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SILVA *v.* SILVA.

P. C., Colombo, 85,874.

Criminal Procedure Code, s. 152 (3)—"May properly be tried summarily"—Summary trial of offence triable by District Court—Discretion of Judge—Duty of Judge to record reasons for entering upon trial of such cases—Power of Supreme Court to review the reasons given.

The question whether a case may be properly tried summarily, under section 152 (3) of the Criminal Procedure Code, is within the province of the Supreme Court to review on appeal, and in that of the Attorney-General to prevent, should he think it necessary to act under section 390.

It is the duty of the Magistrate acting under section 152 (3) to state his reasons for the opinion that the offence may be properly tried summarily.

Any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, or any difficult question of intention or identity, or in which the punishment ought really to exceed two years, is one that is not properly triable summarily.

THIS was a charge of cheating laid under section 403 of the Penal Code. It was alleged that on the 7th March, 1904, the two accused persons, trading together as brokers, fraudulently

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and dishonestly induced the complainant to deliver to them 159 cwt. of copra, falsely pretending that they would sell the same to Messrs. Tarrant, Henderson & Co. at Rs. 54 per candy (equal to 5 cwt.) and pay the proceeds to the complainant, but that they sold the said copra and dishonestly misappropriated the money.

After partly hearing the complainant's evidence, the Police Magistrate (Mr. W. E. Thorpe) recorded as follows:—

" I think this is a case which I can properly deal with as District Judge. "

The accused objected to being tried summarily, and Mr. Thorpe ruled: " This matter is within my discretion, and I see no reason to alter my order. "

He heard the case and found the accused guilty and sentenced each of them to two years' rigorous imprisonment.

They appealed. The case was heard before a Full Bench consisting of Justices Wendt, Middleton, and Sampayo on 9th May, 1904.

Walter Pereira (with him *Batuwantudawa*), for accused, appellants, referred to section 152 of the Criminal Procedure Code; *Jayawardene v. Pereira, 1 Tamb. 15; Danhia v. Donhamy, (2 Browne 230)*; *Vengadasalem Chetty v. Mohideen Pitche (4) N. L. R. 339)*; P. C., Colombo, 85,820, decided by Layard, C.J., on 12th April, 1904; and Koch's *Rep. 8.*

Rámanáthan, S.-G., for the Crown.—The word " properly " in section 152 (3) of the Criminal Procedure Code means suitably to the circumstances of each case. A summary trial is rapid, and gives little time for a proper consideration of all the facts of an involved or obscure case. The accused would therefore naturally seek the advice of able counsel. The accused has a right, if the case is complicated by questions of fact or law, to have it considered also by the Law Officers of the Crown and finally tried by a Judge aided by a jury or assessors.

The word " properly " in section 152 (3) seems to mean the same thing as " if he thinks fit " in section 7 of the same Code. The discretion vested in him should be exercised only for sound reasons. If the reasons appear to be unsound, an appeal lies to the Supreme Court. Otherwise justice would suffer.

Cur. adv. vult.

6th June, 1904. WENDT, J.—

This case was sent before a Bench of three Judges by the Acting Chief Justice in order that the opinion of the Court might be taken upon the scope and effect of section 152 (3) of the

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Criminal Procedure Code. This course, I understand, was considered advisable in view of certain decisions pronounced by individual Judges of this Court, and of the fact that in an increasing proportion of cases Magistrates were assuming to try under this section charges ordinarily deemed too serious or too difficult to be disposed of summarily.

The power of such summary trial was first conferred by Ordinance No. 8 of 1896. Its preamble recited the expediency of providing that "in all cases where a District Court and Police Court are presided over by one and the same officer, such officer as District Judge should try and determine all cases triable by a District Court without such cases being committed for trial to such Court." Section 1 enacted that in cases not triable by a Police Court summarily but triable by a District Court "it shall not be obligatory on the Police Magistrate, where he is also the District Judge of the District, to proceed in manner provided by chapter XVI. of the said Code [of 1883] and to commit such cases for trial; but it shall be lawful for him, in his capacity of District Judge, without any such commitment, to hear, try, and determine all such cases, and in the trial thereof to observe the procedure prescribed by chapter XIX. of the said Code." Section 2 empowered the Magistrate to impose any punishment within the usual powers of a District Judge. Before the passing of this Ordinance any non-summary charge triable by a District Court, if not sent before the Supreme Court, had necessarily to be committed to the District Court. Where, as in many outstations, the same officer was Magistrate and District Judge, the case could only be tried by him as District Judge, if the accused consented to that course; otherwise the Judge of a neighbouring Court had to be specially appointed for the purpose. This inconvenience was remedied by the Ordinance of 1896. It will be observed that its terms applied to all cases triable by District Courts, nothing was left to the discretion of the Magistrate as to which of these cases he might try.

This Ordinance was repealed by the new Criminal Procedure Code of 1898, which has enacted section 152, sub-section 3, in its place. This sub-section is as follows:—"Where the offence appears to be one triable by a District Court and not summarily by a Police Court and the Magistrate, being also a District Judge having jurisdiction to try the offence, is of opinion that such offence may properly be tried summarily, he may try the same summarily, following the procedure laid down in chapter XVIII., and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose."

The differences between the two enactments are (1) that the power to try is now given to every Magistrate who is also a District Judge, and not as before to the Magistrate who is also the District Judge of the station; and (2) that not all District Court cases are triable summarily, but only such as the Magistrate considers may properly be so tried.

This latter qualification is very frequently lost sight of. In March, 1899, soon after the new Code came into ooperation, Lawrie, J., in *Sinne Tamby v. Mendis Appu* (*1 Tamb. 39, 4 N. L. R. 339, note*), said: "It must be borne in mind that the question before the Police Magistrate is not whether the accused can be tried before a District Court—the schedule of the Code settles that—but whether the offence can properly be tried summarily. It seems to me that Magistrates who are also District Judges are too apt to conclude that any District Court case may properly be tried summarily, forgetting the advantage to the accused, if not to the complainant, of an investigation under chapter XVI. and a reference to the Attorney-General for advice and sanction." The lapse of four years since these remarks were made has but emphasized their applicability. The proneness of Magistrates to try all District Court charges summarily has increased in proportion to their familiarity with the provisions of the new Code.

In *Jayawardene v. Perera* (*1 Tamb. 15, Koch 8*) Lawrie, A.C.J., in April, 1899, repeated the opinion I have quoted, and added that the new power conferred on Magistrates should be exercised but seldom and only on good cause shown: ordinarily the jurisdiction of a Police Court should be confined to proper Police Court cases and to those District Court cases in which (under section 166 of the Code) the accused consent to be tried, and where they can get no more than a year's imprisonment. His Lordship ruled against the contention then advanced that section 152 (3) was limited to cases where the Magistrate and the District Judge of the district were one and the same person (a contention which was apparently revived in P. C., Colombo, 85,820, to which I shall presently refer), and pointed out that the phraseology of the Ordinance of 1896 had been purposely changed in enacting the new provision.

In June, 1900, the construction of the Code came before Bonser, C.J., in *The Queen v. Uduman* (*4 N. L. R. 1.*) *1 Browne 129*). in which the charges were, under sections 443 and 444 (house-breaking by night after making preparation for causing hurt, punishable with fourteen years' rigorous imprisonment). The late Chief Justice expressed surprise that the offence under section

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444 was by the Code made triable by a District Court at all, and said that to his mind it was one of the most serious offences of which a person might be guilty, and "certainly ought never to be tried summarily." The Court, in fact, reviewed the opinion of the Magistrate, that the particular case might properly be tried summarily, and held that it could not. It went further and held that under no circumstances could such a charge be tried summarily.

In *Vengadasalem Chetty v. Mohideen Pitche* (*4 N. L. R. 339, 1 Browne 335*) Bonser, C.J., agreed with the *dicta of* Lawrie, J., which I have already quoted from *Sinne Tamby v. Mendis Appu*, and said that it was well known that the reason for the enactment of section 152 (3) was the desire to obviate the inconvenience of committals to the District Court where that Court was presided over by the committing Magistrate himself. He added: "That provision was not made to apply to a case where a District Judge was available to try the case, although the words of the section would cover such a case."

In *Danhia v. Donhamy* (*2 Browne 230*) the charge was under section 443 of the Penal Code (also punishable with fourteen years' imprisonment), and Moncreiff, A.C.J., expressed the opinion that that charge "ought under no circumstances to be tried summarily," agreeing with the view of Bonser, C.J., expressed in *The Queen v. Uduman*. He added that, in view of that decision, the Magistrate, if he formed an opinion at all in favour of trying that offence summarily, was bound not only to state his opinion but the reasons for holding it.

Lastly, in P.C., Colombo, 85,820, which came before the present Chief Justice on 12th April, 1904, section 152 (3) was discussed. The charge was, I understand, one of cheating, an offence usually triable in the District Court. Counsel for accused argued that the Magistrate, although he was also one of the District Judges of Colombo, had no jurisdiction to try it under section 152 (3)—apparently on the ground that he was not the District Judge of the district, nor even that one of the four District Judges who usually tries criminal cases committed to the District Court of Colombo. The Chief Justice held that the words of the section were too clear to admit of doubt, and applied to any Magistrate who was also a District Judge. I entirely agree with that view, and consider that as nothing grossly unreasonable or unjust will ensue from giving the words their plain ordinary meaning, we are not at liberty to limit their operation by the assumed intention of the Legislature to be gathered from the history of the legislation in this matter.

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What then are the powers of such a Magistrate acting under the section? If he is of opinion that the offence may properly be tried summarily, he may try it accordingly. He is not obliged so to try it, but may commit to the District Court. His opinion is a condition precedent to the trial; without it he has no jurisdiction. I cannot, however, accept the view that his opinion is final and not subject to review by this Court. The very fact that that opinion is the basis of an exception to the general rule of jurisdiction is in my opinion a reason for holding that it is not conclusive. And from the nature of the thing it is at least as expedient that the Magistrate's opinion should be submitted to the revision of the Appellate Tribunal as that the guilt or innocence of the accused should be. And being subject to appeal, it follows that it should not only be recorded but supported by the Magistrate's reasons; else how is this Court to judge of its correctness? The gist of the matter is the "summary" trial. It is not a question of punishment, because the Magistrate could inflict the same sentence as the District Court. Assuming in any given case that a maximum term of two years' imprisonment would be sufficient punishment, the question remains whether the interests of justice would be furthered by a summary trial—a trial without a preliminary investigation by a committing Magistrate; without the supervision and control of the Attorney-General; necessarily without assessors to assist the Judge; and, as a general rule, without the aid of Crown Counsel to conduct the prosecution. All of these advantages would attend a trial after committal, and there are many cases in which the complicated character of the facts or the difficult questions of law involved render it desirable that the trying Judge should have the assistance I have indicated. It is therefore right that in forming an opinion as to the propriety of a summary trial the Magistrate should consider all these matters, and that his order should show he has done so.

Our views as to the construction of section 152 (3) of the Code having now been expressed, I think the case should go before a single Judge sitting for criminal appeals, to be disposed of in due course.

6th June, 1904. MIDDLETON, J.—

In this case the two accused have been convicted under section 403 of the Penal Code and sentenced to two years' rigorous imprisonment by the Magistrate of Colombo acting as a District

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Judge, under section 152, sub-section (3), of the Criminal Procedure Code.

The case has been referred to the Full Court by the Acting Chief Justice with a view to an authoritative expression of opinion as to the extent of the power conferred by the terms of the sub-section.

The power was originally conferred by section 1 of Ordinance No. 8 of 1896 without any limitation as regards the Magistrate's views as expressed in the sub-section under review, and was apparently intended to enable the Police Magistrate, who was also the District Judge of the district, to deal with cases beyond the jurisdiction of the Police Magistrate without the trouble of sending the proceedings to the Attorney-General and then rehearing the case in his higher jurisdiction, and so saving a double trial by the same person under different denominations.

With the wisdom of the Legislature in so ordering we have nothing to do, but it seems that when the Criminal Procedure Code was passed it was thought necessary to alter that section, and sub-section (3) of section 152 apparently took the place of section 1 of Ordinance No. 8 of 1896.

This sub-section does not confine this higher jurisdiction to the Magistrate, where he is also the District Judge of the District, but gives it to " a Magistrate being also a District Judge; " thus, in my opinion, conferring it on any Magistrate who is a District Judge, and not confining it to the Magistrate who happens to be one and the same person as the District Judge.

At the same time the restriction was imposed on its exercise to those cases in which the Magistrate should be of opinion that the offence " may properly be tried summarily. "

Whatever was the cause of this alteration in the law, it looks as if the Legislature intended to limit the unrestricted exercise of the jurisdiction, although I do not think there is anything in section 152 to justify the inference that it was to be confined to cases in places where the Police Magistrate was also the District Judge, nor is the punishment permitted to be inflicted any guide as to the principles on which the Magistrate is to assume his higher jurisdiction.

Under section 166 a Magistrate may by consent of the accused try an offence triable by a District Court, if he thinks it expedient so to do, " having regard to the character and antecedents of the accused, the nature of the offence, and all the circumstances of the case, " and award punishment not exceeding one year.

It is evident that under section 166, from the limitation of the punishment, that it was intended that a Magistrate even with

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the consent of the accused should try the graver classes of offence triable by District Courts. What then is the class of case which it is open to the Magistrate, being also a District Judge with the jurisdiction to award punishment up to two years, properly to try summarily without the consent of the accused under section 152, sub-section (3).

It seems to me that it is in the word "summarily" we must seek the measure of the Magistrate's power.

A "summary offence" under the Procedure Code, section 3, is defined to mean a case triable by a Police Court.

An offence which can be properly tried summarily then would seem to be an offence which can be properly tried by a Police Court.

I should say then that any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, or any difficult question of intention, or identity, or in which the punishment ought really to exceed two years, is one that is not properly triable summarily. I mention the latter point, as Magistrates should, I think, take care to consider and distinguish between cases which although triable by a District Court are punishable only to the full extent by the Supreme Court, and those in which the limit of punishment is within the jurisdiction of the District Court.

There may of course be other circumstances which would negative the propriety of a summary trial, and which will have to be dealt with as they arise.

The question whether a case may properly be so tried summarily is I think within the province of this Court to review on appeal, and in that of the Attorney-General to prevent, should he think it necessary to act under section 390 of the Criminal Procedure Code.

Whether the case may be properly tried summarily is a matter primarily for the Magistrate being a District Judge to decide, but I cannot see that the Legislature intended that his decision should be beyond appeal. It is possible that his opinion might be an erroneous one, and our jurisdiction in appeal extends to the correction of all errors in fact or in law which shall be committed by a District Judge (section 39 of The Courts Ordinance, No. 1 of 1889).

I agree with Acting Chief Justice Moncreiff in his judgment in the case reported in *2 Browne*, at page 233, where he lays down that the Magistrate should state his opinion and intentions in order to show that he is not trying a non-summary case in a

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summary manner by mistake, and I think for his own sake he ought to give his reasons for holding his opinion that this Court may judge as to the soundness of them.

In the case before us the Magistrate takes four pages of typewritten matter to found his reasons for thinking it a clear case, but as I understand it the reference to the Full Court was not to ascertain our opinion as to whether the Magistrate was right in this particular case in holding it was a case "properly triable summarily," but academically as to the meaning of those words, and whether the Magistrate's opinion could be reviewed.

SAMPAYO, A.J.—

The accused in this case were charged with cheating under section 403 of the Ceylon Penal Code, which is an offence not summarily triable by the Police Court, but is triable by the District Court. But the Police Magistrate, who is also a District Judge, acting under section 152, sub-section (3), of the Criminal Procedure Code, recorded his opinion that the case was one which he might try summarily, and he tried the same accordingly. Now, in Colombo, besides the District Judge proper, there are three Additional District Judges, including the Police Magistrate, who tried the case, and I understand the District Court criminal cases are now as a rule tried by one of the Additional District Judges, who is also the Commissioner of the Court of Requests. The accused having appealed from a conviction, the question as to the scope and effect of the above provision of the Code, in cases where there is more than one District Judge in the same place, has been reserved for the consideration of the Full Court.

The Ordinance No. 8 of 1896, which for the first time enabled Police Magistrates to try offences not triable by the Police Court but triable by the District Court, had in view, as the preamble shows, the case of the District Court and the Police Court being presided over by one and the same officer, and provided that, in cases where an offence is not triable summarily by the Police Court but is triable by the District Court, it should not be obligatory on the Police Magistrate, where he is also the District Judge of the district, to proceed under chapter XVI. of the old Criminal Procedure Code, but that it should be lawful for him to try the case himself in his capacity of District Judge. This

Ordinance is now repealed, but the above provision with some modifications is re-enacted in section 152, sub-section (3), of the Criminal Procedure Code of 1898, the most material modification being the substitution of the expression " a District Judge " for " the District Judge, " a change which Lawrie, J., in *Jayawardene v. Perera* (Tambiah's *Reports, p. 15*), thought was purposely made, and which at all events renders it clear that the Code confers this power on the Police Magistrate even where there are several District Judges. There are two other reported cases commenting on this section of the Code, viz., *Vengadasalem Chetty v. Mohideen Pitche* (*4 N. L. R. 339*) and *Sinno Tamby v. Mendis Appu* reported as a note at page 340. I do not read either of these cases as holding that the Police Magistrate in places where there are several District Judges can in no case try an offence summarily under the above section, but as merely deprecating and disapproving of the exercise of this power in such circumstances. In the case P. C., Colombo, No. 85,820, decided on 12th April, 1904, Layard, C.J., not only expressed himself very emphatically as to this jurisdiction being vested in the Police Magistrate, but appeared to go further and think that the opinion of the Police Magistrate as to the offence being one that might be properly tried by him summarily was conclusive. It is very clear that the Police Magistrate has this jurisdiction vested in him by the above section, and indeed counsel who appeared for the appellant in this case did not wish to argue the contrary, but said that the case was sent before the Full Court more for the purpose of a definite rule being laid down as to the exercise of the jurisdiction by the Police Magistrate. I do not see how any general rule can be laid down. The exercise of the jurisdiction is a matter of discretion with the Police Magistrate, and each case must depend on its own circumstances. In the course of the argument the significance of the word " properly " in section 152 (3) was much discussed, and the possible view was suggested that all cases, where there is more than one District Judge, would be cases in which the offence would not be properly tried summarily by the Police Magistrate. This, however, cannot be a correct view, because it would amount to taking away from the Police Magistrate by one hand what is given to him by the other. It occurs to me that the word " properly " perhaps contemplates the converse of such cases as the following: where, for instance, the gravity of the offence is such that the case would not be committed even to the District Court, though jurisdiction is given to it in schedule II. of the Code, but would be committed to the Supreme Court; or where the difficulties in fact or law

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are such that the instructions and advice of the Attorney-General may be necessary; or where the aid of assessors in the trial of the case may be desirable. In the class of cases which the Police Magistrate should not in general consider he could properly try summarily, I would include the case where the Police Magistrate is not the only officer having the position of a District Judge; but while we may strongly impress this view on Police Magistrates, I do not see how we can lay it down as a rule absolutely binding on them.

As regards the further question, whether the opinion of the Police Magistrate in exercising his discretion is absolute and not subject to correction, I am unable to agree with such a view. In my opinion the discretion vested in the Police Magistrate should be reasonably exercised, and may be reviewed in individual cases by the Appellate Court, which has ample powers for this purpose, and I fully agree with what is laid down by Chief Justice Moncreiff in *Danhia v. Douhamy* (*2 Browne 230*) to the effect that it is not enough for the Police Magistrate to form the opinion that the offence may properly be tried summarily by him, but he must record the reasons for his opinion, so that the Supreme Court may be satisfied as to the validity of the opinion and the propriety of the assumption of jurisdiction by the Police Magistrate.