1947 *Present :* **Dias J.**

WIMALASURIYA *et al.*, Appellants, *and* DE SARAM (Inspector of Police), Respondent.

S. C.—773-774—M. C. Balapitiya, 57,702.

Criminal Procedure—Accused produced in Court—Evidence of witness recorded under section 187 (1) of Criminal Procedure Code—Necessity for recording that evidence de novo *at the trial—Criminal Procedure Code, s. 297.*

Where the accused were present in Court and the Magistrate, in order to be satisfied that there was sufficient ground for framing a charge against them under section 187 (1) of the Criminal Procedure Code, examined a witness in the presence of the accused and, after the charges were framed, that witness was recalled at the trial and his evidence was read over to the accused who cross-examined the witness—

Held, that the procedure was regular. *Herath v. Jabbar* (1940) 41 N. L. R. 217 (Divisional Court), followed. *Wilfred v. Inspector of Police Panadure,* (1945) 46 N. L. R. 553, distinguished.

Under section 297 of the Criimnal Procedure Code if evidence has been given in the absence of an accused before an inquiry or trial commences, and if that evidence has been taken improperly, that is to say where no provision has been made by law for the recording of such evidence in the absence of the accused, then, when the accused appears and the inquiry or trial commences, the witnesses who had given evidence in the absence of the accused must be recalled and their evidence must be taken *de novo* in the presence of the accused. Failure to do this vitiates the conviction of the accused.

On the other hand, if, in the absence of the accused, the evidence of witnesses has been properly recorded, that is to say in a manner provided for by law, then, when the accused appears and the enquiry or trial commences, it will be sufficient to recall the witnesses and in their presence to read their previous evidence over to the accused who should be allowed to cross-examine them.

APPEALS against two convictions from the Magistrate's Court, Balapitiya.

A. H. C. de Silva (with him *K. C. de Silva*), for the second accused, appellant.

No appearance for the first accused appellant.

B. C. F. Jayaratne, C.C., for the Attorney-General.

Cur. adv. vult.

September 2, 1947. DIAS J.—

These appeals disclose no merits on the facts. On January 18, 1947, the police arrested Kalumahatmaya and Sumathipala for committing criminal trespass and being drunk and disorderly in a public place. When they were being conveyed under arrest to the police station in a motor car which had to halt temporarily owing to a deflated tyre, Kalumahatmaya seeing the first accused riding on a cycle called out to him and at the same time immobilised the car by removing the switch key. The first accused dismounted from his cycle and going up to the car opened the door of the vehicle and demanded the release of both men. When the police Sergeant refused, the first accused pulled the men out of the car. When the police officers endeavoured to prevent their rescue, the first accused called out to the second accused who was standing near, and both of them assaulted the police officers and rescued the two men. The police officers bore marks of the assault. The Magistrate in a careful judgment has given reasons for his finding that the charges have been proved. I see no reason for holding that he has come to a wrong conclusion on the facts. Each appellant was sentenced to undergo four months' rigorous imprisonment. Having regard to the high-handed nature of the offences proved against them, it cannot be said that the sentences are excessive.

The appeal, however, has been pressed on another ground. It is urged that the Magistrate has committed such an irregularity in his procedure that the convictions cannot stand, and that, at least, the convictions must be set aside and the case sent back for a retrial before another Magistrate.

The offences were committed on January 19. On January 21 the police filed a plaint under section 148 (1) (*b*) of the Criminal Procedure Code. On that day both appellants were present in Court, probably on police bail, and were represented by proctors. There was thus no necessity for the Magistrate to hold any examination of witnesses under section 151 of the Code prior to formulating the charge. The offences were summarily triable. Therefore under section 187 before formulating the charge, the Magistrate had to be "*of opinion* that there was sufficient ground for proceeding against the accused". Therefore, Police Constable Wakista was called and examined in chief in the presence of the accused and their proctors. Immediately after this examination the Magistrate framed charges to which each accused pleaded Not Guilty. The Magistrate then fixed the trial. When the trial was resumed witnesses were called for the prosecution. Police Constable Wakista also was recalled, the previous evidence given by him was read over, and he was cross-examined at length by the defence when he went over the ground already referred to by him in chief. He now amplified that evidence by giving a fuller picture of the facts.

It is submitted that the whole trial is vitiated because the Magistrate failed to record *de novo* his examination in chief on Wakista's recall. The question is whether this submission is sound.

The law draws a distinction between the commencement of the "proceedings" leading up to an inquiry or trial, and the commencement

of the "inquiry or trial"—*see* per Soertsz J. in *R. v. Weerasamy*[1] and the observations of the Court of Criminal Appeal in the same case in *43 N.L.R. pp 209-201. Chapter XV* of the Criminal Procedure Code is headed "Of the Commencement of Proceedings before Magistrates' Courts". In a non-summary inquiry, therefore, the proceedings commence by the Magistrate under section 156 reading over the accused the charge or charges in respect of which the inquiry is being held. A summary trial before a Magistrate under *Chapter XVIII* commences with the framing of the charge against the accused, and the recording of his plea. When a Magistrate decides under section 152 (3) of the Criminal Procedure Code to try summarily an offence which is non-summary, the proceedings commence when the Magistrate assumes such jurisdiction and frames the charge against the accused. A trial before a District Court and the Supreme Court commences when the accused is arraigned on the indictment which is read and explained to him, and his plea is recorded. All evidence recorded before the commencement of the inquiry or trial are proceedings preliminary to the inquiry or trial.

In the leading case of *Herath v. Jabbar*[2] a Divisional Bench had to decide, where certain witnesses had been examined in the absence of one of the accused preliminary to his trail and such evidence was not recorded under the provisions of section 151 or section 407 of the criminal Procedure Code, whether those witnesses should have given their evidence *de novo* in the presence of the accused after his arrest, or whether the mere reading over of their previous evidence in the presence of that accused with the opportunity given of cross-examining them, was a sufficient compliance with the law? The facts in *Herath v. Jabbar* are material in order to appreciate the principle laid down by the Divisional Court: The proceedings were initiated under section 148 (1) (b). There were two accused, one of whom appeared while the first accused was absent. On May 30 the Magistrate after recording some evidence in the presence of the second accused ordered a warrant to issue aganist the first accused. In so doing the Magistrate was clearly acting under section 151 (1) *proviso* (ii) which directed him, before issuing a warrant on the absent first accused, to examine on oath the complainant or some material witness or witnesses. *On June 14, however, the Magistrate made a slip.* The first accused was still absent. On that day the Magistrate *in the absence of the first accused,* but in the presence of the second accused, took the evidence of certain further witnesses. In so doing he did not act so far as the first accused was concerned under section 407 of the criminal Procedure Code. Nor could he act under section 151 because that section was exhausted when he issued the warrant for the arrest of the first accused. In fact, the evidence recorded on June 14, so far as the absent first accused was concerned, was not taken under the provisions of any section of the Code which permitted such evidence to be taken aganist him. The question was whether the evidence of the witnesses recorded *on June 14* could merely be read over to the first accused when he appeared, or whether those witnesses should be examined *de novo*? The Court held that the answer to this

[1] *(1941) 43 N. L. R. at p. 154.*

[2] *(1940) 41 N. L. R. 217.*

question is to be found in section 297 of the Criminal Procedure Code which reads :

"Except as otherwise expressly provided, all evidence taken at inquiries or trails under this Ordinance shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader.

Privided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness, and the accused shall have a full apportunity allowed him of cross-examining such witness thereon".

The Court held that the word "evidence" in the *proviso* to section 297 "clearly refers to evidence which has been *properly recorded* aganist an accused *in his absence" e.g.,* under section 151 (1) *proviso* (ii) or under section 407, &c. On the facts it was held that the evidence taken in the absence of the accused had been improperly recorded, *i.e.,* in a manner not provided by law. and that it was not a compliance with the provisions of section 297, merely to read the previous evidence of such witnesses when the accused appeared for trail or inquiry. Such witnesses should have been examined *de novo* in the presence of the accused The conviction was therefore quashed and the case was sent back for a new trail before another Magistrate.

The basis of the decision in *Herath v. Jabbar*[1] is that if evidence has been given in the absence of an accused before an inquiry or trail commences, and if that evidence has been taken improperly, that is to say where no provision has been made by law for the recording of such evidence in the absence of the accused, then when the accused appears and the inquiry or trail commences, the witnesses who had given evidence in the absence of the accused must be recalled and their evidence taken *de novo* in the presence of the accused. The failure to do this vitiates the conviction of the accused. On the other hand, if in the absence of the accused, the evidence of witnesses has been properly recorded, that is to say in a manner provided for by the law, then when the accused appears and the inquiry or trail commences. it will be sufficient to recall the witnesses and in their presence to read their previous evidence over to the accused, who should be allowed to cross-examine them.

It is sometimes difficult to decide into which category a given case falls. In *R. v. Beyal Singho*[2] when evidence was recorded in the absence of an absconding accused in terms of section 407 of the Criminal Procedure Code, it was held that the witness need not be examined *de novo* when the accused appeared in Court, as the witness was examined in the absence of the accused under a legal provision which expressly provided for this being done. That this view is correct is made clear from the language used in *Herath v. Jabbar* (*supra*) when the Divisional Court said (at p. 220) : "It is to be noted that the first accused was not regarded as having absconded. *In that event different considerations would apply* (*section 407*)." In *Musafar v. Wijesinghe*[3] where evidence was recorded in

[1] *(1940) 41 N. L. R. 217.* [2] *(1946) 47 N. L. R. 456.*
[3] *(1941) 43 N. L. R. 61.*

the absence of the accused in the manner provided by section 151 (1) *proviso* (ii) it was held that the witness need not be examined *de novo* when the accused appeared. That case was followed with approval in *Abeysinghe v. Menika*[1]. Where a Magistrate proceeded to the scene of a culpable homicide recorded the evidence of witnesses at the scene in the absence of the accused, the Court of Criminal Appeal expressed the view that such evidence could be read over to the accused when he appeared—*R. v. Mohottihamy*[2]. In *Dhanapala v. D. R. O. Vavuniya*[3] the accused had been brought before the Court under the provisions of section 148 (1) (*d*). The Magistrate, as he was bound to do under section 150 (2), examined certain witnesses. It was held that there was no need to examine those witnesses *de novo* after the accused had been arrested. This case appears to be in conflict with the cases of *Pitche v. Rajasuriya*[4] and *Somadasa v. Jehoran*[5].

The question also arose in a different form. When a Magistrate, in order to decide whether he should assume jurisdiction under section 152 (3) of the Criminal Procedure Code to try summarily a non-summary offence, examines a witness, should the evidence of such witness be recorded *de novo* after the Magistrate had assumed jurisdiction under section 152 (3) ? This question was answered in thhe affirmative in *Dionis v. Piyoris*[6] and in the two Judge decision of *Wilfred v. Inspector of Police, Panadure*[7]. The *ratio decidendi* is contained in the following passage :—"Learned counsel for the Crown contended that the *proviso* (to section 297) impliedly excludes from the operation of the section evidence that has been recorded *in the presence of the accused.* On a careful consideration of the terms of the section and of the effect of the *proviso* with reference to the substantive words of the section we are of opinion that there is no force whatsoever in this contention . . . . The language of section 297 is clear and unambiguous, and according to the authority I have quoted (*West Derby Union v. The Metropolitan Life Assurance Society* (1897) A. C. 647), the construction that the *proviso* impliedly excludes evidence recorded in the presence of the accused from the operation of the section cannot be supported. We fully appreciate that it seems inconsistent that evidence recorded *in the presence of the accused* cannot be read over, whilst evidence recorded *in his absence* can be read over. But we cannot be affected by it. All we can do is to construe the section. The matter may well be one for the attention of the Legislature to remedy the defect. We agree with the view held by Hearne J. in *Dionis v. Piyoris*[6] that in the absence of a *proviso* covering such evidence it has to be recorded *de novo.* The question we are considering seems to have arisen incidentally in the case of *Abeysinghe v. Menika*[8] and in the course of his judgment Howard C.J. has dealt with the inconsistency we have referred to. He has, however, not decided the question. For these reasons we are of opinion that Mr. Jayawardene's contention must be upheld". It was also

[1] *(1942) 43 N. L. R. 419.*
[2] *(1941) 42 N. L. R. 124.*
[3] *(1946) 47 N. L. R. 478.*
[4] *(1946) 47 N. L. R. 566.*
[5] *(1946) 48 N. L. R. 304.*
[6] *(1942) 43 N. L. R. 236.*
[7] *(1945) 46 N. L. R. 553.*
[8] *(1941) 43 N. L. R. 419.*

held that a defect of this kind was fatal to the conviction and a new trial was ordered. It is to be observed that the case of *Herath v. Jabbar*[1] although cited at the argument, was not considered in the judgment of *Wilfred v. Inspector of Police, Panadure*[2]. When a Magistrate takes up a non-summary case for inquiry, and then decides to assume an entirely new jurisdiction under section 152 (3), it would seem on principle that after that new jurisdiction has been assumed the accused is entitled to have all the witnesses previously examined recalled and examined *de novo*.

In passing I may be permitted to observe that the *dictum* in *Somadasa v. Jehoran*[3] that "*any* evidence recorded before the commencement of the trial, even in a summary case, cannot be made use of against the accused at his trial, even though the evidence be read over to him, and even if the accused is afforded an opportunity of cross-examining the witnesses who gave such evidence" appears to be too wide. There are cases when this may properly be done.

Coming to the facts of the case before me, the Magistrate under section 187 of the Criminal Procedure Code before framing charges against the appellants had to be satisfied that there were sufficient grounds for proceeding against them. The Magistrate could not form that judicial opinion except on evidence. In order to enable him to do so, the Magistrate, as he was entitled to do under section 187, caused Police Constable Wakista to be examined in the presence of the accused and their legal advisers. The trial then began when the Magistrate framed charges against the appellants. Wakista was recalled and his evidence was read over in the presence of the witness to the appellants who, thereupon, cross-examined the witness who amplified his examination-in-chief and gave a fuller account of the transaction.

This is not a case where the Magistrate was examining a witness in order to decide whether he was to assume a new jurisdiction under section 152 (3) of the Code. What the Magistrate did was to record evidence previous to the commencement of the trial under section 187 which empowered him to do so. The evidence, therefore, was not recorded improperly. It seems to me, therefore, that the case comes within the principle laid down in *Herath v. Jabbar*[4] by the Divisional Court. I, therefore, hold that no irrigularity was committed when Wakista's evidence was read over to the appellants after the charge was framed. Furthermore, no prejudice whatsoever was caused to the appellants by the procedure adopted. In fact, this point was not taken in the petitions of appeal.

The appeals are dismissed.

Appeals dismissed.

[1] *(1940) 41 N. L. R. 217.*
[2] *(1945) 46 N. L. R. 553.*
[3] *(1946) 48 N. L. R. 304.*
[4] *(1940) 41 N. L. R. 217.*