

1942

Present : Hearne J.

DIONIS *et al.* v. PIYORIS APPU *et al.*

761-7—M. C. Tangalla, 14,125.

Criminal Procedure—Non-summary case—Evidence recorded in presence of the accused—Accused not permitted to cross-examine—Case tried summarily—Evidence read over to accused at trial—Fatal irregularity—Criminal Procedure Code, s. 151 (2).

Where, in non-summary proceedings, evidence was recorded under section 151 (2) of the Criminal Procedure Code in the presence of the accused who was not permitted to cross-examine the witnesses and where the Magistrate thereafter decided to try the case summarily as District Judge—

Held, that the evidence of the witnesses could not be imported into the trial by merely reading it over to them and that the irregularity was fatal to the conviction.

A PPEAL from a conviction by the Magistrate of Tangalla.

H. V. Perera, K.C. (with him S. R. Wijayatilake), for accused, appellants.

H. W. R. Weerasooriya, C.C. (for Crown), respondents.

Cur. adv. vult.

March 23, 1942. HEARNE J.—

On June 21, 1941, the Police made a report to the Magistrate under sections 121 (2) and 131 of the Criminal Procedure Code and produced before him four of the seven persons whose names were mentioned in the report. These four persons were remanded till June 24, and on that date a report under section 148 (b) of the Code was forwarded to the Magistrate. In the presence of the four persons who had been remanded to custody and of the three others who had also been brought to Court, the Magistrate, Mr. Olegesegeram, recorded the evidence of Alice Nona and K. Gunasena. No opportunity of cross-examination was given

and the evidence of the two witnesses was not read over to them nor did they sign the record that had been made of what they said. Amongst the offences alleged in the report was one of rioting which is not triable by a Magistrate but Mr. Olegesegeram assumed jurisdiction as District Judge, charged the seven accused and fixed the date of trial. On August 12, another Magistrate, Mr. Roberts, had succeeded Mr. Olegesegeram. He recorded the evidence of a medical witness but no cross-examination was allowed. It would appear that he assumed he was officiating as Magistrate, for at the conclusion of the Doctor's evidence, he made a note that he had decided to try the case as District Judge. Charges were read and explained to the accused, all of whom pleaded not guilty. The doctor was recalled and his previous evidence was read. He was followed by Alice Nona and Gunasena, whose previous evidence was also read. They were cross-examined; three other witnesses were called and the case for the prosecution was closed. Defence witnesses were then called and the accused were eventually convicted on five charges and sentenced to imprisonment.

It was argued on appeal that when the trial was held by Mr. Roberts, proceedings should have been taken *de novo* and that the evidence of Alice Nona and Gunasena should not merely have been read to the accused in the presence of the witnesses.

Much of the argument was focussed on the subject of the particular section of the Code under which Mr. Olegesegeram purported to act. Mr. Perera argued that he had acted under section 150 (1), but I am inclined to think he is wrong. Apart from the marginal note "procedure in certain cases where accused is unknown" (this is, of course, not part of the law) the section appears to contemplate the absence of any accused person before the Magistrate. The words "although no person by name is accused of having committed such offence" mean, in my opinion, "notwithstanding the fact that no person is accused by name".

The aim of the Code, as it appears to me, is to deal with various situations in which a Magistrate may find himself and to lay down when he shall, may or need not hold an examination of witnesses.

Disregarding for the moment the unusual occasions referred to in (c), (e) and (f) of section 148 (1), the Code provides under section 150 (1) for an examination at the Magistrate's option when no accused is present or named. The object is to enable the Magistrate to decide whether process should issue under section 150 (3) against any person whose name may emerge in the course of the examination. It also provides under section 151 proviso (ii.) for a compulsory or an optional examination when the accused, though named, is not in custody and under section 151 (2) for a compulsory examination when the accused is present and has been brought before the Court.

It would appear that Mr. Olegesegeram acted under section 151 (2).

It has been held by this Court that when evidence is properly recorded in the absence of the accused, e.g., under section 151 proviso (ii.) section 297 applies—*Musafer v. Wijesinghe*¹. What is the position in regard to evidence which has been recorded under section 151 (2) in the presence of the accused? As there is no section, similar to section 297,

¹ 43 N. L. R. 61

covering such evidence, the answer is that it can only be used when it forms part of the trial.

It may be that in certain circumstances the recording of evidence under section 151 (2) would properly be regarded as part of the trial. But where the offence charged is one that ordinarily the Magistrate could not try, where the evidence taken under section 151 (2) was taken at a time when he had not assumed extended jurisdiction and had not informed the accused of the charges against them and, finally, when the accused though present were not given the opportunity of cross-examination, it is impossible to say that the proceedings under section 151 (2) formed part of the subsequent trial. This being the case the evidence recorded under section 151 (2) cannot be imported into the trial itself and merely read to the accused. To hold that it may be done would be to disregard the provisions of section 189 which requires a Magistrate, for the purpose of a trial, to act on evidence which he has taken "in manner hereinafter provided".

It is to be noted that I have arrived at this conclusion independently of the fact that the evidence of Alice Nona and Gunasena was not read over to them or signed by them as required by section 151 (b).

The appeal is allowed and a fresh trial is ordered before a Magistrate other than Mr. Roberts.

Set aside.