1949 *Present :* **Basnayake J.**

VETHANAYAGAM, Appellant, *and* INSPECTOR OF POLICE, KANKESANTURAI, Respondent

S. C. 1,484—M. C. Mallakam, 5,660

Criminal Procedure Code—Recording of verdict—Postponement—Illegality or irregularity—Sections 190 and 425.

A magistrate should record his verdict immediately after taking the evidence in terms of section 190 of the Criminal Procedure Code. The failure to do this is an illegality and not a mere irregularity and is not therefore curable under section 425.

Samsudeen v. Suthoris (1927) 29 N. L. R. 10 dissented from.

APPEAL from a judgment of the Magistrate, Mallakam.

R. L. Pereira, K.C., with *C. S. Barr Kumarakulasinghe* and *Sivagurunathan*, for accused, appellant.

A. C. M. Ameer, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 31, 1949. BASNAYAKE J.—

The appellant and seven others were charged with offences punishable under sections 140, 141, 433, 434, and 409 of the Penal Code. The proceedings commenced on April 12, 1948. The case for the prosecution was closed on September 25, 1948. At the conclusion of the evidence for the defence on October 15, 1948, the learned Magistrate made the following order: "Defence closed. Verdict 20/10." On October 20, 1948, the learned Magistrate made the following order :

"I find the first accused guilty on counts 1, 2, 3, 4, 5, 6, and 9. I convict him on the said counts. I impose a fine of Rs. 10 on each of the said seven counts, in all a fine of Rs 70. I acquit the other accused."

At the same time the learned Magistrate indicated that he would pronounce his reasons on October 22, 1948, and on that day they were read in open court in the presence of the accused.

Learned counsel for the appellant submits that the learned Magistrate should have recorded his verdict on October 15 and that in postponing it for October 20 he has acted in violation of section 190 of the Criminal Procedure Code. He submits that that violation of the statute is an illegality which vitiates the conviction.

Section 190 reads :

> " If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence."

It is submitted by learned Crown Counsel on the authority of the case of *Samsudeen v. Suthoris* [1] that the verdict need not be recorded forthwith after taking the evidence. I find myself unable to agree with the opinion expressed by Dalton J. in that case. He seems to take the view that the Magistrate may form his decision as to the guilt or innocence of the accused at any time after the taking of the evidence is over, but at the same time he regards it essential that the verdict must be recorded forthwith after the finding of the verdict, and without any time elapsing between the two. This seems to me, and I say so with the greatest respect, an impractical view of the section. The finding of the verdict is a mental process and it is only when the Magistrate declares his decision that it can be known that that mental process is over. If the finding need not be declared in court at the end of the evidence, and any period of time may be taken to arrive at the finding, it will be almost impossible to ascertain when the finding was actually reached in order to test whether it was forthwith reduced to writing in the form of a verdict. The Magistrate himself may not be able to say exactly at what point of time in his own mind he formed the conclusion that the accused is guilty or not. There are other reasons why the view that the verdict must be recorded immediately upon the termination of the taking of the evidence is to be preferred. The section fixes the point of time at which the Magistrate has to make his finding, viz., after taking the evidence for the prosecution and defence, and such further evidence (if any) as he may of his own motion cause to be produced. There is nothing in the section which supports the view that the finding of acquittal or guilt may be made at any time after the taking of evidence is over. The word " after " unqualified as it is in this context means immediately after. The finding of acquittal or guilt must therefore be declared in open court immediately after the evidence is concluded. The section requires that that finding must be forthwith reduced to writing in the form of a verdict of acquittal or guilt as the case may be.

[1] *(1927) 29 N. L. R. 10.*

The earlier decisions of this Court do not support the view taken by Dalton J. In the case of *Venasy v. Velan* [1] decided in 1895 under the Code of 1883 Bonser C.J. says :

> " Now, I have already stated in another case that I think it most desirable that Magistrates and District Judges should state their finding as to the guilt or innocence of the accused immediately at the conclusion of the trial, and that, if the impression left upon their minds by the prosecution, after hearing all the evidence, is so weak and unsatisfactory that they are unable to say whether they consider the accused to be guilty or not, they should give the accused the benefit of the doubt and acquit."

These observations were made at a time when the provision of the Criminal Procedure Code corresponding to section 190 was not expressed in such definite and peremptory terms. Section 223 of the Criminal Procedure Code of 1883 reads :

> " If the police magistrate, upon taking the evidence referred to in the last preceding section, and such further evidence as he may of his own motion cause to be produced, finds that no case against the accused has been made out, which, if unrebutted, would warrant his conviction, the Magistrate shall record an order of acquittal. Nothing in this section shall be deemed to prevent a police court from acquitting the accused at any previous stage of the case, if, for reasons to be recorded by the police magistrate, he considers the charge to be groundless."

In the case of *The Queen v. Kiriya* [2] Bonser C.J. gave expression to similar sentiments in commenting on the failure of a District Judge to record his verdict immediately upon the termination of the trial. His remarks are appropriate to the question under discussion and bear repetition. It will be useful if I begin by quoting section 275 of the Code in relation to which they were expressed. It reads :

> " When the case for the defence and the prosecutor's reply (if any) are concluded, and the assessors' opinion, if the trial has been with the aid of assessors, has been recorded, the court shall proceed to pass judgment of acquittal or conviction. If the accused person is convicted, the court shall proceed to pass sentence on him according to law."

It will be seen that the section does not expressly require the Court to pass judgment immediately upon the termination of the trial. The Judge took a week to deliver his judgment. Bonser C.J. observes at page 102 :

> " But there is a serious irregularity in this case which, to my mind, is fatal to the conviction, and that is, that at the conclusion of the trial the District Judge instead of stating at once his verdict, reserved it for a week. No reason for such a postponement is recorded, and there was nothing in the facts of the case, as they appear on the record, to justify any such delay. Such a proceeding is, in my opinion, not warranted by the Criminal Procedure Code. Section 275 which deals

[1] *(1895) 1 N. L. R. 124.* [2] *(1894) 3 S. C. R. 100.*

with trials by District Judges provides that [here are quoted the material parts of the section]. By that I understand that forthwith on the conclusion of the trial, the Judge is to state whether he finds the prisoner guilty or not guilty of the offence charged, and that 'the judgment of acquittal or conviction' corresponds to the verdict in a jury trial."

After discussing section 371 of the Code of 1883, Bonser C.J. proceeds to say :

"It must be remembered that a District Judge trying a prisoner without assessors has to perform a double function. As regards the issues of fact, he is a jury ; as regards questions of law, he is a judge. Now, whoever heard of a jury being allowed to reserve their verdict for a week ? In my opinion it is the duty of the District Judge, acting as a jury, to record at once, at the conclusion of the trial, his finding on the issues of fact. It may be that he would be justified in reserving to a later day the formal statement of the reasons for his verdict, but that his duty is to declare and record at once his verdict of guilty or not guilty, is to my mind clear."

In the course of the same judgment Bonser C.J. says :

"It is in my opinion of the utmost importance that the verdict on which depends the prisoner's liberty, should be given at once, while the impression made by the evidence is fresh in the mind of his judge. A subsequent reading over the notes of evidence is by no means the same thing as the fresh and lively impressions made by the oral testimony of the witnesses. A story which looks very cogent and convincing on paper, may, when heard from the lips of the witnesses, be anything but satisfactory, and for a judge to wait until the impression made by the conduct and demeanour of the witnesses, which are often more important than their words, has faded from his mind, and nothing is left, but the dry bones of notes of evidence, is, in my opinion, an irregularity, which is fatal to the interests of justice."

It is convenient and appropriate to mention at this point that section 214 of our present Criminal Procedure Code is different from the corresponding provision of the Criminal Procedure Code of 1883 in that it provides that the verdict shall be recorded by the District Judge "forthwith or within not more than twenty-four hours ".

I now come to the cases under the Code of 1898. In *Rodrigo v. Fernando* [1] Withers J. says at page 177 :

"It is very important that a Magistrate should observe the requirements of section 190 of 'The Criminal Procedure Code, 1898' which enacts that a Magistrate shall, after taking 'the evidence for the prosecution and defence, *forthwith* record a verdict of acquittal or guilt as he may find'. If this point had been pressed, I might have had to send the case back for a re-trial, which would not have been at all satisfactory."

[1] *(1899) 4 N. L. R. 176.*

In a later case, *P. C. Panadure* 9,292 [1], Lawrie A.C.J., in quashing the proceedings in that case, expressed the following view :

" I think it was *ultra vires* to give a verdict a month after the trial. It must be given forthwith."

These decisions were followed by Pereira J. in the case of *Assistant Government Agent, Kegalla, v. Podi Sinno et al.* [2] The case of *Peris v. Silva* [3] is in my opinion not an authority for the proposition that the failure to record the verdict as required by section 190 of the Criminal Procedure Code is not a fatal irregularity. In that case although the oral evidence was concluded before the date on which the verdict was recorded the case was postponed to enable the accused's proctor to tender certain documentary evidence. On the day fixed for the taking of the documentary evidence after the documents had been tendered the court recorded its verdict of guilty and fixed another day for pronouncing the reasons for the verdict. Wendt J. observes in that connexion : " I am not prepared to hold that the mere fact of a Police Magistrate's judgment not having been pronounced ' forthwith ' as required by section 190 of the Procedure Code, is fatal to its validity. It is at most an irregularity of procedure which, if it has occasioned a failure of justice and not otherwise, may be a ground for reversing or altering the judgment of a competent court." With great respect I wish to say that section 190 does not require that the reasons for the verdict should be recorded forthwith. All it requires is that a verdict of acquittal or guilt as the case may be should be recorded forthwith after the taking of evidence is over. In *Sahul Hamid v. Bamadu* [4] Maartensz A.J. purporting to follow the opinion of Wendt J. in *Peris v. Silva* (*supra*) held that the failure to comply with section 190 of the Criminal Procedure Code was not fatal to the conviction in that case as the delay in recording the verdict had not occasioned a failure of justice. One other case, viz., *The King v. Fernando* [5] deserves mention although it is a decision on section 214 of the Criminal Procedure Code. In that case Wendt J. held that the fact that the verdict of a District Judge is recorded after the time within which he is required by section 214 to record his verdict does not vitiate the conviction. With great respect I find myself unable to share that view. I prefer to follow the view taken by Bonser C.J., Withers J., and Laurie A.C.J., in the earlier decisions I have cited. Enactments regulating the procedure in the courts are as a rule imperative [6] and non-compliance therewith is fatal to a conviction. The fact that the observance of the statute is a duty imposed on a court or public officer and not on a party makes no difference to the imperative effect of the enactment. The cases of *Howard v. Bodington* [7] and *R. v. Chorlton Union* [8] appear to support that view. It is a well-known rule that an accused person cannot waive any procedural statutory requirements even though they

[1] *(1901) 5 N. L. R. 140.*
[2] *(1914) 18 N. L. R. 28.*
[3] *(1905) 3 Balasingham's Reports, p. 165.*
[4] *(1926) 4 Times 145.*
[5] *(1905) 2 Balasingham's Reports, p. 46.*
[6] *Maxwell on Interpretation of Statutes, 9th Edn., p. 377.*
[7] *(1877) 2 P.D. 203.*
[8] *(1872) L. R. 8 Q.B. 5.*

be intended for his benefit [1]. Sections 190 and 214 of our Criminal Procedure Code are two such provisions the failure to observe which cannot be waived.

The only question that still remains to be decided is whether section 425 of the Criminal Procedure Code cures the failure to comply with section 190. But before I discuss that section I think I should record my opinion that in section 190 of the Criminal Procedure Code the word " forthwith " means " immediately after " and not " within a reasonable time after " the taking of the evidence is over. Discussing the meaning of the word immediately in a similar procedural enactment, Cockburn L.C.J. observes [2] :

> " I think that the words ' immediately ' and ' forthwith ' mean the same thing ; they are stronger than the words ' within a reasonable time ', and imply speedy and prompt action, and an omission of all delay, in other words, that the thing to be done should be done as quickly as is reasonably possible."

I now come to section 425. It reads :

> " Subject to the provisions hereinbefore contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—
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> (*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or
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> (*b*) of the want of any sanction required by section 147 ; or
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> (*c*) of the omission to revise any list of assessors,
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> unless such error, omission, irregularity, or want has occasioned a failure of justice."

In the instant case the Magistrate's failure to comply with the provisions of section 190 is not an error or omission in the judgment or other proceedings. Nor can it be said to be an irregularity in the judgment or other proceedings. Non-observance of a procedural statute is an illegality and not a mere irregularity as was laid down in the case of *Smurthwaite v. Hannay* [3]. This view was adopted with approval in the case of *Subramania Ayya v. King Emperor* [4].

For the above reasons I set aside the conviction of the appellant with liberty to the prosecution to institute fresh proceedings against him in regard to the subject matter of the charges on which he has been convicted.

Appeal allowed.

[1] *Queen v. Samaranayake and others (1892) 1 S. C. R. 335.*
Park Gate Iron Co. v. Coates (1870) L.R. 5 C.P. 634 at 639.
Reg v. Bertrand (1867) L.R. 1 P.C. 520.
[2] *The Queen v. The Justices of Berkshire (1879) 48 L. J. M. C. 137.*
[3] *(1894) A.C. 494 at 501.*
[4] *(1901) 28 Indian Appeals 257.*