Present: Ennis and Shaw JJ.

1918.

ABANCHIHAMY *v.* PETER.

567—P. C. Tangalla, 7,555.

Magistrate also District Judge—Magistrate deciding to try case summarily as District Judge under section 152 (3), Criminal Procedure Code, before recording complainant's evidence as required by section 149—Criminal Procedure Code, s. 425.

Where a Magistrate, who was also District Judge, decided to try a case summarily as District Judge under section 152 (3) of the Criminal Procedure Code before taking down the complainant's evidence as required by section 149,—

Held, that the irregularity was not fatal, but that it was one which could be cured under section 425.

THE facts appear from the judgment.

J. S. Jayawardene, for the appellant.

July 22, 1918. ENNIS J.—

This is an appeal from a conviction under section 345 of the Penal Code and a fine of Rs. 100. It was asserted that the Magistrate had exercised powers under section 152 (3) of the Criminal

1918.

ENNIS J.

Abanchi-hamy v. Peter

Procedure Code on a report by the police, and without hearing any evidence as required by section 149. The case has been reserved by my brother for the consideration of two Judges on account of the decisions in *Heyzer v. James Silva* [1] and *Mohamado v. Aponsu*,[2] and further the opinion of Went J., in the case of *Silva v. Silva*,[3] that the formulation of an opinion by the Magistrate that the case was one which might properly be tried summarily, was a condition precedent to the trial, without which the Magistrate had no jurisdiction.

The question is, whether this irregularity is a fatal one, or one which comes within the scope of section 425 of the Criminal Procedure Code, or is, in fact, really a case of irregularity which does not occasion a failure of justice. In this particular case it has not been shown, without question, that the Magistrate took no evidence, but I do not think it is necessary to send it back for inquiry on the point, as I am of opinion that in any event the irregularity is one curable under section 425. It seems to me that in these cases it is very largely a question of fact, and if it is clear from the evidence of the complainant, subsequently recorded, that the Magistrate can come to no other conclusion than that the case was one fit and proper for summary trial, there has been no failure of justice. This case appears to be such, and for that reason I am of opinion that the proceedings are not vitiated by the Magistrate having decided to try it summarily before taking evidence, if, in fact, he adopted that course.

SHAW J.—

I agree. I felt some doubt as to the correctness of the opinion I expressed in the case of *Mohamado v. Aponsu* (*supra*) that the irregularity committed by the Magistrate, in deciding to try the case summarily before taking the complainant's evidence, could not be cured under section 425 of the Criminal Procedure Code. My expression of opinion in that case was an *obiter dictum*, because I came to the conclusion that, for other reasons, the case was not one which the Magistrate ought to have tried summarily. In expressing the opinion I did, I followed the case of *Heyzer v. James Silva* (*supra*) decided by Wood Renton C.J., who in a similar case expressed the opinion that the irregularity was a fatal irregularity. I am not altogether sure that the late Chief Justice was considering whether the irregularity could or could not be cured under the provisions of section 425, and no mention of that section is made by him in his judgment. But whether it is so intended or not, I agree with my brother Ennis that this is not necessarily a fatal irregularity, and in the present case it is one which has occasioned no failure of justice. The appeal should consequently be dismissed.

Appeal dismissed.

[1] *(1915) 1 C. W. R. 136.* [2] *(1915) 1 C. W. R. 170.*

[3] *(1904) 7 N. L. R. 182.*