

1934

*Present : Dalton J.*DE SOYZA *v.* APPURALA.382—*P. C. Mullattivu, 12,359.*

Criminal Procedure—Complaint by Assistant Government Agent—Plaint entertained by Assistant Government Agent as Police Magistrate—Trial before another Magistrate—Irregularity.

An Assistant Government Agent made a written report to a Police Magistrate under section 148 (1) of the Criminal Procedure Code that an offence had been committed by the accused. The same officer as Magistrate entertained the plaint and ordered the issue of process.

The trial took place before another Magistrate who proceeded to examine the Assistant Government Agent as complainant and to frame a fresh charge.

Held, that the proceedings were irregular.

A PPEAL from a conviction by the Police Magistrate of Mullaittivu.

L. A. Rajapakse (with him *D. J. R. Gunawardane*), for accused, appellant.

M. F. S. Pulle, C.C., for Crown, respondent.

Cur. adv. vult.

August 29, 1934. DALTON J.—

In this case the accused has been convicted on a charge of abetting one Kandatage Kaurala to give information to a public servant, namely, the Assistant Government Agent of Mullaittivu, that the Ratemahatmaya of Vavuniya South had felled Crown timber, which information he knew or believed to be false, intending thereby to cause the Assistant Government Agent to use his lawful power to the injury or annoyance of the said Ratemahatmaya.

The appeal is based upon the alleged irregularity of the proceedings, it being alleged that the complainant himself had taken part as Magistrate in part of the trial of the accused.

The record shows that the complainant was described as "G. de Soyza, Assistant Government Agent, Mullaittivu". He makes a written report to the Magistrate that an offence has been committed by the accused, under the provisions of section 148 (b) of the Criminal Procedure Code. The Magistrate to whom he makes the report is in fact himself, and in that latter capacity he receives his complaint made in the capacity of Assistant Government Agent. Having received the report on February 2, he, as Police Magistrate, directed that process do issue against the accused.

Summons was accordingly issued, and on February 9 accused appeared before Mr. de Soyza, the person who had made the complaint against him, in his capacity as Magistrate. Mr. de Soyza charged him from the plaint and took his plea, which was that he was not guilty. Accused also gave the names of his witnesses. Mr. de Soyza then fixed the trial for February 24, stating it would be before another Magistrate.

On February 24 another Magistrate, Mr. R. Y. Daniel, was on the Bench. Accused was present with his counsel, who stated he was not ready as accused's witnesses were not present. The Magistrate, however, decided to go on with the case, and the complainant Mr. G. de Soyza was called as the first witness and affirmed. It would appear from the record that Mr. de Soyza was also conducting the prosecution on this date. Before any evidence was given by him, it is noted on the record that Mr. Daniel found an irregularity in the proceedings, the irregularity being

that accused had been charged from the plaint. Before charging him from the charge sheet the Magistrate states he would record the evidence of the complainant. Mr. de Soyza was then examined and made a statement on affirmation. It is not stated why this was done, but it is suggested by Crown Counsel before me that it was a proceeding by the complainant and by the Magistrate respectively under the provisions of section 148 (1) (a) and section 149 (1) of the Criminal Procedure Code. In that case it is suggested that Mr. Daniel began the case *de novo* with all the necessary proceedings denoted in chapter XV. of the Criminal Procedure Code.

At the conclusion of the statement of Mr. de Soyza, Mr. Daniel at once proceeded to charge the accused from the charge sheet. It does not appear if he had himself drafted the charges after the statement of Mr. de Soyza was made or whether they had been drafted before he came into the case. It is clear, however, after Mr. de Soyza's statement was taken that nothing further was done, for example, in the way of directing process to issue against any accused person, as provided for in section 151 (2) of the Criminal Procedure Code.

After accused was charged by Mr. Daniel on February 24, it being late in the afternoon, the case was postponed for another day to be fixed, the trial to be resumed before yet another Magistrate. Mr. Daniel had previously that day dealt with another case (P. C. No. 12,348), in which the same counsel had appeared for the accused, and noted there why it was desirable another Magistrate than himself should try the case. I gather those reasons applied to his order that the trial in this case be continued before another Magistrate.

On March 20 the trial was resumed before Mr. S. Rodrigo, who had been specially appointed to hear this case and P. C. No. 12,348. Each Magistrate appears to have resumed the case where the other left off, with the one exception mentioned above. A proctor now appeared for the prosecution, but accused was undefended. The latter asked for an adjournment because his counsel and proctor were absent, but this request was refused by the Magistrate, as he had been specially appointed to come from Jaffna to hear these two cases. This fact must doubtless, in the circumstances, have been in the knowledge of the defence. The trial then proceeded.

There was practically no cross-examination of the witnesses for the prosecution, although one or two questions were put to one or two of the witnesses. At the close of the case for the prosecution the Magistrate himself called two witnesses and then he called upon the accused for his defence on the first count in the charge. He acquitted him on the second count. There is no record that he explained to the accused the nature of the evidence against him or complied with the provisions of section 296 of the Criminal Procedure Code, by calling his attention, since he was not represented by counsel or proctor, to the principal points in the evidence against him. Accused gave evidence himself not meeting any

points raised by the prosecution but merely stating that up to date he had done nothing wrong and that he was a man of position and family.

The grounds urged by counsel before me on behalf of appellant are two. The first is that the proceedings are irregular and cannot stand, since in the first part of the case at any rate the first Magistrate who was on the Bench was also complainant and prosecutor. The evidence of Mr. de Soyza gives in detail the inquiry he had held and the part he played as Assistant Government Agent in the institution of the proceedings against accused.

On this first point Crown Counsel urges that although Mr. de Soyza was the complainant and was also on the Bench as Magistrate to receive and take whatever action might appear fit to him on that complaint, nevertheless when Mr. Daniel, the second Magistrate who took part in the proceedings, came into the case, he commenced the proceedings *de novo*. Therefore, he argued that any irregularity in the proceedings before Mr. de Soyza did not extend to the proceedings before Mr. Daniel. I regret I am unable to agree. The proceedings before Mr. de Soyza are all part of the record in the case in appeal before me, and I am unable to see that any fresh case was instituted before Mr. Daniel. If any fresh proceedings had been instituted before him, it would have been done under the provisions of section 148, and the proceedings before Mr. de Soyza would necessarily be no part of this case. As it stands, on his complaint after the exercise of his judicial discretion his direction that process do issue and the proceedings of February 9 are all part of the case which was continued by the other two Magistrates. If the proceedings on the record prior to the appearance of Mr. Daniel on the Bench are to be taken to be another case than the one he heard, then the case heard by Mr. Daniel and Mr. Rodrigo has no proper starting point and is clearly irregular. Whether or not the fact that the Magistrate who received the complaint was satisfied that the complaint, his own, disclosed a summary offence influenced the Magistrate who eventually convicted the accused I am unable to say. If I cannot say it did not do so, then clearly the accused may have been prejudiced by the irregular proceedings. Mr. de Soyza as Magistrate should of course never have allowed proceedings to commence before him or on his order against the accused on a complaint made by him in another capacity. He cannot act as Judge in his own case. Although there is no reason to suggest his action was due to anything but lack of experience or perhaps an inability to keep his executive duties apart from his judicial functions, I am unable to disassociate that portion of the case in which he played the part of Magistrate from the subsequent proceedings in the same case before the other two Magistrates. The proceedings are bad from and including the order of February 2 that process do issue, for under the circumstances stated the irregularity affects all the subsequent proceedings.

The second point refers to the alleged non-compliance by the Magistrate, who eventually convicted the accused, with the provisions of section 296 to which I have referred, to the prejudice of the accused. The record does not show that the provisions of that section were observed by the

Magistrate, and Mr. Pulle cannot satisfy me that he did observe them. In view of my decision, however, on the first point I need not decide what flows on the facts in this case from this failure to observe the provisions of this section.

The appeal must be allowed for the reasons I have given, the conviction being quashed.

Quashed.

