1948 *Present :* **Basnayake J.**

HENDRICK HAMY *et al.*, Appellants, *and* INSPECTOR OF POLICE, KANDANA, Respondent

*S. C. 1,172–1,173—M. C. Gampaha, 44,759*

*Criminal Procedure Code—Magistrate assuming jurisdiction as District Judge—Succeeded by another Magistrate—Latter continues proceedings without giving his own mind to the propriety of a summary trial—Fatal irregularity—Sections 152 (3) and 425.*

Where a Magistrate who has commenced summary proceedings as a District Judge under section 152 (3) of the Criminal Procedure Code is succeeded by another, the latter must form his own opinion as to whether the case is one which he may properly try summarily as District Judge. Unless he does so, he acts without jurisdiction and the provisions of section 425 are of no avail.

APPEAL from a judgment of the Magistrate, Gampaha.

*M. M. Kumarakulasingham*, for accused-appellant.

*J. G. T. Weeraratne, Crown Counsel*, for the Attorney-General.

*Cur. adv. vult.*

December 21, 1948. BASNAYAKE J.—

The accused-appellents (hereinafter referred to as the appellants) were convicted of offences punishable under sections 443, 369, and 314 of the Penal Code and each of them was sentenced to a term of one year's rigorous imprisonment on each count, the sentences to run concurrently.

The proceedings which ended with the conviction of the appellants on 3rd September, 1948, commenced on 3rd May, 1948. A report (hereinafter referred to as the report) under section 148 (1) (*b*) of the Criminal Procedure Code (hereinafter referred to as the Code) bearing that date is in the record. It appears from the first journal entry, which bears the same date as the report, that the appellants were present on that day on remand. The following remarks in the handwriting of two different persons appear on the record under the same date: "Police files plaint under sections 443, 369, and 314. Cite pros. w.s.s. (1) and (2) for 17.5.48. Bail accused in 200/200 each". The trial commenced on 17th May, 1948. On that day after the examination of one B. W. Pablis Naide, a person whose name does not appear on the list of witnesses in the report, the learned Magistrate assumed jurisdiction as District Judge under section 152 (3) of the Code. The reasons given by the learned Magistrate for his opinion that the case may properly be tried summarily are as follows :—

"1. Facts appear to be simple.
2. Can be disposed of expeditiously".

After the charges had been read to the appellants under section 187 (3) of the Code and their statements had been recorded under section 188, the trial was postponed to 12th July, 1948. By that date the Magistrate who originally assumed jurisdiction under section 152 (3) of the Code having been transferred, his successor after recording the evidence of the District Medical Officer again postponed the trial for 27th August, 1948. On that day two witnesses, including the one who had been examined earlier, gave evidence for the prosecution, and the appellants gave evidence for the defence. Thereafter the learned Magistrate recorded a verdict of guilty and remanded the appellants, having under section 3 (1) of the Prevention of Crimes Ordinance caused their finger prints to be taken and forwarded to the Registrar of the Finger Prints Identification Office. On 3rd September, 1948, he gave his reasons and passed sentence on the appellants.

The proceedings in the instant case are not in my view in accordance with the provisions of the Code. On 3rd May, 1948, when the appellants appear to have been brought before the Magistrate in custody without

process, accused of having committed an offence which he had jurisdiction to inquire into, he should have in accordance with section 152 (1) followed the procedure laid down in Chapter XVI of the Code, or if he was proceeding under section 152 (3) followed the procedure laid down in Chapter XVIII and held the examination directed by section 151 (2) of the Code. Without taking either course the learned Magistrate postponed the proceedings for another date. On that day he assumed jurisdiction under section 152 (3). He did so on grounds which I have already mentioned above.

The case has certainly not been disposed of expeditiously, for it was concluded exactly four months after it commenced. It is not clear how the learned Magistrate after hearing one witness, who was not even cross-examined on that day, formed the conclusion that the facts were simple. Learned counsel for the appellants has submitted that the Village Headman to whom the first complaint of the offence had been made, and one Gabo Naide who came up on hearing the cries of the witness B. W. Pablis Naide, have not been called. Of the six persons whose names are mentioned as witnesses in the report, only one besides the D. M. O. has given evidence. The others have not been examined, and learned counsel invites me to presume that their evidence, if produced, would have been unfavourable to the prosecution. Having regard to the fact that a report under section 148 (1) (*b*) is made after an investigation under Chapter XII of the Code, it may fairly be assumed that those whose names appear in the list on the report are persons whom the officer making the report regards as material witnesses. When such witnesses are not called without any excuse or explanation, the court is entitled to presume that they are unfavourable. In the learned Magistrate's order of 3rd May, 1948, he singled out two of the witnesses whose names were on the report and ordered summons on them. The record does not indicate why he did so. Of the two on whom summons was ordered only one, Enga Nachchari, gave evidence. The other, P. Pablis Naide, was not called ; but instead of him one B. W. Pablis Naide gave evidence. These are certainly features of the case which are unsatisfactory, and learned counsel for the appellants has rightly complained of them.

There is also a very important departure from the provisions of the Code which I think affects this conviction. Mr. Alles, the Magistrate who formed the opinion that the offence is one that may properly be tried summarily, did not try the offence. After he had taken the steps prescribed by section 187 (3) and 188 of the Code, and before the trial, he appears to have been transferred. His successor, Mr. Senaratne, proceeded to try the appellants without himself giving his mind to the propriety of trying them under section 152 (3) and without indicating to the accused the fact that he was trying them in his capacity as District Judge. In fact there is no statement on record that Mr. Senaratne was also a District Judge at that date. There is nothing in the Courts Ordinance to indicate that every Magistrate is also a District Judge, nor is there any presumption to that effect. The record should contain a statement that the Magistrate is acting under section 152 (3) [1] and that

[1] *1 C. W. R. 6.*

he is also a District Judge having jurisdiction to try the offence[1]. In view of the fact that a Magistrate acting under section 152 (3) has jurisdiction to impose any sentence which a District Court may impose, it is important that the accused should not be left in any doubt as to the capacity in which the Magistrate is acting. It has been held by this Court that the Magistrate's opinion that the case is one that may properly be tried summarily is a condition precedent to his assumption of jurisdiction under section 152 (3)[2]. That being so, a Magistrate who succeeds another who has commenced proceedings under section 152 (3), must give his own mind to the propriety of trying the case summarily under that section and form his own opinion as to whether the case is one which he may properly try summarily as District Judge. Unless he does so, the condition precedent to the exercise of the Magistrate's jurisdiction as District Judge would be absent, and without it he would have no jurisdiction. The opinion of a Magistrate is not binding on his successor, and it may well be that the successor may not share his predecessor's opinion. In the context the words " he may try the same summarily " to my mind indicate that the trial should be by the Magistrate who forms the opinion that the case should be tried summarily, and not by another who has not given his mind to the question.

Learned Crown Counsel has drawn my attention to the case of *Gunawardena v. The King*[3] where my brother Wijeyewardene has held that section 292 of the Code is sufficient authority for a Magistrate who is also a District Judge to continue proceedings commenced under section 152 (3) by his predecessor without himself giving his mind to the propriety of trying the offence summarily. I wish to say with the greatest respect that I find myself unable to subscribe to that view. Section 292 permits a Magistrate who succeeds another to act on the evidence recorded by his predecessor, but I am unable to find therein any authority for a Magistrate to continue to exercise a special jurisdiction assumed by his predecessor in pursuance of an opinion his predecessor had formed. The successor may, by virtue of that section, peruse the evidence, if any, recorded by his predecessor with a view to forming his opinion; but he must form his independent opinion.

In my view the learned Magistrate has acted without jurisdiction, and section 425 of the Code is therefore of no avail. That section applies to judgments passed by a court of competent jurisdiction. The learned Magistrate having acted without jurisdiction, the judgment in the instant case cannot be said to be a judgment passed by a court of competent jurisdiction.

I observe that the learned Magistrate has imposed a term of one year's rigorous imprisonment in respect of the offence punishable under section 314 of the Penal Code. That is an offence summarily triable by a Magistrate, and in imposing a sentence of one year's rigorous imprisonment in respect of that offence he has acted in disregard of the decisions of this Court which have repeatedly laid down that a Magistrate acting under

[1] *Punchi Naide v. Raltramhamy, Leembruggen's Reports 95. Penaris Appu v. Babun, 6 C. W. R. 319.*

[2] *Silva v. Silva (1904) 7 N. L. R. 182.*

[3] *(1948) 50 N. L. R. 107; 38 C. L. W. 63.*

section 152 (3) is not entitled to impose in respect of an offence triable summarily by a Magistrate a punishment greater than that which a Magistrate may award *qua* Magistrate.

Judging by the appeals that have come up before me, there appears to be a tendency on the part of Magistrates who are also District Judges to use section 152 (3) for the purpose of trying summarily offences which should properly be tried by a District Court. Magistrates seem to lose sight of the fact that the rule to be adopted in the case of offences which appear to be not triable summarily is prescribed in section 152 (1). Section 152 (3) is an exception to that rule, and as an exception it must remain. It cannot be gainsaid than an accused who is tried under section 152 (3) is deprived of the advantage of a preliminary investigation, a consideration of his case by the Attorney-General prior to indictment, and a subsequent trial at which he has the benefit of knowing beforehand the recorded depositions of the prosecution witnesses and the documents that will be in evidence against him. To my mind it is clear from section 152 that the Legislature did not intend that accused persons should be denied all those advantages save in exceptional cases, and that too for good reasons. If it is felt that the jurisdiction of Magistrates is too limited, the remedy seems to be an extension of that jurisdiction by the Legislature and not the usurpation of a higher jurisdiction. Having regard to the fact that they are all trained lawyers, I personally feel that the jurisdiction of Magistrates can safely be enlarged not only in regard to the kind of offences a Magistrate may try, but also in regard to the maximum punishment a Magistrate may impose. Such an extension will no doubt be in the public interest; but those are matters for the Legislature.

For the above reasons I set aside the conviction of the appellants and send the case back for non-summary proceedings.

*Proceedings set aside.*