[BELCHER, C.J., SERTSIOS AND FUAD, JJ.]

1929.
Dec. 11.

POLICE

v.

AGATHOCLES SAVVA.

POLICE
v.
SAVVA.

Criminal Procedure—Magisterial Court—Several counts on same facts—Finding of guilty on one, no finding on others—Powers of Supreme Court on appeal by prisoner—Law 1 of 1886, Section 39.

Accused was charged before the Magisterial Court with stealing six bags of cement, and in other counts with receiving and being in illegal possession of the same bags. He was convicted and sentenced for stealing, but no finding on either of the other two counts was recorded. Accused appealed, The Supreme Court, in quashing the conviction for larceny,

Held, that it had power under Law 1 of 1886, Section 39, to find the appellant guilty on the charge of illegal possession, even assuming that the non-recording of a finding by the Court below was equivalent to "Not Guilty."

Appeal from Magisterial Court of Limassol (No. 3055/29).

P. Kakoyannis (*G. N. Chryssafinis* with him), for appellant: There is no evidence of stealing, and the absence of specific finding on the other counts is equivalent to acquittal on them, and, therefore, he cannot now be convicted on either.

Pavlides, Crown Counsel, for the Crown: The Supreme Court has power under Law 1 of 1886, Section 39, to find him guilty. He is not being tried twice for the same offence. Even if there has been an acquittal, it does not prevent this Court substituting a finding of guilty if the acquittal was due to a conviction on a major charge on the same facts. It is not the same as giving the Crown a right of appeal against an acquittal, for it is prisoner who sets the Court in motion.

The judgment of the majority of the Court (Fuad, J., dissenting) was delivered by the Chief Justice.

JUDGMENT:—

BELCHER, C.J.: Accused was charged in the Magisterial Court with stealing six sacks of cement and also (in two other separate counts of the same charge-sheet) with receiving and being in illegal possession of it. He was convicted on the charge of theft and sentenced to six months' imprisonment, but the Magisterial Court do not mention the other charges in their finding. On the hearing of his appeal against the conviction we were unanimous that it must be quashed as there was no evidence of theft, but the majority of this Court considered there was ample

1929. Dec. 11. POLICE v. SAVVA.

evidence of illegal possession and that if the Court below had directed themselves properly they must have found him guilty on that charge. The question is whether we have power under Section 39 of Law 1 of 1886 ourselves to record the same finding. It was submitted by appellant's counsel that he has been acquitted, and that the legislature never meant to give the Supreme Court the right to interfere with a finding of not guilty or the Crown a right to appeal against it. It is certainly reasonable to infer that the Magisterial Court's silence should be deemed a verdict of acquittal, in this particular case, because the three counts charged are not of separate and distinct offences but embody alternative aspects of the same facts so that if he was found guilty on one count he could not (having regard to Clause 166 of the C.C.J.O., 1927,) be sentenced additionally on either of the others. Section 39 must, it is clear, empower us to convict of illegal possession if stealing, but not illegal possession, was charged in the Court below : such cases are the prime reason for the section being there at all, for the Magisterial Court can only convict on a charge actually before it and the legislature doubtless meant to enable the Supreme Court to make good the lower Court's inability (subject to a qualification as to sentence not material in this connection) so as to save an unnecessary second and separate trial on the same facts viewed in a different aspect of no greater heinousness. The words in Section 39— " any other offence "—could not be wider than they are. Should we read them as being subject to an implied limitation excluding an offence which, being the subject of what is in effect an alternative count, has been before the Court below and decided in favour of the accused by a finding of acquittal ? We are of opinion that there is no reason for so restricting them. In principle, it is objectionable, no doubt, to reverse a verdict of not guilty, but the objection loses its weight when the only reason for the acquittal is that the accused was held guilty of a more serious offence on the same facts. All the material evidence in the case before us was evidence of illegal possession on accused's part of the property in question, and the stealing was inferred, wrongly as we think, from the suspicious circumstances attaching to that possession which (in the view of the majority of this Court) the evidence for the defence failed to remove. So to hold is not to give the Crown a right of appeal against an acquittal : it is the accused's own appeal which affords the Court the opportunity of correcting an error. If we held otherwise it would be impossible ever to set right an erroneous decision of the lower Court as between two alternative charges where from the nature of the case the accused can only be guilty of one but has been convicted of the wrong one : *Regina v.*

Adamo Hji Petri (1) is distinguishable : there, the elements of the two offences charged were essentially different and it would not have been contrary to C.C.J.O., 1927, Clause 166, for the Court to impose separate sentences for each, which we think is the test to apply in deciding whether or not the Supreme Court can exercise its powers under Section 39. The case of *R.* v. *Smith* (2), decided by the Court of Criminal Appeal in 1923, supports this view. In that case the jury at Assizes had returned a verdict of receiving where there was also a count for larceny (and impliedly at least acquitted on the latter). The Court of Criminal Appeal, on the prisoner's appeal against the conviction for receiving, after reviewing all the facts substituted a verdict of guilty of larceny. We bear in mind that Section 39 is not identical in terms with Section 5 (2) of the Crinimal Appeal Act, 1907, which would of course be the section applicable if this case were one from Assizes, but it is not distinguishable in the respect which is now material. Accordingly the majority of this Court, having no doubt on the facts of the appellant's illegal possession and also that the Court below must have found him guilty on that count had they properly directed themselves, quash the conviction for stealing and find appellant guilty of illegal possession and sentence him to six months' imprisonment.

FUAD, J. : I agree with the judgment of the majority of the Court in the points of law involved, but I am not satisfied that the evidence of illegal possession was such that the Court below must have found appellant guilty of it if it had been the only count before them.

Conviction of larceny set aside, and one of illegal possession substituted.

(1) 4 C.L.R. 95.
(2) 17 Cr. App. Rep. 133.