

1946

Present : Jayetileke J.

PITCHE *et al.*, Appellants, and RAJASURIYA (INSPECTOR OF POLICE), Respondent.

729-730—M.C. Colombo, 11,949.

Criminal procedure—Issue of process—Evidence taken under Criminal Procedure Code, s. 151 (2)—Should be recorded de novo after trial commences—Criminal Procedure Code, ss. 148 (1) (d), 151 (2), 297.

Evidence taken under section 151 (2) of the Criminal Procedure Code should be recorded *de novo* after the trial commences.

A PPEAL against two convictions from the Magistrate's Court, Colombo.

C. S. Barr Kumarakulasinghe (with him *K. C. de Silva*), for the accused, appellants.

S. Mahadevan, C.C., for the Attorney-General.

Cur. adv. vult.

October 24, 1946. JAYETILEKE J.—

The appellants were charged under section 316 of the Penal Code with having caused grievous hurt to one Helenahamy. They were convicted and each of them was sentenced to undergo six months rigorous imprisonment.

On December 27, 1945, A. J. Rajasuriya, the Detective Inspector of Police, Pettah, made a report to the Magistrate under sections 121 (2) and 131 of the Criminal Procedure Code and produced before him the appellants and four other persons all of whom were enlarged on bail. On January 16, 1946, Rajasuriya submitted to the Magistrate a report under section 148 (i) (b) of the Criminal Procedure Code. Thereupon, the Magistrate, acting under section 151 (2) of the Criminal Procedure Code, examined on oath Helenahamy, who was present in Court, but did not allow the accused to cross-examine her. Then he charged the accused, all of whom pleaded not guilty, and fixed the case for trial on February 11, 1946, on which date, he recorded the medical evidence and fixed further hearing for February 27, 1946. On that date Helenahamy was recalled and her previous evidence was read over. Counsel for the appellants contends that, according to the judgment of the Divisional Bench in *Wilfred v. Inspector of Police*¹, the evidence of Helenahamy should have been recorded *de novo*. I think the contention is sound and must be upheld. Chapter XVIII of the Criminal Procedure Code lays down the procedure to be followed when the accused pleads not guilty to the charge. Section 188 (2) (a) provides that the Magistrate shall

¹ (1935) 46 N. L. R. 553.

proceed to try the case *in manner hereinafter prescribed* and section 189 (1) provides that when the Magistrate proceeds to try the case he shall take *in manner hereinafter provided* all such evidence as may be produced for the prosecution or defence respectively. A trial commences when the charge is read to the accused (*vide The King v. Weerasamy*¹). In this case the evidence of Helenahamy was recorded by the Magistrate before the charge was read to the accused. In the absence of any provision in the Code that the recording of evidence under section 151 (2) should be regarded as part of the trial it seems to me that the evidence of Helenahamy should have been recorded *de novo*.

I would set aside the convictions and sentences and send the case back for a fresh trial before another Magistrate.

Sent back for fresh trial.

