1961 *Present:* Weerasooriya, J.

DE JONG *et al.*, Appellants, *and* DEMATAGODA POLICE, Respondent

S. C. 1238-1242—M. C. Colombo, 30734/A

Criminal procedure—Assumption of jurisdiction to try summarily a non-summary offence—Procedure—Effect of change of Magistrate—Stage at which summary jurisdiction should be assumed—Value of evidence recorded before assumption of summary jurisdiction—Criminal Procedure Code, ss. 148 (1) (b), 152 (1), 152 (3), 156.

Where there is a change of Magistrate after a Magistrate decides to hear a non-summary case summarily under section 152 (3) of the Criminal Procedure Code, it is not necessary that the new Magistrate should elect afresh to try the case summarily under that section.

It is not open to a Magistrate to assume summary jurisdiction under section 152 (3) of the Criminal Procedure Code after non-summary proceedings have already commenced and evidence of witnesses has been taken as part of the non-summary inquiry.

Evidence recorded by a Magistrate to enable him to decide whether he should exercise summary jurisdiction under section 152 (3) of the Criminal Procedure Code cannot be taken into consideration by him at the trial, unless it is recorded *de novo*.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Colvin R. de Silva, with *P. Nagendra*, for accused-appellants.

D. W. Abeyakoon, Crown Counsel, for Attorney-General.

Cur. adv. vult.

December 21, 1961. WEERASOORIYA, J.—

The proceedings in this case commenced with the filing of a report under section 148 (1) (*b*) of the Criminal Procedure Code on the 17th March, 1960. The report alleged the commission of no less than fifteen offences, some

of which (rioting and house-breaking by night) were not triable summarily, and on the 17th May, 1960, the Magistrate decided to take non-summary proceedings. In doing so he was acting in accordance with the procedure indicated in section 152 (1) of the Criminal Procedure Code. The accused were informed of the charges under section 156 of the Criminal Procedure Code and the inquiry was fixed for the 9th June, 1960. The inquiry was, however, not taken up till the 25th July, 1960, on which date one witness was called, but at an early stage of his evidence the Magistrate thought that the proceedings should not be held before him as he had previously dealt with another case involving the original 6th accused (who was subsequently discharged) and the inquiry was adjourned for the 29th August, 1960. The Magistrate before whom the inquiry was resumed on the adjourned date recorded the evidence of three witnesses including the witness who had been called on the 25th July. Having recorded their evidence, he decided to deal with the case summarily under section 152 (3) of the Criminal Procedure Code. Charges against the accused were framed and their pleas recorded and the case was put off for the 27th September, 1960. There was yet another change of Magistrate when the case was taken up on the 27th September. The new Magistrate commenced proceedings by recording in detail the evidence of the principal prosecution witness, William Perera. The defence was not given an opportunity of cross-examining him at that stage. Thereupon the Magistrate stated as follows: " On the evidence before me I am satisfied that this is a matter that could be tried summarily under section 152 (3) of the Criminal Procedure Code. I act accordingly. Vide Summary Form 1B. Each accused charged from the charge sheet. Each pleads ' I am not guilty '. " Evidently the Magistrate thought that a summary trial before him should be preceded by an election made by him under section 152 (3) to try the case summarily, notwithstanding that his predecessor had already decided on a summary trial. He seems to have overlooked the decision in *William Perera et al. v. Inspector of Police, Maharagama* [1], which indicates that such a course is not necessary.

Having taken the steps on the 27th September as stated above, the Magistrate proceeded with the trial. William Perera was re-called, cross-examined and re-examined. His evidence was not recorded *de novo*. After trial the 1st to the 5th accused, who are the appellants, were found guilty of the charges laid against them and sentenced to various terms of imprisonment. From their convictions and sentences they have filed the present appeals.

Learned counsel appearing for them took two objections to the procedure adopted in this case. One of them is that the decisions of the Magistrates, before whom the case was taken up on the 29th August and 27th September, 1960, to deal with it by way of summary trial, were contrary to section 152 (3) of the Criminal Procedure Code in that they were made subsequent to the stage contemplated in that section. In my opinion this objection is a good one.

[1] *(1949) 51 N. L. R. 10.*

In *Queen v. Uduman et al.* [1] Bonser, C.J., observed that " the Magistrate is to make up his mind whether he will try summarily as District Judge or not after hearing the evidence under section 149 ". Section 149 (1) of the Criminal Procedure Code, as it then stood, made it obligatory on the Magistrate to record forthwith the evidence of the complainant or informant in a case where the report under section 148 (1) (*b*) discloses an indictable offence. In the present case the decision of the Magistrate (on the 29th August) to try the case summarily was made only after the evidence of three witnesses, one of whom was the principal prosecution witness, was taken as part of the non-summary inquiry which commenced on the 17th May, 1960. This procedure is not sanctioned by section 152 (3), nor is there any other provision in the Criminal Procedure Code under which it could be justified. On this objection alone I think that the convictions of the appellants should be set aside.

The other objection taken by counsel for the appellants is even a more serious one. It is based on the ruling of this Court in *Wilfred v. Inspector of Police, Panadure* [2]. The effect of the ruling is that evidence recorded by a Magistrate to enable him to decide whether he should exercise jurisdiction under section 152 (3) of the Criminal Procedure Code cannot be read over when he assumes jurisdiction and tries the case. In the present case, after the Magistrate recorded the evidence of William Perera on the 27th September in order to decide whether he should assume jurisdiction under section 152 (3), he did not even resort to the device of reading over that evidence to the witness at the trial that subsequently took place. In the result, evidence which had been recorded prior to the trial was improperly taken into consideration by the Magistrate in finding the accused guilty of the charges laid against them.

I set aside the convictions of the appellants and the sentences passed on them and remit the case to the Court below for non-summary proceedings to be taken in terms of the decision of the Magistrate on the 17th May, 1960. The non-summary proceedings will be before a Magistrate other than the Magistrate who tried the case summarily.

Case sent back for non-summary proceedings.