1962 *Present :* Sansoni, J.

H. CORNELIS CALDERA, Appellant, *and* V. D. P. WIJEWARDENE (Inspector of Police), Respondent

S. C. 1077—M. C. Colombo South, 4736/N

Criminal procedure—Accused produced in Court by police officer without process—Framing of charge—Omission of Court to record evidence of police officer—Is it a fatal irregularity ?—Criminal Procedure Code, ss. 148 (1) (b), 151 (2), 152 (3), 425—Scope of s. 425.

Where a police officer produces an accused person in custody before Court without process, the omission of Court to record the evidence of the police officer before framing a charge against the accused is an irregularity which can be cured under section 425 of the Criminal Procedure Code, if the omission has not caused prejudice to the accused.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

Colvin R. de Silva, with *Miss Suriya Wickremasinghe,* for the Accused-Appellant.

T. D. Bandaranayake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 2, 1962. SANSONI, J.—

Proceedings in this case appear to have begun with the accused being produced in court by a police officer, after investigation had been made into a complaint that he had cheated one Albert. He was warned to attend on a later day, but he was absent on that day and a warrant was issued for his arrest. He subsequently surrendered, and the Police filed a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code. The offence alleged was that the accused intentionally deceived Albert by making him believe that a Bank of Ceylon cheque dated 1st April, 1960 for Rs. 300 drawn by the accused was a genuine cheque and that there would be funds in the Bank to meet it on presentation, and that the accused thereby dishonestly induced Albert to pay him Rs. 300 in cash on the cheque—an offence punishable under section 403 of the Penal Code. After evidence had been given by Albert, but not by the police officer who had brought the accused before the court, the Magistrate assumed jurisdiction under section 152 (3) of the Code and charged the accused who pleaded not guilty.

The evidence led at the trial proved that the accused had an account at the Bank of Ceylon. The Bank had written to the accused on 10th February, 1960, asking him to close his account on or before 23rd January, 1960, in view of the very unsatisfactory manner in which he had been conducting his account. He was also informed that if he failed to close the account voluntarily, the Bank would do so without any further notice on the date mentioned, and would send him a cheque for the balance at credit on that date. The date mentioned in the letter was obviously wrong. The account was in fact closed by the Bank on 23rd March, 1960. It cannot, however, be said that the accused was aware on 1st April, 1960, that his account had been closed.

But there remains the question whether the rest of the evidence was sufficient to establish the charge. The accused's account with the Bank has been produced, and it shows that on 19th March, 1960, he had Rs. 279.18 to his credit. On 22nd March he was debited with a cheque for Rs. 279, and there was left a balance of only 18 cents. On 23rd March there was a transfer of 18 cents, and there was nothing left to his credit. No further entries appear in the account.

The accused in evidence admitted that he issued the cheque for Rs. 300 on 1st April to Albert. He did not deny Albert's evidence that cash was given in exchange for the cheque. He attacked the Bank's statement as an incomplete statement of his account for March, 1960, but the Bank clerk who gave evidence was not cross-examined on this point. Obviously nothing was sent to his credit by him after 16th March, 1960, as the Bank statement shows. From all this evidence it seems quite clear that when the accused drew the cheque on 1st April, he knew that it would not be paid. His intention in obtaining Rs. 300 from Albert by giving him this cheque was clearly to deceive him and to induce him to part with that sum of money. I do not think this is a case

where the accused did not know the nature of the allegations against him, nor do I think that the accused was taken by surprise in any way. On the facts the guilt of the accused was clearly proved.

The other point urged in appeal was that the police officer who brought the accused before the court should have given evidence before the charge was framed. Mr. de Silva referred me to two judgments of Sinnetamby, J. given on 24th February, 1960, and 3rd March, 1960, where it was held that failure to record the police officer's evidence under such circumstances render the proceedings void. I have also been referred to a more recent judgment of T. S. Fernando, J. given on 23rd November, 1961, where he held that there was no imperative provision of the law requiring a Magistrate to record the evidence of the police officer. I might also refer to the case of *Mohideen v. Inspector of Police, Pettah*[1], where Basnayake, C.J. and K. D. de Silva, J. (Pulle, J. dissenting) decided that where an accused is brought before the court in custody without process, evidence should be recorded before a charge is framed. In the later case of *de Silva v. Sub-Inspector of Police, Matara*[2], Basnayake, C.J. has held that where proceedings are instituted under section 148 (1) (*b*) of the Code, the evidence of the person who brought the accused before the court need not be recorded. The learned Chief Justice would appear to have confined the application of section 151 (2), so far as it requires the evidence of the person who brought the accused before the court to be recorded, to cases where no report is filed under section 148 (1) (*b*). If that be the correct view, then there was no irregularity in the case I am now deciding.

But I shall assume that there was an omission, as I wish to base my decision on another ground as well, and that is on section 425 of the Code. That provision cannot be overlooked and it has in fact been applied in cases very similar to the present one by Howard, C.J. in *Assen v. Maradana Police*[3] following earlier cases, and by Wijeyewardene, J. in *Thomas v. Inspector of Police, Kottawa*[4]. A contrary view appears to have been taken by Soertsz, J. in *Vargheese v. Perera*[5]. In deciding which view I should follow I take into account that section 425 provides that "no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account (*a*), of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial . . . . unless such error, omission, irregularity . . . . has occasioned a failure of justice." There was a time when it was thought that the positive requirements of the Code were all essential, and that any breach of such a requirement constituted an illegality. The supporters of this view generally rely on the case of *Subramania Iyer v. King Emperor*[6], decided by the Privy Council. But if this is the only possible view, section 425 will be of little use, for it is in just those cases where an express provision of the Code has been violated that the section 425 can serve any purpose.

[1] *(1957) 59 N. L. R. 217.*
[2] *(1960) 62 N. L. R. 92.*
[3] *(1944) 45 N. L. R. 263.*
[4] *(1945) 47 N. L. R. 42.*
[5] *(1942) 43 N. L. R. 564.*
[6] *(1902) 25 Mad. 61.*

The Privy Council itself has held in later cases that not all infringements of the Code render the proceedings illegal or void. Thus in *Abdul Raman v. Emperor* [1], it was held that a violation of the section corresponding to our section 299 which requires the deposition of each witness to be read over to him in the presence of the accused or his pleader was not fatal. In *Pulukuri Kotayya v. Emperor* [2] the Privy Council deprecated the taking of too narrow a view of the operation of section 537 of the Indian Code which corresponds to our section 425. Sir John Beaumont there said : " When a trial is conducted in a manner different from that prescribed by the Code (as in *Subramania Iyer's case*) the trial is bad and no question of curing an irregularity arises ; but if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind."

There is also a recent decision of the Supreme Court of India in which the operation of section 537 was considered, see *Slaney v. State of Madhya Pradesh* [3]. Bose, J. expressed the view that the trend of the more recent decisions of the Privy Council, and indeed all later-day criminal jurisprudence in England as well as in India, has been away from technicality, to regard the substance rather than the shadow, and to see whether even where there has been a non-compliance with the provisions of the Code there has actually been a failure of justice. Chandrasekhera Aiyar, J. pointed out in that case that the gravity of the defect will have to be considered—whether it is a mere unimportant mistake in procedure or whether it is substantial and vital. He said : " If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree it will be an irregularity, and prejudice by way of failure of justice will have to be established." As instances of illegality he mentioned " lack of competency of jurisdiction, absence of a complaint by the proper person or authority specified, want of sanction prescribed as a condition precedent for a prosecution, in short, defects that strike at the very root of jurisdiction."

What then should be said regarding the omission to record the evidence of the officer who produced the accused in court on the first day ? Can it be seriously argued, in the absence of any application that he be called as a witness, that the omission caused prejudice to the accused ? I have no doubt that the omission falls within section 425.

The appeal is dismissed.

Appeal dismissed.

[1] *A. I. R. (1927) P. C. 44.* [2] *A. I. R. (1947) P. C. 67.*
[3] *A. I. R. (1956) S. C. 116.*