1952 *Present :* **Swan J.**

JOHN, Appellant, *and* CHARLES SILVA, Respondent

S. C. 178—M. C. Colombo, 22,238

Criminal Procedure Code—Section 188 (1)—Plea of guilty—Right of accused to withdraw plea subsequently.

Accused pleaded guilty and the case was postponed for passing of sentence. On the next date he moved to withdraw the plea of guilty which he had tendered earlier.

Held, that an accused person has no right to withdraw a plea of guilty once tendered, even though a verdict of guilty had not been formally recorded.

APPEAL from an order of the Magistrate's Court, Colombo.

O. M. da Silva, for the accused appellant.

E. A. G. de Silva, for the complainant respondent.

Cur. adv. vult.

April 1, 1952. SWAN J.—

The accused-appellant was charged with (*a*) criminal trespass and (*b*) criminal misappropriation of goods to the value of Rs. 2,100. On being served with summons, the accused appeared before the Additional Magistrate, Mr. Kariapper, who fixed 13th December, 1951, as the date for the prosecution to lead evidence. On that date the accused was represented by Mr. Thiruchelvam, Proctor, who applied that the case should be sent before another Magistrate as Mr. Kariapper had heard several cases against the accused. The case was therefore sent to the Chief Magistrate, Mr. Sri Skanda Rajah. When the case was called in that Court, the accused was again represented by Mr. Thiruchelvam. After the evidence of the complainant was led the learned Magistrate decided to try the case in his capacity as Additional District Judge. The accused was duly charged. He pleaded not guilty and the trial was fixed for 8.1.52.

[1] (*1943*) *44 N. L. R. 221.*

On that date Mr. Adv. Alles instructed by Mr. Thiruchelvam appeared for the accused. After some evidence had been led I find the following note made by the learned Judge on the record :—

" Accused now states, ' I am guilty for committing house trespass '. Complainant is not proceeding with the 2nd charge.

I acquit him of the 2nd charge. Accused proposes to place the complainant in possession of that portion of the premises in question.

Sentence on 16.1.52.

Accused warned to appear. "

On 16.1.52, the accused duly appeared. He was represented by Adv. Cosme instructed by Mr. Velauthapillai.

Mr. Cosme moved the Court to permit the accused to withdraw the plea of guilt already tendered. He cited in support of his application the case of *Fernando v. Costa*[1] in which Bertram A.C.J. expressed the opinion that where an unqualified admission of guilt is subsequently withdrawn the plea of guilty must be treated as never having been made and the case must be decided apart from that plea.

The learned Magistrate refused to allow the withdrawal of the plea of guilt, and sentenced the accused to pay a fine of Rs. 100 and to be detained in the Court cell till 4.30 p.m. that day.

In the course of his order the learned Judge said :—

" I am satisfied that the plea of guilt tendered by the accused on the last date was an unconditional one. If I had any doubts on that point, I would not have accepted that plea. It is true that I did not enter a formal verdict of guilt. That I did because I intended treating the accused under Section 325, Chapter 16.

" I would follow the case of *Sabaratnam v. Santhia* in 43 N. L. R. page 93. There it was held that the omission to record the formal verdict of guilt was an irregularity curable under Section 425. Therefore, I refuse to permit the accused to withdraw the plea of guilt already tendered. "

It is from this order that the accused appeals. Mr. da Silva appearing for him contends that an accused person who has pleaded guilty has the right, before sentence is passed, to withdraw that plea and to insist that the case should proceed to trial.

Section 188 (1) of the Criminal Procedure Code provides :—

" If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him ; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence. "

[1] *(1918) 5 C. W. R. 224.*

Mr. da Silva argues that inasmuch as the Magistrate did not record a verdict of guilty it was open to the accused to retract his plea.

In support of his contention he cited the case of *Roosemalecocq v. Sally* [1], where Koch A.J. held that it was the duty of a Magistrate, on a plea of guilt being tendered, to record a verdict of guilty and pass sentence.

The facts of that case are entirely different from those that confront us here. There the accused had pleaded guilty. The Magistrate had not recorded a verdict of guilty, but remanded the accused for identification and sentence. On the next date the accused asked that the evidence of a witness be recorded. When that was done the proctor moved to withdraw the plea of guilt, and when the accused was questioned he said he was not guilty, and the Magistrate recorded that plea as well. Eventually, when the right of the accused to withdraw his original plea was argued, the Magistrate refused the application and made the following order :—

> " I record now formally a verdict of guilty. No previous convictions. Sentence three months rigorous imprisonment. "

There can be no question that the procedure adopted by the Magistrate was highly irregular and, in the circumstances, the order setting aside the conviction and remitting the case for a fresh trial was, if I may respectfully say so, the proper order to have been made.

Mr. da Silva, however, contends that Koch A.J. based his decision on the dictum of Bertram A.C.J. in *Fernando v. Costa* [2], referred to above. I do not think so. In any event it is clear from a perusal of the judgment of Bertram A.C.J. in *Fernando v. Costa* [2] that what was there decided was not whether an accused had an unqualified right to withdraw a plea of guilt but whether, when a plea of guilt was subsequently withdrawn, a Magistrate could reject a petition of appeal tendered by the accused on the ground that the accused had first made an unqualified admission of guilt. Said the learned Acting Chief Justice :—

> " It appears by the record, however, that although the accused originally made an unqualified admission of their guilt, that plea was withdrawn. In such a case the plea of guilty is treated as never having been made, and the case must be decided apart from that plea. *In this case evidence was taken, and the learned Magistrate expressed the opinion that the evidence was sufficient to justify a conviction. The accused are entitled to appeal from that decision and accordingly a mandamus will issue.* "

The next case relied on by Mr. da Silva is that of *Selvadurai v. Rajah and others* [3] in which Howard C.J. held that, where a plea of guilt is expressed in terms which leave room for doubt whether the plea is unqualified, the accused is entitled to withdraw the plea. It was an application in revision. The learned Magistrate had refused to allow the withdrawal of the plea.

[1] *(1935) 37 N. L. R. 139.* [2] *(1918) 5 C. W. R. 224.*
[3] *(1940) 41 N. L. R. 421.*

The learned Acting Solicitor-General who appeared for the respondents conceded that if the pleas were qualified they could be withdrawn. In the course of his judgment the learned Chief Justice said :—

> " The Magistrate has not recorded a formal conviction of the accused in any of these cases. In these circumstances the judgment of Bertram A.C.J. in *Fernando v. Costa* [1] is authority for the proposition that such pleas could *at the option* of the accused be withdrawn and treated as never having been made. *Roosemalecocq v. Sally* [2] is a further authority for the same proposition."

I would very respectfully say that these two cases are not authority for the proposition that, where a formal verdict of guilty has not been recorded by the Magistrate, the accused has the right to retract his plea.

Mr. da Silva also relied on the judgment of Moseley S.P.J. in *Siriwardene v. James and others* [3] where it was held that a plea of guilt tendered by an accused may be withdrawn before sentence is passed. That, too, was an application in revision. The accused had pleaded guilty and sentence was deferred. Thereafter they filed a motion to withdraw their pleas. It was supported by an affidavit in which they stated that the plea of guilt was tendered under a misapprehension as to the facts. The learned Magistrate held that he had no jurisdiction to vacate the verdict of guilty which he had recorded. Moseley S.P.J. relying on two English cases reported in *8 Cox Criminal Cases 237* and *(1902) 2 K.B. 339* respectively held that the Magistrate " was mistaken in the view that he had no power to set aside his finding of guilty ".

I find it difficult to agree that a Magistrate has jurisdiction to vacate a verdict of guilty entered upon what appears on the record to be an unqualified admission of guilt. There, however, can be no question that this Court, acting in revision, has power to set aside a conviction entered upon a verdict of guilty under Section 188 (1) if it is satisfied that the plea was tendered under a misapprehension as to the facts.

The last case upon which Mr. da Silva relied was *Khan v. P. C. Fernando* [4] where Cannon J. said, *inter alia*, " but it is well established that an accused person has the right to change his plea before sentence is passed " and referred to the case of *Siriwardene v. James and others* [3]. That, too, was an application in revision, and the facts disclose a grave irregularity which vitiated the entire proceedings. The accused was charged with certain offences under the Motor Car Ordinance which involved obstruction to the car of Mr. Malalgoda. The accused appeared on summons in the Court over which Mr. Malalgoda presided as Magistrate. He pleaded guilty, and Mr. Malalgoda sent the case to another Magistrate for sentence. When the case was called before that gentleman the accused moved to withdraw his plea. That application was refused, and the accused was sentenced to pay a fine of Rs. 60. In the circumstances of the case this Court, acting in revision, very properly set aside the conviction and sentence and ordered a fresh trial.

[1] *(1918) 5 C. W. R. 224.*
[2] *(1935) 37 N. L. R. 139.*
[3] *(1940) 41 N. L. R. 560.*
[4] *(1946) 47 N. L. R. 215.*

Let us now examine the case of *Sabaratnam v. Santhia*[1] referred to by the learned Magistrate in his order. That was a judgment of Moseley S.P.J., and in the course of the argument reference was made to *Siriwardene v. James and others*[2] also decided by the same learned Judge. In this case the accused upon being charged stated, "I am guilty". The Magistrate did not record a verdict of guilty as required by Section 188 (1) of the Criminal Procedure Code but merely said "Sentence on 4.7.41.". On that date the accused appeared before another Magistrate and it was stated that the original plea had been tendered under threat. The matter was referred to the Magistrate who recorded the plea and he held that the plea of guilty was unqualified and refused to accept a plea of not guilty. In the course of his judgment the learned Judge remarked :—

> "In the present case the Magistrate had apparently no inclination to allow the plea of guilty to be withdrawn. He regarded that plea as unqualified, as indeed it would seem to be. In my view he was right in refusing to allow the plea to be withdrawn at that stage."

Regarding the failure of the Magistrate formally to record a conviction the learned Judge held that it did not amount to any more than an irregularity which was curable under Section 425 of the Criminal Procedure Code, adding :—

> "It seems to me, however, in the present case the words 'Sentence on 4. 7. 41' at least imply that the appellant was convicted."

In this case the accused, in my opinion, had made an unqualified admission of guilt and the learned Magistrate was right in refusing to allow him to withdraw it. Following the judgment of Moseley S.P.J. in *Sabaratnam v. Santhia*[3] I would hold that the failure of the Magistrate formally to record a verdict of guilty is a mere irregularity which does not vitiate the subsequent conviction and sentence.

In my opinion an accused person has no right to withdraw a plea of guilt once tendered If he has, through misapprehension or under inducement or threat, tendered a plea of guilty and the Magistrate has not recorded a verdict of guilty, the accused *may be permitted* by the Magistrate, if he is satisfied that the original plea was not an unqualified admission of guilt, to withdraw it. If the Magistrate has, in fact, recorded a verdict of guilty he has no jurisdiction to vacate it. In such a case if, in truth, the plea was tendered through misapprehension or under inducement or threat, the accused will have to seek his remedy by way of revision.

The appeal fails and is dismissed.

Appeal dismissed.

[1] *(1941) 43 N. L. R. 93.* [2] *(1940) 41 N. L. R. 560.*
[3] *(1941) 43 N. L. R. 93.*