

1941

Present : Howard C.J.

PERERA v. PERERA.

593—*M. C. Negombo, 32,527.*

Postponement of trial—Absence of material witness—Reasonable efforts to secure attendance—Criminal Procedure Code, s. 289 (5).

Where the evidence of a witness, who is absent, is material and reasonable efforts have been made to secure his attendance, the Magistrate should adjourn the trial.

A PPEAL from a conviction by the Magistrate of Negombo.

J. A. P. Cherubim, for the accused, appellant.

A. A. Rajasingham, C.C., for the complainant, respondent.

November 20, 1941. HOWARD C.J.—

In this case Mr. Cherubim on behalf of the appellant asks for a new trial on the ground that the Magistrate heard the case without allowing an adjournment in order that the appellant might summon what he said was a material witness. The Magistrate in refusing this application for an adjournment was apparently impressed by the fact that the prosecuting Inspector was going on leave for a period of 25 days. He also stated on the record that there was no proof that the summons could not have been served on the witness in question as it was returned without any endorsement and also that there was no proof that the summons was handed to the headman for service on the witness.

Now section 289 (5) of the Criminal Procedure Code provides that no inquiry or trial in a Magistrate's Court shall be postponed or adjourned on the ground of the absence of a witness unless the Magistrate has first satisfied himself that the evidence of the witness is material to the inquiry or trial and that reasonable efforts have been made to secure his attendance. It is obvious that if these conditions existed, the Magistrate should have granted an adjournment. There is nothing on the record to show whether the Magistrate addressed his mind to the question as to whether the evidence of this witness was material. In view of the fact that the accused stated that the evidence was material, it must be taken that his evidence was material. With regard to reasonable efforts having been made to secure the attendance of this witness it appears that five days previously the accused had taken out a summons ordering his attendance. It, therefore, seems to me, that both those conditions existed and in such circumstances an adjournment should have been granted.

I, therefore, allow the appeal, set aside the conviction and sentence and remit the case to be tried by another Magistrate.

Set aside.