

1946

*Present : Nagalingam A.J.*

SOMADASA, Appellant, and JEHORAN, Respondent.

*S. C. 1,053 - M. C. Colombo South, 7,646*

*Evidence—Criminal Procedure Code—Production of accused by Police—  
Examination of witnesses—Section 151 (2)—Framing of charge—  
Previous evidence read—Magistrate's Court.*

Any evidence recorded before the commencement of a trial even in a summary case cannot be made use of against the accused at the trial even though that evidence be read over to him and he be given an opportunity of cross-examining the witness who gave such evidence.

**A** PPEAL against a conviction from the Magistrate's Court, Colombo South.

*Barr Kumarakulasingham*, (with him *K. C. de Silva*), for the accused appellant.

*G. P. A. de Silva*, C.C., for the Attorney-General.

November 28, 1946. NAGALINGAM A.J.—

The accused in this case appeals from his conviction and sentence on charges of using criminal force to one Eugene Gunasekera and of voluntarily causing hurt to one M. A. Gunesekera.

On the facts I am far from satisfied that a case has been made out for interfering with the findings of the learned Magistrate. In fact my view is that the facts abundantly support the conclusion reached by the Magistrate and that a *prima facie* case has been made out against the accused.

A point of law has been urged which tends to show that the procedure adopted by the Magistrate must be deemed to be illegal specially in view of certain previous decisions of this court.

In this case proceedings against the accused would appear to have commenced upon a report made by a Police officer under section 148 (1) (b)

<sup>1</sup> (1922) 23 N. L. R. 362.

<sup>2</sup> (1915) 1 C. W. R. 194.

of the Criminal Procedure Code, but it seems to be the fact that at the same time the Police officer produced the accused person. That would be in terms of section 148 (1) (d) of the Criminal Procedure Code. Where there is both a report under section 148 (1) (b) and the production of the accused under section 148 (1) (d), it has been held by this court in the case of *Varghese v. Perera*<sup>1</sup> that in these circumstances it is the duty of the Magistrate to proceed under section 151, sub-section (2) of the Code and examine on oath the person who has brought the accused and any other person who may be present in court and able to speak to the facts of the case. The learned Magistrate in this case appears to have quite properly followed this course and examined the first witness in this case, namely, Eugene Gunesekera. After he had recorded that evidence the learned Magistrate in terms of section 187 (1) of the Code framed a charge against the accused, to which the accused pleaded not guilty, and the Magistrate set down the case for trial. On the date fixed for trial, the learned Magistrate commenced the trial by recalling the witness Eugene Gunesekera and by reading her previous evidence in the presence of the accused.

Objection is taken that as the learned Magistrate has acted upon the evidence recorded by him prior to the commencement of the trial, that was not evidence taken at the trial in the presence of the accused within the meaning of section 297 of the Criminal Procedure Code, and that therefore the proceedings are involved in illegality and that the conviction therefore cannot stand.

I have examined the relevant provisions of the Code with the assistance of counsel, and if I may say so, I have reached the conclusion myself that a strict construction of the various sections leads one to the conclusion that any evidence recorded before the commencement of a trial even in a summary case cannot be made use of against the accused at the trial even though that evidence be read over to him and even if the accused is afforded an opportunity of cross-examining the witness who gave such evidence. This view of the matter has been taken in the case of *Wilfred v. Inspector of Police, Panadure*<sup>2</sup> where, in regard to evidence recorded during an investigation by a Magistrate in regard to an offence triable non-summarily, the evidence recorded by him was made use of later when he decided to try the case summarily as District Judge. The judgment of the court was delivered by Jayetileke J. with whom Rose J. concurred and they held that the admission of that evidence was an illegality which could not be cured even under section 425 of the Criminal Procedure Code. This view of the matter was adopted even in regard to a summary case in an unreported judgment delivered by Jayetileke J. on the 24th of October, 1946—S. C. No. 729-730; M. C. Colombo 11,949. In this view of the point of law that has been urged, there is no other alternative but to quash the conviction. But as I said earlier, a *prima facie* case has been made out against the accused and I would therefore set aside *pro forma* the conviction and send the record back for proceedings to be taken *de novo* before the Magistrate.

*Sent back for re-trial.*

<sup>1</sup> (1942) 43 N. L. R. p. 564.

<sup>2</sup> (1945) 46 N. L. R. 553.