1960 *Present :* **Weerasooriya, J.**

CLAUDE SILVA, Appellant, *and* T. C. JOSEPH (Sub-Inspector of Police), Respondent

S. C. 1170—M. C. Colombo South, 97273

Criminal Procedure Code—Accused brought before Court otherwise than on summons or warrant—Examination of witnesses—Framing of charge thereafter—Duty of Magistrate to form opinion that there is sufficient ground for proceeding against the accused on any particular count—Sections 151 (2), 187 (1), 425.

When an accused is brought before the Court otherwise than on a summons or warrant, section 187 (1) of the Criminal Procedure Code precludes the Magistrate from framing a charge on counts other than those disclosed by the evidence recorded by him in terms of section 151 (2). The irregularity of convictions on such counts is not curable under section 425.

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

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

R. Abeysuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 5, 1960. WEERASOORIYA, J.—

The accused-appellant was charged on four counts with the commission of offences punishable under the Motor Traffic Act, No. 14 of 1951. He was found guilty on all the counts and sentenced to a fine of Rs. 50/- on each of the first and second counts, and a fine of Rs. 10/- on the fourth count. No separate sentence was imposed in respect of the conviction on the third count, apparently for the reason that the charge under it was in the nature of an alternative to the charge under the fourth count.

With the conviction and sentence on the first count, under which the accused was charged with having driven his van No. CV 4119 on the highway when under the influence of alcohol, I see no reason to interfere, as there is sufficient evidence, which the Magistrate has accepted, to sustain it.

The accused was charged under the second count with having driven the van on the highway recklessly or in a dangerous manner, under the third count with having driven the van on the highway when he was not the holder of a driving licence valid for driving vehicles of the class to which the van belonged, and under the fourth count with having failed to carry his driving licence in the motor vehicle or on his person and to produce it for inspection on demand made by a police officer. In regard to the charges under these three counts, Mr. Kumarakulasingham raised a point of law that the Magistrate had failed to comply with the peremptory requirements of Section 187 (1) of the Criminal Procedure Code and that the convictions on those charges are thereby vitiated.

The proceedings show that on the 17th July, 1959, the accused appeared in Court otherwise than on a summons or warrant, and the Magistrate purporting to act in terms of Section 187 (1), recorded the evidence of Mr. Joseph, Sub-Inspector of Police, Mirihana, which is as follows—

> "On 13.7.59 at 9.10 p.m. I stopped and checked private van CV 4119 proceeding towards Maharagama and found this accused driving the vehicle smelling of alcohol. He was produced before the Doctor and the Doctor reported that he was under the influence of liquor".

This evidence clearly relates only to the charge against the accused under the first count (of driving the van on the highway when under the influence of alcohol) and at the most would have justified the framing of

the charge under that count. But without any further evidence the Magistrate proceeded to frame charges as in the other three counts also and record the accused's plea, which was one of not guilty. These charges are identical with those set out in the report to Court under Section 148 (1) (*b*) of the Criminal Procedure Code which Mr. Joseph had filed on the same date, and from which, it would appear, they were transferred to the charge sheet without the Magistrate having given his mind to the need for arriving at a decision, as Section 187 (1) of the Criminal Procedure Code requires him to do, whether on the evidence before him there was sufficient ground for proceeding against the accused on those charges.

Section 187 (1) may be dissected into two parts : The first part requires the Magistrate to hold the examination directed by Section 151 (2) ; and the second part requires that if on that examination he is of opinion that there is sufficient ground for proceeding against the accused he shall frame a charge against the accused. The case of *Mohideen v. Inspector of Police, Pettah* [1] dealt with the failure of the Magistrate to comply with the requirements of the first part of Section 187 (1). But a failure to comply with the first part of Section 187 (1) would necessarily involve a failure to comply with the requirements of the second part as well. In that case a Divisional Bench held that where the accused was brought up before the Court otherwise than on a summons or warrant the failure to hold the examination directed by Section 151 (2) is not curable under Section 425 and vitiates the conviction. (The sections referred to are sections of the Criminal Procedure Code.)

In the present case the Magistrate cannot be said to have failed to comply with the requirements of the first part of Section 187 (1). But, in my opinion, he has failed to comply with the requirements of the second part of the section in that, before framing the charges on the second, third and fourth counts of the charge sheet, he manifestly did not consider the question whether on the evidence before him there was sufficient ground for proceeding against the accused. As this is a question essentially for the Magistrate, the position would, no doubt, have been different had there been even a scintilla of evidence of an admissible nature relating to those charges on which he might have formed the opinion that there was ground for proceeding against the accused on those charges.

The point which arises for decision is, therefore, whether a failure to comply with the second part of Section 187 (1) is curable under Section 425 or whether the convictions on the charges in respect of which the failure has occurred are thereby vitiated. No previous decision exactly in point was cited to me at the hearing of the appeal. But it seems to me that if the failure to comply with the requirements of the first part of Section 187 (1) is not curable under Section 425, it would be illogical to hold otherwise in regard to the failure to comply with the requirements of the second part of the section. The section is so designed as

[1] *(1957) 59 N. L. R. 217.*

to ensure that in a summary trial an accused who is brought up otherwise than on a summons or warrant will not be called upon to face a charge unless the Magistrate has formed an opinion, based on evidence elicited as a result of the examination directed under the first part, that there is sufficient ground for proceeding against him on that charge. It would seem, therefore, that the first part of Section 187 (1) is only complementary of the second and more material part of the section. In my opinion the failure of the Magistrate to comply with the requirements of the second part of the section is, therefore, not curable under Section 425, and the convictions of the accused on the second, third and fourth counts are thereby vitiated.

The view that I have taken appears to be supported by the observations of my Lord the Chief Justice in *Mohideen v. Inspector of Police, Pettah* (*supra*) where, however, this particular question did not directly arise for consideration. Those observations are as follows : " If the provisions of Section 187 are imperative, as I think they are, it is difficult to resist the conclusion that the requirement that the Magistrate shall ascertain whether there is sufficient ground for proceeding against the accused after the examination directed by Section 151 (2) is also imperative ".

The conviction of the accused on the first count and the sentence passed thereunder are affirmed. The convictions of the accused on the second, third and fourth counts of the charge sheet are set aside and he is discharged therefrom. I also set aside the sentences passed in respect of the convictions on the second and fourth counts. In all the circumstances I do not think that this is an appropriate case in which to order a retrial of the accused on the charges in the second, third and fourth counts.

Convictions on 2nd, 3rd and 4th counts set aside.