

1946

Present : Canekeratne, J.

DHANAPALA, Appellant, and D. R. O., VAVUNIYA, Respondent.

531—M. C., Vavuniya, 20,103.

*Criminal procedure—Evidence of witness recorded under section 151 (2) of Criminal Procedure Code—Need not be taken de novo on date of trial of accused—Criminal Procedure Code (Cap. 16), ss. 148 (1) (d), 151 (2), 297.*

In proceedings instituted under paragraph (d) of section 148 (1) of the Criminal Procedure Code the evidence of a witness recorded under section 151 (2) need not be taken *de novo* on the date of the trial of the accused. It would be sufficient if it is read over to the accused and he is given an opportunity of cross-examining the witness.

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

*Frederick W. Obeyesekere* for the accused, appellant.

*E. P. Wijetunge, C.C.*, for the Attorney-General.

*Cur. adv. vult.*

July 4, 1946. CANEKERATNE J.—

The appellant and one Dingiri Banda were convicted of committing theft of three articles. The main ground urged by counsel for the

appellant is that evidence, improperly recorded, is to be found in this case and that the conviction is vitiated thereby.

The record shows that the accused were produced in Court on January 1, 1946; they were on remand till January 7, on which date they were produced on remand and a plaint was filed. A portion on page 2 of the record reads thus :

7.1.46. Complainant : D. R. O. V. S.

Accused : 1. H. Dhanapala—present.

2. H. Dingiri Banda—present.

Mr. Pasupathy for accused.

After the examination of K. V. Ausadhahamy, the Village Headman, the learned Magistrate framed a charge against the accused, recorded their pleas and fixed the date of trial. When the case came on for hearing on March 6, the first witness called was Ausadhahamy and after his previous evidence had been read over he was cross-examined by the proctor for the accused.

The general rule is that all evidence taken at an inquiry or trial shall be taken in the presence of the accused (section 297 of Cap. 16 of Legislative Enactments of Ceylon); this rule is subject to the following exceptions :—

(i.) Where express provision has been made in the Code.

(ii.) Where the personal attendance of the accused has been dispensed with and the evidence is taken in the presence of his pleader. A Court is empowered by section 154 to dispense with the personal attendance of an accused person and to permit a pleader to appear on his behalf.

The evidence of a witness taken in the absence of an accused person must be read over to the accused in the presence of such witness and the accused must be given a full opportunity of cross-examining such witness; this provision need not be followed where the Court has dispensed with the personal attendance of the accused. One of the cases for which special provision is made by the Code is that referred to in section 151 (2).

The proceedings in this case were instituted under paragraph (d) of section 148 (1) of the Code. The learned Magistrate, in terms of section 151 (2), examined the headman who was able to speak to the facts of the case : as he was of opinion that there was ground for presuming that the accused had committed an offence triable by him, he framed a charge against them, read the same to each of them and asked each of them whether he pleads guilty or has any defence to make. The trial then commenced against the accused. On the date of hearing he properly read over the evidence previously given by the headman. The case

quoted by counsel for the appellant, *Wilfred v. Inspector of Police Panadura*<sup>1</sup> deals with the general rule: it has no application to this case. The view which I have taken in regard to section 297 is supported by that of Hearne, J., in *Herath v. Jabbar*<sup>2</sup>—a judgment of a Divisional Bench.

The appeal is dismissed.

*Appeal dismissed.*



<sup>1</sup> (1945) 46 N. L. R. 553.

<sup>2</sup> (1940) 41 N. L. R. 217