

Present : Maartensz A.J.

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REX *v.* MARTHELIS PERERA.

62—*D. C. (Crim.) Colombo, 7,535.*

*Criminal Procedure—Conviction set aside—No notice to accused—
Criminal Procedure Code, ss. 307 and 357.*

Where the conviction of an accused by a Police Court was set aside by the Supreme Court in revision without notice being served on him,—

Held, that the terms of section 357 of the Criminal Procedure Code were imperative and that an order under that section to the prejudice of the accused, without notice, was ineffective.

A PPEAL from a conviction by the District Judge of Colombo. The accused was summarily tried and convicted under section 316 of the Penal Code and sentenced to three months' simple imprisonment. On December 19, 1924, the Solicitor-General moved the Supreme Court in revision to enhance the sentence. On February 6, 1925, the Supreme Court set aside the conviction and sent the case back directing that non-summary proceedings be taken against the accused. It appeared that the accused had received no notice of the Solicitor-General's application. When non-summary proceedings were taken against the accused

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and the case came on for trial objection was taken on his behalf that he could not be tried again for the offence for which he had been charged and convicted. The learned District Judge overruled the objection, whereupon the accused pleaded guilty and was sentenced to three months' simple imprisonment.

Drieberg, K.C. (with *B. F. de Silva*), for appellant.

J. E. M. Obeyesekere, C.C., for respondent.

August 26, 1925. MAARTENSZ A.J.—

The accused in this case was summarily tried and convicted under section 316 of the Penal Code for causing grievous hurt to one Kariawasamage Peter, and on November 29, 1924, he was sentenced to three months' simple imprisonment. On December 19, 1924, the Solicitor-General moved the Supreme Court in revision to enhance the sentence passed on the accused or to make such order as to it shall seem meet. Notice on the accused was ordered for January 23, 1925. On February 6, 1925, order was made setting aside all the proceedings in the case and directing that non-summary proceedings be taken with a view to the case being committed for trial before a higher Court. This order was made on the assumption that the accused had received notice of the Solicitor-General's application. Non-summary proceedings were taken and the case came on for trial before the District Court on May 4, when the objection was taken that the accused could not be tried again for an offence of which he had been charged and convicted. The learned District Judge overruled the objection. Thereupon the accused pleaded guilty and was sentenced to three months' simple imprisonment. The District Judge in passing sentence took into consideration the fact that he had already served the full term of three months imposed by the Police Court. The accused appeals from the order of the District Judge. It is contended that on the day non-summary proceedings commenced the accused had practically served his term of imprisonment, and that on the date of trial he had, in fact, served that term of imprisonment. The return to the notice shows that the accused was not served with the notice of the Solicitor-General's application. It is contended that the order made by the Supreme Court on February 6 is ineffective, as section 357 (2) of the Criminal Procedure Code enacts that no order under that section shall be made to the prejudice of the accused, unless he has had an opportunity of being heard either personally or by advocate in his own defence. Section 357 vests this Court with power to revise proceedings of the Courts.

of original jurisdiction. I allowed Crown Counsel an opportunity of meeting this objection, as I understood when the case was argued yesterday that he was not aware that the order of February 6 had been made without notice to the accused. Crown Counsel informs me to-day that he is not prepared, in view of the fact that the accused had no notice, to support the order of the District Court sentencing the accused to three months' simple imprisonment. I am of opinion that the terms of section 357 (2) are imperative and that an order made under that section without notice to the accused is ineffective, and that at the date the accused pleaded to the indictment before the District Court the conviction and sentence by the Police Court had not been set aside. I am, therefore, of opinion that this is a case to which section 330 applies, and that the conviction and sentence of the accused not having been set aside by the Supreme Court his plea that he could not be tried again should have been upheld.

I accordingly set aside the sentence of three months' imprisonment and discharge the accused.

Set aside.

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