1947 *Present :* **Jayetileke J.**

GHOUSE, Appellant, *and* ELIATAMBY (Inspector of Police), Respondent.

S. C. 793—M. C. Colombo, 29,982.

Criminal Procedure Code—Section 325—When order may be made under that section—First offender—Sentence of imprisonment.

An order can be made under section 325 of the Criminal Procedure Code only where the offence committed is a trivial one.

The principle that first offenders should not be sent to jail is not one that should be applied where the offence committed is of a grave nature.

APPEAL from a judgment of the Magistrate, Colombo.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen, K.C.*, and *S. J. Kadirgamar*), for the accused, appellant.

Boyd Jayasuriya, C.C., for the Attorney-General.

Cur. adv. vult.

November 7, 1947. JAYETILEKE J.—

The accused was charged under section 345 of the Penal Code with having used criminal force to a young lady with intent to outrage her modesty. He pleaded guilty to the charge, and was sentenced to undergo six months' rigorous imprisonment.

The facts appear in the statement P 1 made by the lady to the Police which was read in evidence, by consent, after the accused's plea was recorded, and was admitted by Counsel for the accused to be correct.

P 1 shows that, when the lady was returning home on a bicycle from the office in which she worked, the accused rode up to her on a bicycle from behind, at a somewhat lonely spot, and molested her.

The accused appealed against the sentence, and also made an application to have the sentence revised. The appeal and the application were listed for hearing together.

It appears from the affidavits that are before me that the accused is 18 years of age, that he belongs to a respectable family, that he has borne a good character, and that, at the date he committed the offence, he was attending the Royal College.

Mr. Perera made an appeal to me to deal with the accused as a first offender under section 325 of the Criminal Procedure Code. The proceedings show that a similar appeal was made to the Magistrate. The Magistrate was of opinion that the offence was one of such gravity that it was necessary to impose a heavy penalty so that it may act as a deterrent. He says :—

> "If it be known that these youths could go about committing these acts of indecency, the public roads will not be safe for women."

The offence is one which is punishable with imprisonment, of either description, for a period of two years, and with whipping, and I agree with the Magistrate that it is one of great gravity. In view of the gravity of the offence, I do not think I have the power to release the accused, without immediate punishment, under section 325 of the Criminal Procedure Code. It seems to me that an order can be made under that section only where the offence that has been committed is a trivial one.

There is hardly any difference in phraseology between that section and the corresponding section of the Probation of Offender's Act, 1907, of England. The latter section reads :—

> "1.—(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—
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> (i.) dismissing the information or charge
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> (ii.) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.
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> (2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing

a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

(3) The court may, where it makes an order under this section, further order that the offender shall pay such costs of the proceedings, or such damages for injury or compensation for loss (not exceeding in the case of a court of summary jurisdiction twenty-five pounds, or, if a higher limit is fixed by any enactment relating to the offence, that higher limit), as the court thinks reasonable, or both such costs and damages or compensation.

(4) Where an order under this section is made by a court of summary jurisdiction, the order shall for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner and as to the payment of money upon or in connexion with such restitution or delivery, have the like effect of a conviction."

Kenny in his "Outlines of Criminal law" says at pages 603 and 604 :—

"This lenient release is not appropriate where the first offence is one of great gravity, like coining or forgery or doing grievous bodily harm. Its indiscriminate application is apt to produce in the locality an impression that every person may commit *one* crime with impunity . . . . Obviously this light treatment must have some tendency to encourage crime ; both by the offenders' prospect of comparative immunity and also by the victim's reluctance to undertake the trouble of prosecuting for a result so slight."

On page 603, there is a footnote which reads :—

"On October 26, 1925, the Court of Criminal Appeal in two bad cases of theft by first offenders confirmed the sentences of nine months and of twelve months ; and one of three years' penal servitude for a second conviction."

Mr. Perera invited my attention to the passage so often quoted from Bertram C.J's judgment in *Gunasekera v. Solomon*[1], that the policy of the law is that first offenders should, so far as possible, not be sent to jail.

The facts of the case in which that observation was made show that the offence was quite a trivial one. The charge was one of theft, and the Magistrate was of opinion that the accused was bent not so much on stealing as on causing annoyance or injury to the complainant. On appeal, the accused was acquitted of theft, but was convicted of criminal intimidation. I find it quite impossible to take the view that Bertram C.J. intended that observation to apply to grave cases. In *Gunasinghe, Sub-Inspector of Police v. Perera*[2], Abraham C.J. said :—

"Courts ought not to regard it as a rule that first offenders are not to be sent to prison where crimes of violence are concerned."

[1] *(1923) 25 N. L. R. 474.* [2] *S. C. No. 688—S. C. Minutes of 10.11.37.*

Mr. Perera also urged that, for the first offence committed by the accused, the sentence that was imposed by the Magistrate is too severe. P1 shows that the lady had often met the accused on the road, and that, on those occasions, he did nothing to offend her. He did not dog her steps or pursue her. In these circumstances, it may be possible to accept the view put forward by Mr. Perera that the act of the accused was an impulsive act. Having regard to the previous character of the accused, which has been put in issue, and has not been challenged, I think I will be justified in making a substantial reduction in the sentence. I would direct that the accused be sentenced to undergo simple imprisonment for a period of six weeks.

Sentence varied.