowing the nature of his acts, takes another's car and attempts to drive it, he must be held to have knowledge that by his act he was at least likely to cause damage to the vehicle. I cannot subscribe to this proposition because, to my mind, it is neither the proper nor reasonable inference to be drawn from the facts. The more correct view would appear to be that the offender continues in the belief that his physical and mental powers are normal and that if any thought crosses his mind as to any impaired state of his physical and mental powers he would assume that his faculties are not so impaired as to prevent him from exercising a proper and sufficient control over the vehicle. Nothing could have been further from his mind than that he would not be able to control the vehicle or that he would get involved in an accident and, in any event, to such a man it is not possible to ascribe knowledge that by his driving the car he was likely to cause damage to it. It cannot therefore be said that when the appellant drove the car he had knowledge that he was likely to cause damage to the car by his driving. The mental element required, therefore, fails.

In regard to the actual act itself, it is necessary to observe that the primary objective of the act must be the destruction of the property. It would be insufficient, to satisfy the requirement of the section, merely to establish that, in doing an act the object of which was not to cause destruction of property, damage to or destruction of property had been caused. The term " destruction " in this section involves more than the bare idea of damage or destruction to property. It involves the idea of destruction of property out of a sense of malice, ill-will or spite, or even wantonly, but where the damage to property is caused as a result of negligence or recklessness in driving a vehicle, the elements of malice, ill-will, spite or wantonness are negatived. Besides, as stated earlier, it is essential that the destruction of property must be the primary motive in doing the act which causes the damage to property. In other

words, the damage to or destruction of property must be intended to result from the act itself. Damage to or destruction of property that results as a remote consequence from an act which is not intended to cause damage to or destruction of property cannot be regarded as destruction of property within the meaning of the section. The driving of a car with the object of obtaining further supplies of liquor can in no sense be said to have for its objective the destruction of or damage to the car ; the damage caused to the car was occasioned by negligence and was neither intended nor anticipated. The second requisite too is, therefore, absent in this case.

The charge of mischief too against the appellant fails. The conviction is set aside and the accused is acquitted.

Accused acquitted.