1909.
January 21.

*Present :* The Hon. Sir Joseph T. Hutchinson, Chief Justice.

THE KING *v.* ELIATAMBI *et al.*

*D. C. (Criminal), Batticaloa, 2,462.*

*Assessors, refusal of Judge to summon—Discretion—Courts Ordinance (No. 1 of 1887), s. 72—Criminal Procedure Code, s. 200.*

Where a District Judge in the exercise of his discretion under section 72 of the Courts Ordinance (No. 1 of 1889) refuses to summon assessors to try a criminal case, such refusal is final, and the Supreme Court has no power to over-rule it.

APPEAL by the accused from a conviction by the District Judge (H. R. Freeman, Esq.). The facts sufficiently appear in the judgment.

*H. Jayewardene*, for the accused, appellants.

*W. Pereira, K.C., S-G.*, for the Crown.

January 21, 1909. HUTCHINSON C.J.—

The appellants apply to have the conviction set aside and a new trial ordered by the Judge with assessors, on the ground that the Judge wrongly refused to have a trial with assessors. Section 72 of the Courts Ordinance enacts that the District Judge may in his discretion, at his own instance, or upon the application of any party, have three assessors associated with him at the hearing and decision of any cause ; and that in case of any difference of opinion between him and the assessors, his judgment shall prevail. And section 200 and following of the Criminal Procedure Code direct the manner of trial with or without assessors.

The accused were committed for trial and were convicted for (1) causing hurt, an offence under section 314 of the Penal Code ; and (2) committing mischief by fire, an offence under section 419. It seems that when they were committed for trial they informed the Magistrate that they wished for a trial with assessors ; but the District Judge, after the indictment was filed, but some days before the trial, made the following note in the record :—" This is a very simple case, and I am unwilling to have assessors summoned for it. The jury list here is a short one, and a good deal of inconvenience is being caused by the monthly summoning of assessors in cases in which there is no necessity for them. Moreover, I object on principle to assessors in the present state of the law ; the Judge is not bound by their opinion (section 213 of Ordinance No. 15 of 1898) ; yet, when

sitting with assessors, it is natural to leave the facts to them. Last month in two cases when I was sitting with assessors one found the accused guilty, the other found them not guilty. It is less easy in my experience to absorb the facts when there are assessors on whom one is relying to decide ; and I therefore think such cases as this can be more effectively dealt with without assessors. Assessors not to be summoned therefore." He accordingly tried the case without assessors. There is no note that at the trial the accused or his counsel applied for assessors.

Counsel in support of the appeal urged that the discretion given to the Judge by section 72 of the Courts Ordinance must be exercised by him on reasonable grounds, and that in this case the Judge did not really exercise his discretion at all, but that he said in effect that he did not approve of the system of trial with assessors, and that he would not in any case direct a trial with assessors.

The Ordinance does not give any hint as to what kinds of cases ought to be tried with assessors. The Judge cannot know until he has heard the evidence whether the case which he is going to try is easy or difficult, and the opinions of Judges may very well differ as to the kinds of cases in which they would like to have the advice of assessors. The same reason which might be given by one Judge for summoning assessors might be given by another Judge as his reasons for not doing so. It appears to me that the Legislature intended to leave the matter absolutely in the hands of the Judge, and that he is not bound to give any reason. In this case the Judge gave one reason, which would have been enough, that the case was a very simple one. But I am bound to say that his other reason appears to me to be a bad one. The trial with assessors, who do not decide, but only give their opinion, which the Judge may over-rule, is not peculiar to Ceylon ; it exists in other colonies ; and the principle is the same as that which prevails in the Executive Council of every Colony, in all of which the Councillors give their opinion, but the Governor decides. However, in my opinion, the discretion of the Judge is absolute, and whether he gives no reason at all, or gives one which we may think mistaken, this Court cannot over-rule his discretion.

I dismiss the appeal.

*Appeal dismissed.*