

1938

Present : Koch J.

## TENNEKONE v. DAHANAYAKE.

264—P. C. Hatton, 7,634.

*Charge—Proceedings originate with police report—Summons issued—Accused appear before service of summons—Charge framed from summons—Criminal Procedure Code, ss. 148 (b) and 187.*

Where, on a police report under section 148 (b) of the Criminal Procedure Code, summons was issued against an accused person and the accused appeared in Court before service of summons, and where the Magistrate explained the charge to the accused from the summons,—

*Held*, the omission to frame a charge was not a fatal irregularity. *Hendrick v. Pelis Appu* (1. C. W. R. 194) followed.

<sup>1</sup> 31 L. J. Ex. 233.

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

*Sri Nissanka* (with him *Victor Gunaratne*), for accused, appellant.

*Gunasekara, C.C.*, for Crown, respondent.

*Cur. adv. vult.*

June 23, 1938. KOCH J.—

The appellant, who was the driver of a private car, was charged with having plied the car for hire in contravention of the conditions inserted in his licence and was convicted under section 84 of the Motor Ordinance, No. 20 of 1927. He was sentenced to pay a fine of Rs. 100. The appeal is not pressed on the facts. His Counsel has, however, raised a point of law of some interest.

A police report under section 148 (b) of the Criminal Procedure Code was presented to Court on March 21, 1938, and the appellant was warned by the Police to appear on March 28. Summons appear to have issued on the appellant in the meantime, although I do not see an entry authorizing such issue. The accused, however, in obedience to the warning appeared in Court on March 28. On that date, the entry made is as follows:—"No return to summons. Call for and reissue for April 11, 1938. Accused present. Charge is read and explained under section 187 of the Criminal Procedure Code from summons. Accused states:—"I am not guilty". Summons taken by Sergeant. Trial, April 4, 1938".

It is somewhat difficult to understand why there should have been a reissue of summons ordered when the accused was present and the charge was read to him from the summons.

The point raised by Mr. Gunaratne on behalf of the appellant is that as the accused was not brought before the Court on a summons or a warrant, the Magistrate should have framed a charge against him. He relies on section 187 (1) and (2) of the Criminal Procedure Code.

It is clear that the appellant was not brought before the Court on a summons, but a summons had issued. Was the Magistrate justified in the circumstances in dispensing with the framing of a charge and reading the charge from the summons to the appellant?

The authorities on the point are conflicting. The earlier decisions are in the appellant's favour. They are: (1) *Inspector of Police v. Elaris*<sup>1</sup>, (2) *Sanders v. Vally Thampan*<sup>2</sup>, (3) *James Appu v. Egonis Appu*<sup>3</sup>, (4) *Assan Singho v. Perera*<sup>4</sup>.

They were all cases in which warrants were issued by the Court, but the accused were present in Court, although the warrants had not been executed.

The present case is one of summons, but the principle would be the same as was indicated by Schneider J. in *Assan Singho v. Perera* (*supra*).

In *Hendrick v. Pelis Appu*<sup>5</sup>, however, Shaw J. held that as the object of framing a charge and reading it to the accused was to inform him of

<sup>1</sup> 6 *Balasingham's Notes* 27.

<sup>2</sup> 1 *Criminal Appeal Reports* 55.

<sup>3</sup> 3 *C. W. R.* 363.

<sup>4</sup> 6 *C. W. R.* 278.

<sup>5</sup> 1 *C. W. R.* 194.

the exact offence of which he is accused, the omission to frame a charge was not an irregularity as the charge was read from the warrant. In this case the accused appeared but not on the warrant.

This decision was followed by Schneider J. in the two cases of *Assan Singho v. Perera* (*supra*) and *Mudiyanse v. Appuhamy*<sup>1</sup>.

In *Ebert v. Perera*<sup>2</sup>, a case which came up before a Divisional Bench of three Judges in 1922, the point decided was that where proceedings were instituted under section 148 (b) of the Criminal Procedure Code and the offence committed was punishable with more than three months' imprisonment and the accused appeared without a summons or a warrant, the Magistrate was not justified in reading the charge from the report. It was held that he should have framed a charge and the irregularity was not covered by section 425 of the Criminal Procedure Code. In the course of his judgment Ennis J. referred to the decision of Shaw J. in *Hendrick v. Pelis Appu* (*supra*), and approved of it. His opinion was that an appearance in Court to show cause against a complaint when a warrant or a summons had been issued was an appearance on the summons or warrant, even though the summons or the warrant had not been executed. Schneider J. one of the other Judges concurred and agreed, to use his own words, "with the reasoning and conclusions" arrived at by Ennis J. De Sampayo J. in a separate judgment justified the decision in *Hendrick v. Pelis Appu* (*supra*) on the ground that it was the Magistrate who stated the charge in the summons or warrant, and that therefore there was no practical object in requiring the Magistrate to record the charge over again. This view clashes with what he himself previously expressed in *James Appu v. Egonis Appu* (*supra*) and *Assan Singho v. Perera* (*supra*).

The opinions of the three Judges in this case are entitled to the highest respect, although they appear to be *obiter*.

In a later case, *Abanchy v. Sirimalhamy*<sup>3</sup>, Porter J. followed the ruling in *James Appu v. Egonis Appu* (*supra*), but the cases which expressed a contrary view were not cited before him.

Considering that the later decisions met with the approval of the Divisional Bench and that De Sampayo J., who decided the earlier cases, had reason to change his opinion, the decisions in the later cases must be adopted by me and I am bound by them.

Mr. Gunaratne wanted me to refer this matter to a larger Bench, but I think that the law is now fairly settled on the point and there is therefore no necessity to carry it further.

The appeal is dismissed.

*Affirmed.*

<sup>1</sup> 22 N. L. R. 169.

<sup>2</sup> 23 N. L. R. 362.

<sup>3</sup> 1 *Times of Ceylon* 183.