1930

[IN REVISION.]

Present : **Dalton J.**

NADA RAJAH *v.* GOPALAN.

P. C. Mullaittivu, 10,890.

Criminal Procedure Code, s. 152 (3)—*Summary trial by police Magistrate as District Judge—Where accused has previous convictions—Prevention of Crimes Ordinance, No.* 2 *of* 1926, *s.* 6 (2).

Quaere, whether a Police Magistrate, who is also District Judge, trying an accused person summarily, under section 152 (3) of the Criminal Procedure Code, is bound to discontinue summary proceedings on receipt of a certificate under section 6 (2) of the Prevention of Crimes Ordinance to the effect that the accused is a registered criminal.

APPLICATION for revision by the Solicitor-General.

Crossette Thambiah, C.C., in support.

December 2, 1930. DALTON J.—

This is an application by the Solicitor-General on behalf of the complainant, in revision. The respondent does not appear.

The application sets out that the respondent was charged with housebreaking by night and theft of jewellery. The Police Magistrate, being also a District Judge having jurisdiction to try the offences, was of opinion that the offences might properly be tried summarily. He set out his reasons for his conclusion, and thereupon tried the respondent under the provisions of section 152 (3) of the Criminal Procedure Code. Upon being charged he pleaded guilty. The Judge then remanded him for identification. Subsequently, it having been certified that respondent had at least twice previously been convicted and sentenced to not less than a year's rigorous imprisonment, respondent admitted the previous convictions and was then sentenced to one year's rigorous imprisonment and four years' preventive detention.

The Solicitor-General now asks that the proceedings be set aside and the case be remitted to another Magistrate to take non-summary proceedings.

It is argued for the Solicitor-General that the trial Judge should have acted under the provisions of section 6 (2) of Ordinance No. 2 of 1926, and on receipt of the certificate in respect of the finger prints, have discontinued the summary proceedings and commenced non-summary proceedings.

The section however only refers to a Police Magistrate. In this case the summary trial was by a District Judge who had complied with all the requirements of the law to clothe himself with all the powers and jurisdiction of that office. Was he any more for the purpose of this case a Police Magistrate ? Was he not for the nonce nothing more or less than a District Judge ? His original appointment, it must be remembered, is Police Magistrate and District Judge, and not Police Magistrate only. Does section 6 apply to a District Judge who also happens to be a Police Magistrate, acting under section 152 (3) ?

The Judge in this case appears to have been in two minds. After trying the case summarily as District Judge, he appears to have applied sub-section (1) of section 6 by having the finger prints taken. When the certificate is however obtained, he does not apply the provisions of sub-section (2) but at once proceeds to sentence the respondent.

Mr. Thambiah has referred me to Ordinance No. 8 of 1896, which set out the law as it stood before the enactment of section 152 (3) of the Code. That Ordinance seems to me to provide in fairly definite terms that a Police Magistrate who acts under the provisions of that Ordinance and tries a case as a District Judge, completely rids himself, so far as that particular case is concerned, of his character or quality of Police Magistrate and is nothing more and nothing less than a District Judge with all the powers of such an officer. Crown Counsel agrees with me there, but he suggests that section 152 (3) makes a change in that respect. Section 152 (3) of the Criminal Procedure Code takes two sections of that Ordinance and in fewer words appears to me to re-enact the provisions of the Ordinance. I cannot see the change that is suggested.

There are however decisions of this Court, in the course of which it is definitely stated, *obiter* so it would appear, that a Judge who is both a Police Magistrate and a District Judge, when acting under the provisions of section 152 (3), is nothing but a Police Magistrate, with the punitive powers of a District Judge added. I must admit that I have some difficulty in seeing why that should be so. That opinion is strongly expressed however by that experienced Judge, De Sampayo J., in the case reported in the footnote to page 379 of 18 *N. L. R.* De Sampayo J. further stresses that opinion in the full Court case, *Madar Lebbe v. Kiri Banda*[1], but the only question for decision there was whether a Police Magistrate, who happened also to be a District Judge, trying a case summarily within his powers as a Police Magistrate could in such a case exercise his larger punitive powers. The answer was definitely "no". That decision shows that the two functions must be kept quite separate and distinct, and whilst performing the duties of and exercising the powers of a Police Magistrate, those duties and powers cannot be affected or augmented by powers and duties one exercised in quite another capacity.

In a recent unreported case (Supreme Court Minutes of February 7, 1930, Police Court, Dandagamuwa, No. 4,802) Lyall Grant J. has expressed an opinion which is directly in point. He states there that he cannot see anything in Ordinance No. 2 of 1926 which entitles a Magistrate acting as Additional District Judge to deal Summarily with the case of a reconvicted criminal. On the contrary, he states the provisions of section 6 are imperative. That of course is again assuming the point on which I have some difficulty, namely, whether the Judge was at the time of trial for the purpose of the case a Police

[1] 18 *N. L. R.* 376.

Magistrate at all. In the case before him, as in the case, I am now trying the respondent is not represented and so no argument is presented from the other side.

Mr. Thambiah has urged that a difficulty would arise under section 10 (1) of Ordinance No. 27 of 1928, if any other interpretation is placed upon the words " Police Magistrate " as used in section 6, but I am unable to see any difficulty. The procedure laid down in section 10 (1) applies to both the Supreme Court and the District Court. It is obvious that cases might arise in both these Courts in which the antecedents of accused persons (*e.g.*, persons from outside the Island) were unknown at the time of committal for trial or even later. Such a person might admit previous convictions after conviction on the charge before the Court, or the Court might, after such conviction, allow a second indictment to be presented on a charge of being an habitual criminal.

I do not wish to make an order differing from previous orders without hearing full argument on the point. That I have not had the benefit of here. The course, then, that I propose to adopt is to allow the application in revision but reserving to the respondent the right to raise the plea of *autre fois convict*, that is, that he has been tried by a Court of competent jurisdiction for the offence and convicted, in any subsequent proceedings against him, for the same offence. If he is advised to raise the plea, the question of the construction of section 6 to which I have called attention and upon which I feel a difficulty can be threshed out. If it is not raised I presume it will not be thought worth while to raise it.

The proceedings, therefore, will be set aside subject to that reservation and the matter remitted for non-summary proceedings before another Magistrate. If, on a trial following such non-summary proceedings, a plea of *autre fois convict* is upheld, these proceedings and the conviction the subject-matter of this application will stand.

Set aside.