

Present : Sansoni, J.

MUDLR. S. C. C. GUNewardENE, Appellant, and
D. J. GUNewardENE, Respondent

S. C. 223—M. C. Colombo South, 78,011

Appeal—Discrepancy on a material point between two certified copies of the case under appeal—Effect—Criminal procedure—Failure of Court to call upon accused for his defence—Irregularity.

The accused-appellant's main ground of appeal was that he was not called upon for his defence. He relied on an affidavit filed by the Counsel who appeared for him at the trial and on the certified copy of the case which was issued to him on March 4, 1957. The certified copy, however, of the case made on March 8, 1957, for the use of the Supreme Court contained an entry that the accused's Counsel informed the Magistrate that he was not calling for the defence. This entry did not appear in the certified copy issued on the 4th March. The circumstances under which the entry in the record appeared to have been made were certainly unusual.

Held, that, in the circumstances, the case should be sent back for a fresh trial.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

S. Nadesan, Q.C., with *M. M. Kumarakulasingham* and *J. V. C. Nathaniel*, for the accused-appellant.

E. B. Wikramanayake, Q.C., with *G. D. Welcome*, for the complainant-respondent.

Cur. adv. vult.

September 11, 1957. SANSONI, J.—

This is an appeal by an accused who was charged with having received rent in excess of the authorised rent and thereby committed an offence under section 3 (1) of the Rent Restriction Act, No. 29 of 1948, and punishable under section 3 of the said Act.

The trial took place on February 12th when Mr. Christie Perera with Mr. Casie Chetty appeared for the complainant and Mr. Advocate Haniffa for the accused. The complainant and one witness gave evidence and the prosecution was closed. The trial was then adjourned to 23rd February for addresses. On the adjourned date Mr. Casie Chetty appeared for the complainant and Mr. Advocate Haniffa for the accused. They both addressed the Court and order was reserved for 2nd March on which date the Magistrate delivered his order convicting the accused and imposing a fine of Rs. 100.

A petition of appeal, drafted and signed on 3rd March, was filed on 4th March at 9.15 a.m. and one of the grounds of appeal set out in that petition is that the accused was not called upon for his defence, and this is the ground which formed the subject of the submissions made by counsel for the accused-appellant. In support of the argument that the accused was not called upon for his defence the appellant's counsel relied on an affidavit filed by Mr. Advocate Haniffa and the certified copy of the case which was issued to the accused on 4th March. According to that certified copy the proceedings of 23rd February were confined to addresses by the lawyers who appeared for the complainant and the accused respectively; the entry "Mr. Haniffa is not calling evidence",

which appears just prior to the notes of addresses in the record and in the certified copy of the case made on 8th March for the use of this Court, does not appear in the certified copy issued on 4th March.

Under these circumstances Mr. Haniffa's affidavit is important, for in that affidavit he has stated that the Magistrate did not call for a defence. He has also stated that he did not at any stage inform the Magistrate that he was not calling evidence for the defence. When this appeal first came before K. D. de Silva J. the Magistrate was asked to report on the affidavit and the absence of the entry "Mr. Haniffa is not calling evidence" from the certified copy issued to the accused. The Magistrate in his report has stated that it is quite possible that Mr. Haniffa had not specifically stated that he was not calling evidence. He has also stated that it was quite possible that he may not have asked Mr. Haniffa whether he was calling evidence. He has explained the words "Mr. Haniffa is not calling evidence" as being "an entry made in the normal course when further evidence is not expected to be called." I must confess that I cannot understand what this statement means. If the Magistrate means that he makes such an entry when he does not expect evidence to be led, even though no such statement has been made by the accused's counsel, and no opportunity has been afforded to the accused's counsel to call evidence, it is highly irregular for him to do so. Such an entry would mislead a Court of Appeal; and it could work grave injustice, particularly when the Magistrate himself has commented in his order in this case on the failure of the accused to give evidence at the trial.

But if such an entry is made merely because the Magistrate does not expect further evidence to be called, I should have expected it to have been made on 12th February when the trial was adjourned for addresses. The question of further evidence being led or not being led did not arise on the next date of hearing, especially as the Magistrate has stated in his report that the case is usually adjourned for addresses when there is no further evidence to be recorded. The circumstances under which the entry in question appears to have been made are certainly unusual.

The appellant's counsel also submitted that there was no substance in the Magistrate's explanation that the omission of the entry in the certified copy issued to the accused was due to an accidental or intentional omission on the part of the typist. I cannot say, in the absence of expert testimony, that the entry is an obvious interpolation. I think it would be dangerous to come to such a conclusion by merely looking at the record. I do feel, however, that if the entry was there when the certified copy was prepared on 2nd or 4th March it is most unlikely that it would have been omitted from that certified copy. The two certified copies bear all the marks of having been prepared and certified with meticulous care. The slightest correction or erasure in the copies has been initialled by the Chief Clerk who certified them, and both copies show that they have been carefully compared with the original and closely scrutinised by the person who certified them. The copy issued to the accused has as many as twenty corrections initialled by the Chief Clerk, while the copy issued for the use of this Court has thirty-six such

initialled corrections. Even if the impugned entry had been omitted by the typist from the copy prepared for issue to the accused, such omission would not, in my view, have gone unnoticed by the Chief Clerk.

For these reasons I set aside the conviction of the accused and send this case back for a fresh trial before another Magistrate.

P.S.

The above is the judgment which was prepared and signed by me on the 9th instant in order that it might be delivered the next day. On the 10th instant I received certain papers and documents relating to this case, but not from either of the parties. These were shown by me to the counsel on either side but they did not desire to take any further steps before I delivered judgment. I do not think that the new material brought to my notice should affect my judgment in any way, since it has not come before me in any of the recognized ways by which evidence is tendered. My judgment has therefore been delivered as it stood on the 9th instant.

Sent back for a fresh trial.
