

1897.
October 5 and
November 19.

QUEEN v. MARSAL SILVA *et al.*

D. C., Colombo, 1,428.

Plea of autrefois convict—Committal of accused after conviction, but before sentence—Criminal Procedure Code, s. 399.

A plea of *autrefois convict* will not avail unless the accused has received judgment of imprisonment or other like sentence.

THE two accused persons in this case were committed by the Police Magistrate of Colombo for trial before the District Court for criminal breach of trust.

On the trial day they pleaded *autrefois convict* in case No. 48,540 of the Police Court of Colombo.

It appeared that in the Police Court the Magistrate (Mr. Moor) recorded evidence for the prosecution and defence, and found both the accused guilty, and remanded them for sentence for the following day; but that on that day he expressed himself as follows :—

“ On consideration I do not think that the punishment I am empowered by law to inflict is adequate for the offence committed by the accuseds, which has resulted in the loss to the complainant of property worth Rs. 750, which he has not yet recovered. The case should, I think, go before the District Court.”

The Additional District Judge (Mr. Pagden) upheld the plea of *autrefois convict* in these terms :—

“ As the Magistrate actually found the accused guilty he has convicted them, and as long as that conviction remains in force they cannot be tried again. It is true that section 225 of the Code (as amended by Ordinance No. 22 of 1890) empowers a Magistrate to refrain from passing sentence on an accused if he thinks he cannot adequately punish him, but he must do so after taking the evidence for the prosecution and defence, and in view of section 223, which says that if a Magistrate finds the accused guilty he shall pass sentence on him according to law, I take it that, if he acts under section 225, he must not record any conviction, for, if he does so, he is bound to pass sentence. Section 372 too seems to imply that both the finding and sentence must appear in the same judgment, and that they cannot be dissociated.”

The District Judge discharged the accused.

The Attorney-General appealed against the order.

Chitty, for the appellants.

No appearance for the respondents.

Cur. adv. vult.

5th October, 1897. BROWNE, A.J.—

The requirements of section 372 of the Criminal Procedure Code alone are sufficient to show that the plea was in this case unsustainable, for if there be no sentence added to the finding, the accused has never been so convicted that he could thereafter raise the plea.

This Court has, in *1 N. L. R. 73 and 194*, shown that a departure from the requirements of section 372, paragraph 2, in not specifying the offence of which a man is convicted, invalidates the conviction whereby (*2 C. L. R. 79*) a person might be very seriously prejudiced, who may have occasion thereafter to set up the plea of *autrefois convict* or *acquitt*. So, too, it is defective if it fails in the other essential, and does not "specify the punishment to which he is sentenced," for the prisoner must have received "judgment of imprisonment or the like, or if acquitted *quod eat sine die* ere either plea can be successfully taken." (Roscoe's *Evidence*, p. 189, 11th edition.)

The accused here were therefore never previously so convicted as to be able to plead that they had been. The order of the Court below is set aside and the case is remitted for trial.

Set aside.

On a subsequent day *Van Langenberg*, for the first accused, moved that the case be relisted for argument, as the notice of appeal by the Attorney-General was not served on his client, the Fiscal having reported service on second accused, but not on first accused, as he was not to be found.

BROWNE, A.J., ordered the case to be relisted.

16th November, 1897, *Ramanathan, S.-G.*, appeared for the Crown; *Van Langenberg* for first accused.

19th November. BROWNE, A.J.—

On referring to the judgment of Coleridge, J., in *R. v. Drury*, *18 L. J. M. C. 189*, citing Lord Hole's views, and the conclusion therefrom in Starkie's *Crim. Plead*, cited in Roscoe, quoted in my former order, it will be found that the conclusion of the last-named writer is correct, and I therefore set aside the acquittal of this accused also and remit the prosecution for trial.



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