

1934

*Present : Dalton J.*KING *v.* JOSEPH.

111—D. C. (Crim.) Colombo, 10,817.

Criminal Procedure—Accused undefended—Judge's failure to record entry under section 296—Point raised in appeal—No material before Supreme Court—Criminal Procedure Code, s. 296.

Where in criminal proceedings the accused is undefended and the record does not contain an entry to the effect that the trial Judge has complied with the provisions of section 296 of the Criminal Procedure Code, the Supreme Court will not infer from the mere fact that no record has been made that the section had not been complied with.

Where the petition of appeal does not make the failure to comply with the section a ground of appeal, there should be material before the Court that the accused was not informed of his rights under the section.

A PPEAL from a conviction by the District Judge of Colombo.

Rajapakse, for accused, appellant.

E. B. Wickremanayake, Acting C. C., for the Crown.

December 21, 1934. DALTON J.—

The accused has been convicted on a charge of aiding and abetting the offence of highway robbery; a sum of £10. 10s. is alleged to have been stolen from one J. Lloyd Jones on April 14, and the accused has been convicted of aiding and abetting that offence.

He was not represented at the trial in the District Court and it has been urged in appeal that the trial Judge has failed to comply with the provisions of section 296 of the Criminal Procedure Code. He has failed, it is urged, to inform the accused of his right to give evidence on his own behalf. It is quite clear that there is no entry on the record of the proceedings in the lower Court that the trial Judge did comply with the provisions of this section; but there is no ground of appeal urged in the petition of appeal based upon this alleged failure, nor does the accused say anywhere that he was not informed of his right to give evidence, nor is his Counsel able to tell me that the learned Judge failed to comply with the provisions of this section.

He urges that the Court could presume from the fact that no record is made on the proceedings of the trial by the trial Judge; that, therefore, the trial Judge did not do what is required of him under this section. I have been referred, in course of argument, to the decision in *Fernando v. Perera*¹ where this Court quashed the proceedings and sent the case back for retrial, because the record did not show that the Magistrate had complied with the provisions of section 296 of the Criminal Procedure Code. It is clear, however, that in that case, the Court had before it an allegation in the appellant's petition of appeal that he was not defended by a proctor, that he was unaware of his right to give evidence and that he was never informed of his right to give evidence.

In another case cited (*Fernando v. De Jong*²) a similar order was made. In that case also the Court had before it an affidavit submitted by the accused to show that the Court had not complied with the provisions of section 296 of the Criminal Procedure Code. Mr. Justice Akbar held, in that case, that that affidavit corroborated the record, the record being silent on the point of the Magistrate having complied with the provisions of this section, and he therefore presumed, in view of the affidavit corroborated by the lack of entry on the record, that the Magistrate had not carried out the provisions of this section.

In the case before me, there is a very clear distinction between the two cases to which I have been referred and this case. There is nothing to show that the District Judge has not complied with the provisions of this section, and Counsel for the appellant agrees with me that if the learned Judge has complied with the provisions of this section, his only failure has been to make a record of this compliance of the provisions of this section, and that no prejudice whatsoever has in that event been caused to the accused. In the two cases referred to, there was a definite statement before the Court from the accused that the provisions of the section had not been complied with. I am certainly unable to infer from the mere fact that the record has not been made that therefore the section had not been complied with; and, as I have stated, if it was in fact done, and not recorded although it should have been recorded, it is admitted that the accused could not show that he has been in anyway prejudiced by the mere fact that the District Judge failed to make the entry on the record of what he has done. If, therefore, the learned Judge has complied with the provisions of this section, it will be almost a waste of time to order a new trial.

¹ 16 N. L. R. 477.

² 34 N. L. R. 304.

It seems to me that the best course I shall adopt in this case is, in view of the absence of any allegation on the part of the accused that the provisions of this section had not been complied with, to ask the District Judge if in fact he did comply with the provisions of this section.

I will, therefore, direct that the District Judge be asked if he did comply with the provisions of this section 296 at the close of the case for the prosecution. I might also at the same time ask, if his answer to this question is in the affirmative, how it is that he failed to make a record in the proceedings of what he has done. If he has not done so, he will, of course, answer in the negative. When his answer is received, I can make a final order as to whether this appeal should be allowed and a fresh trial ordered or whether the appeal should be dismissed.

The report of the District Judge called for, as notified to Counsel for appellant at the conclusion of the argument, is now before me. The learned Judge states that it has been his invariable practice to act in conformity with the provisions of section 296 (1) of the Criminal Procedure Code, and that he did so in this case. He adds that it has not been usual to make a record that he so acted in the proceedings, but since the matter was brought to his notice, he has done so. It is clear that accused was informed of his rights and that no prejudice of any kind has been caused to him.

If in any future case Counsel for the appellant proposes to raise any such point, he should see either that there is material before the Court to support an argument that accused has not been informed of his rights or obtain clear and definite instructions on the point.

The appeal is dismissed, the conviction being affirmed.

Affirmed.
