

1948

Present : Wijewardene A.C.J.

GUNAWARDENE *et al*, Appellants, and VELOO (Inspector of Police), Respondent

S. C. 870-871—M. C. Gampaha, 44,314

Criminal Procedure Code—Magistrate assuming jurisdiction as District Judge—Transfer of Magistrate—Successor continues proceedings without independent decision to act under section 152 (3)—Conviction not vitiated—Sections 152 (3), 292 and 425.

Where a Magistrate decides to try a case summarily under section 152 (3) of the Criminal Procedure Code his successor in office can continue the proceedings without an independent decision of his own that the case is properly triable under that section. In any event the failure to make such a decision does not amount to more than an irregularity which is curable under section 425 of the Criminal Procedure Code.

APPPEAL from a judgment of the Magistrate, Gampaha.

H. W. Jayewardene, for 1st accused, appellant.

C. S. Barr Kumarakulasingham, for 2nd accused, appellant.

A. C. M. Ameer, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 12, 1948. WIJEYWARDENE A.C.J.—

Proceedings were instituted before Mr. J. E. A. Alles in the Magistrate's Court of Gampaha on a written report by a Police Officer that the accused committed an offence punishable under section 419 of the Penal Code. In the presence of the accused, Mr. Alles recorded the evidence of one Sirisena and then decided to try the case under section 152 (3) of the Criminal Procedure Code, as the facts were simple and the case could be disposed of expeditiously in the Magistrate's Court. The Magistrate, thereafter, charged the accused, and on their pleading not guilty the case was fixed for trial on June 3, 1948. On that date the case could not be taken up, as the Government Analyst, a material witness for the Crown, was absent. The case came up for trial next on July 6, 1948, before Mr. P. A. de S. Senaratne who had succeeded Mr. Alles, on the latter being transferred to another station. Mr. Senaratne recorded the evidence of Sirisena *de novo* in addition to the evidence of the Government Analyst and other witnesses called by the prosecution. The Counsel appearing for the accused led evidence for the defence the same day and the Magistrate convicted both the accused.

It is argued in appeal that the entire proceedings before Mr. Senaratne are vitiated by the fact that the proceedings were conducted by him under section 152 (3) merely on the basis of the assumption of jurisdiction by Mr. Alles. It is contended that Mr. Senaratne should have recorded some evidence and then decided whether he should proceed under section 152 (3) independently of the previous decision reached by Mr. Alles.

My attention was drawn to an *obiter dictum* of Browne A.J., in *The Queen v. Silva*¹. It is sufficient to say that the facts of that case are different. There, one Magistrate recorded the evidence of a witness and his successor decided on the evidence so recorded to act under section 152 (3), merely because he was both a Magistrate and District Judge. It was in reference to these facts that Browne A.J., said:—

“ I doubt he could do so upon the mere examination of the complainant made by another than himself, and he has not recorded that he was of opinion that the offence charged might properly be tried summarily by him. His reason was stated by him to be that the charge was one triable by a District Judge, and that he held the dual office of Judge and Magistrate. That *per se* is not sufficient reason for exempting non-summary charges from the operation of Chapter XVI ”.

¹ (1901) 5 N. L. R. 17.

I do not think there is any merit in the argument of the appellant's Counsel. When Mr. Alles decided to try the case under section 152 (3), he was still going to try the accused as a Magistrate but with punitive powers higher than those ordinarily exercised by a Magistrate (vide *Madar Lebbe v. Kiri Banda et al.* ¹). If Mr. Alles recorded some evidence thereafter, Mr. Senaratne could have continued the case from that stage in view of section 292 of the Criminal Procedure Code. I fail to see, therefore, any reason why Mr. Senaratne should not have continued the case from the stage that Mr. Senaratne decided to try it under section 152 (3) [*vide* Chitale and Rao on the Code of Criminal Procedure (second edition) page 1957].

Even if the contention of appellant's Counsel is sound, the failure of Mr. Senaratne to act in the way suggested by Counsel does not amount to more than an irregularity curable under section 425 of the Criminal Procedure Code as it has not occasioned a failure of justice (vide *Kalinghamy v. Porolis Appu* ²). On the facts I agree with the view expressed by Mr. Alles that this was a case which could and should have been tried by a Magistrate under section 152 (3).

I dismiss the appeals.

Appeals dismissed.

