

[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present* : Basnayake, C.J. (President), K. D. de Silva, J., and
H. N. G. Fernando, J.

THE QUEEN *v.* K. GEEDRICK

Appeal 89 of 1959, with Application 108

S. C. 37—M. C. Galle, 5486

Trial before Supreme Court—Plea of autrefois acquit or convict—Judge must allow it to be tried by the jury—Criminal Procedure Code, ss. 216, 330, 331.

In a trial before the Supreme Court, a plea of *autrefois acquit* or *convict* must be tried by the jury.

A PPEAL against a conviction in a trial before the Supreme Court.

M. L. de Silva, with *Douglas Wijeratne* and *N. Wijeratne* (assigned),
for Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

September 8, 1959. BASNAYAKE, C.J.—

The accused-appellant was indicted on the following five charges, all of which related to the theft and illegal removal of property from the premises of M. P. Gomez and Company, Galle :—

“ 1. That on or about the 28th day of May 1958 at Havelock Place, Galle, in the division of Galle, within the jurisdiction of this Court, you did commit theft in the premises of M. P. Gomez & Co., Galle,

which had been left vacant and unprotected; of articles, to wit, One Saucepan, One Tiffin Carrier, Two Pillows, One Blanket, Four Towels, Two Shirts, One Rug, Five Sarongs, One Suspender, One Hand Saw and Three Handkerchiefs, property in the possession of Santhosam Thomas, and that you are thereby guilty of an offence against Regulation 22 of the Emergency (Miscellaneous Provisions and Powers) Regulations published in *Government Gazette* No. 11,321 of the 27th May, 1958, and made by the Governor-General under Section 5 of the Public Security Ordinance No. 25 of 1947 as amended by Act No. 22 of 1949 and Act No. 34 of 1953, punishable under Regulation 22 of the said Regulations.

“ 2. That at the time and place aforesaid and in the course of the same transaction you did commit theft in the premises of M. P. Gomez & Co., Galle, which had been left vacant and unprotected, of articles, to wit, seven bottle-openers, property in the possession of J. L. Devotta and that you are thereby guilty of an offence against Regulation 22 of the said Regulations, punishable under Regulation 22 of the said Regulations.

“ 3. That at the time and place aforesaid and in the course of the same transaction, you did illegally remove articles, to wit, the articles set out in Charges 1 and 2 above from the said premises and that you are thereby guilty of an offence against Regulation 22 of the said Regulations, punishable under Regulation 22 of the said Regulations.

“ 4. That at the time and place aforesaid and in the course of the same transaction you did, in a building used for the custody of property, to wit, the said premises of M. P. Gomez & Co., commit theft of One Saucepan, One Tiffin Carrier, Two Pillows, One Blanket, Four Towels, Two Shirts, One Rug, Five Sarongs, One Suspender, One Hand Saw and Three Handkerchiefs, property in the possession of the said Santhosam Thomas and that you have thereby committed an offence punishable under Section 369 of the Penal Code.

“ 5. That at the time and place aforesaid and in the course of the same transaction you did, in a building used for the custody of property, to wit, the said premises of M. P. Gomez & Co., commit theft of seven bottle openers, property in the possession of J. L. Devotta, and that you have thereby committed an offence punishable under Section 369 of the Penal Code.”

After the indictment was read and explained to him the accused pleaded “not guilty”. Thereafter an English speaking jury was empanelled. At the request of counsel for the defence the learned trial Judge directed the jury to retire. After they had retired counsel made the following submission :—

“ In addition to the plea of ‘not guilty’ the accused also says that by virtue of Section 330 of the Criminal Procedure Code he is not liable to be tried in respect of charges 4 and 5 of this indictment.

“ The accused has been charged and convicted in the Magistrate’s Court of Galle in case No. 6194 under Regulation 40 of *Gazette* No. 11,376 of 27.6.1958 of the same articles except that instead of two pillows two bottles are mentioned in this case, and sentenced to 3 months’ rigorous imprisonment, which he has served.

“ I wish to add that that conviction is a bar to these two charges.”

After hearing Crown Counsel and defence counsel the learned trial Judge made the following order :—

“ The preliminary issue which I have to decide is whether the previous conviction of the accused of an offence under Regulation 40 of the Regulations published in the *Government Gazette* of June 27th 1958 has a bearing to his being tried again in respect of counts 4 and 5 of the indictment. It is common ground that the same articles are involved in both cases and the crucial question is whether the ingredients of the offences covered by Regulation 40 are such that the case is covered by Section 181 of the Criminal Procedure Code. One point on which the Regulation differs from the Section of the Penal Code relating to theft and dishonest retention of stolen property is that dishonesty is not an element in the Regulation. Again, it would be necessary if the charge was under the Penal Code for the prosecution to prove beyond reasonable doubt that the articles were in fact stolen, whereas under the Regulation it is sufficient if the articles are suspected to have been stolen. There is, therefore, it seems to me a very real distinction between the offences covered by Regulation 40 and the crime of theft or dishonest retention of stolen property. I, therefore, over-rule the plea. The accused would be tried on all counts of the indictment.”

The question that arises for decision is whether it was within the competence of the learned trial Judge to try the plea of *autrefois convict*. A plea of *autrefois acquit* or *convict* is a plea that must be specially taken as prescribed in section 331 of the Criminal Procedure Code and tried before the plea on the indictment is tried. Sub-section (2) of that section reads :

“ Such plea may be pleaded together with any other plea, but the issue raised by such plea shall be tried and disposed of before the issues raised by the other pleas are tried.”

Now section 216 of the Criminal Procedure Code provides that all trials before the Supreme Court shall be by jury before a Judge or a Commissioner of Assize. The trial of a plea of *autrefois acquit* or *convict* is no exception to the rule laid down by the Code. In the instant case the learned Judge was acting without jurisdiction in trying the plea himself and not allowing it to be tried by the jury. As this is a matter for which the Code makes express provision there is no need to examine the law of England but I wish to add that the practice in England is that these pleas are tried by the jury. (*Archbold Criminal Pleadings, Evidence and Practice*, 34th Ed., s. 447, p. 153.)

In regard to trial upon the indictment the accused has been acquitted on counts 1, 2 and 3, all of which depend on the inference which may properly be drawn from the recent possession of property which had been stolen from M. P. Gomez and Company. It is difficult to reconcile his acquittal on counts 1, 2 and in particular count 3, with his conviction on counts 4 and 5. We think that his convictions on counts 4 and 5 are unreasonable and we accordingly quash those convictions and direct that a judgment of acquittal be entered in respect of counts 4 and 5.

Accused acquitted.

