1941 *Present* : **Soertsz J.**

MUSAFER *v.* WIJEYSINGHE.

391—M. C. Kandy, 2,577.

Evidence in absence of accused—Reading over of depositions at trial—Witnesses not called de novo*—Proviso to Criminal Procedure Code, s. 297.*

On an oral complaint made to a Magistrate under section 148 (1) (*a*) of the Criminal Procedure Code he examined certain witnesses and upon their evidence issued a warrant against the accused.

When the accused was brought up the evidence of the witnesses was read out to him and after further examination they were tendered for cross-examination.

Held, the reading over of the depositions was justified by the proviso to section 297 of the Criminal Procedure Code.

Herath v. Jabbar (41 N. L. R. 217) distinguished.

APPEAL from a conviction by the Magistrate of Kandy.

L. A. Rajapakse for the accused, appellant.

R. R. Crosette-Tambiah, C.C., for Crown, respondent.

Cur. adv. vult.

October 3, 1941. SOERTSZ J.—

On the evidence adduced by the prosecution in this case the learned Magistrate could not but have held that the charge made against the appellant was established.

The only questions left for consideration are: (*a*) whether the conviction is vitiated, as Counsel for the appellant submits, because the evidence given by the witnesses Silva and Dharmaratne, Podinona and Tikiri Menika, on March 23, 1941, in the absence of the accused-appellant, was admitted into the case in the manner in which it was; (*b*) whether the Magistrate exercised his discretion wrongly when he refused an application for a postponement of the trial made on April 23, 1941; (*c*) whether the sentence passed by the Magistrate is excessive.

In regard to (*a*), the material facts are these: On March 23, 1941, S. I. Dharmaratne produced the witnesses I have named before the Magistrate at his bungalow and had their evidence recorded, and upon that evidence he obtained a search warrant to search the house concerned in the charge and a warrant for the arrest of the accused-appellant. When the case came up for trial on April 23, 1941, the evidence already given by these four witnesses in the absence of the accused was read to the accused, as each of them came into the witness-box, they were questioned further and they were tendered to the accused for cross-examination.

Counsel for the appellant contends that the reading over of the evidence given by the witnesses in the absence of the accused was irregular. He says that these witnesses should have given their evidence *de novo* in the presence of the accused. For this contention, Counsel relies on the

ruling in the Divisional Bench case of *Herath v. Jabbar*[1]. But in that case what was held was that evidence which could not have been recorded, in the absence of the accused, by virtue of any of the exceptions to the general rule that " all evidence taken at inquiries and trials shall be taken in the presence of the accused ", would be wrongly admitted if it were admitted by *reading* that evidence in the presence of the witnesses when the accused came before the Court and stood his trial. In that case, there was no exception to the general rule stated above to justify the taking of the depositions in the absence of the accused. In the present case the taking of the depositions on March 23 must be held to have been done under section 151 of the Criminal Procedure Code on an oral complaint made to the Magistrate under section 148 (*a*) of the Criminal Procedure Code. That this was the case is shown by the fact that after taking these depositions as he was bound to do by sub-section 2 of the proviso of section 151, the Magistrate issued warrant against the accused-appellant. Counsel also submitted that the witnesses Podinona and Tikiri Menika were not examined by the Magistrate *mero motu* for the purpose of the sub-section 2 of the proviso of section 151, but at the instance of the Sub-Inspector. But that, in my view, makes no difference. When the Magistrate entertained that application, it must be assumed that he entertained it because he agreed that they were material witnesses.

The fact that on March 24, 1941, the Sub-Inspector of Police filed a written plaint presumably under Section 148 (*b*) of the Criminal Procedure Code does not eliminate the oral complaint made through the four witnesses in question. The subsequent written complaint was something more than need have been done. Proceedings had already been instituted. In these circumstances, the reading over of the depositions taken on March 23 is justified by the proviso to section 297 of the Criminal Procedure Code.

I, therefore, hold that the submission made in (*a*) above fails. Incidentally, I would point out that it would have been more regular if the Magistrate before issuing a warrant in the first instance, had in terms of section 62 of the Criminal Procedure Code recorded his reasons for doing so. The offence was a non-cognizable offence and it is not stated to be an offence for which a warrant may be issued in the first instance.

In regard to (*b*), I am quite unable to sustain the objection involved in that submission. To hold that a postponement should have been granted in the circumstances alleged would result in dislocation of the work of the Courts. I agree with the Magistrate that for some reason or other the accused " was only seeking to gain time ". I also agree with him in regard to the conduct of Mr. Proctor Rodrigo in withdrawing from the case when the postponement was refused. These undersirable tactics—they are no less—are becoming somewhat frequent. I had occasion recently to comment on a similar incident in a case from the Magistrate's Court at Point Pedro. Such conduct displays a lack of a sense of responsibility, and perhaps it may not be possible on future occasions to pass it by only with a comment.

[1] *41 N. L. R. 217.*

There remains the question of sentence. The Magistrate says that the sentence he has imposed is severer than the sentences he normally imposes in these cases, and the reason he gives for a severer sentence here is that the accused was carrying on this business on a large scale. That is, certainly, a relevant fact, but as against that there is the fact that this is the accused's first offence, and there is nothing to show that she had conducted this house in this manner for any length of time. In these circumstances, I think that the ends of justice will be met and the accused will be sufficiently dealt with both by way of punishing her for her offence and deterring her from a similar course of conduct in the future if she is sentenced to pay a fine of Rs. 250 and is ordered to enter into a recognizance in a sum of Rs. 250 with two sureties to be of good behaviour for a period of twelve months. If the fine is not paid, she will suffer rigorous imprisonment for two months. If she fails to enter into the recognizance, she will undergo simple imprisonment for two months. If she fails to do both, the second sentence will run consecutively.

The conviction is affirmed, but the sentence is varied in the manner indicated.

Affirmed.