1962 *Present:* **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

MARTIN APPUHAMY, Appellant, *and* SUB-INSPECTOR OF POLICE, JAFFNA, Respondent

*S. C. 1003 of 1959—M. C. Jaffna, 17,894*

*Criminal procedure—Accused produced in custody without process—Plaint filed by Police—Duty of Magistrate to record statements on oath before framing charge—Inadmissibility of hearsay statements—Criminal Procedure Code, ss. 121 (1), 122 (3), 126A, 127, 148 (1) (a) (b) (c) (d) (e) (f), 150, 151 (1), 151 (2), 187 (1)—Evidence Ordinance, ss. 2 (1), 60.*

The decision in *Mohideen v. Inspector of Police, Pettah* (59 N. L. R. 217) is applicable to all cases where an accused person is brought before a Magistrate in custody otherwise than on a summons or a warrant.

The accused had first been produced by the Police with a report under section 126 (A) of the Criminal Procedure Code and remanded pending investigations. On a subsequent date the police filed plaint under section 148 (1) (*b*).

*Held*, that, before framing a charge against the accused, it was incumbent on the Magistrate to have recorded statements on oath as required by sections 151 (2) and 187 (1) of the Criminal Procedure Code.

*Lamanatissa de Silva v. S. I. Police, Matara* (62 N. L. R. 92), overruled.

*Held further* (H. N. G. FERNANDO, J., dissenting), that *Tikiri Banda v. Perimpanayagam* (61 N. L. R. 286) rightly decided that in every case where section 187 (1) of the Criminal Procedure Code renders an examination under section 151 (2) necessary, a charge cannot be framed against an accused person unless and until " a person able to speak to the facts of the case " has been examined, and that hearsay statements cannot be acted upon for the purposes of framing a charge in such a case.

TWO questions reserved under section 48 of the Courts Ordinance for decision of more than one Judge.

*M. L. de Silva*, with *K. Jayasekera*, for Accused-Appellant.

*D. St. C. B. Jansze, Q.C.*, Attorney-General, with *Ananda Pereira*, Senior Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for Complainant-Respondent.

*Cur. adv. vult.*

April 11, 1962. BASNAYAKE, C.J.—

The following questions were reserved by my brother T. S. Fernando under section 48 of the Courts Ordinance :—

(*a*) " Is the decision of the Court in *Mohideen v. Inspector of Police, Pettah*[1], applicable only in the case of accused persons against whom proceedings have been instituted under section 148 (1) (*d*) of the Criminal Procedure Code ? "

(*b*) " Does the decision in the case of *Tikiri Banda v. Perimpanayagam*[2] in so far as it excludes the admission of hearsay upon an examination of a person in terms of section 151 (2) of the Criminal Procedure Code correctly interpret the relevant provision of law ? "

A Bench of three Judges was constituted for their determination in accordance with an order in that behalf made by me under section 48A of the Courts Ordinance.

In regard to the first question, *Mohideen v. Inspector of Police, Pettah*, deals with a case for which provision is made in section 151 (2), i.e., where proceedings have been instituted under paragraph (*d*) of section 148 (1). That paragraph deals with the case in which a person accused of an offence is brought before a Magistrate in custody without process. For the purposes of section 187 (1) such a person would be an accused who is brought before the Court otherwise than on summons or warrant. That provision requires that the Magistrate shall, in accordance with the direction in section 151 (2), first examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case, and if on such examination he forms the opinion that there is sufficient ground for proceeding against the accused, frame a charge against him.

While section 151 (2) deals with only proceedings instituted under paragraph (*d*) of section 148 (1), i.e., on any person being brought before a Magistrate in custody without process accused of having committed an offence which such Court has jurisdiction either to inquire into or try, section 151 (1) deals with cases in which proceedings are instituted under paragraphs (*e*) and (*f*) of section 148 (1). Section 151 (1) deals with cases in which the accused is not in custody. In those cases the

[1] *(1957) 59 N. L. R. 217.* [2] *(1959) 61 N. L. R. 286.*

process indicated in the 4th column of the First Schedule would issue—summons where summons is prescribed in the first instance and warrant where warrant is prescribed; but before issuing a warrant in any case under paragraph (*a*) or (*b*) of section 148 (1) the Magistrate is bound to examine on oath the complainant or some material witness or witnesses. He may also examine them in a case in which summons may issue in the first instance, but he is not bound to do so. In a case under paragraph (*c*) of section 148 (1) the Magistrate is bound, before issuing process, to record a brief statement of the facts which constitute his means of knowledge of the grounds of his suspicion, as the case may be.

> "Where proceedings are instituted under paragraphs (*e*) or (*f*) of section 148 (1) no examination of the complainant or any other person is required as a condition precedent to the issue of summons. The Magistrate is bound to issue summons or warrant accordingly as the fourth column of the First Schedule provides that the case is one in which a summons or a warrant should issue in the first instance."

Provision is also made in section 150 for a case in which the offence alleged in proceedings instituted under section 148 (1) (*a*) or (*b*) is an indictable offence and no person is accused of having committed it. In such a case too the Magistrate may examine on oath the complainant or informant and any other person who may appear to him able to speak to the facts of the case. If, after recording such evidence, there is in his opinion sufficient ground for proceeding against any person, he is bound to issue process against such person in the manner provided in section 151. Failure to comply with the corresponding provision of the Code (s. 149 (4)) prior to its amendment has been held to be fatal (*Mohammado v. Appuwa*[1]). In that case Shaw J. said—"The failure to comply with section 149 of the Code is in my opinion a fatal irregularity which cannot be cured under the provision of section 425". The *ratio decidendi* of the case of *Mohideen v. Inspector of Police, Pettah*, is that the failure to observe conditions precedent to the issue of process is fatal to any proceedings which take place without the observance of such conditions. That decision deals primarily with a case falling under section 148 (1) (*d*); but the *ratio decidendi* is applicable to other similar cases.

Now in regard to the second question the relevant sections provide that the Magistrate should examine on oath—

(*a*) in the case of section 150 (1) the complainant or informant and any other person who may appear to the Magistrate to be able to speak to the facts of the case,

(*b*) in the case of section 151 (1) the complainant or some material witness or witnesses, and

(*c*) in the case of section 151 (2) the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case.

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

It would appear that the sections contemplate the taking of evidence, and there is no doubt that the proceedings under sections 150 and 151 are judicial proceedings. Section 2 (1) of the Evidence Ordinance provides that the Ordinance shall apply to all judicial proceedings in or before any Court other than Courts-Martial. Therefore in the taking of evidence under sections 150 and 151 the provisions of the Evidence Ordinance must be observed. In an examination under those sections hearsay evidence can be admitted only in cases in which the admission of such evidence is permitted by the Evidence Ordinance and in no other. Oral evidence must in all cases be direct. Section 60 explains what that means—

(1) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;

(2) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(3) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(4) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Any person who gives oral evidence in an examination under section 150 or 151 may only give direct evidence as explained in section 60. *Tikiri Banda v. Perimpanayagam*[1] lays down the law correctly in excluding such hearsay evidence as is not permitted by the Evidence Ordinance.

H. N. G. FERNANDO, J.—

The first question reserved for determination by this bench is the following :—

> " Is the decision of the court in *Mohideen v. Inspector of Police, Pettah, (59 N. L. R. 217)* applicable only in the case of accused persons against whom proceedings have been instituted under section 148 (1) (*d*) of the Criminal Procedure Code ? "

It would appear from the terms of the reference made by T. S. Fernando, J. that his reason for reserving this question was that doubts are cast by the decision of my Lord the Chief Justice in *S. C. No. 712, M. C. Matara No. 55987, S. C. M. March 14th, 1960* (now reported at *62 N. L. R. 92*) on the scope of the decision of a bench of three Judges in *Mohideen v. Inspector of Police, Pettah* (*supra*).

The brief judgment in *62 N. L. R. 92* refers to the fact that in that case there had been a written report to the court under section 148 (1) (*b*), and that in addition *the accused was also produced by the police.* On these facts the Chief Justice held " that circumstance does not convert

[1] *(1959) 61 N. L. R. 286.*

proceedings instituted under section 148 (1) (*b*) to proceedings instituted under section 148 (1) (*d*). The procedure prescribed in section 151 (2) is confined to proceedings instituted under section 148 (1) (*d*) ". With respect, the opinion just cited is entirely in accord with that which I myself held, and indeed that was the reason why in reserving the appeal in *Mohideen v. Inspector of Police, Pettah* (*supra*) for fuller consideration I expressed disagreement with the earlier judgment of Soertsz J. in *Vargheese v. Perera* [1].

But my view was overruled by the majority of the bench of three Judges who considered the point in *Mohideen v. Inspector of Police, Pettah* (*supra*). In that case an accused had been produced in court in terms of section 126 A (1) of the Criminal Procedure Code by a police officer who submitted at the same time to the Magistrate the report of an investigation into a cognizable offence. Thereupon the Magistrate acting under section 126 A (2), remanded the prisoner into custody until August 22nd, 1955. On that day the police sergeant filed a report in terms of section 148 (1) (*b*) of the Code and when the report was filed the accused was present in court under Fiscal's custody. K. D. de Silva, J. writing the principal judgment declined to accept the submission that the case fell under section 148 (1) (*b*) and not under section 148 (1) (*d*), and he decided accordingly that sub-section 2 of section 151 (which in terms applies to a case where proceedings have been instituted under section 148 (1) (*d*) ) must be complied with, namely that the Magistrate must examine on oath the person who brought the accused before the court and any other person able to speak to the facts of the case.

Much of the reasoning of K. D. de Silva, J. was based on the terms of section 187 (1) of the Code, and his opinion, which in my view was the *ratio decidendi*, was as follows :—

> " This section 187 (1) includes not only a case where the accused is present in custody, but also when he is present on remand on police bail or on being warned by the police to appear in court. In all those instances it would appear that it is incumbent on the Magistrate to hold the examination contemplated by section 151 (2)."

My Lord the Chief Justice (*at page 218*) was of the same opinion :—

> " Be that as it may, the question whether proceedings were instituted under section 148 (1) (*d*) or section 148 (1) (*b*) is of little importance in this case as admittedly the accused was brought before the court otherwise than on a summons or warrant. In such a case clearly the procedure under section 187 must be followed. The word " brought " in that section does not mean brought by a police officer, but compelled to attend either by virtue of the fact that he is in police custody and is forwarded to court or is accompanied by a police officer or is compelled to attend by virtue of having executed a bail bond under section 126 A or section 127."

[1] (*1942*) *43 N. L. R. 564.*

In view of these *dicta* the subsequent decision in *Lamanatissa de Silva v. Sub-Inspector of Police, Matara* (*62 N. L. R. 92*), must be held to have been wrongly decided. The answer to the first question we are now considering is to be found in the *dicta* which I have just cited from *Mohideen v. Inspector of Police, Pettah* (*supra*).

The second question for decision is whether *Tikiri Banda v. Perimpanayagam* (*S. I. Police*)[1], rightly decided that in every case where section 187 of the Code renders an examination under section 151 (2) of the Code necessary, a charge cannot be framed against an accused person unless and until " a person able to speak to the facts of the case " has been examined, and that hearsay statements cannot be acted upon for the purpose of framing a charge in such a case.

Section 151 (2) directs the Magistrate to examine on oath—

(i) the person who has brought the accused before the court ; and

(ii) any other person who may be present in court able to speak to the facts of the case.

The provision is directly applicable in a case referred to in section 148 (1) (*d*), that is where " a person is brought before a Magistrate in custody without process "; accordingly it seems to me that the meaning of the provision can be best ascertained by a consideration of its application in that particular case. In very nearly every such case the person would be brought to court in the custody of a police officer or of some other officer authorised to make an arrest. This officer has necessarily to be examined on oath by the Magistrate. But his knowledge of the facts of the case will not, save in exceptional circumstances, be direct, so that his examination by the Magistrate will ordinarily reveal only the substance of the complaint made by some other person and the results of any inquiry which he, or some other officer, may have conducted. In so far therefore as the examination of this officer is concerned, the court is compelled by section 151 (2) to place on record evidence which can be largely or even totally hearsay.

Turning now to the other examination directed by the section, the Magistrate is expressly required only to examine any person *who may be present in court* able to speak to the facts of the case. *Prima facie* section 151 (2) appears to be applicable on the occasion when a person is produced in custody, or in other words to direct what action a Magistrate should take on such an occasion. In the absence of any provision in the section which requires or enables a Magistrate to secure the attendance of some person not present in court on that occasion, I cannot agree with the view taken in *Tikiri Banda v. Perimpanayagam* (*Sub-Inspector of Police*), (*supra*) that the Magistrate is bound by the section to summon and examine some person able to speak to the facts of the case who is not present on the occasion when the accused is produced in custody.

[1] *(1959) 61 N. L. R. 286.*

Such a view would be justifiable only if there is compelling reason to import into the section a duty or power not expressed therein. It remains to consider whether any such reason is suggested in the context.

Bearing in mind that the " prime " case contemplated in sub-section 2 of section 151 is that in which a person is produced in custody so that no issue of process is necessary, it is clear that the purpose of the examination directed by the sub-section is that the Magistrate may be in a position to decide whether " *there is sufficient ground for proceeding against* " the person brought in custody (*vide* section 187 (1) ). Since identical language occurs in sub-section (1) of section 151, it seems to me perfectly legitimate to infer that in all probability the legislature intended that the step to be taken under section 187 (1) may be taken upon material of substantially the same weight and value as that upon which a Magistrate may take under sub-section 1 of section 151 the step therein mentioned, namely the issue of process against a person not in custody.

One knows from experience that in the vast majority of cases where a report under section 148 (1) (*b*) is furnished to the court, the step of issuing *summonses* is generally taken under sub-section 1 of section 151 solely upon the report : in other words a Magistrate when he issues summons ordinarily forms, upon the material of the report, the opinion that " there is sufficient ground for proceeding against " some person not in custody. Reverting now to the examination under sub-section 2, it seems to me that even if the police officer who produces a person in custody is only able to speak to matters not within his own knowledge and to report only what has been said to him by some other person, the weight or value of what he so orally states can be at least equal to that of material which may be furnished by a police officer in a written report : it may even be of greater value for the reason that it is stated on oath in the presence of the court and not merely in writing.

The decision in *Tikiri Banda v. Perimpanayagam* (*supra*) would render essential the recording of direct evidence, such as that of an eye-witness, which implicates the accused. To my mind the omission of the legislature to provide *expressly* for the taking of evidence of this kind is significant having regard to the difference in the language of sub-section 2 of section 151 as compared with the language of sub-section 1. The proviso (ii) to sub-section 1 expressly requires that before issuing a warrant against a person who is accused in a section 148 (1) (*b*) report, the Magistrate *shall examine on oath the complainant or some material witness or witnesses.* It would seem *prima facie* that even under this proviso it would be sufficient for the Magistrate to examine the complainant, who will ordinarily be the police officer making the report, and that therefore even the language of this proviso may not require as a matter of necessity the examination of " some material witnesses ". But assuming for the purposes of argument that this proviso does compulsorily require some direct evidence to be recorded, what is significant is that the legislature in sub-section 2

chose to provide for the examination not of some material witness, but only of any person who may be present in court able to speak to the facts of the case. One point of difference in sub-section 2 is that there is here no reference to "some material witness": and if that means a person who can give direct evidence, then the person referred to in sub-section 2 might well be one who cannot give direct evidence but only testify to some matters related to him, say by a person who cannot attend court because he is lying injured in a hospital. The second point of difference is that a person to be examined under sub-section 2 is a person "who may be present in court", so that *prima facie* at least the words do not compulsorily require the Magistrate to examine anyone who is not present in court on the occasion when the sub-section becomes applicable, that is on the occasion when a person is produced in court. While in the proviso to sub-section 1 it is made clear that the proceeding may have to be adjourned in order to secure the attendance of some material witness, the language of sub-section 2 indicates on the contrary that adjournment for such a purpose need not be a normal step. In my view it would not be reasonable to imply that the language in the two provisos, so different in many important respects, was intended nevertheless to convey the same meaning.

For these reasons my answer to the second question referred for consideration is that section 151 (2) does not compel a Magistrate to record direct evidence implicating an accused person and does not exclude the admission of hearsay upon an examination under the sub-section, I would hold that *Tikiri Banda v. Perimpanayagam* (*supra*) was to this extent wrongly decided.

The charge in this case was read after the Magistrate had recorded evidence of the Inspector of Police who had investigated the complaint against the accused. This examination in my opinion satisfies the requirements of section 151 (2) of the Criminal Procedure Code. I would accordingly dismiss the appeal.

SINNETAMBY, J.—

I have had the advantage of reading the judgments prepared by My Lord the Chief Justice and my brother H. N. G. Fernando, J. I agree with the conclusions they have reached in regard to the first question reserved for determination by this Bench, namely, that the decision in *Mohideen v. Inspector of Police, Pettah* [1], is applicable to all cases where an accused person is brought before a Court otherwise than on a summons or a warrant. It would appear that in the case which has been referred to us for consideration of these questions, the accused had first been produced by the Police with a report under section 126 (A) of the Criminal Procedure Code and remanded pending investigations. On a subsequent date the police filed plaint under section 148 (1) (*b*). In *Mohideen v. Inspector of Police* (*supra*) the facts were identically the same. There too, the accused had first been remanded pending investigations and was

[1] *(1957) 59 N. L. R. 217.*

under fiscal custody and then plaint was filed under section 148 (1) (*b*). I agree with Fernando, J. that the case *Lamanatissa de Silva v. Sub-Inspector of Police, Matara*[1] was wrongly decided.

The second question reserved for the consideration of this Bench is one of some difficulty. It is undoubtedly correct that section 151 (2) imposes upon a Magistrate the duty to examine the person who brought the accused before Court and any other persons who may be present and able to speak to the facts of the case; and it may be that neither the person who produces the accused nor any other person present would be able to give direct evidence of facts to enable the Court to conclude that there are sufficient grounds for proceeding against the accused : it may also be that such a conclusion can only be reached if the person producing the accused person is permitted to give evidence of what eye-witnesses had told him. The question that poses itself immediately is whether it is permissible for a police officer, who invariably would be the person producing an accused otherwise than upon a warrant, to give evidence of what witnesses told him in the course of his investigations. It seems to me that he would be debarred from doing so having regard to the interpretation placed upon the relevant provisions of the Criminal Procedure Code and the Evidence Ordinance by a Divisional Bench of this Court in *Queen v. Buddharakkita Thera et al.*[2]. It would follow, therefore, that it is not open to a police officer in giving evidence under section 151 (2) to state what witnesses told him in the course of his investigations. A police officer must confine his evidence to what he actually knows and to the information which he received under section 121 (1) of the Criminal Procedure Code, which of course would be admissible evidence. To give evidence of what other witnesses told him would be to act in contravention of the provisions of section 122 (3) as interpreted in the *Buddharakkita case*. On this ground alone, therefore, it seems to me that if the material before the Court on the day the accused is produced is insufficient to enable the Magistrate to frame a charge, then an adjournment should be sought in order that material witnesses may be summoned to give evidence.

There is another aspect of the matter deserving consideration. It is a principle rigidly followed by framers of the Code that wherever the liberty of the subject is involved an independent judgment, that is to say, other than the judgment of the police, is brought to bear upon the facts of the case before an order imperilling the subject's liberty is made. It is for that reason that express provision was made for a police officer investigating an offence to produce an accused person before a Magistrate within twenty-four hours of his arrest and then obtain the Magistrate's order for further remands pending further investigations. That is provided for in section 126 (A) of the Criminal Procedure Code and the Magistrate in doing so undoubtedly is guided by police reports of what witnesses stated in the course of police investigations. The burden of deciding whether the accused should be further remanded is by that

[1] *(1960) 62 N. L. R. 92.* [2] *(1962) 63 N. L. R. 433.*

section placed on the Magistrate. What the Magistrate peruses is not evidence in the case and it is open to him to refuse to remand the accused. At that stage he is only concerned with deciding whether the complaint is well founded and not with whether the accused should be charged and brought to trial. The report is not evidence in the case.

Section 148 which deals with the way in which the proceedings in the Magistrate's court may be instituted permits summons to be issued by the Magistrate on complaints whether made orally or in writing. Under sub-section 1 (*a*) the complaint may be made by a private person and under section 1 (*b*) in writing by a person holding an official position. In either case, if it is sought to obtain a warrant of arrest, the procedure expressly provides that the Magistrate shall before doing so examine the complainant or some material witness or witnesses. It makes no difference whether the plaint is a private plaint or a police plaint. In either case, before a warrant is ordered, the law requires the Magistrate to bring his independent judgment to bear upon the facts. Where proceedings are instituted under section 148 (1) (*c*), (*e*) or (*f*) it is open to a Magistrate to issue a warrant in the first instance without any examination; but in these cases the Magistrate himself, or the Attorney-General or a Judge has brought his mind to bear upon the facts. It will thus be seen that throughout, the procedure prescribed secures in some way an examination of the facts by an independent judicial mind before the liberty of a subject is imperilled. Now, in proceedings under section 148 (1) (*d*) we have a person brought to court without process. He may be so brought by a police officer or by a private person and he has already been deprived of his liberty. It seems to me that in such a case too the Code, following the same policy, requires a judicial mind to be brought to bear upon the facts in order to ascertain whether the accused has been properly deprived of his liberty and to decide whether he should be further remanded or admitted to bail. If upon consideration of the facts the Magistrate thinks that there are no grounds for proceeding against the accused, he would be discharged, but if there are grounds the Magistrate is required to frame a charge. It is essential, therefore, that a Magistrate should be placed in possession of all the material facts and this can only be done by admissible evidence of the facts being led. Such evidence being the material on which the Court acts forms part of the proceedings and the witnesses called are liable to be examined and in due course cross-examined in the normal way. Indeed, it would be wrong and in my view illegal not to recall and tender such a witness for cross-examination.

For these reasons I am of the opinion that the decision in *Tikiri Banda v. Perimpanayagam*[1] is correct and when a police officer produces accused persons in custody he should take steps to see that the material witnesses are present to be examined by Court, or obtain an adjournment to do so. He should not give hearsay evidence except of the first information.

[1] *(1959) 61 N. L. R. 286.*