1940 **Soertsz, Hearne and Keuneman JJ.**

HERATH *v.* JABBAR.

479–479A—M. C. Kandy, 62,200.

Criminal Procedure—Evidence improperly recorded in absence of accused—Necessity for calling witnesses afresh—Illegality—Criminal Procedure Code, s. 297 (Cap. 16).

Where evidence is improperly recorded against an accused in his absence, there is no compliance with the law in reading over the evidence to him. The witnesses should be required to give their evidence *de novo* in his presence.

The use against an accused person at his trial of evidence improperly recorded against *him* is an illegality, which vitiates his conviction.

THIS was a case referred to a Bench of three Judges by Hearne J.

The facts are stated in the reference as follows:—

This is an appeal by the first and second accused in case No. 62,200 of the Magistrate's Court of Kandy.

On May 30, 1939, the police instituted criminal proceedings against both the accused under section 148 (*b*) of the Criminal Procedure Code and, on that day, the Magistrate recorded in the presence of the second accused alone the evidence of one Kulugammana and one Jayawardene. The second accused was charged from the charge sheet and the Magistrate ordered a warrant to issue against first accused. He stated he was trying the case as Additional District Judge. On June 14 (the first accused not having been arrested), the Magistrate, in his absence and in the presence of the second accused, recorded the evidence of four other witnesses—Piyadasa, Ramen, Ratnasekere and Cornelis. On July 4, both the accused were present, Kulugammana was recalled, his previous evidence was read over, additional questions were asked, and he was cross-examined by Counsel for both the accused. The same procedure was adopted in the case of Jayawardene, Piyadasa, Ramen, Ratnasekere and Cornelis. Further witnesses were also called, the accused entered on their defence, and were eventually convicted.

It should be noted that the first accused was not treated as having absconded, there was no evidence before the Court to the effect that there was no immediate prospect of arresting him, and the evidence taken on June 14 was not taken under the provisions of section 407 of the Criminal Procedure Code. The question referred was whether the witnesses who gave their evidence on June 14, in the absence of the first accused, should have given their evidence in his presence, *de novo* on July 4.

L. A. Rajapakse (with him *H. A. Wijemanne* and *Jayamanne*), for first accused, appellant.—This is a case where the accused were tried summarily under Chapter 18 of the Criminal Procedure Code. The general rule is that all the evidence at the trial must be taken in the presence of the accused: see sections 189 and 297 of the Criminal Procedure Code, *Parupathen v. Kandiah* [1] and *Lawrence v. The King* [2]. This rule is intended

to prevent false evidence being given which the accuser may be reluctant to give in the presence of an accused, though he may be prepared to give it in the accused's absence. Also, to enable an accused to watch the demeanour of an accuser when he makes his accusations: *Attorney General, N. S. W. v. Bertrand*[2], *Queen v. Bishonathpal*[4].

There are exceptions to this rule:—(1) Where an accused is absconding (not merely absent), depositions may be taken under section 407 of the Code. These may be read in evidence under sections 32 and 33 of the Evidence Ordinance; (2) A deposition of a medical officer or the report of a Government Analyst under section 406 of the Code; (3) Commissions for recording a witness' evidence under sections 401 and 402 of the Code; (4) Evidence taken prior to the issue of process under section 151 (ii.) or under section 150 where the accused is unknown; and (5) In certain statutory offences like the Motor Ordinance or the Paper Currency Ordinance. In certain minor offences the Magistrate may dispense with the personal attendance of the accused; in such cases the evidence must be recorded in the presence of his pleader: see section 154 of the Code. Apart from these exceptional cases, the general rule is that all the evidence must be taken in the presence of the accused. Thus, under section 358 of the old Criminal Procedure Code, No. 3 of 1883, as well as under section 353 of the Indian Criminal Procedure Code, which are both similar to our present section 297 of the Code without the proviso, the evidence recorded prior to the issue of process could not be *read,* and those witnesses submitted for cross-examination. The witnesses had to give that evidence by word of mouth and afresh, in the presence of the accused: see *2 Chitterly and Rao (2nd edition) pages 1861–1862.* Similarly in the English law, the entire body of evidence must be led in the presence of the accused upon his trial: see *9 Hailsham, pages 104–106* et seq.

Apparently with a view to expediting the work in summary trials the law was amended enabling the Magistrate to *read* the evidence given by witnesses prior to the issue of process, provided such witnesses were tendered for cross-examination by the accused. This was the proviso added to section 297 by the Ordinance No. 22 of 1890.

This view is strengthened because under the revised legislative enactments the words "when the magistrate proceeds to try the accused he shall read over to him the evidence if any recorded prior to the issue of process" have been omitted from section 189. The reason is that the proviso to section 297 provides for it. Moreover the proviso in section 297 refers to evidence that has been legitimately recorded. It cannot refer to evidence that cannot be legitimately recorded. A proviso does not introduce new matter. It qualifies the substantive words in the enactment.

Mudiyanse v. Appuhamy[5] took a contrary view. It is a single-judge decision and it is submitted that it is wrong. Under our Code, therefore,

[1] *30 N. L. R. at p. 141.*
[2] *13 Law Recorder at p. 115.*
[3] *4 Moors Privy Council Cases p. 460.*
[4] *12 South W. R. (Cr.) p. 3.*
[5] *22 N. L. R. p. 169.*

evidence supportive of the plaint, led before process issued may be *read* out, but all other evidence (except the exceptions) must be given *orally* in the presence of the accused.

This is not an irregularity curable by section 425 of the Code. It is an illegality and is fatal to the conviction: see *Police Vidane, Kandana v. Amaris Appu* [1]; *2 Chitterly and Rao (2nd edition), page 1862.*

R. R. Crossette-Thambiah, C.C., for complainant, respondent.—The reference reads:—"The evidence of these witnesses could not have been *recorded* in the absence of the accused unless one of the exceptions applies and the facts do not fall within any exception of the Code of which I am aware or which has been brought to my notice".

The evidence of these witnesses could have been recorded in the absence of the first accused under section 188 of the Code. In doing so the Magistrate exercised a wise discretion. He had before him two accused jointly charged with the same offences. There was no suggestion that there would be much delay in securing the attendance of the first accused. Therefore, acting under section 188, the Magistrate recorded some of the evidence in the presence of one accused and gave a short date for the trial of the case. By doing so he avoided the waste of time which would have resulted from two sets of cross-examination and caused no real prejudice to the first accused.

[KEUNEMAN J.—But the evidence was not recorded as against the first accused.]

It was evidence duly recorded in the case. That is the only point taken in the reference.

[HEARNE J.—I meant to say "as against the first accused". I was there meeting a point raised by Crown Counsel.]

In that case it will be necessary to consider the true scope of section 297. The Code of 1883 was amended by Ordinance No. 22 of 1890. The then Attorney-General in moving the first reading of that Ordinance stated that the object was "to simplify the procedure in summary cases and expedite the trial of accused persons". See *Ceylon Hansard (1890 to 1896), page 7.* Referring to section 12 of the Ordinance, which is the present section 297, the Attorney-General said "The evidence of witnesses who had been examined during the absence of an accused will not be taken *de novo* when the accused is present or is brought up under arrest, but such evidence will be read over to the witnesses in the presence of the accused and he will be given the opportunity to cross-examine". This evidence was duly recorded in the absence of the first accused. Section 297 is imperative and requires that "such evidence *shall* be read over to the accused". Sections though framed as provisos upon preceding sections may contain matter which is in substance a fresh enactment. *See Craies on Statute Law, 1923 ed., p. 195.* In two local cases where the Magistrate had acted in a manner which was grossly irregular it was held that section 297 did not apply. In *Police Vidane, Kandana v. Amaris Appu (supra)* the Magistrate ordered the accused out of Court when it was intimated to him that the accused intended to give evidence. When the accused came back into Court to give evidence the Magistrate refused to allow the evidence taken against him in his absence to be read on the

[1] *25 N. L. R. 400.*

ground that section 297 of the Code did not require him to do so in the circumstances of the case. Bertram C.J. rightly characterized such an error as fatal. In *Cornelis v. Uluwitike* [1], U was charged before Mr. M, Magistrate of Galle. Mr. M recorded certain evidence and decided that no charge lay against U. Subsequently one R was tried by another Magistrate and the witnesses who had been heard before Mr. M on the charge against U were called as witnesses for the prosecution on the charge against R, and the Magistrate read out to the witnesses the evidence given by them on the previous charge against U and then examined them further. Bonser C.J. held that such procedure was not justified by section 297 but that even such an irregularity was not such as to amount to an illegality as the accused had not been prejudiced in any way. In the present case the Magistrate acted in no such unreasonable manner.

Cur. adv. vult.

March 7, 1940. HEARNE J.—

In this case which has been referred to us the Magistrate took cognizance on May 30, 1939, of criminal proceedings against two named accused persons on a report made to him under section 148 (*b*) of the Criminal Procedure Code. The second accused was before the Court and, after recording certain evidence in his presence, he directed a warrant to issue against the first accused-appellant.

A fortnight later, on June 14, he recorded further evidence, which affected the first accused, in his absence but in the presence of the second accused. It could not be argued that this evidence, *in so far as it affected the first accused*, could have been recorded in his absence by virtue of any of the exceptions to the general rule that "all evidence taken at inquiries and trials shall be taken in the presence of the accused". In particular the exception referred to in section 151 has no application. That section permits the examination on oath of a complainant or any other person who can speak to the facts of the complaint to enable a Magistrate to decide whether process should issue against an accused person who is not in custody. In this case, however, a warrant had already been issued on May 30. It is to be noted that the first accused was not regarded as having absconded. In that event different considerations would apply (section 407).

Counsel for the Crown did not, in fact, seek to bring the facts of the case within section 151. It was tentatively submitted by him that the evidence recorded on June 14, might properly have been recorded against the first accused under the provisions contained in the last paragraph of section 188, but as this section unambiguously refers to an accused who is present the argument was abandoned.

The question of law which has been referred to us is, in effect, whether the witnesses, whose depositions were taken on June 14, in the circumstances I have mentioned, should have given their evidence *de novo* in the presence of the first accused after his arrest, or whether the reading of the recorded depositions in the presence of the witnesses to the accused with the opportunity given to him of cross-examining them is a sufficient compliance with the law ?

[1] *1 N. L. R. 248.*

The answer is to be found in the provisions of section 297. The section lays down in the first paragraph that "all evidence taken at inquiries or trials shall be taken in the presence of the accused" unless his personal attendance has been dispensed with or unless one of the specific exceptions of the Code is applicable: and in the second paragraph, that in the latter case "the evidence" of which the accused would otherwise have no notice "shall be read over to *him*".

The second paragraph of section 297 clearly refers to evidence which has been properly recorded against an accused in his absence. The evidence to which I have referred was improperly recorded as against him in his absence and there was, therefore, no compliance with the law in merely reading it to him. The witnesses should have been required to give their evidence afresh in his presence.

In my view the use made at a trial of an accused person of evidence improperly recorded against him is an illegality and a conviction founded upon such evidence cannot be sustained.

I would allow the appeal and remit the case for trial of the appellant before another Magistrate.

SOERTSZ J.—I agree.

KEUNEMAN J.—I agree.

Set aside.