1945 *Present :* **Jayetilleke J.**

RATNAYAKE *et al.*, Appellants, *and* INSPECTOR OF POLICE, MORATUWA, Respondent.

1,318-20—M. C. Panadure, 34,118.

Sentence of whipping—Magistrate trying case summarily as District Judge—Power to impose sentence of whipping—Corporal Punishment Ordinance (Cap. 17), sec. 7 (1).

Where a Magistrate assumes jurisdiction as District Judge and tries a case summarily under section 152 (3) of the Criminal Procedure Code he has no power to impose a sentence of whipping for an offence under section 380 of the Penal Code.

APPEAL from a conviction by the Magistrate of Panadure.

L. A. Rajapakse, K.C. (with him *Shelton de Silva*), for 3rd accused, appellant.

D. W. Fernando for 2nd accused, appellant.

Cur. adv. vult.

T. S. Fernando, C.C., for the Crown.

February 11, 1945. JAYETILEKE J.—

There is ample evidence to support the convictions of the 1st and 2nd accused and I would affirm them. But I have doubts about the correctness of the conviction of the 3rd accused. The evidence led by the

prosecution was to the effect that on November 1, 1944, at about 8.30 P.M. the 1st and 2nd accused and two others stopped Privates Manns and Hayward of the Royal Air Force when they were going along the road, threatened them with knives and clubs, and took them into a garden. Then one of the four men blew a whistle and about 12 others armed with clubs turned up. The 1st and 2nd accused took everything that Privates Manns and Hayward had in their pockets and handed some of the things to one of the 12 men. The 1st and 2nd accused were identified by Manns and Hayward that very night. On the following day the naval ratings were paid their salaries at the camp and there was a crowd assembled there. Hayward noticed the 3rd accused in the crowd and thought that he was the person to whom the things that were robbed were handed by the 1st and 2nd accused. He requested the Duty Petty Officer to speak to the 3rd accused in English in order to satisfy himself whether he was the person, He did so, because the person who received the articles the previous night spoke a word or two to him in English. The Duty Petty Officer asked the 3rd accused in English where the foreman was. The 3rd accused replied, " What for master ". Hayward was then satisfied that it was the 3rd accused to whom the stolen things were handed the previous night. The 3rd accused was thereupon taken to the guard room where Manns also identified him. The evidence of Hayward shows that before the 3rd accused uttered the words, " What for master ", he had some doubt in his mind as to his identity. The Magistrate does not seem to have given his mind to this aspect of the matter. Nor has he given his mind to the evidence of the 3rd accused. The 3rd accused said that he lived at Moratuwa about two miles away from the scene of the robbery, that he was employed at the camp as a first grade mason and was in receipt of a salary of Rs. 160 a month. He led evidence to prove that he had hitherto borne a good character. To my mind it seems improbable that at the age of 45 the 3rd accused would have joined the 1st and 2nd accused who are hardly out of their teens in waylaying people and robbing them. I am inclined to think that Manns and Hayward are mistaken about the identify of the 3rd accused. I would accordingly set aside the conviction of the 3rd accused and acquit him.

The only other question is whether the sentence that the 1st and 2nd accused should receive six lashes each is illegal. Counsel for the 2nd accused contended that the accused were convicted by the Magistrate's Court and that for an offence under section 380 of the Penal Code a sentence of whipping can be imposed only by the Supreme Court or the District Court. He relied on section 7 (1) of the Corporal Punishment Ordinance (Cap. 17). It reads :

" Whoever is convicted by the Supreme Court or any District Court of any of the following offences may be punished with whipping.

.....

In this case the Magistrate, who was also an Additional District Judge, assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and tried the accused summarily. The question arises whether he tried the accused as Magistrate or as District Judge. Considerable light

is thrown on the problem by a consideration of Ordinance No. 8 of 1896 which was repealed by the Criminal Procedure Code, No. 15 of 1898, and replaced by section 152 (3). The preamble to and the title of the Ordinance show that the object of the Ordinance was to enable cases triable by a District Court to be tried summarily by the District Judge without the necessity for a preliminary inquiry and commitment when a District Court and Police Court are presided over by one and the same officer. The reason for the repeal of the Ordinance seems to be that the legislature was anxious that the District Court should not try cases without a committal and without an indictment being presented by the Attorney-General.

In an unnamed case [1] Lawrie A.C.J. said :—

" The Ordinance 8 of 1896 dealt with the trial of cases by a District Court summarily without a committal for trial. The Ordinance was repealed by the New Criminal Procedure Code and the 152nd section of the code deals with the trial of cases not only by a District Court but also by a Police Court.

Instead of giving power to the District Court to try without commitment, the law now gives power to the Police Magistrates, who are also District Judges, not only to try summarily cases hitherto triable by a District Court, but to impose District Court sentences not as District Judges but as Police Magistrates ".

In *The King v. Kulanthaivelu* [2] de Sampayo A.J. said :—

" It has often been pointed out that what section 152 of the Criminal Procedure Code does is to enable a judicial officer to hear a case summarily *as Police Magistrate* and not to give jurisdiction to the District Judge without a committal and without an indictment being presented by the Attorney-General ".

The question I have referred to is entirely concluded by these decisions with which I must say with the greatest respect, I have no hesitation in agreeing. These decisions given in 1899 and 1904 are reinforced by the decisions of the subsequent 40 years. I shall refer to only two of them viz. : *Usubu Lebbe v. Sopiya Nona* [3] and *Madar Lebbe v. Kiri Banda* [4]. In the former de Sampayo said :—

" Misleading language is often employed to describe the nature of the proceedings authorised by section 152 (3). The Police Magistrate, for instance, is said to act as District Judge but this is wholly incorrect. The Police Magistrate acts, and can only act as Police Magistrate, the only difference being that, being also District Judge, he has power to impose a sentence which ordinarily a District Judge may impose ".

and in the latter case he said :—

" The fact to be emphasized is that the Police Magistrate acts in all cases as Police Magistrate and in conformity with the procedure laid down for the trial of cases in the Police Court ".

[1] *Koch's Reports 19.*
[2] *1 Tambyah's Reports 17.*
[3] *1 C. W. R. 93.*
[4] *18 N. L. R. 376.*

Counsel for the respondent sought to find support in the decision in *Nadar Rajah v. Gopala* [1] where Dalton J. doubted the correctness of the decisions in *Usubu Lebbe v. Sopiya Nona* (*supra*) and *Madar Lebbe v. Kiri Banda* (*supra*) on the ground that the provisions of Ordinance No. 8 of 1896 appeared to him to have been re-enacted in section 152 (3). With great respect I wish to say I cannot agree with that view. Ordinance No. 8 of 1896 expressly provides that the officer who tries the case should do so *in his capacity as District Judge*. The words italicized by me do not appear in section 152 (3). Nor is there anything in the section which indicates that the judicial officer who tries the case summarily does so in his capacity as District Judge. Indeed the provision that he shall have the power to impose any sentence which a District Court has power to impose indicates that he tries the case as Magistrate. The 1st and 2nd accused were not, in my opinion, convicted by the District Court and the sentence of whipping is therefore illegal. I cannot accept the view presented by counsel for the respondent that the sentence of whipping can be supported on the ground that the Magistrate had the power to impose any sentence which a District Court can impose, for the reason that section 7 (1) of the Corporal Punishment Ordinance is clear beyond mistake on the point. It enacts that a sentence of whipping can be imposed where a person is convicted by a District Court. The 1st and 2nd accused were clearly not convicted by the District Court. For these reasons I would set aside the sentence of whipping. The sentences of imprisonment will stand.

Sentence of whipping set aside.