

1963

*Present : Tambiah, J.***PABILIS**, Appellant, and **N. SIVANDIYEN**, Respondent*S. C. 197/63—M.C. Badulla, 33521*

*Criminal procedure—Withdrawal of plea of guilt—Circumstances when it is permissible—Criminal Procedure Code, s. 188.*

A plea of guilt may be withdrawn by the accused person at any time before an order of conviction has been made.

## **A**PPEAL from an order of the Magistrate's Court, Badulla.

*M. Kanagaratnam*, for the Accused-Appellant.

*Nimal Senanayake*, for the Complainant-Respondent.

July 24, 1963. **TAMBIAH, J.**—

The accused in this case was charged with having committed house trespass by remaining in a line room in the occupation of the complainant, Sivandiyen.

On 23.2.62 the accused withdrew his former plea of not guilty, tendered on 22.12.61, and stated that he was guilty. He also undertook to leave the estate on or before 30th April, 1962. Further it is recorded that this undertaking is without prejudice to the right of the accused in any other legal proceeding.

The complainant also agreed and undertook not to plead, canvass or put in issue the undertaking in any other judicial proceeding or before the Labour Tribunal. The complainant also undertook to reinstate the accused if an award favourable to the accused was made by the Labour Tribunal.

It may be noted that no plea of guilt was entered by the learned Magistrate as required by Section 188 of the Criminal Procedure Code. The case was called on 30.4.62 and on that day Mr. Devarajan, who appeared for the accused, stated that the accused wanted to withdraw his former plea of guilt and plead not guilty. The learned Magistrate then postponed the case and subsequently on 14.5.62 he refused to allow the accused to withdraw his earlier plea of guilt. The learned Magistrate then sentenced the accused to two weeks' rigorous imprisonment. From this order the accused has appealed.

Mr. Senanayake brings to my notice that there are also some revision papers filed. The journal entry under the date 15.5.62 bears out his statement.

I do not think it necessary in this case to file formal revision papers. In my view an error in law has been committed by the learned Magistrate and the proper way to bring this matter before this Court is by way of appeal. There are several rulings of this Court which lay down the principle that an accused person can withdraw his plea of guilt before an order of conviction has been made. Where an accused person withdraws his plea of guilt before an order of conviction is made the case against the accused should proceed as if the admission has never been made. (*Vide Leembrugen v. Pitchaipillai*<sup>1</sup>, *Fernando v. Costa*<sup>2</sup> and *Roosemalacocq v. Sally*<sup>3</sup>.)

Mr. Nimal Senanayake contended that this case comes within the ruling of *John v. Charles Silva*<sup>4</sup>. But that is a case where the accused pleaded guilty and after the plea was recorded it was postponed for the passing of sentence. When the case was postponed for the passing of sentence the learned Magistrate had accepted the plea of guilt tendered by the accused. Therefore the case of *John v. Charles Silva* is clearly distinguishable from the present case.

In the instant case no plea of guilt, either expressly or impliedly, has been entered by the learned Magistrate before the accused wanted to withdraw his plea of guilt. Therefore, in my view, the learned Magistrate should have recorded the plea of not guilty tendered by the accused and proceeded to trial.

For these reasons I set aside the order of the learned Magistrate convicting the accused and the sentence of two weeks' rigorous imprisonment. I remit the case back for trial in due course.

*Order set aside.*

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