Present : Schneider A.J.

1920.

MUDIYANSE *v.* APPUHAMY *et al.*

432—P. C. Kurunegala, 8,211.

Warrant against accused—Surrender of accused to Court—Charge explained from warrant—Criminal Procedure Code, s. 187.

Where an accused person against whom a warrant was issued surrendered to Court, the Magistrate explained the charge from the warrant.

Held, that it was a sufficient compliance with the requirement as to framing a charge.

"The warrant is in writing, and contained all the particulars which a formal charge should contain under the provisions of chapter XVII. of the Procedure Code. It is in every sense identical with a formal charge."

Where two accused were charged in the same plaint, one accused surrendered to Court after the other was convicted, and the new

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Magistrate recalled the witnesses and read over to the accused the evidence already recorded, and put further questions to the witnesses and submitted them for cross-examination—

Held, that the procedure followed was sanctioned by section 297 of the Criminal Procedure Code, and that it was not necessary to hold an entirely independent trial.

Croos-Dabrera, for second accused, appellant.—There has been no charge framed. The Police Magistrate has read the charge from the warrant. It has been consistently held that where an accused surrenders it is not sufficient to read the charge from the warrant. The omission to frame a charge is a fatal irregularity, and the conviction is therefore bad. *Mendis v. Fernando*,[1] *Gunewardene v. Lebbe*,[2] *Dunuwila v. Singho*,[3] *Inspector of Police v. Elaris*,[4] *James Appu v. Egonis Appu*,[5] *Sanders v. Vally Thampan*,[6] *Silva v. Peiris*.[7] A contrary decision was arrived at in *Hendrick v. Palis Appu*[8] and *Singho v. Perera*,[9] but it is submitted that the true construction of section 187 of the Criminal Procedure Code, regarding the framing of charges, is contained in the earlier decisions. Section 187 (1) distinctly says that when an accused is brought up otherwise than on a summons or warrant the Magistrate shall frame a charge. When an accused surrenders it cannot be said that he was brought up. Nor can it be said under section 187 (2) that he appears on a warrant.

The procedure adopted by the Magistrate at the trial is irregular. The two accused were tried on different occasions. When the second accused was tried the witnesses should have been examined afresh. Instead of doing this, the Magistrate has simply read over the evidence led at the trial of the first accused. This is obnoxious to the provisions of sections 156 (1), 297, and 298 of the Criminal Procedure Code. The Magistrate had no opportunity of observing the demeanour of the witnesses. He has been influenced by the evidence given at trial of first accused. These irregularities have caused grave prejudice to the second accused.

Cur. adv. vult.

July 8, 1920. SCHNEIDER A.J.—

The proceedings in the trial of this case were initiated by a report under the provisions of section 148 (*b*) of the Criminal Procedure Code, 1898, made by a Police Inspector charging one Appuhamy as the first accused and this accused, the appellant, as second accused, with theft of a buffalo. According to the evidence the first accused was seized as he and this accused were removing the animal, but

[1] *(1900) 4 N. L. R. 104.*
[2] *(1911) 15 N. L. R. 183.*
[3] *(1915) 3 B. N. C. 50.*
[4] *(1916) 6 B. N. C. 27.*
[5] *(1916) 3 C. W. R. 363.*
[6] *(1914) 1 C. A. R. 55.*
[7] *(1919) 6 C. W. R. 279.*
[8] *(1915) 1 C. W. R. 194.*
[9] *(1919) 6 C. W. R. 278.*

this accused, who was seen and identified by some of the witnesses, managed to escape by running away. The Magistrate recorded, in the presence of the first accused, the evidence of the complainant on April 7, 1920, the day on which the first accused was brought to Court, and directed a warrant to be issued against this accused. He postponed the trial for April 16. On that date it was reported that this accused was not to be found. He directed the warrant to be re-issued for April 27, and then for May 6. On that day he tried the first accused in the absence of this accused and convicted him of the offence, and ordered a proclamation to issue for the attendance of this accused. On May 10 this accused surrendered to the Court. The charge was explained to him from the warrant. He pleaded "not guilty," and the trial was fixed for May 20. By that date the Magistrate who had dealt with the case up to that point had been transferred, and his successor proceeded with the trial of this accused. He re-called the witnesses who had given evidence previously, read to them their previous evidence, put further questions to them again in examination-in-chief, and submitted them for cross-examination. These witnesses were all cross-examined by this accused. Upon the evidence so recorded he convicted this accused. The findings of fact by the Magistrate were not questioned, except, incidentally, as connected with the objections which I am now proceeding to consider. Two objections were urged. One was that no charge had been framed, and that the explaining of the charge from the warrant is not a sufficient compliance with the requirement to frame a charge. In support of this contention counsel for the accused referred me to a number of cases. It seems to me that I need refer to two of them only, as they alone appear to be in point. They are the cases of *James Appu v. Egonis Appu*,[1] and *Silva v. Peiris*.[2] These cases do clearly support the contention; but in spite of my great regard for the opinion of my brother De Sampayo upon any point of law, I do not feel disposed to follow his ruling in those cases in deciding the present. I would rather adopt the ruling in *Hendrick v. Palis Appu*,[3] which was followed by me in *Assan Singho v. Perera*.[4] The facts of this case may be regarded as bringing it within the provisions of section 187 (1) and (3) of the Criminal Procedure Code. The warrant, in this instance, is in writing, and contained all the particulars which a formal charge should contain under the provisions of chapter XVII. of the Procedure Code. It is in every sense identical with a formal charge. I would, therefore, hold against this objection.

A second objection was as to the manner in which the evidence was recorded. It was contended that the witnesses should have been examined *de novo*, and that the trial of this accused should have been regarded as a proceeding entirely independent of the trial

[1] *(1916) 3 C. W. R. 363.*
[2] *(1919) 6 C. W. R. 279.*
[3] *(1915) 1 C. W. R. 194.*
[4] *(1919) 6 C. W. R. 278.*

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of the other accused. This objection, it seems to me, is not sound. The trial of this accused is part and parcel of the trial of the other accused. They were charged in the same plaint with having committed the same offence jointly. It is only the absence of this accused which prevented his trial taking place at the same time as the trial of the other accused. Therefore, it appears to me that section 297 sanctions the procedure which the Magistrate followed. The fact that the one Magistrate tried the first accused while the other tried this accused does not vitiate the proceedings either, in view of the provisions of section 89 of the Courts Ordinance, 1889.

I therefore dismiss the appeal.

Appeal dismissed.