1935 *Present :* **Koch A.J.**

SILVA *v.* KELANITISSA.

123—P. C. Kandy, 46,248.

Criminal Procedure—Summary trial of non-summary offence—Magistrate assuming jurisdiction as District Judge—Failure to record opinion that the case may be tried summarily—No presumption—Criminal Procedure Code, s. 152 (3).

Where a Police Magistrate, who is also District Judge, tries summarily a non-summary offence it cannot be presumed, in the absence of a record to that effect, that he proceeded under section 152 (3) of the Criminal Procedure Code.

It is the duty of the Magistrate not only to record his opinion but also to state his reasons for the opinion that the offence may properly be tried summarily.

APPEAL by the complainant with the sanction of the Solicitor-General.

E. B. Wickramanayake C.C. (with him *Kariapper, Acting* C.C.) for complainant-appellant.

L. A. Rajapakse, for accused-respondent.

June 5, 1935. KOCH A.J.—

The accused-respondent was charged on three counts and acquitted by the Police Magistrate. An appeal has been preferred against the acquittal by the complainant, R. O. de Silva, District Inspector of Police, Kandy, with the sanction of the Solicitor-General. The appeal is based both on the facts and the law.

I advisedly refrain from making any comments on the merits in view of the order I propose to make.

On the law it is submitted that two at least of the three counts were not triable by a Police Court. The counts respectively were, to put them briefly : (1) that the respondent did commit theft of three tea coupons numbered S. C. 2387, S. C. 2393, and S. C. 2413, belonging to three different persons, and rendered himself punishable under section 368 of the Ceylon Penal Code, (2) that he did commit criminal breach of trust in respect of these three coupons and rendered himself punishable under section 392 of the Ceylon Penal Code, and (3) that he dishonestly misappropriated the proceeds of sales of two of these coupons, viz., S. C. 2413 and S. C. 2393, and rendered himself punishable under section 386 of the Ceylon Penal Code.

The accused is an assistant Postmaster, and the evidence led was directed to show from the outset that the alleged offences were committed by him while acting in that capacity. Also at an early stage of a long trial evidence was led to prove that coupon S. C. 2387 was worth Rs. 39.30, coupon S. C. 2393 Rs. 58.80, and coupon S. C. 2413 Rs. 190. The aggregate value amounting to Rs. 288.10.

Now the offence of theft punishable under section 368 of the Penal Code is not triable by a Police Court when the value of the property stolen exceeds 100 rupees. The offence punishable under section 392

is only triable by a District Court, while the offence punishable under section 386 is triable both by the Police Court and the District Court. It is clear therefore that the Police Court had no jurisdiction to try the offences set out in the first and second counts.

Mr. Rajapakse, who appeared for the accused-respondent, strongly pressed on me the hardship that his client would undergo if the acquittal is set aside and the case remitted to the Police Court for the taking of non-summary proceedings. He argued that his client would have to defend himself over again for no fault of his own and he will have lost the benefit of the expense he had incurred in retaining a proctor to defend him at the trial which resulted in his acquittal. That the respondent will suffer this loss there can be no doubt, but some portion of the blame does lie on the respondent himself. He was defended by counsel right through a lengthy trial and at no stage did he point out to the Magistrate that the proceedings which were being held were irregular. It is surprising that neither the Inspector (complainant) nor the Magistrate nor defending counsel noticed the irregularity, and it is regrettable that so much money, time, and labour have been expended to no purpose. Perhaps the excuse is that all three concentrated so much on the merits of a troublesome and involved case that the point of jurisdiction quite escaped them. There is something in this, but unfortunately it is no justification and cannot assist the respondent.

Mr. Rajapakse further pressed the point on me that as the Magistrate was also an Additional District Judge, it should be presumed that he tried the case under section 152 (3) of the Criminal Procedure Code, and rightly so, he argued, as there was a general presumption in favour of the regularity of proceedings in a court of law.

The argument, in my opinion, is not sound. This section specifically requires that the Magistrate, having regard to all the circumstances of the case, must be of opinion that such offence may be tried summarily. The Magistrate's opinion, it appears to me, is a condition precedent to the assumption of the jurisdiction contemplated by that section. It is necessary therefore that that opinion must be recorded.

My view is supported by the judgment of the Full Bench in *Silva v. Silva*[1]. I shall quote for brevity the words of de Sampayo J. only on the point:— "It is not enough for the Police Magistrate to form the opinion that the offence may be tried summarily by him, but he must record the reasons for his opinion." It was further held that the opinion when recorded was itself subject to revision by this Court.

The necessity for setting out the reasons becomes therefore apparent for this Court is entitled to know what they are when called upon to interfere. This necessity has been consistently insisted on, as shown in P. C. Tangalla, No. 12,994 (*Koch's Rep. 18*) *Danhia v. Donhamy*[2], *Naide v. Rataranhamy*[3], *Rex v. Rodrigo*[4], P. C. Kegalla, 20,736[5], *Punchirala v. Cornelis*[6], and *Parupathy v. Levvai*[7].

Sir Forrest Garvin in a recent case (*Sheddon v. Ago Singho*[8]) approved of and followed the decision of *Silva v. Silva* (*Supra*). He set aside the

[1] *7 N. L. R. 182.*
[2] *2 Br. 230.*
[3] *Leem 95.*
[4] *4 Bal. Notes of cases 62.*
[5] *1 C. W. R. 6.*
[6] *8 N. L. R. 58.*
[7] *2 S. C. D. 34.*
[8] *14 Cey. Law Rec. 42.*

conviction and remitted the case to the Police Magistrate with directions that non-summary proceedings should be taken with a view to committal to a higher tribunal. The Magistrate in that case had recorded his opinion, but Sir Forrest Garvin did not see eye to eye with him, being of opinion that charges of cheating by personation and forgery were too grave to be disposed of in a summary manner.

The offence disclosed in the second count in the case before me is of a very serious nature. It involves a liability to imprisonment for a period of ten years. The evidence of the two witnesses H. B. Abeykoon and H. B. Nikatenne, if true, also shows that the respondent was a party to a forgery committed in respect of two of these coupons. These were the earliest witnesses called, and had the Magistrate recorded that in his opinion the case against the respondent could summarily be tried by him acting under the power allowed him in section 152 (3), I should have followed the view expressed by Sir Forrest Garvin and acted as the latter did.

The cases of *Heyzer v. James Silva* [1], *Mohamadu v. Aponsu* [2], *Abanchihamy v. Peter* [3], and *Kalinguhamy v. Porolis Appu* [4] that were also referred to in the argument, do not exactly touch the point and I see no necessity to deal with them.

For the reasons expressed I set aside the verdict of acquittal and remit the case to the Police Magistrate for the taking of non-summary proceedings against the accused.

Case remitted.