1947 *Present :* **Wijeyewardene S.P.J.**

PILLAYAN *et al.*, Appellants, *and* MANAMPERUMA (Police Sergeant), Respondent.

S. C. 663-667—M. C. Batticaloa, 2,568.

Criminal Procedure Code—Section 298—Evidence taken down in shorthand—Writing in English.

Evidence taken down in shorthand is evidence taken down in writing in English within the meaning of section 298 of the Criminal Procedure Code.

Attygalle v. Shemsudeen (1905), 4 Thambyah's Reports, followed.

APPEAL against certain convictions from the Magistrate's Court, Batticaloa.

G. E. Chitty (with him *H. Wanigatunga*), for the accused, appellants.

Boyd Jayasuriya, C.C., for the Crown.

Cur. adv. vult.

August 28, 1947. WIJEYEWARDENE S.P.J.—

The five accused were charged with—

(*a*) being members of an unlawful assembly,
(*b*) having destroyed by fire a Guard Station of the Internal Purchase Scheme (sections 419 and 140 of the Penal Code).
(*c*) having caused grievous hurt to Sambasivam, a Guard under the Internal Purchase Scheme (sections 316 and 140 of the Penal Code),
(*d*) having committed theft of three bushels of paddy which were in the possession of the aforesaid Sambasivam (sections 369 and 140 of the Penal Code), and
(*e*) having caused hurt to Thambyappah, a Guard under the Internal Purchase Scheme (sections 314 and 140 of the Penal Code).

The Magistrate tried the case under section 152 (3) of the Criminal Procedure Code. He convicted the accused on all the counts but dealt with them leniently, as they had no previous convictions and as they "appeared to be young". He passed the following sentences on each of the accused :—

(*a*) imprisonment till the rising of the Court and a fine of Rs. 40 on the first count, in default one month's rigorous imprisonment ;
(*b*) a fine of Rs. 15 on the second count, in default two weeks' rigorous imprisonment ;
(*c*) a fine of Rs. 25 on the third count, in default one month's rigorous imprisonment ;
(*d*) a fine of Rs. 10 on the fourth count, in default one week's rigorous imprisonment ; and
(*e*) a fine of Rs. 10 on the fifth count, in default one week's rigorous imprisonment.

The evidence of the witnesses for the prosecution shows that the accused had acted in a very high handed manner. The first and fifth accused went near the Guard Station in question on July 26, 1946, at about 4 P.M., carrying some paddy and attempted to pass the Station without any permit for the transport of the paddy. Sambasivam, the Guard at the Station, seized the paddy and informed them that they should go before the Headman. The two accused abused him and went away saying that they "would teach him a lesson". All the five accused along with several others came to the Guard Station at 1 A.M. on July 27 and set fire to the Station and removed some of the paddy. They also assaulted the two Guards, Sambasivam and Thambyappah. Sambasivam had five injuries including a fracture of the right forearm, and he was in Hospital for about a month. The evidence led by the prosectution stands uncontradicted, as no evidence was led for the defence.

When the appeal came up before me first on July 16, the accused were absent and were not represented by Counsel. As I thought I would have to enhance the sentences passed by the Magistrate, I gave them an opportunity to appear on July 25.

On July 25 Counsel appeared for the accused and contended that the Magistrate had acted in contravention of the provisions of section 298 of the Criminal Procedure Code, as he had got the official Stenographer to record the evidence in shorthand and then transcribe the evidence so taken down. The relevent portion of that section reads :—

> "In the District Courts and the Magistrates' Courts the evidence of each witness shall be taken down in writing in English by the District Judge or Magistrate or in his presence and hearing and under his personal direction and superintendence".

The argument of Counsel was that evidence taken down in shorthand was not evidence "taken down in writing in English" and that the section contemplated not only that the language in which the evidence is recorded should be English but that ordinary English script and not shorthand should be used in recording the evidence. I find that a similar argument was advanced unsucessfully over forty years ago in *Attygalle v. Shemsudeen*[1] to which my attention was drawn by the Crown Counsel after I reserved judgment. In that case Wendt J. said :—

> "It is not denied that the language which the shorthand symbols express is English, nor can it be denied that they are "writing", within the meaning of the definition in section 3. I understand the term "in English" to mean that the language in which the evidence is expressed shall be English. In my opinion the term was not used to qualify "writing" for it would be a very inapt form of words for the purpose. If it had been intended that the Magistrate shall employ the characters in which English, is usually written and none other, I should have expected clearer words to be used."

In the course of his judgment Pereira J. said :—

> "Whatever may be said as to the meaning that should have been assigned to these words ("in writing in English"), a contury ago, there

[1] *(1905) 4 Thambyah's Reports 138.*

is no question that in modern times shorthand has become a means of writing the English language as well recognised as any other means especially in the matter of legal proceedings."

I follow the decision in *Attygalle v. Shemsudeen* (*supra*) and hold against the accused on the point raised by the Counsel. I may add that *Rex v. wijesekere* [1] is not applicable to the present case. The decision in that case turned largely on the absence of the words "under the personal direction and superintendence of the Judge" in section 169 of the Civil Procedure Code.

The Counsel for the accused desired that a further opportunity be given to the accused to meet the allegations in the affidavit filed by the Crown regarding the ages of the accused. I acceded to his request and asked him to file the birth certificates of the accused together with an affidavit to show that the birth certificaes filed referred to the accused. The accused have now filed two birth certificates one of Pillayan, son of Verakudy Kathan, born in 1927, and the other of Vinayagamoorthi, son of Mothan Arumugam, born in 1914. In the absence of any affidavit I am unable to identify the persons mentioned in these birth certificates as two of the accused. According to the affidavit filed by the Crown the ages of the accused are 25 years, 28 years, 26 years, 25 years and 30 years respectively.

I am of opinion that the sentence passed by the Magistrate are grossly inadequate. I set aside those sentences and sentence each accused to—

(*a*) one month's rigorous imprisonment on the first count,
(*b*) six months' rigorous imprisonment on the second count,
(*c*) six months' rigorous imprisonment on the third count.
(*d*) one month's rigorous imprisonment on the fourth count, and
(*e*) one month's rigorous imprisonment on the fifth count.

These sentences will run concurrently.

Sentence enhanced.