1964 *Present :* **H. N. G. Fernando, J.**

T. M. P. MAHAWASALA, Appellant, *and* INSPECTOR OF POLICE, KOHUWELA, Respondent

S. C. 593/63—M. C. Colombo South, 15333/N

Criminal Procedure Code—Sections 152 (3) and 292—Assumption of jurisdiction under s. 152 (3) by Magistrate—Power of new Magistrate to hear the case fixed for trial by his predecessor—Courts Ordinance, s. 88.

Where a Magistrate, after assuming jurisdiction under section 152 (3) of the Criminal Procedure Code, charges the accused and fixes the case for trial, it is open to his successor in office to continue the case from that stage without forming his own opinion on the question whether to assume such jurisdiction.

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

E. A. G. de Silva, for the Accused-Appellant.

D. S. Wijesinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 21, 1964. H. N. G. FERNANDO, J.—

In this case the Magistrate of Colombo South assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code, charged the accused and then fixed the case for trial. By the time the case was taken up

for trial, that Magistrate had ceased to hold office and on the date of trial the case was taken up before a new Magistrate. He having made a minute, " I proceed to hear this case as Additional District Judge as jurisdiction has already been assumed by my predecessor ", tried the case and convicted the accused. The principal submission on appeal has been that the new Magistrate did not form his own opinion on the question whether to assume jurisdiction and that on that ground the trial before him in his capacity as Additional District Judge was illegal.

Support is to be found for Counsel's submission in the concluding paragraph of the judgment of Windham J. in *Perera v. Inspector of Police, Maharagama* [1]. He refers (at page 14) to the judgment in *Hendrick Hamy v. Inspector of Police, Kandana* [2], deciding that the succeeding Magistrate ought to form his own opinion as to whether the case is one that may properly be tried by him summarily as District Judge and expresses his entire agreement with that decision. In the case before Windham J. the succeeding Magistrate had made no minute at all in regard to the assumption of jurisdiction and all that appeared in the record was that he proceeded to try the case which had been fixed for trial by his predecessor after the latter had assumed jurisdiction. Windham J. held that it would be presumed that the succeeding Magistrate had " looked at the record, including the opinions and reasons of his predecessor, and that he adopted his predecessor's opinion and his assumption of jurisdiction ". In the present appeal counsel has submitted that a minute made by a new Magistrate can raise no such presumption, because its terms appear to indicate that he tried the case as Additional District Judge merely because his predecessor had already assumed jurisdiction as such. I agree that if the law on the point was correctly stated by Windham J. in the concluding paragraph of the judgment in *Perera v. Inspector of Police, Maharagama*, there would be substance in Counsel's present submission. But the matter does not end there. The case just mentioned was one referred to a Bench of three Judges in view of the conflict between *Gunawardene v. Veloo* [3] and *Hendrick Hamy v. Inspector of Police, Kandana* [4]. In all three instances, as also in the present case, a new Magistrate had without recording a decision under Section 152 (3) proceeded to try a case fixed for trial by his predecessor after the assumption of jurisdiction. In dealing with the question referred Windham J. (at page 13) held that the Section in the light of which section 152 (3) should be interpreted is section 88 of the Courts Ordinance and he thus explains the scope and effect of that section :— " The section provides that such prosecution may be ' continued before the successor of such judge '. It seems to me that this provision necessarily implies that the new judge shall step into the shoes of the original judge and may carry on from the point where he left off. Any act lawfully done in the case by the original judge may therefore be adopted by the new judge as if it had been

[1] *(1949) 51 N. L. R. 19.*
[2] *(1948) 50 N. L. R. 116.*
[3] *(1948) 50 N. L. R. 107.*
[4] *(1948) 50 N. L. R. 116.*

done by himself, without the necessity of his having to do such act himself afresh. And this as I see it, would apply to the act of assuming jurisdiction under section 152 (3). There is in my view no question of his having independently to assume or re-assume jurisdiction. He is at liberty to vest himself in the cloak of jurisdiction which has already been assumed by his predecessor."

The statement of the law in the concluding paragraph of the judgment is not readily reconcilable with Windham J.'s explanation of section 88 which I have just reproduced. But if so I readily endorse the opinion that section 88 did permit the new Magistrate in the present case (as also in the earlier three cases) to proceed to trial without forming an independent decision to act under section 152 (3). Section 88 clearly enables the *continuance of the prosecution* before a succeeding judge, and in my opinion the continuance of a proceeding does not involve the repetition or duplication of procedural steps previously taken. Once the case was fixed for trial by the original Magistrate after he decided to assume jurisdiction the next step in the procedure was the commencement of the trial before the Additional District Judge, which latter office came by the time of the trial date to be held by the new Magistrate, and section 88 did not require him to reconsider the earlier decision to assume jurisdiction.

While there is nothing in the Criminal Procedure Code expressly providing that a new Magistrate need not consider afresh the question of acting under section 152 (3), there is on the other hand nothing in the Code which states that such a fresh consideration is necessary. But the examination of the operation of section 292 in a particular situation serves to show that the course which the succeeding Magistrates have followed is not legally objectionable. This was a point which Wijeyewardene J. attempted to make, but it seems to me that the force of it was not appreciated in the subsequent judgments.

Wijeyewardene, A.C.J. in *Gunawardene v. Veloo*[1] contemplated a case where a Magistrate assumes jurisdiction under section 152 (3), and commences to hold a trial in his capacity as District Judge, but ceases to hold office before the conclusion of the trial. In such a situation, section 292 authorises the succeeding Magistrate to *continue the case from that stage*, without it being necessary for him to consider afresh whether to act under section 152 (3). In other words section 292 clearly authorises a proper continuance where there has been both (*a*) an assumption of jurisdiction, and (*b*) the recording thereafter of some evidence, by the former Magistrate. Since such a continuance is authorised by express provision in the Code, *a fortiori*, there can be no objection to a proper continuance where the former Magistrate has not recorded evidence but only reached the stage of fixing the case for trial.

I would hold for these reasons that there can be no objection to the procedure adopted by the Magistrate in this case. The appeal is dismissed.

Appeal dismissed.

[1] *(1948) 50 N. L. R. 107.*