1942 *Present:* **Moseley S.P.J., Soertsz and Wijeyewardene JJ.**

TENNEKOON *v.* MARADAMUTTU.

615-22—M. C. Hatton, 1,034.

Criminal Procedure—Summary trial—Addition of fresh charge—Assumption of jurisdiction as District Judge—Reading over of evidence of witnesses to accused—Criminal Procedure Code, s. 152 (3).

Where a Magistrate who has started summary proceedings on charges which he can try summarily adds a charge of such a nature that, unless he assumes jurisdiction under section 152 (3) of the Criminal Procedure Code, he cannot try the case summarily, he is not bound to start proceedings *de novo*.

Gressy v. Direckze (6 *N. L. R. 33*) followed.

Sub-Inspector of Police Alles v. Charles Appuhamy (20 C.L.W. 100) overruled.

CASE referred by Nihill J. to a Bench of three Judges.

The facts are stated in the reference as follows:—In this case the thirteen accused-appellants were charged before the Magistrate of Hatton with offences involving unlawful assembly and simple hurt. The Magistrate proceeded to try the accused summarily. After hearing four of the witnesses for the prosecution and the medical evidence he amended the charges so as to include a charge of rioting under section 144 of the Penal Code. This is an offence which is not triable summarily and the Magistrate realizing this and being an additional District Judge assumed jurisdiction under section 152 (3) of the Criminal Procedure Code.

His note on the record is as follows:—"At this stage I amend the charges. The charge of rioting will make the offence non-summary. I however decide to try this case as District Judge. Charges under sections 140, 146, 314/144, and 314 are read and explained to the accused from the charge sheet and their pleas recorded".

Thereafter, the evidence of the witnesses who had already been called was read over to the accused and they were tendered for further cross-examination.

The main point taken by Mr. Rajapakse for the appellants is that the procedure adopted did not comply with the provisions of section 189 of the Criminal Procedure Code in that having discontinued summary proceedings and initiated proceedings under section 152 (3) the Magistrate should have recorded the evidence *de novo* and not read over the depositions made in the summary trial. There is authority for this proposition in the recent case of *Alles v. Charles Appuhamy*[1] in which Moseley J. so held.

Mr. Chitty for the Crown has contested the correctness of that decision and has called my attention to the case of *Gressy v. Direckze*[2], in which Wendt J. held that a conviction resting on such procedure was not bad as the accused was on his trial from the commencement and had the fullest opportunity to cross-examine the witnesses. In that case a charge laid for simple hurt was converted into one of grievous hurt when the Magistrate assumed jurisdiction under section 152 (3).

[1] *(1941) 20 C. L. W. 100.*

[2] *(1901) 6 N. L. R. 33.*

A similar case reported in the same volume of the New Law Reports is that of *Abdul Cader v. Fernando*[1]. Here the additional point was taken that the assumption of the enhanced jurisdiction was taken at too late a stage but overruling this, Moncrieff A.C.J. did not question the regularity of the proceedings themselves.

Now these are decisions of this Court taken some forty years ago and I have therefore had to consider whether amendments made to the Criminal Procedure Code in recent years have resulted in a change of the law.

Section 189 was amended by section 13 of Ordinance No. 13 of 1938, and now reads as follows :—

"189. (1) When the Magistrate proceeds to try the accused he shall take in manner hereinafter provided all such evidence as may be produced for the prosecution or defence respectively.

(2) The accused shall be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate.

(3) The complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused."

Before amendment the section read thus :—

"189. (1) When the Magistrate proceeds to try the accused he shall read over to him the evidence (if any) recorded under section 150 and take in manner hereinafter provided all such further evidence as may be produced for the prosecution or defence respectively.

(2) The accused shall be permitted to cross-examine any person whose evidence has been recorded under section 150 and all witnesses called for the prosecution and called or recalled by the Magistrate.

(3) The complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused."

Section 150 was also amended in 1938 but the new section as well as the old section concerns evidence taken by a Magistrate before the issue of process. It is this class of evidence which cannot now as formerly be read over to the accused at the commencement of the trial.

With regard to evidence taken in the presence of the accused during a summary trial there has therefore been no change in the substantive law. It occurred to me that the recent case was probably one in which evidence had been recorded under section 150 but a study of the record of the Magisterial proceedings has revealed that this was not the case, although from the judgment of my learned brother it would seem that the

[1] *(1902) 6 N. L. R. 95.*

case may have been argued before him on that assumption. It must therefore I think be conceded that the recent decision conflicts with the earlier decisions.

With respect I may add that I myself agree with the view taken by Wendt J. for reasons I will give later, but in view of the conflicting decisions I prefer to submit the point for the consideration of a Bench of three Judges.

L. A. Rajapakse (with him *S. Alles* and *S. P. Wijewickreme*), for the accused appellants.—The Criminal Procedure Code provides for all possible contingencies that may arise during a trial, and is exhaustive. Under section 152 a Magistrate has three alternatives. In the present case the Magistrate decided to act under sub-section (2) and followed the procedure laid down in Chapter 18 of the Code. When, while proceeding under Chapter 18, the non-summary offence of rioting was disclcsed, the Magistrate should have acted under section 193 (2) and commenced proceedings afresh under Chapter 16. It was too late for section 152 (3) to be applied. The Magistrate assumed jurisdiction under section 152 (3) at a stage when he had not the power to do so.

Even if the Magistrate could have acted under section 152 (3), he should have recalled all the witnesses for the prosecution for examination *de novo* and not read over the depositions made by them previously. *Alles v. Charles Appuhamy*[1] is exactly in point. *Gressy v. Direckze*[2] and *Abdul Cader v. Fernando*[3] were decided before section 189 of the Criminal Procedure Code was amended by section 13 of Ordinance No. 13 of 1938. Even in those two cases the procedure adopted, although it was held that it did not cause prejudice, was certainly irregular. The older section 189 made exception of evidence led previous to issue of process. There is no such exception in the amended section. The irregularity would be much greater in the case of reading over of evidence led after the issue of process. Except under section 297, in no instance can the previous evidence of a witness be read over.

The Magistrate assumed jurisdiction under section 152 (3) at too late a stage. *Reg. v. Uduman et al.*[4] has been consistently followed.

E. H. T. Gunasekera, C.C., for complainant, respondent.—All the evidence taken in this case was taken in the presence of the accused. Section 297, read with section 189, has been complied with.

At the lowest, English procedure would be applicable, under section 6 of the Criminal Procedure Code. See section 27 of 42 and 43 Vict., Ch. 49.

Cur. adv. vult.

February 25, 1942. MOSELEY J.—

This matter has been referred by Nihill J. to a Bench of three Judges. The point submitted can in the words of the learned Judge be stated thus :—

> Where a Magistrate who has started summary proceedings on charges which he can try summarily, adds a charge of such a nature that,

[1] *(1941) 20 C. L. W. 100.*
[2] *(1901) 6 N. L. R. 33.*
[3] *(1902) 6 N. L. R. 95.*
[4] *(1900) 4 N. L. R. 1.*

unless he assumes jurisdiction under section 152 (3) of the Criminal Procedure Code, he cannot try it summarily, is it incumbent upon him to start proceedings *de novo* ?

The facts of the case are shortly as follows :—A number of accused were charged with offences involving unlawful assembly and simple hurt. The Magistrate properly proceeded to try the accused summarily. After hearing four witnesses for the prosecution and the medical evidence he amended the charges by adding a charge of rioting under section 144 of the Penal Code. Since this offence is not triable summarily by a Magistrate's Court he decided to try the case as District Judge, apparently assuming jurisdiction under section 152 (3) of the Criminal Procedure Code.

The charges as amended were read and explained to the accused, the evidence of the witnesses who had already been called was read over to the accused and they were tendered for cross-examination. This is the procedure to which exception was taken by Counsel for the appellants when the appeal was argued before Nihill J. His submission appears to have been based upon the decision in *Alles (Sub-Inspector of Police) v. Charles Appuhamy (supra)*, in which I held that, in similar circumstances the proper course was to commence proceedings *de novo* " as provided by section 189 of the Criminal Procedure Code". I may say at once that my judgment, in that case, was based upon the assumption that the procedure followed was on all fours with that in *Nair (Police Sergeant) v. Yagappan*[1] which was the only authority brought to my notice. In this I was clearly mistaken and my decision in that case need be considered no further.

It appears to have been the citation of *Alles (Sub-Inspector of Police) v. Charles Appuhamy (supra)* and its obvious conflict with *Gressy v. Direckze (supra)* which presented a difficulty to the mind of Nihill J. In the latter case a Magistrate, upon a charge of voluntarily causing simple hurt, recorded the evidence of several witnesses, and then, finding that the evidence disclosed an offence of grievous hurt, tried the case summarily as District Judge. The evidence already recorded, which had not in fact, as in the present case, been given in the presence of the accused, was read over to him, and the witnesses were cross-examined on his behalf. Objection was taken on appeal that when the Magistrate advised himself that he might try the case summarily, he should have re-called all the witnesses for the prosecution for examination *de novo*. Wendt J. did not think that necessary.

> "This was not" he said "a case in which, proceedings having commenced as upon an inquiry, the Magistrate afterwards made up his mind to try summarily. In such a case the accused, expecting to be committed to a higher Court, might well have forborne to cross-examine the witnesses at the earlier stage. Here the accused was on his trial from the commencement, and he had the fullest opportunity of cross-examining the witnesses. I think, therefore, there was no irregularity in the procedure."

The reference by Wendt J. to the opportunity for cross-examining witnesses may seem to suggest that the learned Judge was somewhat

[1] *18 C. L. W. 123.*

influenced by the fact that the accused was not prejudiced. On the other hand there is the definitely expressed opinion that the accused was on his trial from the commencement. If that is so, the question of prejudice could hardly arise.

Counsel for the appellants was inclined to argue that the Magistrate, having assumed jurisdiction under section 152 (3), and having therefore proceeded to follow the procedure laid down in chapter XVIII., must ultimately reach the stage provided for by section 193 (2), that is to say, finding the offence not within his jurisdiction as Magistrate, he should commence proceedings afresh under chapter XVI. The sub-section, when it is applied to the case of a Magistrate who has assumed jurisdiction as a District Judge, seems to me to apply, in such case, to an offence which is not triable by a District Court. Otherwise the result would lead to an absurdity.

A further point was raised by Counsel for the appellants, namely, that the Magistrate assumed jurisdiction as District Judge at too late a stage in the proceedings. He relied upon the case of *Queen v. Uduman et al.*[1] in which the Magistrate completed taking all the evidence of the witnesses for the prosecution and then announced his intention of trying the case summarily. Bonser C.J. in that case said, "It is quite clear that the Magistrate is to make up his mind whether he will try summarily as District Judge or not after hearing evidence under section 149". The "evidence under section 149" to which Bonser C.J. referred is for practical purposes that referred to in the present section 150 (1). I do not think this authority helps the case for the appellants. It does not appear that the Magistrate delayed unduly in assuming his enlarged jurisdiction when it became apparent to him that an offence, not triable by him as Magistrate, had been committed.

It seems to me that the simple question to be answered is, were the proceedings, both before and after the assumption by the Magistrate of his enlarged jurisdiction, part of one and the same trial? Wendt J. whose observations in *Gressy v. Direckze* (*supra*) I have quoted above, while he does not say so in so many words seems to have answered the question in the affirmative. No other authorities on the point have been brought to our notice and, for myself, I have no hesitation in the present case in expressing my opinion that the assumption of enhanced jurisdiction by the Magistrate did not mark the beginning of a new trial.

In my view it was not incumbent upon the Magistrate, as District Judge, to start proceedings *de novo*.

This is the only question to be decided. Since it is decided against the appellants, these appeals are dismissed.

SOERTSZ J.—I agree

WIJEYEWARDENE J.—I agree.

Appeals dismissed.

43/15

[1] *14 N. L. R. 1.*