ABDUL CADER *v.* FERNANDO.

1902.
August 7.

P.C., Colombo, 76,306.

Causing hurt voluntarily with knife—Amendment of charge after evidence heard—Charge of grievous hurt—Summary trial of accused by Magistrate, in his capacity as District Judge—Criminal Pocedure Code, s. 152—Irregularity.

An accused being charged with causing hurt with a knife under section 315 of the Penal Code, witnesses were examined and the case postponed. Some days afterwards the wound being found to be of a grievous nature, the charge was altered to one under section 317, and the accused was informed by the Magistrate that he would be tried by him as District Judge. The accused pleaded not guilty, and the witnesses were recalled and tendered for cross-examination. The case was then adjourned for want of time. On a subsequent day, the accused objected to the summary trial, but the Magistrate proceeded with the case. The accused cross-examined the witnesses.

Held, on appeal against a conviction, that as the amendment of the charge was not made too late, nor the accused prejudiced, the objection to the proceedings should not succeed.

THE accused in this case was charged with causing hurt with a knife to one Pieris, under section 315 of the Penal Code. After two witnesses were examined on the 27th June, 1902, the case was postponed for the following day, when two more witnesses were examined, including the Judicial Medical Officer, who gave evidence to the effect that Pieris had a stab wound 1¼ inch long

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and 2½ inches deep on the inner side of the right arm, and that he was unable to say for what length of time Pieris would be disabled; he could not express any opinion as to whether the wound was grievous or not. The case was adjourned, and the Judicial Medical Officer examined on the 9th July. He swore that Pieris " will be incapacitated over twenty days: over five days from now."

The Police Magistrate (Mr. R. B. Hellings) thereupon altered the charge to one under section 317, and recorded as follows:—

" Charge amended, section 317. Accused informed. It is triable by a District Court. I find it can be properly tried summarily by me, as I am an Additional District Judge. I inform the accused that I intend so to try him.

" He pleads not guilty.

" I tender all the witnesses for cross-examination. Accused's proctor wishes to cross-examine them. Postponed to 10th for want of time."

On the 10th July the accused objected to be tried summarily. The Magistrate over-ruled the objection on the authority of the decision of the Supreme Court in P. C., Colombo, 71,853, and called the witnesses already examined. They were cross-examined by accused's counsel. Evidence for the defence was also heard. And the Court found the accused guilty and sentenced him to one year's rigorous imprisonment.

The accused appealed.

Dornhorst, for appellant.—The Magistrate was wrong in arrogating jurisdiction when he had passed the stage at which section 152 of the Criminal Procedure Code gives him power to amend the charge. That stage is after the preliminary evidence, not after the greater part of the evidence has been heard. The Magistrate may, on discovering that a hurt is technically grievous, decide to try the case summarily *ab initio*. But here the accused was tried on one charge, and after most of the evidence was recorded, the charge was altered and jurisdiction arrogated. There are District Judges available in Colombo to try this case. *Chetty v. Pitche* (*1 Browne, 335*); *Queen v. Tamby* (*1 Browne, 129*). It is important that a man should know, when the witnesses are being heard, whether it is an inquiry or a trial.

H. J. C. Pereira, for respondent.—The original charge was non-summary. It was one under section 315. The proceedings were not an inquiry turned into a trial. There was no prejudice done to the accused in any way. Finding the hurt was grievous the Magistrate

changed the charge and allowed the accused to re-call the witnesses and cross-examine them. The alteration of the charge under section 172 made no difference in the evidence. The accused and his proctor acquiesced in the procedure by cross-examining the witnesses, and the accused was not prejudiced. Section 425 of the Criminal Procedure Code, therefore applies. Bonser, C.J., never said in the cases cited that the Magistrate could not try the case, but that it was advisable that he should not. He has the power to try under section 152. His practice in doing so has been sanctioned by the Supreme Court in P. C., Colombo, No. 71,853, which the Magistrate quotes.

7th August, 1902. MONCREIFF, A.C.J.—

The charge against the appellant, dated the 27th June, 1902, was that of causing hurt with a knife, an offence punishable under section 315 of the Penal Code. On the same day, the Magistrate proceeded to try him summarily, and witnesses were examined and cross-examined for the appellant. On the 28th June, after hearing the evidence of the Judicial Medical Officer, the Magistrate altered the charge to one of causing grievous hurt with a knife, an offence punishable under section 317 of the Penal Code. This offence is triable in a District Court, but not in a Police Court. So the Magistrate announced that he could properly, and that he intended to, try the case summarily in accordance with the power given him, in his capacity of Additional District Judge, by section 152 of the Criminal Procedure Code.

The accused then pleaded to the amended charge, and the witnesses were tendered for further cross-examination.

On the 15th July this course was objected to, but the objection was over-ruled. Witnesses were re-called and cross-examined and the case for the defence was entered upon and concluded. The appellant was sentenced to one year's rigorous imprisonment.

I do not think that the alteration of the charge was made too late in the proceedings, or that the appellant was prejudiced by it. Whatever the immediate object of section 152 of the Criminal Procedure Code may have been, it gave the Magistrate power to do what he did. I grant there are cases of a nature so serious that Magistrates should hold their hands and proceed with them as being fit for non-summary trial, but this was not such a case.

I therefore think that the objection taken on behalf of the appellant should not succeed.