1948 *Present :* **Windham J.**

SIVARAJASINGHAM, Appellant, *and* S. I. POLICE, POINT PEDRO, Respondent.

S. C. 1,361—M. C. Point Pedro, 9,681.

Criminal Procedure Code—Application for adjournment—Absence of witness—Attention of Magistrate not directed to whether reasonable efforts were made—No reasons for refusal—Re-trial—Section 289.

The accused in this case applied for a postponement in order to call a doctor to testify to his injuries. This application was refused by the Magistrate. There was nothing on the record to show that the Magistrate had directed his attention to the question whether reasonable efforts had been made to call the witness.

Held, that this was sufficient ground for re-trial.

Held, further, that under section 289 (3) of the Criminal Procedure Code an order refusing a postponement must contain a written statement of the reasons for such order.

APPEAL from a judgment of the Magistrate, Point Pedro.

R. L. Pereira, K.C., with *H. W. Tambiah* and *S. Sharvananda*, *for* the appellant

Arthur Keuneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 21, 1948. WINDHAM J.—

The appellant was convicted under section 316 of the Penal Code with having caused grievous hurt to a woman with a club, and was sentenced to six months' rigorous imprisonment. The injuries to the complainant were not disputed, and it was also uncontested that the appellant, upon being arrested four days after the assault upon the woman, was himself found to have sustained considerable injuries. The appellant's defence was that the injuries were caused to him by a number of persons who assaulted him with clubs in front of the complainant's house at the time when the complainant received her injuries. He denied having assualted the complainant.

At an early stage of the trial the appellant asked for an adjournment to call a doctor to testify to his injuries. The application was refused The following brief entry appears in the learned Magistrate's record after the conclusion of the evidence of the first prosecution witness a doctor, who apparently had not examined the injuries on the appellant :—"Mr. Kulaveerasingham moves for a date to call the doctor to speak to the injuries on accused. I refuse the date." The sole point seriously urged in this appeal is that the learned Magistrate erred in refusing the adjournment without recording any reasons for his refusal. In his judgment he rejects the stroy of the appellant, and one of the reasons he gives for rejecting it is that—"there is no evidence as to the age of the injuries on the accused". He goes on to say that "they appear to be recent". His judgment was delivered four weeks after the date of the assault on the complainant. It is not clear what the learned Magistrate meant by "recent"; but it may well be that he meant that they appeared to have been received after the date of the assault on the complainant, otherwise it is hard to see the relevance of his observation. And if that is what he meant, then the fact of the appellant having brought no medical evidence to show that they had been, or could have been, sustained on the date of the assault on the complainant may well have been a determining factor in the Magistrate's rejection of the appellant's story of a concerted assault upon him during the course of which the complainant might have received her injuries.

But, as we have seen, the appellant had applied to call such evidence and the Magistrate had rejected his application without reasons given. In these circumstances it is urged that the case should be remitted for retrial, so as to allow the appellant to call such evidence. Section 289 (5) of the Criminal Procedure Code is relied on. That sub-section provides that no adjournment shall be

allowed on the ground of the absence of a witness unless the Magistrate has satisfied himself that the evidence of such witness is material, and that reasonable efforts have been made to secure his attendance. Now this is not strictly the same proposition as the proposition that no adjournment shall be *refused* where the Magistrate has satisfied himself that the evidence *is* material and that reasonable efforts *have* been made. At the same time section 289 (5) has been construed, reasonably if I may say so with respect, to imply the latter meaning, in a similar case, in *Perera v. Perera*[1], where Howard C.J., after referring to the two requirements of section 289 (5), concluded by holding that—" It therefore seems to me that both these conditions existed, and in such circumstances an adjournment should have been granted. "

In the present case, while from the Magistrate's own judgment the medical evidence sought to be called would seem to have been relevant, there is nothing on the record to show, one way or the other, whether reasonable efforts had been made to secure the medical witness's attendance before trial. But this very absence from the record of anything to show that the learned Magistrate had directed his attention to the question whether reasonable efforts had been made, is in my view a good ground for allowing this appeal and remitting the case for retrial. For it does not follow, from the silence of the Magistrate's record on the point, that the appellant could not have shown that he had made reasonable efforts, if the necessity for his showing this had been pointed out to him. I am further of opinion, after due consideration of the point, that the requirement of section 289 (3) of the Criminal Procedure Code, whereby every Magistrate's order under that section must contain a written statement of the reasons for such order, applies not only to an order postponing or adjourning proceedings, but to an order refusing to postpone or adjourn proceedings. This equally, in my view, is an order " under this section ", and it would be prevarication to argue that because it was an order refusing to act under the section (*i.e.*, refusing to postpone or adjourn) it could not logically be held to be an order under the section.

For these reasons I allow the appeal, set aside the conviction and sentence, and remit the case to be re-tried by another Magistrate.

Sent back for re-trial.