1940 *Present :* **Howard C.J.**

SIVAPARKASAPILLAI *v.* SUPRAMANIAM.

*705—M. C. Trincomalee, 8,276.*

***Jurisdiction—Magistrate assuming jurisdiction to try case summarily—Case involving complexity of law or fact—Discretion to try summarily subject to review—Objection not taken before Magistrate—Criminal Procedure Code, s. 152 (3).***

**A Magistrate should not try an accused person summarily under section 152 (3) of the Criminal Procedure Code where the case involves any complexity of law, fact or evidence or where the case cannot be tried shortly and rapidly in point of matter and time.**

**The decision of the Magistrate to try an accused summarily is subject to review by the Supreme Court.**

***Silva v. Silva* (7 *N. L. R.* 182) followed.**

**Objection to the jurisdiction of the Magistrate may be taken in the Supreme Court even where no objection was raised when the Magistrate assumed jurisdiction.**

***Ahamadu Levvai v. Abdul Caffoor* (3 *A. C. R. X.*) not followed.**

APPEAL from a conviction by the Magistrate of Trincomalee.

*R. L. Pereira, K.C.* (with him *M. Balasunderam*), for the accused, appellant.

*H. V. Perera, K.C.* (with him *G. G. Ponnambalam* and *V. Arulambalam*), for the complainant, respondent.

*Cur. adv. vult.*

December 10, 1940. HOWARD C.J.—

This is an appeal from a judgment of the Magistrate of Trincomalee dated July 29, 1940, convicting the appellant of falsification of accounts under section 467 of the Penal Code and sentencing him to a term of 18 months' rigorous imprisonment. Counsel for the appellant has submitted two grounds of appeal as follows: (1) that the case was not one that could properly be tried summarily by a Magistrate and (2) that the charge was defective inasmuch as it failed to comply with the provisions of section 179 (1) of the Criminal Procedure Code. With regard to the first ground an offence against section 467 of the Penal Code is not triable summarily. The Magistrate who was also the District Judge of Trincomalee in so trying the case purported to act under the provisions of section 152 (3) of the Criminal Procedure Code. He has stated that the offence might properly be tried summarily for the following reasons:— (1) the facts of the case are simple, (2) no points of law are involved, (3) the nature of the offence, (4) all the circumstances of the case, (5) it is expedient to do so, (6) it is economical to do so. The interpretation to be given to the word "properly" in section 152 (3) was considered by this Court in the case of *Silva v. Silva*[1]. The following passage occurs in the judgment of Wendt J.:—

> "Assuming in any given case that a maximum term of two years' imprisonment would be sufficient punishment, the question remains whether the interests of justice would be furthered by a summary trial—a trial without a preliminary investigation by a committing Magistrate; without the supervision and control of the Attorney-General; necessarily without assessors to assist the Judge; and as a general rule, without the aid of Crown Counsel to conduct the prosecution. All of these advantages would attend a trial after committal, and there are many cases in which the complicated character of the facts or the difficult questions of law involved render it desirable that the trying Judge should have the assistance I have indicated. It is therefore right that in forming an opinion as to the propriety of a summary trial the Magistrate should consider all these matters, and that his order should show he has done so."

Middleton J. in the same case has also expressed his opinion on the meaning of the word "properly" in the following passage:—

> "An offence which can be properly tried summarily then would seem to be an offence which can be properly tried by a Police Court.
>
> I should say then that any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of

[1] *7 N. L. R. 182.*

law, fact or evidence, and double theory of circumstances, or any difficult question of intention, or identity, or in which the punishment ought really to exceed two years, is one that is not properly triable summarily. I mention the latter point, as Magistrates should, I think, take care to consider and distinguish between cases which although triable by a District Court are punishable only to the full extent by the Supreme Court, and those in which the limit of punishment is within the jurisdiction of the District Court.

There may of course be other circumstances which would negative the propriety of a summary trial, and which will have to be dealt with as they arise."

The Judges in *Silva v. Silva* (*supra*) have expressed the opinion that a case involving any complexity of law, fact or evidence is not one that is properly triable summarily. In this case the learned Magistrate has expressed the opinion that the facts of the case are simple and no points of law are involved. It appears from the record that on May 17, 1940, the appellant was charged that, being employed by the complainant, with intent to defraud the latter he made false entries in the accounts kept by him on various dates in respect of various sums of money and more particularly between October 14, 1939, and March 31, 1940, in respect of Rs. 1,173.09 and thereby committed an offence punishable under section 467 of the Penal Code. On May 19, 1940, the charge was amended and the appellant charged that, being employed as clerk and cashier, he wilfully and with intent to defraud falsified and altered certain books specified in the charge or wilfully or with intent to defraud made false entries, *vide* sheet annexed, and thereby committed an offence punishable under section 467 of the Penal Code. The annexed sheet contained particulars of eighteen false entries. On July 22, 1940, the charge was again amended and the appellant charged with not only being a clerk or cashier employed by the complainant but also "acting in the capacity of such clerk or cashier". The annexed sheet was also amended by increasing the number of alleged false entries from eighteen to forty-three. These amendments to the charge indicate that the Magistrate at the outset of the case was confronted with considerable difficulties in framing the charge. Those difficulties arose from doubts as to the capacity in which the appellant should be charged and as to whether each separate falsification that was alleged should be specified in the charge. It is probable that difficulties ensued in consequence of an incomplete understanding of the provisions of section 467 of the Penal Code and the explanation annexed thereto. Having regard to these difficulties and the complexity of this provision it is difficult to appreciate how the learned Magistrate could have expressed the opinion that the facts of the case are simple and no points of law are involved. A case involving forty-three seperate falsifications cannot be regarded as simple. In the case of *Silva v. Silva* (*supra*), Middleton J., moreover, stated that any case which cannot be tried shortly and rapidly in point of matter and time "is not" properly triable summarily. The record indicates that the case took six days to try. It, therefore, cannot be said to be a case that can be tried "shortly and rapidly in point of time and matter". The further reasons given by the Magistrate for trying

this case summarily, namely, (3) the nature of the case, (4) all the circumstances of the case, (5) it is expedient to do so, and (6) it is economical to do so require brief consideration. (5) and (6) cannot be regarded as valid reasons. With regard to (3) and (4) I am of opinion that these considerations should have led the Magistrate to the conclusion that the interests of justice would not be furthered by a summary trial. The nature and circumstances demanded a preliminary investigation by a committing Magistrate, the supervision and control of the Attorney-General and the aid of Crown Counsel to conduct the prosecution. In these circumstances I am of opinion that the learned Magistrate was wrong in coming to the conclusion that this was a case "properly" triable summarily.

In *Silva v. Silva* (*supra*) the question was considered as to whether the decision of a Magistrate under section 152 (3) of the Criminal Procedure Code was subject to review by this Court. In this connection Wendt J. stated as follows :—

> "His opinion is a condition precedent to trial; without it he has no jurisdiction. I cannot, however, accept the view that his opinion is final and not subject to review by this Court. The very fact that that opinion is the basis of an exception to the general rule of jurisdiction is in my opinion a reason for holding that it is not conclusive. And from the nature of the thing it is at least as expedient that the Magistrate's opinion should be submitted to the revision of the Appellate Tribunal as that the guilt or innocence of the accused should be."

The following passage also occurs in the judgment of Middleton J.:—

> "Whether the case may be properly tried summarily is a matter primarily for the Magistrate being a District Judge to decide, but I cannot see that the Legislature intended that his decision should be beyond appeal. It is possible that his opinion might be an erroneous one, and our jurisdiction in appeal extends to the correction of all errors in fact or in law which shall be committed by a District Judge."

A similar opinion was also expressed by de Sampayo J.

Following the opinions expressed by the Judges in *Silva v. Silva* (*supra*) I have, therefore, come to the conclusion that the decision of a Magistrate to try an accused person summarily under the provisions of section 152 (3) of the Criminal Procedure Code is subject to review by this Court. The further point as to whether if no objection is made by an accused person when the Magistrate assumes jurisdiction such objection can be taken in this Court, now requires consideration. In *Silva v. Silva* (*supra*) the objection was taken when the Magistrate assumed jurisdiction. In *Sheddon v. Agosingho*[1] the report does not expressly state whether the objection to the Magistrate trying the case summarily was taken by the accused when he assumed jurisdiction. The report, however, rather indicates that objection was only taken in the Supreme Court on appeal. In *Reg. v. Uduman*[2] the objection to the Magistrate assuming jurisdiction on the ground (*a*) that his discretion should be exercised immediately after hearing the evidence of the complainant or other witness as enjoined by section 148 (*b*) that an offence under section 444 should not

[1] *14 C. L. Rec. 43.*

[2] *4 N. L. R. 1.*

be tried summarily, was upheld although objection was not made when the Magistrate assumed jurisdiction. In *Ramasamy v. Sinnochchi*[3] de Sampayo J. held that an offence, whether coming under sections 443 or 444 of the Penal Code, was of a very serious character and ordinarily should not be tried by a Police Magistrate even with the consent of the accused. In this case the Magistrate assumed jurisdiction under section 166 of the Criminal Procedure Code. In spite of the Magistrate assuming jurisdiction with the consent of the accused an objection taken by the latter on appeal was upheld and the case remitted to the Magistrate for the taking of non-summary proceedings with a view to a committal to a higher Court. It is true that *Ahamadu Levvai v. Abdul Caffoor*[4] is authority for the proposition that the objection to the Magistrate trying the case summarily should be taken by the accused when the Magistrate assumes jurisdiction. The report of this case is, however, meagre and I am not prepared to follow it in view of the other cases I have cited. I am, therefore, of opinion that the first ground of appeal succeeds. In the circumstances the necessity for considering the second ground does not arise. The appeal must be allowed and the proceedings quashed. I further order that the case be sent back in order that the Magistrate of Trincomalee may take non-summary proceedings with a view to committal to a higher Court.

*Quashed.*