

1935

*Present : Koch A.J.*

ROOSEMALACOCQ v. SALLY.

227—P. C. Colombo, 28,570.

*Plea of guilt—Failure to record verdict—Application to withdraw appeal—Refusal of permission—Subsequent verdict of guilt—Irregularity—Criminal Procedure Code, s. 188 (1).*

On a plea of guilt being tendered by an accused, the Magistrate did not record a verdict of guilty, but remanded the accused for identification. On the next date the accused asked that the evidence of a witness be recorded. When this request was complied with, the accused withdrew his plea of guilt and pleaded not guilty.

The Magistrate refused the application to withdraw the plea of guilt and convicted the accused.

*Held*, that it was the duty of the Magistrate on the plea of guilt being tendered to record a verdict of guilty and pass sentence; and that, in the circumstances, the subsequent verdict could not stand.

**A** PPEAL from a conviction by the Police Magistrate of Colombo.

*L. A. Rajapakse*, for accused, appellant.

*Cur. adv. vult.*

July 8, 1935. Koch A.J.—

The appellant was charged under section 369 of the Ceylon Penal Code with the theft of cash Rs. 25 and a silver pendant and necklace. On the charge being read to him, the record shows that he stated as follows: "I am guilty". This was on March 11, 1935. The Magistrate thereupon, instead of convicting him, made the following order: "Identification and sentence March 13, 1935".

On March 13 the Magistrate records that the accused was present and wanted one Madariamamma called. Madariamamma's evidence was then recorded, and at its close Mr. Tiruchelvam on behalf of the accused moved to withdraw the plea. The accused was then questioned and he said, "I am not guilty". This was recorded and the case put off for the 15th.

On the 15th the case was called again and it is recorded that further time was wanted by the defence to cite cases in support of the right of the accused to withdraw his plea of guilt. The Magistrate allowed this



and fixed the matter for March 25. On that day a judgment of the Supreme Court was cited by defending counsel and once again application was made to withdraw the plea and a statement by the accused was recorded, which was to the effect that he had a defence but that he pleaded guilty as the Police Constable asked him to do it. The learned Magistrate thereupon made order refusing the plea to be withdrawn. The entry is as follows: "I record now formally a verdict of guilty. No previous convictions. Sentence 3 months R.I.". He also stated he would give his reasons later. These reasons were given later in the day. In doing so the learned Magistrate says, "Apparently I should formally have recorded a verdict of guilty, but I do not think this is ever done when accused has definitely stated that he is guilty".

It is hardly an excuse to make, that often a verdict of guilty is not recorded by Magistrates, when the law insists on its being done. Section 188 (1) of the Criminal Procedure Code requires the presiding Magistrate on a plea of guilt being tendered to record a verdict of guilty and pass sentence. The language is imperative, the word used is "shall", and the insistence of the law is not merely confined to recording a verdict but also extends to the passing of a sentence.

This was not done on March 11, when the accused pleaded, "I am guilty". The result was that Madariamamma's evidence has been subsequently recorded and a plea of not guilty thereafter also recorded. We have in consequence, before the date of the Magistrate recording a verdict of guilty, two pleas, one the opposite of the other. I think the procedure adopted in this case is quite irregular and confusion and discord have thereby arisen.

In *Saheed v. Silva*<sup>1</sup> Lyall Grant J., following an old case reported in *Lorenz, p. 100*, held that it was highly irregular for the Magistrate to have recorded any evidence after a plea of guilty was tendered and also held that section 188 (1) of the Criminal Procedure Code "in the clearest possible language laid down that on a plea of guilty being tendered the verdict should be recorded and the sentence passed". I am in complete agreement with this decision.

There is the further point whether in these circumstances the appellant could withdraw his plea of guilt. I have already pointed out that two pleas, one of "guilty" and the other of "not guilty" have been recorded.

In S. C. 165 (P. C. Point Pedro, 1,338—S. C. M. of July 28, 1932) the Magistrate recorded the plea "I am guilty" but did not enter a verdict of guilty. After recording this plea he directed that the case be called at a later date and permitted the accused to stand out on bail. Sir Forrest Garvin in appeal expressed the opinion that "if the Magistrate was satisfied that the accused consciously and with full realization of its consequences had made a statement which amounted to an unqualified admission of his guilt, the Magistrate had no alternative but to record a verdict of guilty and pass sentence". This decision was brought to the notice of the learned Magistrate who heard this case, and who had recorded that he "was satisfied that the accused understood what he was saying".

<sup>1</sup> 10 Cey. Law Rec. 117.

In these circumstances I cannot conceive how the learned Magistrate came to overrule the point raised, by sheltering himself under the assertion that he did not think that a verdict of guilty is ever recorded when the accused has pleaded guilty. If there is such a practice, the sooner it is stopped the better, as it traverses the section of the Criminal Procedure Code and the judgments of this Court.

In *Fernando v. Costa*<sup>1</sup> Sir Anton Bertram states thus: "It appears by the record that although the accused originally made an unqualified admission of 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".

Here the accused has not only withdrawn his plea of "guilty" but has had recorded a plea of "not guilty". Evidence has also been recorded after the plea of "guilty" was entered, and in addition no verdict of "guilty" was passed in terms of section 188 (1) of the Criminal Procedure Code.

I set aside the conviction and remit the case for a new trial before a different Magistrate.

*Sent back.*

