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THE QUEEN *v.* RAMALINGAM.

D. C., Colombo (Criminal), 1,215.

Offering gratification to screen an offender—Ceylon Penal Code, s. 211—Necessary averment in charge under s. 211—Judgment in rem.

R was charged under section 211 of the Ceylon Penal Code with offering a gratification to F in consideration of his screening C from legal punishment for the offence of criminal breach of trust under section 389 of the Ceylon Penal Code. C had been tried for that offence and acquitted.

Held by BONSER, C.J., and WITHERS, J., that before R could be found guilty it must be proved that C was guilty of the offence of criminal breach of trust, and that C's acquittal was not conclusive on that point, a judgment of acquittal or of conviction not being a judgment *in rem* which could not be controverted.

Held, further, by BONSER, C.J., that a charge under section 211 should contain an averment of the offence committed by the person sought to be screened.

Per LAWRIE, J.—The question whether the offer of a gratification by R to F was punishable by law depends not on whether C was or was not guilty of criminal breach of trust; it is sufficient to show that F had reason to believe facts which were relevant to the issue of C's guilt. In either case, C's acquittal was not material to the issue in the prosecution against R.

THE facts of the case sufficiently appear in the judgment of BONSER, C.J.

Cooke, C.C., for appellant.

Dornhorst, Pereira, and *de Saram*, for accused, respondent.

The following authorities were cited in the course of the argument:—I. L. R., 14 Mad. 400; 2 Moody, C. C., 124; I. L. R., 12 All., 432; 20 W. R., Cr. Rul., 66; Russ. and R., 84; I. L. R., 11 Cal., 619; I. L. R., 3 All. 279; 8 W. R., Cr. Rul., 68, VII., S. C. C., 132.

Cur. adv. vult.

23rd June, 1886. BONSER, C.J.—

The question in this case is as to the construction of section 211 of the Penal Code, which, so far as is material, is as follows:—"Whoever gives, or causes, or offers, or agrees to give or cause, any "gratification to any person, or to restore or cause the restoration "of any property to any person in consideration of that person's "concealing an offence, or of his screening any person from legal "punishment for any offence, or of his not proceeding against any "person for the purpose of bringing him to legal punishment, shall, "if the offence is punishable with imprisonment not extending to

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"ten years, be punished" as therein mentioned. It appears that one Chelliah, an assistant shroff in a bank in Colombo, was charged with three separate acts of criminal breach of trust in respect of three several sums of money, viz.: (1) a sum of Rs. 3,000 deposited by one Fernando; (2) a sum of Rs. 2,510·70 deposited by another person; and (3) a sum of Rs. 1,700 deposited by a third person. As these offences were alleged to have taken place within a period of twelve months, the charges were under our law tried together at one trial in the District Court of Colombo by the Acting District Judge sitting alone without assessors. The result of that trial was that Chelliah was acquitted of the first two charges and convicted on the third. It is alleged that whilst these charges were pending against Chelliah, the present respondent (Ramalingam) offered Fernando to pay him his Rs. 3,000 if he would refuse to give the bank manager any information respecting the deposit; that Fernando refused, and was subsequently offered by Ramalingam Rs. 5,000, which also he declined. It appears that Fernando not only communicated with the manager, but gave evidence in the preliminary inquiry and at the trial. After the trial Ramalingam was charged and tried for this alleged offence in the District Court of Colombo. The indictment charged Ramalingam: "(1) That he on or about the month of June, 1895, at "Colombo, within the jurisdiction of this Court, offered to give a "gratification of Rs. 5,000 to one Lucas Fernando in consideration "of his refraining from giving evidence against Marimuttu Chelliah, "and thereby screening the said Marimuttu Chelliah from legal "punishment for the offence of criminal breach of trust of property "under section 389 of the Ceylon Penal Code, of which offence the "said Marimuttu Chelliah was on the 2nd December, 1895, con-"victed by the District Judge of Colombo, and thereby committed "an offence punishable under section 211 of the Ceylon Penal "Code." After this trial had proceeded a short way, and as soon as it appeared by the evidence that Chelliah had been acquitted of the charge in respect of Fernando's Rs. 3,000, the learned District Judge stopped the case and acquitted the respondent on the authority of an Indian case, *Queen Empress v. Saminathan* (*I.L.R. 14 Madras, 400*). He thus states the effect of that case:—"The "charge there was that a gratification was agreed by accused to be "given to S in consideration of S not giving evidence against K "on a charge of house-breaking and theft. S did give his evidence, "but K was nevertheless acquitted, and it was held that accused "was also entitled to be acquitted on the ground that the section "presupposed as the condition for accused's offence that the house-"breaking and theft had been committed, or that he was guilty

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"thereof. K's acquittal having negatived each of these the tender "of the gratification was not punishable under this section." If that is a correct statement of the case I am unable to agree with it, for I do not understand how K's acquittal could possibly be proof, or even evidence, that the offence had not been committed. It might have been committed by some one else. Nor in my opinion does it prove that K did not commit the offence. All it determined was that the evidence adduced on K's trial was insufficient in the opinion of the jury to warrant his conviction. A judgment either of acquittal or of conviction is not a judgment *in rem* which cannot be controverted. To make the acquittal of the person sought to be screened a bar to a prosecution under section 211 would produce this absurd result, that the innocence or guilt of a person charged under that section would depend on whether he had been successful in defeating justice or not, for the acquittal might be the direct result of the gratification. If the Madras High Court judgment means more than this, viz., that in a case under section 211 it is necessary to prove that an offence has been committed by the person who is sought to be screened, I venture respectfully to disagree with it. But Mr. Cooke, who argued for the appellant, the Attorney-General, contended that it was not necessary that any offence should have been actually committed, and that an offence under section 211 was complete when a gratification was offered by one person in order to screen another person whom he believed, though erroneously, to have committed an offence. But this construction, in my opinion, is not warranted by the words of the section which speaks of "an offence," and of "a person being "screened from legal punishment for an offence," and again of "the offence." Section 38 of the Penal Code defines an "offence" as a thing "punishable in Ceylon under this Code or any law other than this Code." Neither the Penal Code nor any other law, so far as I know, makes a thing punishable which only exists in a person's imagination, and has no actual existence in fact. Again, if section 211 is to be construed in the way contended by Mr. Cooke, we should have this strange result, that if A falsely accuses B of an offence of which he knows him to be innocent, and B from cowardice pays him hush money, B will be guilty of an offence and liable to punishment. In my opinion this section must be taken in its plain and literal meaning. If the Legislature had intended to include in the term "offence" that which was not an offence as having no real existence, nothing could have been easier than to have expressed this intention by apt words. For these reasons I agree with the learned District Judge that

before Ramalingam can be found guilty under section 211 it must be proved that Chelliah was guilty of an offence; but I disagree with him when he holds that Chelliah's acquittal is conclusive on this point. It is clear that if Chelliah had been convicted his conviction would not have been conclusive of the fact of his guilt, and that it would have been open to Ramalingam to show that Chelliah had been improperly convicted, and was in fact innocent. And I doubt whether the record of the conviction would be admissible as evidence on the issue as to guilt of Chelliah. Similarly, I doubt whether the record of the judgment of acquittal would be admissible in the present case on the same issue. For these reasons I am of opinion that the learned District Judge was premature in stopping the case and entering a judgment of acquittal, and that judgment must be set aside and the case tried out.

I may add that in my opinion the charge should contain an averment of the offence committed by the person sought to be screened, following the precedent of an English indictment for compounding a felony.

Again, whilst I agree with the observations of the learned District Judge as to the necessity of keeping distinct the evidence on the three charges, it is by no means clear that Fernando's evidence might not have been material on the other charges. In cases of embezzlement evidence of other acts of embezzlement may be given to anticipate the defence that the cases being tried were merely accidental errors (see *Reg. v. Richardson, 8 Cox 488; and Makin v. A. G. of N. S. Wales, [1894] A. C. 57*). It may well be that Ramalingam believed, and rightly believed, that the suppression of Fernando's evidence might materially assist to screen the prisoner on the other charges.

LAWRIE, J.—

I agree in the result at which the Chief Justice has arrived, but on rather different grounds. In my opinion it lay on the prosecution to prove that Lucas Fernando knew facts from which he had reason to believe that Chelliah had committed criminal breach of trust, an offence which could not lawfully be compounded, punishable under section 389. If Lucas Fernando knew these facts, he was legally bound to give information; and if he omitted to do so, he was liable to punishment under section 199 of the Penal Code; or if he in any way screened the offender, he was liable to punishment under section 209. Further, it lay on the prosecution to prove that Ramalingam instigated

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Lucas Fernando to commit the offence of intentionally omitting to give information, or of screening the offender, under sections 199 and 209. The instigation of abetment by Ramalingam took the form of the offer of a gratification, but the essence of his offence was abetting Fernando to an unlawful omission. Lucas Fernando did not commit the offence to which (it is said) Ramalingam instigated him. But if Ramalingam did illegally instigate Fernando to commit an offence under sections 199 and 209, he is punishable either under section 109 or 211, either for simple abetment or for abetment by offer of a gratification (it does not matter which), because the punishment of both is the same—one-fourth of the punishment which the person abetted would have got if he had committed the offence desired by the abettor. It is my opinion that the offence under section 211 is complete at the moment when offer of the gratification is made to induce a man, who has relevant information regarding the commission of an offence which cannot be compounded by himself, to commit the offence of omitting to give that information, or to induce a man who has reason to believe that an offence has been committed to screen the offender. The question whether the offer of a gratification by Ramalingam to Fernando was punishable by law depends not on whether Chelliah was or was not guilty of criminal breach of trust : it is sufficient to show that Fernando had reason to believe facts which were relevant to the issue of Chelliah's guilt. The question is, whether Ramalingam was liable to punishment if he in fact instigated Fernando to suppress these facts and to screen the offender, and thus attempted to prevent the matter of Chelliah's guilt or innocence being fully and fairly tried. But whether the question of the guilt or innocence of Chelliah be material or not, it is at least certain that his acquittal at the trial is not material. If he had been convicted it could not have prejudiced Ramalingam in his defence here. A conviction could neither have made Ramalingam's guilt more obvious nor more heinous. Chelliah's acquittal seems to me irrelevant in this trial for illegally abetting Lucas Fernando to commit an offence under sections 199 and 209. It may be suggested that at this trial for an offence under section 211 Ramalingam's defence may be either a denial that he offered a gratification or an attempt to justify that offer by proof that Lucas Fernando had no reason to believe that criminal breach of trust had been committed by Chelliah, and hence that the offer of a gratification to Fernando was in fact to induce him to abstain from giving false evidence, and therefore it was a legal offer. What the effect of such a line of defence would be, I need not

anticipate. I agree that the learned District Judge was wrong to stop the trial and to acquit Ramalingam merely on proof that Chelliah was acquitted—a fact which seems to me, if not altogether irrelevant, at least quite inconclusive.

WITHERS, J.—

The respondent in this appeal was indicted in the District Court of Colombo under section 211 of the Penal Code for offering a gratification to one Lucas Fernando, in consideration of that person screening one Chelliah from legal punishment for the offence of criminal breach of trust of certain moneys which Lucas Fernando had entrusted to him. At a certain stage in the cause proof was put in of the fact that Chelliah had been prosecuted for that very offence, and had been acquitted by a judgment of a Court of competent jurisdiction, and it was urged in defence of the respondent that he could not be convicted of bribing a person in consideration of that person screening from legal punishment for an offence one who had been adjudged not guilty in respect of that very offence. The learned District Judge, yielding to that argument, stayed the proceedings and discharged the respondent. In my opinion the learned District Judge was premature in so disposing of the case before him. No authority was cited to us that a judgment of acquittal has the effect of a judgment *in rem* conclusive, that is, against all the world. In the case before us the prosecution is, I take it, bound to prove that offence of criminal breach of trust of Lucas Fernando's deposit was committed, that Chelliah had rendered himself liable to legal punishment for that offence, and that in consideration of Lucas Fernando screening that offender from legal punishment the respondent offered him a gratification. Why should the prosecution be debarred from proving that Chelliah was the actual offender? Supposing, for argument sake, that evidence had been suppressed by some act or omission of Lucas Fernando which would have brought home the offence to Chelliah, and rendered him liable to legal punishment, and that in consequence Chelliah secured an acquittal and immunity from punishment. The acquittal cannot be an answer, unless a judgment of acquittal has the force and effect of a judgment *in rem*. But the judgment in itself has so little effect that it does not stand in the way of a second prosecution for the same offence. It becomes effectual only when *pleaded*, and then the plea is only admitted on the generous maxim of the common law that no one should be brought into jeopardy more than once for the same

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offence. Conversely, a conviction is not a judgment *in rem*. It appears to me that if Chelliah had been convicted of the criminal breach of trust of Lucas Fernando's deposit, it would have been open to the respondent in the proceedings to prove that Chelliah was not the real offender. An accessory, by the English law, may controvert the guilt of his principal (*Foster, 365*). For these reasons, I think the order appeal from should be set aside, and the case remitted to the District Court for trial.