SARAM *v.* WEERA.

P. C., Colombo, 37,639.

Criminal Procedure Code, chapters XVI. and XIX.—Change of proceeding from inquiry into trial—Criminal Procedure Code, s. 226 (Ordinance No. 22 of 1890, s. 7)—Right of Police Magistrate to convict upon evidence taken in a case which he has no power to try.

In proceedings taken under chapter XVI. of the Criminal Procedure Code, a Police Magistrate has to take and record evidence for the prosecution with the view of ascertaining whether there is such a *primâ facie* case made out against the accused as could justify him in committing the accused for trial to a Superior Court, and not to determine his guilt or innocence which is in issue only in trials under chapter XIX.

Where, in the course of proceedings initiated under chapter XVI., a Magistrate finds that the facts proved amount to an offence triable by him summarily under chapter XIX., the proper course is to stay

proceedings on the inquiry, frame a fresh charge, and try the case, giving the accused notice that he is on his trial, and affording him sufficient time to prepare his defence.

Section 226 of the Code (as amended by Ordinance No. 22 of 1890) refers to cases where a Police Magistrate is trying a case over which he has jurisdiction, and not to cases where he is not acting as Judge, but as an inquirer. Its import is that, when a Judge is trying a case and finds that the charge laid was not correctly framed according to the facts which appear in evidence before him, but that some other offence over which he has jurisdiction is proved, he may convict of that offence.

Facts which appear in the depositions of witnesses taken, not for the purpose of a trial, but for the purpose of an inquiry, cannot be said to be proved for the purpose of a conviction.

THE accused in this case was charged at the instance of the Superintendent of Police under section 392 of the Penal Code with criminal breach of trust as a public servant, in that, while acting as storekeeper of the Police Department, he was entrusted with a sum of Rs. 100, whereof he misappropriated a sum of Rs. 86. On being brought up on a warrant, the Police Magistrate explained the charge to the accused, who stated he was not guilty. Evidence was taken on a subsequent day and a charge formulated.

The Police Magistrate then recorded as follows :—

Accused denies the charge. Mr. Advocate Bawa, for accused, addresses the Court on the question of jurisdiction, and the question of the innocence of the accused ..... Counsel has quoted a case in the Indian Courts, in which a public servant, who had been entrusted with the care of stamps, the property of the Government, with the full knowledge and consent of his superior officers, had misappropriated those stamps to his own use, was held guilty of criminal breach of trust as a public servant—an offence punishable under section 392 of the Ceylon Penal Code, and not within the jurisdiction of a Police Court; but in that case it was decided that the responsibility for the due custody of the stamps had been properly delegated. In another case reported in the same book submitted to me, in which responsibility had been improperly delegated, it was held that the delinquent could not be charged with criminal breach of trust as a public servant. It is for this reason, "that the responsibility delegated to the accused Weera has been most improperly delegated," that I overrule the argument against my jurisdiction.

Accused was a very subordinate clerk on small pay; he was bookkeeper and storekeeper, and as such his duties were to keep books and keep stores; it was no part of his duty to handle Government moneys, and when allowed to do so by his superiors he lay under no responsibility to Government for any misappropriation of Government money; the fact that his immediate superiors had allowed him and his predecessor in office to handle public moneys cannot affect the propriety of his being allowed to do so. The proceedings disclose the existence of a good deal of laxity in money matters in the office of the Superintendent of Police, Western Province, but I cannot allow this laxity to render the accused not liable to conviction on the very grave charge of criminal breach of trust as a public servant. Regarding the guilt of the accused the evidence is clear, and calls for no remarks.

The Police Magistrate found the accused guilty under section 391, and sentenced him to three months' rigorous imprisonment.

On appeal, *Bawa* appeared for him, and *Dumbleton, C.C.*, for respondent. 1895. *June 19.*

The Supreme Court quashed the proceedings and sent the case back to be investigated as a non-summary case.

19th June, 1895. BONSER, C.J.—

The proceedings in this case should, in my opinion, be quashed, and the case sent back to be dealt with according to law.

The accused was charged under section 392 of the Penal Code with breach of trust as a public servant. He was brought up before Mr. W. H. Moor, the Acting Police Magistrate of Colombo, on a warrant on this charge. The charge was read and explained to him, and then the Magistrate proceeded to deal with the charge. Now, that charge was one which the Magistrate had no power to try. He could only deal with it under chapter XVI. of the Criminal Procedure Code, which lays down the procedure in such cases. He has to take and record the evidence for the prosecution with the view of ascertaining whether there is such a *primâ facie* case made out against the accused as would justify him in committing the case for trial before a superior Court. He is, therefore, exercising a strictly limited function. It is not his duty to determine the guilt or innocence of the accused. That is not in issue in proceedings under chapter XVI. of the Criminal Procedure Code. And we know by experience that proceedings before a Magistrate, as held under that chapter, are conducted in a very different way from proceedings held before him on the trial of an offence. In the latter case the accused is on his trial, and he or his counsel cross-examines the witnesses for the prosecution with a view to establishing his innocence. In the former case, the accused and his counsel, if well advised, content themselves with watching the case to see that no improper evidence is recorded ; but, if they are wise, they do not endeavour to break down the evidence of the witnesses for the prosecution unless their case is a very clear one.

In the present case, the accused was brought up on the 3rd of June, and charged with an offence under section 392, and the Magistrate proceeded to record evidence under chapter XVI. He pleaded not guilty to this charge under section 392, and the case was adjourned to the 5th. On the 5th the witnesses for the prosecution are all called, and, at the conclusion of the proceedings of that day, the Magistrate records that the accused is charged under section 391 of the Penal Code, and that the accused denies the charge. Now, section 391 is a section

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which deals with the offence of criminal breach of trust by a clerk or servant, and that is an offence over which a Police Court has concurrent jurisdiction with District Courts and the Supreme Court. No notice, however, appears to have been given to the accused that the Magistrate was going to deal with the case summarily, and no fresh evidence was called ; but the Magistrate, after hearing some remarks from the defendant's counsel, forthwith convicts the defendant, not of the offence with which he was originally charged, but of a new offence. The proceedings were thus suddenly, at their conclusion, changed from an inquiry as to whether there was a *primâ facie* case that the accused had been guilty of one offence into a trial of the guilt or innocence of the accused on an entirely fresh charge of another offence.

It is said that the Magistrate acted under section 226 of the Code as amended by Ordinance No. 22 of 1890. Of course, if the Code says it may be done,—although the result of such a course would be exceedingly unfair to the accused,—we are bound to obey the law. But in my opinion section 226 does not justify what was done in the present case. That section provides that a Magistrate "may convict an accused of any offence over which a Police "Court has summary jurisdiction, which, from the facts admitted "or proved, he appears to have committed, whatever may be the "nature of the complaint or information." My opinion is that this section refers to cases where the Police Magistrate is trying a case over which he has jurisdiction, and not to cases where he is acting not as Judge, but as an inquirer ; and I am confirmed in this view by the heading of the chapter. That section is contained in chapter XIX., which is headed, "The trial of cases where a "Police Court has power to try summarily." That heading shows that the chapter is dealing with trials. Section 226 imports that when a Judge is trying a case, and finds that the charge was not correctly framed, according to the facts which appear in evidence before him, but that some other offence over which he has jurisdiction is proved, he may convict of that offence.

It will be noticed that section 226 speaks of facts proved. Now, I do not think that facts which appear in the depositions of witnesses taken, not for the purpose of a trial, but for the purpose of an inquiry into the *primâ facie* guilt of an accused, can be said to be proved for the purpose of a conviction. The proper course for a Magistrate to adopt in such a case would be to stay proceedings on the inquiry, frame a fresh charge, and try the case (I was about to say *de novo*, but as there was no trial these words would not be appropriate), giving the accused notice that he was now to be put on his trial, and affording him time to prepare his defence,

—such time as would be sufficient,—because the accused is not there to make his defence, but to have the question decided whether there is a *prima facie* case made out against him—for that purpose, and no other.

For these reasons the conviction in this case is quashed, and the accused remanded to the Police Court to be dealt with according to law.