

Present: Pereira J.

KING v. DORISAMY et al.

54, 55—D. C. (Crim.) Chilaw, 3,111.

*Proceedings quashed ab initio—No bar to re-prosecution—Evidence should be recorded afresh.*

Where proceedings are quashed *ab initio* there is no bar to the accused being re-prosecuted for the offences with which he was charged at the first trial.

Where proceedings were quashed *ab initio* and the accused is re-prosecuted, it is 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.

**T**HE facts appear from the judgment.

*Bawa, K.C.*, (with him *H. Fernando*), for the accused, appellants.—The proceedings were quashed when the case came up in appeal on the last occasion, and there was no direction for a re-trial. That amounted to an acquittal of the accused. The re-prosecution was illegal.

The District Judge was not entitled to read out the evidence recorded at the previous trial, to get the witnesses to swear to the correctness of that evidence, and merely submit the witnesses for further cross-examination and re-examination. *Silva v. Cooray*.<sup>1</sup>

*Cooray, Acting C.C.*, for the Crown.—The proceedings were quashed in appeal altogether, and it is open to the Crown to try the accused again.

The evidence was read out subject to the express consent of the counsel for the accused. The witness admitted the correctness of the evidence as it was read out. That is tantamount to the witnesses deposing to the facts over again. There has been no prejudice to the accused by the procedure adopted.

*Cur. adv. vult.*

May 12, 1914. PEREIRA J.—

In this case objection has been taken that the order of this Court on appeal in case No. 3,111 quashing the conviction was tantamount to an acquittal of the accused, and that they could not therefore be re-prosecuted. The simple answer to this objection is that in that case this Court quashed, not only the conviction, but

<sup>1</sup> 6 *Tamb* 54.

1914.  
FERRERA J.  
King v.  
Dorisamy

all the proceedings *ab initio* in the District Court, so that there is nothing left on which an acquittal or any such order can be supported.

A further objection has been taken, which, I regret, I am obliged to uphold. I say I regret, because the success of the objection will necessitate a further re-trial of the accused. 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, 1913 (that is to say, the evidence in the quashed proceedings), was "read over and explained and sworn to by" the witness, and that the witness was further examined. This proceeding was in contravention of the terms of sections 208 (2) and 298 of the Criminal Procedure Code, and was otherwise grossly irregular. The consent to it by the accused's proctor did not validate it (see, on question of consent, *Punchirala v. Punchi Banda*,<sup>1</sup> *Hami Appu v. Balappu* <sup>2</sup>).

I quash the conviction and all proceedings since the presentment of the indictment and remit the case for a new trial. I think that in the event of a conviction the loss suffered by the accused by reason of the nugatory trials should be taken into account in passing sentence.

*Proceedings quashed.*

