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QUEEN *v.* UDUMAN *et al.*

D. C., Kalutara, 1,068.

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June 18.

Criminal Procedure Code, s. 152 (3)—Summary trial of case of house-breaking and hurt—Proper time for Police Magistrate, who is also District Judge, to exercise his jurisdiction as to trial or inquiry—Evidence of house-breaking.

Under section 152 (3) of the Criminal Procedure Code, a Police Magistrate who is also a District Judge should exercise his discretion as to whether or not the accused should be tried summarily, immediately after hearing the evidence of the complainant or other witness as enjoined by section 149.

It is not competent for him to take all the evidence for the prosecution as a committing Magistrate, and then after remand try the case as District Judge.

Offences under section 444 ought never to be tried summarily.

THE two accused in this case having been produced by the Police Headman of Hinatiangala before Mr. Allan Beven, Police Magistrate of Kalutara, upon a charge of house-breaking and cutting with a *kris*, non-summary proceedings were commenced and three witnesses examined for the prosecution on the 27th April and 31st May. The complainant said:—" I was sleeping inside " my house. I awoke hearing a sound like one boring the wall. I " saw a breach in the wall. My lamp was burning in the room. I " opened the back door and spoke to my brother Amala Marikar, who " lives in the adjoining house. First accused came up and stabbed " at me with a *kris*. I held the *kris* and my left hand got cut. " Second accused was also there. He snatched the *kris* which I " was holding while in the grasp of the first accused. My children

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"and wife raised an alarm. Neighbours collected. Accused ran "away. The headman came, made inquiries, and arrested them. "Nothing was missing from my house. This took place at 2 A.M."

The medical officer (Dr. Heynsburg), who examined the complainant soon after he received the injuries, deposed that the complainant had three incised wounds in the palm and one abrasion in the left arm, and that none of them were grievous.

After the examination of these witnesses, the Magistrate adjourned the case for the 31st May, on which day he examined three more witnesses and informed the accused that he would try the case summarily, being of opinion that he could do so adequately under section 152 (3) of Ordinance No. 15 of 1896. The witnesses already examined were then offered for cross-examination, charges framed under sections 443 and 444 of the Penal Code, and evidence heard for the defence.

The Magistrate found the accused guilty and sentenced each to eighteen months' rigorous imprisonment.

The accused appealed.

Van Langenberg, for appellant.—Under section 152 (3) of the Criminal Procedure Code, where the Police Magistrate is also a District Judge, he should exercise his discretion (as to whether or not the accused should be tried summarily) immediately after examining the complainant and taking down the statement of the accused. He has no power to exercise it after hearing the whole case for the prosecution. On the merits, the case was not one which should have been dealt with by the Police Court. It should have been committed for trial before a higher Court.

BONSER, C.J. (having perused the evidence).—I think the conviction should be quashed and the case sent to the Attorney-General for such instructions as he may think proper to give.

Templer, C.C., for the Crown, stated that he had no objection to the course suggested by his Lordship.

16th June, 1900. BONSER, C.J.—

In this case the District Judge of Kalutara purported to exercise the power given to him by section 152 of the Criminal Procedure Code to try summarily an offence triable by a District Court, he being a District Judge and at the same time a Police Magistrate, who was investigating the charge with the view to a commitment to a higher Court. I think he was ill-advised in the circumstances in doing this.

It appears from the evidence that the two accused had made a breach in complainant's wall, but there is no evidence that they

had done anything more so as to commit the offence of house-breaking. They only got to the stage of an attempt to commit house-breaking. The complainant was aroused by the noise, opened the door, and went out, whereupon the first accused is said to have laid a *kris* to his neck and threatened to kill him. A struggle then ensued for the *kris*, in which the complainant's left hand got severely cut. The cries of the complainant and his wife brought the neighbours to the scene, and the accused ran away. They were, however, at once arrested by the headman and taken before the Police Court of Kalutara. On the 27th April the Police Magistrate took the evidence of the complainant and his wife and the headman, and remanded the accused on two charges: first, under section 443 of the Penal Code, of committing house-breaking by night in order to the committing of an offence punishable by imprisonment; and second, under section 444, of committing house-breaking by night having made preparations for causing hurt, an offence which is punishable with fourteen years' rigorous imprisonment, but which is, strangely enough, made by our Code triable by a District Court. To my mind it is one of the most serious offences of which a person can be guilty, and certainly ought never to be tried summarily. Then the case was adjourned until the 31st of the following month, when further evidence was taken, besides that of the doctor who described the wounds on the complainant's hand. He deposed that they were not of a serious nature. The Magistrate completed taking the evidence of all the witnesses for the prosecution and then announced his intention of trying the case summarily.

Even if the offence was one which he could try summarily, which it was not, it seems to me that it was too late for him to exercise the power given him by section 152. It is quite clear from the whole of chapter 15, in which that section occurs, that the Magistrate is to make up his mind whether he will try summarily as District Judge or not after hearing evidence under section 149. It is not competent for him to take all the evidence for the prosecution as a committing Magistrate, and then, after various remands, say suddenly, "All this time I have not been "acting as a committing Magistrate, but trying the case as District "Judge." That is what it comes to.

The conviction is quashed, and the case ordered to be submitted to the Attorney-General, as it ought to have been submitted in the first instance, in order that he may determine what further proceedings he will take, and frame such charge as he may think proper.