

Present. : De Sampayo J.

1921.

INSPECTOR OF POLICE *v.* NADAR.

578—*P. C. Avissawella, 32,193.*

Magistrate examining accused after close of case for defence—Summary case—Criminal Procedure Code, ss. 295 and 429.

After the close of the case for the defence in a summary case, the Magistrate, at his own instance, purporting to act under sections 295 and 429 of the Criminal Procedure Code, called the accused into the witness box again and put him through a long examination, part of it being in the nature of cross-examination.

Held, that this was irregular.

Section 295 does not enable a Magistrate to question an accused in a summary case. Section 429 does enable a Magistrate only to summon or examine any person who is not an accused.

THE facts appear from the judgment.

J. S. Jayawardene, for the appellant.

Amarasekera, for the respondent.

August 16, 1920. DE SAMPAYO J.—

I am obliged to take notice of a serious irregularity committed by the Magistrate. The accused, who was a boutique-keeper at Puwakpitiya, was charged with having dishonestly received stolen property, knowing the same to have been stolen, namely, certain brass bearings belonging to Elston estate at Puwakpitiya. After the prosecution was closed, the accused gave evidence on his own behalf and called certain witnesses. At this stage, after the accused's proctor has addressed the Court, the Magistrate, at his own instance, called the accused into the witness box again and put him through a long examination, part of it being more in the nature of cross-examination. The Magistrate convicted the appellant, and largely based his opinion on the statements elicited by him when the accused was called a second time. The Police Magistrate purported to act under sections 295 (1) and 429 of the Criminal Procedure Code, but it is obvious that these sections have no application and do not justify the procedure adopted by the Police Magistrate. Section 295 (1) provides that "for the purpose of enabling an accused person to explain any circumstances appearing in the evidence against him, the Police Magistrate holding an inquiry may question the accused generally on the case after the witnesses for the prosecution have been examined, and may, at any stage of the inquiry

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for the purpose aforesaid, put to him such questions as he may think necessary." This provision clearly has reference only to a case where the Magistrate is taking non-summary proceedings against an accused person and not to a trial for an offence for which the Magistrate is trying him summarily. Section 429 provides that "any Court may, at any stage of an inquiry, trial, or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned, as a witness, or recall and re-examine any person already examined." In my opinion this provision enables a Magistrate to summon or examine any person who is not an accused. Consequently, the procedure adopted by the Magistrate in this case is not justified by any provision in the Criminal Procedure Code or in any other Ordinance.

On this point I may refer the Magistrate to the decisions in *The King v. Thuraiappa*¹ and *Simon Appukamy v. Rowel Appu and another*.² In these two cases the Supreme Court took such a serious view of the irregularity that the accused were even acquitted in appeal, but, considering the circumstances of the present case, I am not disposed to discharge the accused from further prosecution, but would quash the present proceeding and send the case back for trial *de novo* before another Magistrate.

Sent back.

