COURT OF APPEAL

Romulis Fernando
Vs.
Officer in Charge of Marawila Police Station

C.A. No 365/78 — MC. Marawila 43757

Administration of Justice Law sections 162, 163, 166; Accused produced before Magistrate without process; Does failure to record evidence by Magistrate before charging accused vitiate subsequent proceedings?.

Accused-appellant was produced before the Magistrate on 12.10.77 and was bailed out. On 17.10.77 Inspector of Police Marawila filed a report in the Magistrate's Court while the accused was also present in Court.

Counsel argued that the subsequent proceedings were vitiated by the Magistrate's failure to record evidence before charging accused.

Held 1) When accused was produced on 12.10.77 he was produced in the course of investigation.

2) Proceedings were instituted against the accused only when Inspector of Police Marawila filed a report under section 163 (1) of the AJL on which day accused was present in Court.

3) There was no requirement that the Magistrate should record evidence before charging accused.

APPEAL from the order of the Magistrate of Marawila

Before: Tambiah, J & L.H.de Alwis, J.,
Counsel: J.C.T. Kotalawela for the appellant.
Anura Haddagoda, State Counsel for the Attorney-General.
Argued on: 18.3.1982
Cur. adv. vult.
Decided on: 14.5.1982

L.H.DE ALWIS,J.,

The appellant who was the first accused in this case along with his son, who was the 2nd accused, were charged with causing mischief by setting fire to the house of one Mary Theresa Fernando and causing damage to the extent of Rs. 300/-, an offence punishable under section 419 read with section 32 of the Penal Code. At the

conclusion of the evidence for the prosecution the 2nd accused was acquitted. The appellant's defence was that of an alibi and at the conclusion of the trial, he was convicted and sentenced to 6 months' rigorous imprisonment. He now appeals from his conviction and sentence.

The case for the prosecution consisted of the evidence of Mary Theresa Fernando, and her daughter Srimathie. Mary Theresa stated that on the day in question at about 10 or 10.30 p.m when she was in her house with her daughter, the first accused came into their compound and ordered them to get out of the house saying that he was going to set fire to it. He had been uttering this threat from morning that day. He had a chulu light and held it to the thatched roof which caught fire. The house was made of wattle and daub. Mary Theresa Fernando stated that she raised cries and her neighbours rushed up and helped her to remove her belongings from the house before it burned down.

Mary Theresa Fernando's evidence is corroborated by that of her daughter Srimathie. The appellant lives about 50 yards away and the motive suggested was that he wanted to grab Mary Theresa Fernando's land by driving her out of it.

The motive suggested by the appellant was that a proposal of a marriage was made by his son to Mary Theresa's daughter which was turned down and that was the reason for Mary Theresa to make this false complaint against them. Both Mary Theresa and her daughter denied the proposal of marriage and if anyone should have taken offence over the rejection of the marriage proposal it was the appellant and his son and not Mary Theresa. Moreover it is most unlikely that Mary Theresa would have burnt down her own house in order to falsely implicate the appellant.

The incident is alleged to have occurred on 24th July 1977 and the appellant surrendered to the Police about 3 weeks later, on 12.8.77.

This incident occurred during the period of the last General Elections and the Inspector of Police was busy and unable to visit the scene and make investigations till the 28th July 1977. He testified to the fact that the whole house had been burnt down except for the mud walls and estimated the damage at about Rs. 500/-.

The appellant gave evidence and took up the plea of an alibi. He said that on the day in question he was working at Parakrama Tile Factory as a watcher under the owner, Wilfred Peiris, and called Wilfred Peiris to support him. But far from doing so, Wilfred Peiris has contradicted him on vital matters, as a result of which the learned Magistrate has rejected the appellant's defence. He has accepted the evidence of the virtual complainant, which was corroborated by that of her daughter's and he found the appellant guilty of the charge.

Learned Counsel who appeared for the appellant submitted that there were several contradictions in the evidence of Mary Theresa which have not been considered by the learned Magistrate. One of the contradictions he pointed out was that at the trial Mary Theresa said that only the appellant entered her compound while the 2nd accused stood outside on the road whereas the report filed by the Police on 12.8.77 attributed to the complainant the statement that both the appellant and his son came into the compound. This is only a report and consists of a summary of the statement that the virtual complainant had made to the Police. It may not be an accurate reproduction of her complaint. If it was sought to contradict Mary Theresa on this point, it could easily have been done by confronting her with her statement to the Police, when she was in the witness box. As the report contained only a paraphrase of her statement, I do not think it can be said to amount to a contradiction of her evidence.

The next contradiction sought to be relied on is that Mary Theresa said that the appellant held the chulu light to the front portion of the house whereas her daughter said that the appellant set fire to the roof of the house and threw the chulu light on to it. This is hardly a contradiction as Mary Theresa may not have waited to watch the throwing of the chulu light onto the roof, being more concerned with saving her belongings.

The other contradiction related to a statement alleged to have been made by Mary Theresa to the Police to the effect that her daughter had not seen the incident. Mary Theresa denied that she made such a statement and said that if the certified copy of it contained it, it would be wrong. If indeed there was such a contradiction in her statement made to the Police, it could very well have been produced and marked in evidence. But this was not done. On the contrary even when her daughter gave evidence, this suggestion was not put to her in cross examination.

Counsel next submitted that the learned Magistrate erroneously put the burden on the accused of proving his innocence by establishing his alibi. I do not think that is so. The learned Magistrate has dealt with the evidence of the appellant and his witness and in view of the material contradictions in their evidence he has rejected the defence of an alibi. He has accepted the evidence of the virtual complainant and her daughter. But this does not mean that he accepted their evidence because he was influenced by the contradictions in the appellant's defence, as was submitted by learned Counsel. I see no reason to disturb the finding of the learned Magistrate on the facts.

Learned Counsel also raised a point of law. These proceedings were instituted under the Administration of Justice Law, No. 44 of 1973. Learned Counsel for the appellant submitted that when the appellant was first brought before the Magistrate in custody on 12.8.77 without process it was in terms of section 163(1)(c), and under section 162(2)(b) read with section 166(1) the Magistrate was required to record evidence before framing a charge against the appellant. Admittedly no evidence was recorded before the appellant was charged.

The learned Magistrate purported to assume jurisdiction as District Judge in order to try the offence which was one triable by a District Court. But that was unnecessary because section 31 of the Administration of Justice Law defining the criminal jurisdiction of the Magistrate's Court had been amended by Law No. 31 of 1975 which gave the Magistrate Jurisdiction to try offences under section 419 of the Penal Code. Counsel for the appellant made no point of this. His sole contention was that the Magistrate should have recorded evidence before charging the accused. He relied on the case of *Junaid Vs. Inspector of Police. Ambalangoda*, 66 CLW 69 which held that where an accused person is produced before the Magistrate otherwise than on summons or warrant, it is incumbent on the Magistrate to examine on oath the person so producing him forthwith – that is, on the same day. Failure to do so vitiates the subsequent proceedings. In another case relied upon by learned Counsel, *Wadivelu Vs. Kanagaratnam*, 66 CLW 16, it was held that where an accused is brought before Court in custody, without process, the failure of the Magistrate to examine the Police Officer so producing him on the same day, constitutes a failure to hold the examination directed by section 151(2) of the Criminal Procedure Code and vitiates the subsequent proceedings. Counsel also cited the case of *Tikiri Banda*

Vs. Perimpanayagam, 61 NLR 286, where it was held that where an accused person is brought before a Magistrate's Court otherwise than on summons or warrant, the requirement of section 187(1) read with section 151(2) of the Criminal Procedure Code that the Court should examine on oath a person or persons able to speak to the facts of the case excludes hearsay statements being acted upon. In such a case, therefore, it would be a fatal irregularity if the Magistrate frames a charge solely upon the statement on oath of a Police Officer who speaks only of information received by him from other persons of the commission of an offence by the accused.

In the instant case however the appellant was first produced before the Magistrate without process under section 75(1) of the Administration of Justice Law and bailed out. Subsequently on 17.10.77 a report under section 163 (1)(b) was filed and he was charged without evidence being recorded by the Magistrate. The question is whether this was illegal and rendered the subsequent proceedings void as submitted by the learned Counsel for the appellant.

In *Wadivelu's* case (supra) as in the present case the written report under section 148(1)(b) of the old Criminal Procedure Code which corresponds with section 163(1)(b) of the Administration of Justice Law was filed in Court sometime after the accused had first been produced before the Magistrate in custody without process. It was held in *Wadivelu's* case that proceedings in the Magistrate's Court had been instituted under section 148(1)(d) when the accused was first produced in custody without process and that the failure of the Magistrate on that occasion to examine the Police Constable who produced him constituted a failure to hold the examination directed by section 151(2) and therefore vitiated the subsequent proceedings. But in my view *Wadivelu's* case is distinguishable from the present case, where the production of the appellant on the first occasion i.e. on 12.8.77, was in the course of investigations conducted under section 75(1) of the Administration of Justice Law and that does not amount to an institution of proceedings in the Magistrate's Court in terms of section 163(1) (c) of the Administration of Justice Law.

A comparison of the corresponding sections relating to the investigation of offences in the old Criminal Procedure Code and in the Administration of Justice Law discloses a significant difference. Section 126 A(1) of the Criminal Procedure Code provides that

whenever the investigation cannot be completed within a period of 24 hours, the Officer-in-charge of the Police Station must forthwith transmit a report to the Magistrate and at the same time forward the *accused* to such Magistrate. (The emphasis is mine). On the other hand, section 75(1) of the Administration of Justice Law provides that in a similar situation the Police Officer in charge of the investigation shall forthwith transmit a report to the Magistrate and at the same time send the *suspect* before the Magistrate. (The emphasis is mine). The reference to the accused in the one case and to the suspect in the other is an important distinction. Section 148(1) (d) of the Old Criminal Procedure Code and the corresponding section 163(1) (c) of the Administration of Justice Law both make the bringing of a person before the Magistrate, in custody without process *accused* of having committed an offence one of the ways in which proceedings in a Magistrate's Court shall be instituted. But as has been pointed out the person who is produced in custody without process before the Magistrate in the course of investigations under section 75(1) of the Administration of Justice Law is a 'suspect' and not an 'accused', so that his production at that stage does not amount to an institution of proceedings in the Magistrate's Court under section 163(1) (c). A 'suspect' becomes a person accused of having committed an offence only when the Police having completed their investigations have made a report to Court under section 163(1) (b) of the Administration of Justice Law. It is only when report is filed that proceedings are instituted in a Magistrate's Court.

In the instant case I am of opinion that proceedings were first instituted in the Magistrate's Court, when the Inspector of Marawila Police Station filed a report in the Magistrate's Court under section 163(1) (b) of the Administration of Justice Law 17.10.77, on which day the appellant was also present having previously been bailed out to appear in Court on that day.

It is now settled law that where proceedings in a Magistrate's Court are instituted on a written report made under section 148(1)(b) of the Criminal Procedure Code which corresponds with section 163(1)(b) of the Administration of Justice Law, and the accused is at the same time brought before the Court in custody without process it is not necessary for the Magistrate to record any evidence before he charges the accused. This is a decision of a Divisional Bench of 5 Judges of the Supreme Court, in the case of *Perera Vs. S.I., Police, Marawila.* 67 NLR 125.

> "The word 'brought' in that section does not mean brought by a Police Officer, but compelled to attend either by virtue of the fact that he is in Police custody and is forwarded to Court or is accompanied by a Police Officer or is compelled to attend by virtue of having executed a bail bond under section 126 A or section 127" - Per Basnayake, C.J., in *Mohideen Vs. Inspector of Police, Pettah* - 59 NLR 217, at 219.

The fact that the accused was present in Court at the same time when the written report is filed makes no difference and does not convert the institution of proceedings under section 148(1)(b) into proceedings instituted under section 148(1)(d) which corresponds with section 163(1)(c) of the Administration of Justice Law. Sansoni, C.J., in the Divisional Bench case said -

> "proceedings which have been instituted in one of the six ways do not change their character merely because there is present some additional circumstance which might also be present in the case of proceedings instituted in another way."

I am therefore of the view that there was no legal requirement for the Magistrate to record evidence before charging the accused in the instant case. The submission of learned Counsel for the appellant must therefore fail.

I accordingly dismiss the appeal.

TAMBIAH, J., — I agree.

Appeal dismissed