ADONIS APPU *v.* NICHOLAS.

1902.
August 21.

P. C., Balapitiya, 23,712.

Offence not summarily triable—Trial by consent—Criminal Procedure Code, s. 166—Obtaining consent of accused before framing charge—Irregularity without prejudice—Conviction for lurking house trespass and theft—Separate sentences.

Where information had been given to the Police Court of theft in the complainant's house and gaining entrance into his house through a hole made near the frame of the door, and the accused, being brought up on the same day, knew the fact of this information and what they were going to be charged with, and the Magistrate, deeming it expedient to try the case summarily, obtained their consent to do so without having previously framed the charges of lurking house trespass and theft, as provided in section 166 of the Criminal Procedure Code, and then convicted them of those offences and passed two separate sentences,—

Held, that as the charge was framed almost immediately after their consent was obtained, and they did not object to that procedure or consider themselves injured by it, the irregularity complained of in appeal did not justify the reversal of the conviction.

Held, further, that lurking house trespass and theft were distinct offences and punishable with separate sentences.

APPEAL against a conviction for lurking house trespass, under section 439 of the Penal Code, and for theft. The Police Court of Balapitiya was informed of the theft in the complainant's house and that entrance thereto had been gained through a hole made near the frame of the door. The accused, who knew the fact of this information and what they were going to be charged with, were brought up before the Magistrate. He deemed it expedient to try the case summarily and obtained the consent of the accused to do so, without previously having framed the charges of lurking house trespass and theft. After hearing evidence for the prosecution and defence, he sentenced the accused to rigorous imprisonment for three months for each of the offences aforesaid, such sentences to run in succession.

H. Jayawardene, for appellant.—The offence of lurking house trespass is beyond the jurisdiction of the Police Court. The Magistrate illegally obtained the consent of the accused to be tried in the Police Court. No charge had been framed against them before they consented. Section 166, sub-section (3), of the Criminal Procedure Code shows the proper procedure to be adopted by the Magistrate, if he thinks it expedient to deal with the case himself. He framed no charge as he ought to have done under that section; the accused therefore did not then know what they were tried for, and their consent has no value. [MONCREIFF, A.C.J.—Is that a

1902. *August 21.*

substantial objection?] Certainly, not to know what they are going to be tried for. How are they to direct their evidence in defence? *Victoria Kurera v. Jusey Fernando, 7 S. C. C. 177; Christian v. De Soysa, 9 S. C. C. 176.* There is another serious irregularity. The Magistrate recorded part of the evidence for the prosecution. He then examined some of the witnesses for the defence, and then he resumed the evidence for the prosecution. That was unfair and embarrassing. The conviction and sentence also are illegal. The Magistrate found the accused guilty under sections 439 and 367 and awarded two separate sentences, which section 67 of the Penal Code does not justify. *Meedin v. Kirihatana, 2 N. L. R. 157; Queen v. Cara, 1 N. L. R. 320.* In *Mendis v. Cornelis* (*3 N. L. R. 196*) Bonser, C.J., expressed a contrary opinion and questioned the soundness of the decision in *Meedin v. Kirihatana*. That, however, leaves the weight of authority against the imposition of two sentences for an offence arising out of the same act or series of acts. One of the sentences here should be cancelled.

21st August, 1902. MONCREIFF, A.C.J.—

The accused appeal from a conviction on charges framed under sections 369 and 439 of the Penal Code. It has been urged on their behalf that the Magistrate has committed some irregularities which entitle the accused to have their convictions set aside. In this case, after one of the witnesses had been called, the Magistrate entered a note to the following effect: "I think this case may be tried summarily. Accused explained the difference between a Police Court and a District Court trial and their right to the latter. They prefer this Court."

Now, at that time the Magistrate had framed no charge, nor did he read the report as a charge. So he undoubtedly did not observe the terms of sub-section (3) of section 166 and sub-section (3) of section 187 of the Criminal Procedure Code. At a later period of the case he did frame a charge, and the case proceeded summarily. A decision was quoted to me from *7 S. C. C. 177, Kurera v. Fernando*, in which Chief Justice Burnside set aside a conviction on the ground that the Magistrate reversed the reasonable provision and the natural order supplied by the Procedure Code by first asking the accused if they consented to be tried, and then, having received their consent, informing them of the offences for which they were to be tried. Undoubtedly the Magistrate was wrong, but to my mind the question in this case is whether any harm has been done. It cannot be said that the accused were ignorant of what they were charged, or

what they were going to be charged with, because there is the complaint on the information given to the Court. This information is dated on the day of the trial, but it relates to the theft of certain articles from a certain house on a certain day and at a certain hour, and to the fact that entrance had been gained by making a hole near the frame of the door. There being no doubt that the accused knew what charge had been, or was about to be, brought against them, they must have been well aware of what they were doing when they consented to be tried summarily. In point of fact, the charge was framed on the same day and almost immediately after their consent, two or three pages later in the record. When the charge was made and explained to them, they took no objection, they did not consider themselves injured. As far as I know they made no complaint in the Court below on that subject. That being so, I am not willing to set aside the conviction in a case in which substantial justice have been done, and in which the irregularities complained of have had no injurious results.

Then it was urged that the conviction was wrong, because the Magistrate has convicted the accused under two sections and inflicted practically two sentences, a sentence on each charge. I may refer to the case of *Meedin v. Kirihatana* (*2 N. L. R. 157*), and also to the case of *Queen v. Cara* (*1 N. L. R. 320*), where Withers, J., held that, although there may be two distinct charges in a case, one conviction only can properly take place, provided the two acts complained of are part or product of one intention. There is also a case in *3 N. L. R. 368*, which seems to be more pertinent. I am not disposed to agree with the objection. The accused are not charged under any provision making the complex act of stealing from a dwelling-house, and doing so by means of committing house trespass, one offence. There are two distinct offences, although they may be founded upon one series of acts, and in my opinion it was not only right but necessary that there should be a conviction on each of the charges. On that point the Magistrate is right.

As for the merits, I think that there was abundant evidence upon which the Magistrate could rest his decision, and I am inclined to think his view of the facts is correct. That being so, the conviction must be affirmed.