

1944

Present: **Wijeyewardene J.**

MARIYANAYAGAM, Appellant, and BASNAYAKE, Respondent.

648—(Joint) M. C. Colombo, 1,084.

Charge—Charge of theft and in the alternative of receiving stolen property and assisting in disposing of stolen property—No charge framed under the latter offences—Fatal irregularity—Penal Code, ss. 366, 394, and 396.

Where the accused was charged with theft and, on the trial date, the prosecution moved that the alternative charges under sections 394 and 396 of the Penal Code be added without any objection on the part of the accused's Counsel, and where the Magistrate proceeded to try the accused and convicted him under section 396,—

Held. that the failure to frame a charge vitiated the conviction.

Held, further, that the conviction under section 396 could not be justified under the provisions of section 182 of the Criminal Procedure Code.

The King v. Piyasena (44 N. L. R. 58) followed.

A PPEAL from a conviction by the Joint Magistrate of Colombo.

N. Nadarajah, K.C. (with him *H. Wanigatunge*), for the accused, appellant.

G. P. A. Silva, C.C. for the Crown, respondent.

Cur. adv. vult.

October 13, 1944. WIJEYWARDENE J.—

The Police filed a written report on May 1, 1944, charging the accused with the theft of a typewriter. The accused was present in Court on May 10 and the Magistrate framed a charge of theft and read the charge to him. On the accused pleading not guilty to the charge the Magistrate fixed the trial for May 15. On that day the prosecuting Inspector moved that the alternative charges under sections 394 and 396 of the Penal Code "be included in the case." This was allowed and the Magistrate proceeded with the trial as the accused's Counsel had no objection to the "amendment" and did not want a postponement. The Magistrate did not frame any charges under sections 394 and 396 of the Penal Code and the record does not give the slightest indication of the accused being even made aware of the alternative charges.

The accused called one witness but did not give evidence himself. The Magistrate convicted the accused under section 396 of the Penal Code and sentenced him to three months' rigorous imprisonment.

I am unable to sustain the conviction in view of the failure of the Magistrate to frame a charge in respect of the offence under section 396 of the Penal Code. The Crown Counsel contended that the conviction could be justified in view of the provisions of section 182 of the Criminal Procedure Code. The decision of *The King v. Piyasena*¹ is a clear authority against that contention.

I quash the conviction and send the case back for a fresh trial before another Magistrate on a properly framed charge.

Conviction quashed.