1931

Present: **Macdonell C.J.**

BARTHOLOMEUSZ *v.* VELU.

531—P. C. Kandy, 35,968.

Information book—Police Magistrate perusing extracts from book at close of the case—Irregularity.

Where a Police Magistrate at the conclusion of the evidence in a case sent for and perused the police information book, for the purpose of arriving at a decision,—

Held, that the use of the information book was irregular.

Where a Magistrate wishes to use the information book, he should call the Police Officer who recorded the information.

APPEAL from a conviction by the Police Magistrate of Kandy.

R. L. Pereira, K.C. (with him *H. V. Perera* and *Gratiaen*), for accused, appellant.

September 25, 1931. MACDONELL C.J.—

In this case the accused was charged and convicted under section 345 of the Penal Code. Evidence was led for the prosecution, and the accused himself gave evidence denying the offence alleged and called two witnesses. The accused was represented by a proctor. After evidence for both prosecution and defence had been led there occur the following entries in the record:—" Closed. Let I. B. extracts be produced to-morrow, 10/6/31. Accused present. I find him guilty . . . . 116/31. " Copies of the information book extracts are duly filed in the record of the case. These entries in the record can, I think, only mean this, that after hearing the evidence on both sides the learned Police Magistrate was not quite satisfied which side he should believe, and that he sent for the information book to assist him. This is a purpose for which the information book must not be used, and to my thinking it vitiates the conviction. There is abundant authority for this and perhaps I need only cite the latest reported authority, *Paulis Appu v. Don Davith*, reported in *8 Times of Ceylon Law Reports, page 59*. There Mr. Justice Akbar said: " The conviction is further vitiated by what, I think, is a very serious fault on the part of the Magistrate. After the case was closed on August 26 the Magistrate deferred judgment, noting down that he wished to peruse the information book. In my opinion it was a mistake on the part of the Magistrate to have looked at the information book to enable him to come to a decision in the case. "

The present case seems to me to fall absolutely within the same principle, and if so, the appeal against the conviction must be allowed.

The reason why the Court should not use the information book to help itself in arriving at a conclusion which side to believe is that the Court would thereby be supplementing sworn and cross-examined evidence

by evidence—if it can be so called—neither sworn nor cross-examined. But this would be contrary to very simple principles. If the Magistrate had wished to bring the information book into the case, there was a very simple way of doing so, namely, to call the Police Officer who recorded the information. He would then have been sworn, examined, and cross-examined, and the statements shown by the information book to have been made would have become evidence under section 157 of the Evidence Ordinance.

The only question I have to decide is whether I ought in allowing the appeal to quash the conviction or to send the case back for a new trial. In this case the evidence is as to acts done and words spoken nearly four months ago, as to which the memories of the witnesses cannot be expected to be as good as when they gave evidence shortly after the occurrence. If the Magistrate sent for the information book at the end of the evidence in this case, that means that he had a difficulty in being satisfied as to the prosecution case and that difficulty would not be lessened but on the contrary would be increased, if that evidence were to be repeated now after the lapse of months even before a new Court of trial. I think therefore that it would be more in the interests of justice in allowing this appeal on the grounds above stated if I were also to set aside the conviction, and that is the order which I now make.

Set aside.