1948 *Present :* **Dias J.**

THE ATTORNEY-GENERAL, Appellant, *and* HERATH SINGHO Respondent.

S. C. 1,264—M. C. Dandagamuwa, 21,427.

Criminal procedure—Prosecution initiated by public officer—Right of private pleader to conduct prosecution—Criminal Procedure Code, ss. 148 (1) (b), 199, 392.

Where a public officer initiates a prosecution in a *summary case* under section 148 (1) (*b*) of the Criminal Procedure Code he alone is entitled to conduct the prosecution, and a pleader retained by the injured or aggrieved party has no right to displace the public officer and conduct the prosecution. In section 199 of the Criminal Procedure Code the word "complainant" must mean the person who makes the "complaint" to the Magistrate.

Held, further : In a *non-summary inquiry* section 392 of the Criminal Procedure Code indicates that, in the absence of the Attorney-General or the Attorney-General's agents, it is the duty of the Magistrate personally to conduct the prosecution. The provisions of section 392 (2) do not entitle the Magistrate to delegate to a police officer or to a pleader who is not the agent of the Attorney-General, the duty cast on him by law of "conducting the prosecution".

APPEAL from a judgment of the Magistrate, Dandagamuwa.

Boyd Jayasuriya, C.C., with *A. C. Alles, C.C.*, for the attorney-General, appellant.

No appearance for the accused-respondent.

January 15, 1948. DIAS J.—

In this case A. W. Abeyratne, Sub-Inspector of Police, initiated proceedings under section 148 (1) (*b*) of the Criminal Procedure Code against the accused-respondent R. M. Herath Singho alleging that he did on the night of May 20, 1947, commit house trespass by entering into the house of Dingiri Banda with the intention of commiting an offence punishable under section 434 of the Penal Code. It was further alleged that at the same time and place the accused-respondent used criminal

force on Dingiri Banda's wife, Manel Ethana, with intent to outrage her modesty, an offence punishable under section 345 of the Penal Code. There was a third charge that the accused-respondent criminally intimidated the woman by threatening to shoot her with a gun, an offence punishable under section 486 of the Penal Code.

The permanent Magistrate recorded the formal evidence of the woman who stated that at about 7.30 P.M., on the day in question her husband had gone to the cassawa plantation when the accused entered the house and closed the front door and held her by the hand. When she raised cries the accused struck her with the stick P 1 which he had with him. He also had a loaded gun P 2 with him. He threatened the woman and slapped her and struggled with her, in the course of which he kissed her, felt her breasts, and tried to put her on the ground. For her shouts her husband and neighbours came up and overpowered and arrested the accused. She was examined by the doctor who found that she was injured.

The Magistrate assumed summary jurisdiction under section 152 (3) of the Criminal Procedure Code on the ground that the facts were simple and that no questions of law of a complicated character were likely to arise. The accused pleaded not guilty to the charges. It is to be noted that nowhere in the record is there any indication that a proctor appeared for him.

The Magistrate put the trial off for June 10, 1947, and for some reason which does not appear on the record, he took steps to ask the Legal Secretary to appoint a local proctor, Mr. O. M. P. Perera, to be gazetted to try the case. The trial was put off until July 8, 1947, when the case was called before Mr. O. M. P. Perera on that day.

The record reads as follows :—

" Accd. R. M. Herath Singho present.

Produced by jail authorities. Mr. Storer for the prosecution states that he has examined the evidence of witnesses in the case and that it appears to him that the accused had gone into the house of the complainant woman at her invitation when they were surprised by the unexpected appearance of the husband. There had been two children and the woman's brother who had not been put up before the husband appeared on the scene. I am inclined to believe that the woman would have raised cries if the man went into the house and struggled with her as stated by her. This would have put up her brother and the children. There is nothing in her evidence to show that these three who were sleeping were put up by any noise or shouts, clearly showing that the accused had gone there at her invitation. I discharge accused from the charges under section 345, 434 and 486 ".

The Attorney-General appeals against that order. To his petition of appeal are appended four affidavits marked A–D from Manel Ethana, her husband Dingiri Banda, the District Medical Assistant Dr. S. Suppiah and Police Sergeant Chandrasekeram, who inquired into the complaint and appeared to prosecute in the Magistrate's Court. To the Attorney-General's petition of appeal are also appended copies of the statements

of the following persons recorded in the Police Information Book—Manel Ethana, Dingiri Banda, Gunerathamy, M. A. Appuhamy, Ukkubanda and Sohandirala. The last four persons helped to disarm and arrest the accused at the scene.

These documents prove (*a*) that a day or two previous to July 8, 1947, Dingiri Banda retained Proctor Mr. Storer to prosecute the accused and not to defend him ; (*b*) that for such services Mr. Storer was paid the sum of Rs. 20 ; (*c*) that no instructions were given to Mr. Storer to the effect that the accused had entered the house at the invitation of the woman ; (*d*) that Mr. Storer questioned Dingiri Banda and the woman, but did not question any other witness or the doctor ; (*e*) that no brother of the woman or other adult was in the house at this time ; (*f*) that there were only two little children aged 6 and 4 in the house when the accused did what he is alleged to have done ; (*g*) that Mr. Storer had no consultation or communication with the prosecuting police sergeant ; (*h*) that Mr. Storer did not ask to peruse the Information Book extracts ; (*i*) that the case was heard in chambers and not in open Court ; (*j*) that when the sergeant protested against the discharge of the accused, a proctor, Francis Jayawardene, who represented the accused (although his name does not appear on the record) told the sergeant that he had no status as the complainant was represented by Mr. Storer ; (*k*) that the sergeant at once informed Dingiri Banda that his proctor had really appeared as the proctor for the defence ; (*l*) that when Dingiri Banda questioned Mr. Storer and demanded an explanation and the refund of his fee, Mr. Storer replied " That's alright " and drove off in his car ; (*m*) that if the medical officer's evidence had been led it would have proved that the woman had been rather severely assaulted—thereby throwing doubt on the suggestion that the accused had entered the house at the invitation of the woman.

In these circumstances I do not think it is possible to allow this order of discharge to stand. It must be set aside, and the case sent back before another Magistrate with the direction that he should take non-summary proceedings.

This case raises in a rather acute form the vexed question as to who is the " Complainant " in a *summary* case which has been instituted by a public officer or the police under the provisions of section 148 (1) (*b*) of the Criminal Procedure Code.

Any person has the right to give a Magistrate information in regard to the commission of an alleged offence, and it is open to the Magistrate to commence proceedings on the information so given. The Court may, however, in its descretion refuse to entertain a complaint when it appears that the complainant has no interest whatever in the prosecution, especially where the alleged offence is against a law passed for the benefit or protection of a certain class of persons—*Inspector of Local Board, Chilaw v. Sollamuttu* [1]. It will be seen that Pereira J. here used the word " complainant " as referring to the person who gave information to or moved the Court to initiate proceedings.

The word " complainant " has not been defined by the Criminal Procedure Code. Section 2 (1) defines " complaint " to mean " the

[1] *(914) 17 N. L. R. 449.*

allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence ". Obviously, these words refer to the provisions of section 148 of the Code which enumerate the various methods by which a Magistrate can be set in motion to try or inquire into an alleged offence. The " complainant ", therefore, must be the person who makes the " complaint ".

There cannot be two or more complainants in the same case, unless of course there are several aggrieved persons as where X stabs A, B, C and D, all of whom file one plaint under section 148 (1) (*a*).

In section 199 therefore the word " complainant " must mean the person who makes the " complaint " to the Magistrate.

If the aggrieved person or persons desire to be the " complainant ", section 148 (1) (*a*) gives him or them the right to make a " complaint " orally or in writing provided that such " complaint ", if in writing, shall be drawn and countersigned by a pleader and signed by the complainant.

If the aggrieved person or persons, without exercising their right to make a complaint under section 148 (1) (*a*), state their grievances to the police, who after inquiry decide to take up the case and institute proceedings on their own, then they will file their " complaint " under section 148 (1) (*b*) and, subject to the law regarding the compounding of offences, the aggrieved person or persons cease to exercise any further control over the proceedings.

When the aggrieved party or parties proceed under section 148 (1) (*a*) they are the " complainant " within the meaning of section 199 and are entitled to be represented by a pleader. In *Juakino v. Fernando* [1] the complainant initiated proceedings under section 148 (1) (*a*). The Magistrate refused to hear the pleader retained by him. It was held that section 199 gave the complainant the right to appear by his own pleader, and that the Magistrate had acted irregularly.

On the other hand, when the aggrieved person or persons induce the police to take up their grievance, not only do they thereafter cease to be " complainants " except in a popular sense, but they lose control over the proceedings. For example, in the event of an acquittal in a summary case, it is the complaining police officer who can appeal. Neither the Attorney-General nor the aggrieved persons can appeal—*Babi Nona v. Wijeysinghe* [2]. Dalton J. said : " The first question to be decided is whether Babi Nona has any right of appeal—the parties to the proceedings in the lower Court being the Sub-Inspector *who instituted the proceedings* and the accused person . . . . She may well be dissatisfied with the order of the Court, *but is she a party in the case* to whom the right of appeal is given within the meaning of section 338 of the Criminal Procedure Code ? She did not institute the proceedings although she could have done so, had she wished, under the provisions of section 148 (1) (*a*) of the Criminal Procedure Code. I have heard nothing from Mr. Weerasooria which satisfies me that Babi Nona is a party in the case as instituted. As I pointed out in *Nonis v. Appuhamy* [3] it would appear that where section 148 provides for the institution of

[1] *(1910) 3 S. C. D. 91.* [2] *(1926) 29 N. L. R. 43.*
[3] *(1926) 27 N. L. R. 430.*

proceedings by complaint or written report, the person making the complaint or written report is regarded as the party instituting the proceedings against the accused person. This matter has been considered from another aspect in *Sedris v. Singho*[1], but the Court there left it to await further elucidation. On the facts before me in this appeal, I have come to the conclusion that Babi Nona has no right of appeal". If Babi Nona was not "a party" to the criminal case or matter from which the appeal was taken under section 338, *a fortiori* she could not be "the complainant" within the meaning of section 199 when the proceedings were initiated by the police under section 148 (1) (*b*) of the Criminal Procedure Code. In fact, Dalton J. so holds.

In *Grenier v. Edwin Perera*[2] the proceedings were initiated by the police under section 148 (1) (*b*). Keuneman J. formed the view that there could be two complainants in a summary case—namely, the public officer who initiated the proceedings under section 148 (1) (*b*), and also the aggrieved person who gave information to the police. He further was of the view that where the question arose as to who should conduct the prosecution under such circumstances, "it is a matter for the Magistrate to decide in his discretion who should be permitted to conduct the prosecution in a case like the present". He pointed out the desirability that nothing should be done to leave even the impression that the case has been conducted otherwise than impartially. With great respect I cannot subscribe to the view that there can be two complainants in the same case—the aggrieved party who did not file the plaint, and the police who initiated the proceedings.

In *de Silva v. S. I. Herath*[3] de Kretser J. who considered that this question deserved consideration by a Divisional Bench ruled that where a public officer has initiated a prosecution under section 148 (1) (*b*), he is not entitled to conduct the prosecution, and that a pleader retained by the complainant (aggrieved party ?) has the right to appear for him, displace the public officer and conduct the prosecution. Again, with the greatest respect, I am unable to subscribe to this view. In the first place, the decision of Dalton J. in *Babi Nona v. Wijeysinghe*[4] was not considered; in the second place, a curious position will result. The public officer who investigated the case having been displaced and the case having been conducted in a manner which possibly did not meet with his approval, yet he will have to be the appellant in the event of the accused being acquitted, or an application in revision having to be made. In the third place, it would seem from the judgment that de Kretser J. did not agree with the reasoning in *Grenier v. Edwin Perera*[5] I agree with de Kretzer J. that the law could not have contemplated that there should be two "complainants" in a case, but I cannot agree with him that where proceedings are initiated under section 148 (1) (*b*) by a public officer, that he is displaced by the aggrieved party who is the real complainant. There is no warrant or justification for calling the public officer "the informant". In my opinion, he is the "complainant" and the only "complainant". It is clear from the judgment of Soertsz J. in *Sanmugam Pillai v. S. I. P. Ferdinand*[6] that he did not

[1] *(1921) 23 N. L. R. 171.*
[2] *(1941) 42 N. L. R. 377.*
[3] *(1943) 44 N. L. R. 320.*
[4] *(1926) 29 N. L. R. 43.*
[5] *(1941) 42 N. L. R. 377.*
[6] *(1942) 46 N. L. R. 380.*

subscribe to the view that under section 199 the police officer who initiated the proceedings could not conduct the prosecution. Incidentally, this decision is in conflict to some extent with the observations made in *Police Sergeant Kulatunga v. Mudalihamy*[1] where the view was expressed that it is improper for a police officer who is a material witness for the prosecution to conduct the prosecution. Soertsz J. quoted several unreported decisions of the Supreme Court where a contrary view was taken.

The danger of permitting private pleaders retained by the aggrieved party to intervene in a summary trial in which the complainant is a public officer is illustrated by what happened in this case. When the police undertake to prosecute in a case, the Court and the public expect that the proceedings will be conducted with that detachment and impartiality which may be wanting when the aggrieved party is allowed to intervene. The aggrieved party and those advising him are responsible to nobody. Furthermore, if the aggrieved party is allowed to intervene, he can claim not only that his advisers should interview and interrogate the prosecution witnesses, but also that the Information Book entries relating to the case should be made available to them. Has the aggrieved party or his lawyers the right to peruse the Information Book? I doubt it.

Non-summary inquiries stand on an entirely different footing by reason of the language of section 392 of the Criminal Procedure Code.

The only persons entitled to appear before the Magistrate and *conduct the prosecution* in a non-summary inquiry are—

(1) The Attorney-General ;
(2) The Solicitor-General ;
(3) Crown Counsel ;
(4) A pleader generally authorised by the Attorney-General, *e.g.*, the Crown Advocate or the Crown Proctor ;
(5) A pleader specially authorised by the Attorney-General, *e.g.*, an advocate or proctor who has obtained special authority from the Attorney-General to prosecute in that particular case ; and
(6) In the absence of any of the foregoing persons, the law casts *the imperative duty on the Magistrate personally* " *to conduct the prosecution* ".

Neither the public officer, police officer nor the aggrieved party who initiated the proceedings under section 148 has any right to demand that he or a pleader retained by him should be allowed to conduct the prosecution. In the absence of the Law Officers or the agents of the Attorney-General, it is the duty of the Magistrate to assume the role of prosecutor, to keep the threads of the inquiry in his own hands, to give instructions to the authorities or the aggrieved party who is the complainant as to what evidence is to be available, &c., and " to conduct the prosecution " personally.

The law, however, says that " Nothing in this section shall preclude the Magistrate from availing himself, *if he considers it so desirable*, of the

[1] *(1940) 42 N. L. R. at p. 35.*

assistance of any pleader or public officer in the conduct of any inquiry "— section 392 (2). In other words, in each case where the Magistrate considers it is desirable that he should have such assistance, he should make a minute on the record to that effect. Furthermore, the pleader or public officer is called in " *to assist* " the Magistrate and not to relieve him of his duty of conducting the prosecution.

The case law based on section 199 of the Criminal Procedure Code has no relevancy or bearing on the interpretation of section 392 which is based on entirely different principles. A non-summary inquiry may end in the committal of an accused for trial before a higher Court. Non-summary offences, unlike summary offences, are of a more serious nature, and it is essential that the Crown (*i.e.*, the public) being the interested party, the preliminary investigation should be detached and dispassionate, which may not be the case if partizanship is introduced into the case by allowing the aggrieved party or the police to interfere with the course of the proceedings.

It is the duty of the Magistrate who is conducting a non-summary inquiry to study the proof, and to satisfy himself before committal (*a*) that the evidence covers all the ingredients of the offence charged, and (*b*) that all the requisite witnesses, documents, and exhibits have been produced ; and if necessary to give directions for their production. The Magistrate holding a non-summary inquiry is not only a judge, but he is the investigating officer as well. He cannot delegate the latter duty to anybody else when the Attorney-General or his agents are not conducting the prosecution.

I quash the order appealed against and send the case back for non-summary proceedings to be taken before a magistrate other than Mr. O. M. P. Perera.

In terms of section 352 of the Criminal Procedure Code I direct that the accused-respondent shall pay to the Crown costs which I fix at Rs. 52.50.

Appeal allowed.