cause the finding to be published "as soon as may be" in the *Gazette*, if the finding is adverse to the petitioner, and that on such publication the petitioner should be subject to the disqualifications set out in that section. An adverse finding of the Commissioner, therefore, results necessarily in affecting the legal rights of the petitioner. For the above reasons, I am of opinion that the respondent is a person having legal authority to determine a question affecting the rights of the petitioner and having the duty to act judicially. Following the decision in *The King v. The Electricity Commissioners*[1] I would answer in the affirmative the question reserved for our decision.

WINDHAM J.—I agree and have nothing to add.

GRATIAEN J.—I agree.

1949 *Present:* **Wijeyewardene C.J. and Gunasekara J.**

VADIVELU, Appellant, *and* INSPECTOR OF POLICE, BADULLA, Respondent

S. C. 1,236—M. C. Badulla, 6,043

Criminal Procedure Code—Charge of housebreaking and theft—Whether triable summarily—Section 152 (3)—Penal Code, sections 440, 443, 369.

A charge of housebreaking and theft may be tried summarily by a Magistrate under the powers conferred on him by section 152 (3) of the Criminal Procedure Code; but the Magistrate should, of course, decide whether it is "proper" for him to exercise that jurisdiction in the particular case before him.

APPEAL from a judgment of the Magistrate, Badulla.

This appeal was referred to a Bench of two Judges by Dias J.

S. Nadesan, for accused appellant.

H. A. Wijemanne, Crown Counsel, with *S. Wijesinha, Crown Counsel*, for the Attorney-General.

Cur. adv. vult.

June 16, 1949. WIJEYEWARDENE C.J.—

The accused appeals from a conviction under section 443 of the Penal Code and a sentence of two months' rigorous imprisonment.

This appeal comes before a Bench of two Judges on a reference made by my brother Dias in the following terms:—

1. "I think this case should be decided by a Bench of two Judges".
2. "The question is whether a charge of house breaking and theft, namely sections 443 and 369 or under sections 440 and 369 may summarily be tried by a Magistrate under the powers conferred on him by section 152 (3) of the Criminal Procedure Code".
3. "In this case the Magistrate assumed jurisdiction before any evidence was led and the case therefore falls within the principle

[1] *(1924) 1 K. B. 171.*

laid down by my brother Nagalingam in the case of *Kandiah et al. v. D. R. O. of Pallai* [1]. On the other hand there is my judgment in *Pancha v. Veloo* [2] where I came to a different conclusion after citing a number of authorities ".

I have numbered the various paragraphs for facility of reference. The question propounded in paragraph 2 has to be answered in the affirmative in view of the language of section 152 (3) of the Criminal Procedure Code which enacts :—

" Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of opinion that such offence may properly be tried summarily he may try the same summarily. . . . ".

Such a Magistrate has, therefore, the jurisdiction to try an offence of that nature but, of course, he has to decide whether it is " proper " for him to exercise that jurisdiction in the particular case before him.

I have read carefully the judgments in *Kandiah et al. v. D. R. O. of Pallai* (*supra*) and *Pancha v. Veloo* (*supra*) mentioned in paragraph 2.

In the former case the Magistrate assumed jurisdiction stating " that the facts were simple and no complicated questions of law or fact were involved ". He made that statement at a time when he had " no material before him excepting the written report itself ". Pointing out these facts Nagalingam J. observed that " the serious nature of the charge is in itself an important factor which must not be lost sight of " in deciding whether the case may be properly tried under section 152 (3). He proceeded to examine the charge and the sentences passed and then remarked that in the circumstances of that case the Magistrate should have " hesitated " to try the case summarily. In that case nine persons were charged with being members of an unlawful assembly with intent to commit robbery. There were six other charges one of which referred to robbery of Rs. 617. The sentences passed on each of the accused aggregated to four years' rigorous imprisonment.

In *Pancha v. Veloo* (*supra*) one accused was charged with housebreaking and theft and sentenced to six months' rigorous imprisonment. The only point taken in appeal was " that the Magistrate should have taken non summary proceedings ". Dias J. referred to a number of authorities and then said,

" I think the point of law fails. I have read through the proceedings and can find no sufficient ground for setting aside these proceedings and sending the case back for non summary proceedings ".

I am unable to read these two judgments as being in conflict with each other. They were concerned with the question of fact whether any particular case could " properly " be tried summarily.

In accordance with the view expressed by Dias J. in paragraph 1 that this case should be decided by a Bench of two Judges we permitted Counsel to argue the entire appeal before us.

[1] *(1948) 49 N. L. R. 503.*
[2] *(1946) 47 N. L. R. 567.*

The proceedings commenced with a written report filed by a Police Officer on April 8, 1948, charging the accused with the offence of house-breaking by night with intent to commit theft. The case was called before the Magistrate on April 12. Without recording any evidence, the Magistrate decided to try the case under section 152 (3), as he thought it " expeditious " to do so.

The main evidence for the prosecution was given by one Serasinghe, a junior Assistant Tea Maker of St. James' Estate, Hali-Ela, where the accused was employed as a labourer. He said :—

" I was on night duty, my hours being 4.30 p.m. to 12.30 a.m. I went to the sifting room of the factory about 7 p.m. to check up the windows and the padlocks on the bin boxes. I then went into the nailing room. I saw a bundle of sacks near a bin box. I tried to check up the padlock of the bin box when I saw the sacks moving. I called out. There was no answer. I shouted out there was a rogue. The rogue jumped on me . . . . He had a kris knife in his hand. I struggled with him . . . . The key was in the padlock and the padlock was on the frame of the bin box. The padlock was open. The keys of the bin boxes and the key of the nailing room door and the other keys are in my charge till firing is over (i.e., after 7.15 p.m.) . . . . I told the Police I was injured with a kris knife . . . . All the keys are kept in a steel trunk in the office. This trunk is not closed. When the firing is over the steel trunk is sent to the Head Tea Maker's Bungalow and he brings it with him in the morning at 6. I gave the accused a few blows ".

The other witnesses for the prosecution were Thomas, a watcher, Vidane, an Engine driver, and Fernando, the Tea Maker. The first two witnesses came to the sifting room on hearing the cries of Serasinghe and the third, on receiving a message from him. On arriving at the sifting room Vidane and Fernando found it desirable to give " a few blows " to the accused. So did Serasinghe. Even Mr. de Mel, the Assistant Superintendent who came after the Tea Maker could not help giving " a few blows ".

Now the defence in the case is that this is a false charge engineered by the Tea Maker who was annoyed at the accused telling the other labourers a few days earlier " that the Head Tea Maker took some tea chests with him when he went on leave ". The accused suggested that the other witnesses, excluding Mr. de Mel, were induced by the Tea Maker to help him in making the charge. He said :—

" Piyadasa came to my line room and told me that the Head Tea Maker wanted me. I then went along to the Head Tea Maker's Bungalow. The Head Tea Maker asked me to go to the Factory and bring a bulb . . . . I went to the Factory packing (nailing) room. Mr. Serasinghe the Asistant Tea Maker was there. I asked him for a bulb. He then took me into a room adjoining the packing room. Mr. Serasinghe then seized my hand and raised cries. Then Vidane, Piyadasa and Thomas came up . . . . They assaulted me saying that I had come there to commit theft. About five or ten minutes later the Head Tea Maker came there. He remarked, ' you

have said that I was a thief; now you have become a thief'. Then Mr. de Mel came. He assaulted me. He asked me why I came there to commit theft. I told him that I did not come there to commit theft. I said that it was the Head Tea Maker who did all this".

I have no doubt that the accused made the accusation against the Tea Maker on the arrival of Mr. de Mel. Mr. de Mel himself said in his evidence :—

"After I struck him (the accused) he spoke. He answered in Tamil which I cannot recollect. He said something to the effect that he and the Tea Maker committed this offence".

We have been seriously handicapped by the failure of the prosecution to produce a sketch showing the positions of the sifting room, the nailing room and the office and the possible means of access which the accused had to the nailing room so as to go and conceal himself near the bin box without being observed by Serasinghe who was all the while in the sifting room. If the Magistrate had taken non summary proceedings it is most likely that the prosecuting department would have instructed the Magistrate to call for such a sketch before the accused was asked to stand his trial in a higher Court.

There is moreover an air of unreality about the case for the prosecution. The accused has been employed on the estate for over thirteen years. He has been working in the nailing room itself for a number of years. He must have been well aware of the fact that the Assistant Tea Maker went usually to the sifting room shortly after 7 p.m. "to check up the windows and the padlocks in the bin boxes". And yet it is suggested that the accused opened the padlock with a key stolen from the steel trunk and kept the key in the padlock, though he knew well that Serasinghe would inspect the padlock in the course of his duty and close it. If this was what happened, it looks as if the accused kept the key in the padlock for the express purpose of rousing the suspicion of the Tea Maker. Though Serasinghe is said to have received an injury at the hands of the accused, he did not choose to show his injury to the Police Constable but only showed the bandage covering the alleged injury. Moreover, the successive attacks made by the various Crown witnesses on the accused seem to me to be indicative more of revenge for a personal wrong than of anger at the attempted theft of estate property.

I am of opinion that the Magistrate who desired to try the case "expeditiously" has not paid sufficient attention to all these matters. The question that caused me some anxiety was whether I should acquit the accused or quash the proceedings and send the case back for non-summary inquiry, but, in view of the fact that more than a year has passed since the alleged commission of the offence and the accused has been put to a great deal of expense already, I think the accused should be spared the anxiety and expenses of fresh proceedings.

I allow the appeal and acquit the accused.

GUNASEKARA J.—I agree.

Appeal allowed.