1939 *Present :* **Soertsz A.C.J.**

WIJESINGHE *v.* MATHER.

354—M.C. Colombo, 35,947.

Supreme Court—Powers in appeal—Order of acquittal set aside—Right of Court to hear evidence in defence—Courts Ordinance, s. 37 ; Criminal Procedure Code, ss. 347 and 348.

Where the Supreme Court in appeal has set aside an order of acquittal entered by a Magistrate on the ground that, contrary to the opinion of the Magistrate, the prosecution has made out a *prima facie* case,—

***Held*, that the Court has power to receive in appeal such evidence as the accused may tender in exercise of his right of defence.**

THE accused-respondent was charged with the offence of abetting the offence of receiving an illegal gratification by a public servant. After trial, the learned Magistrate without calling a defence acquitted the accused. The Attorney-General appealed against this order. The Acting Chief Justice, who heard the appeal, set aside the order of acquittal and called upon the accused for his defence. His Lordship acceded to the request of the Counsel for the respondent that he be heard on the jurisdiction of the Court to make such an order.

H. V. Perera, K.C. (with him *J. E. M. Obeyesekera, E. F. N. Gratiaen* and *H. W. Thambiah*), for the accused, respondent.—Under section 347 of the Criminal Procedure Code (Chapter 16), the Court has the power to do one of three things, after the reversal of the order of acquittal which is a final order. The Court cannot after that stage order an acquittal. As long as the accused had not the opportunity of defending himself, an order of conviction cannot be made. The jurisdiction given under section 348 is ancillary to that under section 347. The kind of order is not affected. There is an inherent limitation to section 348. It does not confer original jurisdiction. Under this section the Court can take evidence. There is no distinction made between the prosecution and the defence.

[SOERTSZ A.C.J.—What is the purpose in the section to the reference to Chapter XVI. ?]

The reference supports the view that the Court can take the evidence, but cannot try the accused.

[SOERTSZ A.C.J.—It may mean that the evidence is taken by the Magistrate and transmitted to this Court with his opinion.]

Yes, that view can be taken. Otherwise the Court is exercising original jurisdiction.

[SOERTSZ A.C.J.—How does it prejudice the accused ?]

It cannot be said that there is any prejudice except that he has a trial and an appeal. From an abstract point of view there is prejudice. The Code does not authorize the Court after setting aside the order of acquittal to acquit him at a later stage.

[SOERTSZ A.C.J.—But it is a mere *pro forma* setting aside.]

But the setting aside is effective. The power given to the Appeal Court must be construed strictly. The Court cannot exercise original

jurisdiction, section 37 of the Courts Ordinance (Chapter 6), does not empower the Court to compel a person to give evidence unless he had been tendered by either party.

[SOERTSZ A.C.J.—I do not intend to compel you to give evidence.]

The words "additional to, or supplementary of" indicates that a party has already given evidence or has had the opportunity of giving evidence.

[SOERTSZ A.C.J.—Does it not mean additional to evidence in the whole case ?]

Yes, if it is necessary in the interests of justice.

In *Ex parte Jacobson, In re Pincoffs* [1], a distinction is drawn between the additional evidence led in the Appellate Court according as the witness had an opportunity in the lower Court or not. It was held in *Arnison v. Smith* [2] that where a party was not given an opportunity, his evidence could not be regarded as additional evidence.

J. W. R. Illangakoon, K.C., A.-G. (with him *D. Janszé, C.C.*), for complainant, appellant.—The Supreme Court has the power to allow a person to tender evidence, if he so desires. The powers are wide and cannot be limited. The language of section 348 enables the Court to receive any evidence which the party is willing to tender. See *In re Narayana Menon* [3]. The discretion is in the Court whether it should order a retrial or call evidence.

Cur. adv. vult.

August 10, 1939. SOERTSZ A.C.J.—

The order I made on this appeal was made after careful examination of the nature and extent of the jurisdiction conferred on an Appellate Tribunal by section 37 of the Courts Ordinance and sections 347 and 348 of the Criminal Procedure Code. But, as a matter of grace, and against the possibility of some point in those sections having escaped my attention, I acceded to the request of Counsel for the respondent that he be heard on this question of jurisdiction.

I have now heard him and I have considered the submissions he made, but I see no reason whatever for taking a different view of the scope of the sections I have referred to, or for doubting the validity or the expediency of the order I made.

Sections 347 and 348 of the Criminal Procedure Code provide the various orders that an Appeal Court may make in an appeal from an acquittal or conviction, and give it a wide discretion in regard to the calling for, or procuring of any additional or supplementary evidence that it thinks to be necessary for disposing of the case. It may itself take the additional evidence it deems necessary, or it may direct some other judicial officer to take it and transmit it with his opinion on it, or it may remit the case for further inquiry with a view to committing it for trial, or for a retrial. As Wallace J. observed in the case of *Narayana Menon* [4], to which the learned Attorney-General referred me, "whether the proper course is a retrial or taking further evidence is a matter of discretion—the discretion of the Court apart from what the appellant or the prosecution may desire". Mr. Perera contended that there is

[1] (1882) 22 *Ch. D. 312.*
[2] (1889) 41 *Ch. D. 98.*
[3] 25 *Cr. Law Jnl. Rep. 401 at 406.*
[4] 25 *Cr. Law Jnl. Rep. 401.*

inherent in these sections a limitation of the kind of evidence that may be taken by virtue of them, and he submits that it is only such evidence that an Appeal Court is entitled to *require* to be taken, that it may call for and take under these sections, and not such evidence as may be *at the option* of a party to tender or not. In the Indian case just referred to, Odgers J. commented on a similar submission made in that case as follows : " it will be observed that in neither of the cases just mentioned it is stated or even suggested that section 428 (i.e., the Indian equivalent of our section 348) is confined to supplying proof of the prosecution case. On the other hand, the learned Prosecutor draws our attention to several recent cases of this Court in which evidence for the defence has been taken under the provisions of this section apparently without the jurisdiction ever being questioned . . . . I am not prepared . . . . to limit the ambit of section 428 ".

I would add that my order does not imply that I require the respondent to enter upon a defence or that I call upon him to tender evidence. All it implies is that I am prepared to take such evidence as the respondent may desire to tender in exercise of the right given to him by law, before I decide upon the whole case, my view at present being that the prosecution has made out a *prima facie* case. In other words, the position is just the same as it would have been if the Magistrate came to the conclusion that a *prima facie* case had been established against the respondent and had called upon him for his defence. The implication of such a course is that the Magistrate thinks additional evidence necessary—if it is available—for the disposal of the case, consistently with the rights and interests of the prosecution and of the defence. *A priori,* there appears to be no good reason why an Appeal Court should not—once it decides to reverse an order of acquittal entered at the stage at which it was made in this case—be in the position in which the Magistrate would have been if he had taken the view which, in the opinion of the Appeal Court, he should have taken. Nor can I see in the wording of these sections anything to suggest that that antecedent probability has ben negatived, and that an Appeal Court may not intimate to an accused-respondent that it is prepared to take such evidence as may be tendered.

So far as I can see, the only limits to the discretion given by these sections are such as an Appellate Tribunal may impose upon itself in exercising the discretion, paying due regard to the rights and interests of the parties and to general convenience and expediency.

The more I examine this case, the more I am convinced that the course I propose to take is the best and most convenient course. The case for the prosecution has been closed, and all its evidence is before me. To order a retrial by the same Magistrate or by another, will mean an unprofitable expenditure of time, with no conceivable legitimate benefit likely to accrue to the respondent. To send the case back to the Magistrate who tried the case to take any evidence that the defence may wish to tender and to transmit such evidence to me with his opinion on it, would be a roundabout way of doing what I myself can do directly by calling for such evidence as the respondent may desire to adduce. Moreover, there is no point in asking the Magistrate for his opinion. He has already expressed it.

For these reasons, the order made by me will stand and the case will be called on August 25, 1939, at 11 A.M., for the defence to place its case before me.

Cite proctors Kadirgamar and de Silva to be present on that day, at that time, in case it becomes necessary to examine them further.