

1931

Present : Akbar J.

CANAGASINGHAM v. MEYADIN BAWA.

702—P. C. Trincomalee, 5,257.

Autre fois acquit—Charge of theft and receiving stolen property—Acquittal—Reservation of right to prosecution—Fresh charge of criminal misappropriation—Bar—Criminal Procedure Code, ss. 181 and 330.

Where the accused was charged with theft and in the alternative with receiving stolen property, and the Magistrate acquitted him of the charges, reserving to the prosecutor the right to charge the accused for criminal misappropriation on the same facts,—

Held, that the acquittal of the accused was a bar to the further prosecution for criminal misappropriation.

The Magistrate has no power to take away the effect of the bar by reserving rights in the judgment.

A PPEAL from a conviction by the Police Magistrate of Trincomalee.

N. E. Weerasooria, for accused, appellatant.

September 3, 1931. AKBAR J.—

The accused was charged in the alternative with two charges, viz., with committing the theft of a she-buffalo in or about December, 1928, and then he was charged alternatively with receiving or retaining this stolen buffalo knowing or having reason to believe it was stolen in February, 1931. After evidence was led at very great length to prove that the buffalo was most probably the property of one Mohamradu Ismail, the Judge acquitted the accused on the charges laid, because the evidence placed before him was not sufficient for such a conviction, but he added that there was clear evidence to prove that the accused misappropriated this man's property for his own use and instead of charging the accused

with criminal misappropriation because he thought that the accused would be prejudiced by such a charge at that stage of the case, whilst acquitting the accused he reserved to the prosecutor the right to charge the accused for criminal misappropriation in a separate case, and he ordered that the buffalo should be given over to the alleged owner, Mohammadu Ismail, reserving to him the right to charge the accused under section 386 of the Ceylon Penal Code, if so advised.

It will be seen from section 330 of the Criminal Procedure Code that an acquittal acts as a bar to a further prosecution, not only in regard to the offence for which the accused is acquitted on the same facts, but also that it acts as a bar on the same facts for any other offence, for which a different charge from the one named might have been made against the accused under section 181 of the Criminal Procedure Code, or for which he might have been acquitted under section 182. Section 181 of the Criminal Procedure Code states, "that if a series of facts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences"; so that it is quite clear that the accused on those facts could have been charged not only with committing theft or receiving stolen property, but also with criminal breach of trust or criminal misappropriation. Although the illustration does not specifically mention criminal misappropriation, yet the offence of criminal misappropriation is of such a type that sometimes there is a doubt whether the facts amount to criminal misappropriation or theft or criminal breach of trust. In my opinion the offence of criminal misappropriation is clearly one of the offences contemplated in section 181.

Under section 182 it was open to the Police Magistrate to have convicted the accused for the offence of criminal misappropriation although he was not charged with it.

I cannot understand how the Magistrate can reserve to the prosecutor any rights which he is precluded from claiming under the terms of section 330 of the Criminal Procedure Code. Either the acquittal could be pleaded as a bar to a subsequent prosecution on the same facts for other offences or it cannot be. If it can be pleaded, the Police Magistrate cannot proceed to take away the effect of the bar by reserving such rights in his judgment of acquittal.

As I have stated, in my opinion this acquittal of the accused on both charges of theft and receiving stolen property is a bar to a subsequent prosecution on the charge of criminal misappropriation on the same facts. The Magistrate could not take away the effect of this bar by reserving to the complainant his right to so proceed. That being so, he had no jurisdiction to make the order disposing of the property produced and giving it over to the alleged owner, Mohammadu Ismail.

The order of the Police Magistrate will be varied to this extent—that portion of his judgment reserving to the complainant the right to proceed under section 386 will be deleted and also that portion of the order giving over the buffalo to the witness, Mohammadu Ismail. The buffalo will remain in the possession of the accused, and Mohammadu Ismail, if so advised, may proceed in a Civil Court to assert any right he may have.

Order varied.