Present: Jayewardene A.J. 1924.

SILVA *v.* HEYZER.

404—P. C. Colombo, 2,650.

Case sent back for rehearing before another Magistrate—Evidence previously recorded not to be taken into consideration—Criminal Procedure Code, ss. 298 and 208 (2).

When a case is sent back for rehearing before another Magistrate, the Magistrate has no right to take into consideration any evidence given at the previous trial, except with the express consent of the accused or his proctor or advocate.

King v. Dorisamy [1] followed.

De Jong (with him *R. C. Fonseka*), for accused, appellant.

H. V. Perera, for complainant, respondent.

August 1, 1924. JAYEWARDENE A.J.—

This is an unfortunate dispute between a landlady and her tenant. The accused who is the tenant was prosecuted in the Police Court for criminal trespass alleged to have been committed by him by entering his landlady's premises and assaulting some of the servants, which resulted in annoyance to her. At the first trial before the Police Magistrate of Colombo, the accused was acquitted. The learned Magistrate incorporated some facts obtained from the police information book in his judgment of acquittal, and on the ground that this was an admission of irrelevant and inadmissible evidence, the order of acquittal was set aside and the case was sent back to be reheard by another Magistrate. The case was thereupon heard by the Additional Police Magistrate of Colombo, who has convicted the accused and sentenced him to pay a fine of Rs. 25. From a sentence to pay a fine of Rs. 25, an appeal to this Court could only be maintained on points of law. Two points of law have been taken before me: (1) That at the second trial no charge was framed or read out to the accused, and his plea was not taken. I think that, when a case is sent back to be reheard before another Magistrate, it is the duty of that Magistrate to obtain the plea of the accused to ascertain whether he pleads guilty or not, for it may be that in certain cases an accused who has once pleaded not guilty may on a subsequent occasion be prepared to plead guilty. In this case the accused was represented by counsel, and no prejudice has resulted to him, but there may be cases where the accused is unrepresented where it may become absolutely essential that the

[1] *(1914) 17 N. L. R. 245.*

1924.

JAYEWARDENE A.J.

Silva v. Heyzer

Magistrate should ascertain before he proceeds to hear evidence wherether the ussed pleads guilty or not guilty, but as in this case the charge had been framed against the accused at the first trial, and he had pleaded not guilty and at the second trial he was represented by counsel, it is not necessary for me to take a strictly technical view of the procedure, and I am not, on the facts of this particular case, prepared to give effect to the objection; (2) the second objection taken seems to be a more formidable one, that is, that the new Magistrate read over the evidence recorded by the Magistrate whose proceedings had been quashed, and permitted the witnesses to be further examined and cross-examined. It has been pointed out by this Court that where a case is sent for retrial or trial *de novo*, all the steps laid down in the Criminal Procedure Code should be followed from the very commencement. In support of this contention counsel for the appellant has referred me to the case of *King v. Dorisamy* (*supra*) where it was held that, where the proceedings were quashed *ab initio* and the case ordered to be retried, it was not enough to get the witnesses to swear to the correctness of the evidence recorded at the first trial and then submit them for further examination. In the course of his judgment laying down this rule, Pereira J. said: "A further objection has been taken, which I regret I am obliged to uphold. I say I regret, because success of the objection will necessitate a further retrial of the case. The objection is that the witnesses have not been examined, nor has their evidence been recorded as required by the Criminal Procedure Code. As each witness was called, the District Judge recorded that the evidence given by him on November 12 (that is to say, the evidence in the quashed proceedings) was read over and explained and sworn to by the witnesses, and that the witness was further examined. This proceedings was in contravention of section 208 (2) and section 298 of the Criminal Procedure Code, and was therefore grossly irregular," and he further added " even the consent of the accused's proctor did not validate it." The position here is exactly the same, and the only difference being that the case before me is a Police Court case, and the case before Pereira J. was a District Court case, but the provisions of section 298 which the Judge referred to applies to every Court whose proceedings are regulated by the Criminal Procedure Code. I might also refer to another case, the case of *Murugasu v. Charles Appuhamy*.[1] That is not on all fours with the present case, but it lends support to the principle which has been laid down in *King v. Dorisamy* (*supra*), and which I am compelled to give effect to in this case. I think that when the case was sent back for rehearing before another Magistrate, this Magistrate had no right to take into consideration any evidence given at the previous trial except, I would say, with the express consent of the accused or his duly authorized proctor or advocate.

[1] *(1922) 4 C. L. R. 225.*

I would, therefore, set aside the conviction. I am not sorry that I have to come to this conclusion, because, according to the judgment of the learned Magistrate, neither party has come out with the whole truth, and both parties seem to be responsible for the trouble that took place on the day in question. In the circumstances I do not think this miserable dispute should be carried any further.

I set aside the conviction, and I do not think it is necessary to take any further proceedings in this case.

Set aside.