1949 *Present :* **Dias J.**

JAYASINGHE, Petitioner, *and* ATTORNEY-GENERAL, Respondent

S. C. 65—Application for revision in M. C. Colombo, 1,035A

Criminal Procedure Code—Arrest of suspect without warrant—Subsequent production before Magistrate—No summary of statements of witnesses—Order of remand—Irregularity—Prejudice—Curable—Section 126A—Courts Ordinance—Section 36.

Where a person arrested without a warrant is produced before the Magistrate under section 126A of the Criminal Procedure Code and the report is not accompanied by a summary of the statements made by the witnesses examined in the course of the investigation, an order remanding the suspect is irregular. Such irregularity however does not vitiate the order of remand if it has caused no prejudice to the suspect and the Supreme Court can apply the provisions of section 36 of the Courts Ordinance.

APPLICATION to revise an order of the Magistrate, Colombo.

E. B. Wikremanayake, K.C., with *K. C. Nadarajah* and *M. Markhani*, for the petitioner.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 24, 1949. DIAS J.—

This is an application to revise the order of remand made by the Magistrate, Colombo, on February 17, 1949, in regard to three suspects who had been arrested without a warrant in connection with an alleged daylight robbery in the city of Colombo of over three lakhs of rupees which were being conveyed from the Ceylon Turf Club by car for deposit in the bank. It is stated that in the same transaction there is an allegation of attempted murder, and that one person has been murdered. I have been informed that the police are engaged in Island-wide investigations in order to bring the culprits to book. Hitherto eight suspects in all have been arrested. One was admitted to bail, while the other seven are on remand. The application for revision is in regard to three of them, namely, Simon de Silva Jayasinghe, P. Vincent Fernando and C. E. Sylvester Fonseka, the seventh, third and second suspects respectively.

The submission made on their behalf is that the orders remanding them to the custody of the Fiscal under section 126A of the Criminal Procedure Code must be quashed because the report furnished by the police under section 126A (1), when the suspects were produced before the Magistrate, does not contain " a summary of the statements of witnesses examined in the course of the investigation relating to the case in connection with which the suspects had been arrested ". Counsel argues that even though the police investigation began on January 31, and is still proceeding, nevertheless, it is a condition precedent laid down by statute, that the police report which accompanies a person who has been arrested without a warrant must contain a summary of the statements (if any) made by each of the witnesses examined in the course of such investigation relating to the case. It is contended that this not having been done, the proceedings are vitiated and that, consequently, the remand is bad. It is argued that, even though the statements taken in the course of the

police investigation are voluminous, and incapable of being summarised within the time available to the police before they produce the suspect before the Magistrate, this does not matter. If there are statements of witnesses examined during the course of the investigation relating to the case in connection with which the suspects have been arrested, a summary of such statements must be appended to the report under section 126A. The failure to do so, it is submitted, prevents the Magistrate from remanding them to the custody of the Fiscal under section 126A (2). The question is whether this submission is correct ?

Section 126A was added to the Criminal Procedure Code by Ordinance No. 31 of 1919, section 6. Therefore, in construing that section it is necessary to consider certain other sections of the Code which have a bearing on section 126A.

Section 32 of the Criminal Procedure Code empowers a Peace Officer to arrest a person without a warrant, and without an order from a Magistrate (*inter alia*) who has been concerned in the commission of any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been so concerned. It is not in dispute that the arrests in this case were lawful.

Section 36 provides that a person who has been arrested without a warrant shall, without delay, subject to his being enlarged on what is called " Police Bail ", be taken before the Magistrate. Section 37 makes it clear that the police cannot indefinitely hold an arrested suspect. The section says that no Peace Officer shall detain in police custody a person who has been arrested without a warrant " for a longer period than, under all the circumstances of the case, is reasonable ; and such period shall not exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate " In the present case, the three suspects were arrested on February 16, 1949, and were produced before the Magistrate on the following day. The contention for the petitioner is that during those twenty-four hours, besides sending the suspects to the Magistrate with a report of the arrest under section 126A (1), the police should have prepared a summary of the statements, if any, made by each of the witnesses examined in the course of such investigation relating to the case. Assuming for argument that it is alleged that a conspiracy existed for this robbery, it follows that this summary must, in the case of each and every suspect as he is arrested, contain a summary of the statements of the witnesses examined from January 31, 1949, up to February 17, 1949. This may be a task impossible of fulfilment within the twenty-four hours available between the arrest and the production of the suspect before the Magistrate.

Before section 126A was added to the Code, section 126 dealt with the situation which would arise where " upon an investigation " under Chapter XII of the Code the police were satisfied that there " is not sufficient evidence or reasonable grounds of suspicion to justify the forwarding of the accused to a Magistrate's Court ". In such a case the suspect was to be released on police bail and directed to appear before the Magistrate if and when so required. In other words, the

police investigation was completed and it was found that there was no evidence against the suspect. Section 127 dealt with the case where " upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid ". In such a case, subject to the taking of police bail in proper cases, the police " shall forward the accused under custody before a Magistrate's Court ". Both sections 126 and 127 contemplate that the police investigation has been completed within the period of twenty-four hours allowed to them under section 37. In neither case do the sections require the police to send a summary of the statements recorded at the inquiry.

Section 126A deals with a case where the police investigation could not be completed within twenty-four hours from the time of the arrest. The section reads as follows :—

> " Whenever an investigation under this Chapter cannot be completed within the period of twenty-four hours fixed by section 37, and there are grounds for believing that the information is well founded, the officer in charge of the police station . . . . shall forthwith transmit to the Magistrate . . . . a report of the case, together with a summary of the statements, if any, made by each of the witnesses examined in the course of such investigation relating to the case, and shall at the same time forward the accused to such Magistrate ".

In order to bring section 126A into action the following conditions must exist :

1. *A suspect must have been arrested without a warrant under section 32 of the Criminal Procedure Code.*

2. *The police investigation cannot be completed within twenty-four hours from the time of the arrest as fixed by section 37.*

3. *The officer in charge of the police station must have grounds for believing that " the information is well founded ".*

What is the meaning of the word " information " as used in section 126A (1) ? A suspect may be arrested without a warrant under section 32 (*a*) if he has been concerned in the commission of a cognizable offence, or (*b*) against whom a reasonable complaint has been made, or (c) credible *information* has been received, or (*d*) a reasonable suspicion exists of his having been so concerned—see section 32 (1) (*b*) of the Criminal Procedure Code. Sections 126 and 127 refer to " sufficient evidence or reasonable grounds of suspicion ". Section 126 of our Code appears to be derived from section 169 of the Indian Criminal Procedure Code, while section 127 is based on section 170 of the Indian Code. Section 126A is modelled on section 167 of the Indian Code, the relevant words of which are as follows :—

> " Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for

believing that *the accusation* or information is well founded, the officer in charge of the Police Station . . . . shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate ".

It is puzzling why the draftsman of section 126A while departing from the Indian Section, did not refer to the various conditions specified in our section 32 (1) (*b*). It is quite possible to envisage a case where, as the police inquiry proceeds, the combined effect of the statements of various witnesses and the logic of circumstances may indicate to the investigating officer that a particular person, not yet arrested, has been concerned in the offence, or that a reasonable suspicion exists of his having been so concerned, without any particular person having made a complaint against him, or without any information having been received against him. If the police officer reaches such a conclusion he can arrest that person, as he would be entitled to do under section 32. It is because the investigating officer had grounds for believing that his " information " was well founded that he forwarded the suspect to the Magistrate. If not, he would have acted under section 126. Of course, one cannot say that the view of the investigating officer is not well founded, until either the investigating Magistrate discharges the suspect, or until the trial Judge or Jury acquits him. I agree with Counsel that there cannot be " grounds for believing that information is well founded " except on some evidence direct or circumstantial.

4. *The officer in charge of the police station must " forthwith " transmit to the Magistrate " a report of the case " and at the same time forward the suspect to the Magistrate.*

A report " of the case " does not mean a report " on the case ". For example a " report of a death " means an intimation that a death has occurred. A " report on a death " means something more. When a person reports " on " something, besides intimating the fact, he gives details of the circumstances under which the fact reported took place. There have been five reports in all submitted by the police to the Magistrate up to date. In my opinion section 126A does not expect the police officer, in a case like the present, to reiterate in each fresh report what he has already intimated in his earlier reports. The fifth report with which alone we are concerned draws attention to the earlier reports. Seven suspects were produced and their remand pending the completion of the police investigation was asked for.

5. *The report shall be accompanied by a summary of the statements— if any—made by each of the witnesses examined in the course of the investigation relating to the case.*

This is the point stressed by the petitioner, The words " if any " indicate that the Legislature contemplated a case where a suspect has been arrested without any witnesses having been examined. Obviously, in such a case there cannot be a summary of the statements to be sent with the report. There is no evidence in the report which enables me

to say whether any statements of witnesses have, in fact, been recorded implicating these suspects. What is the position when, from the magnitude of the investigation, or the time available to the investigating authorities being insufficient to prepare the summary within the twenty-four hours allowed them, a suspect has to be forwarded without the summary ? The law does not compel a person to do that which is impossible of fulfilment. It is argued for the petitioner that this is a penal enactment affecting the liberty of the subject and that, therefore, section 126A should be strictly construed. I agree. As I have pointed out before, there is no evidence before me that there are statements recorded in the course of the investigation relating to the cases of these suspects. It is to be noted that after the objection was taken in open Court on February 17, 1949, and the Magistrate had made order remanding the suspects till February 25, 1949, the Magistrate, in view of the point taken, appears to have called upon the police to produce all the papers relating to the investigation. He has made a minute, dated February 17, 1949, at 9 p.m., stating that from 7.35 p.m., on that day he was engaged in perusing the police investigation files of which there were a number. He says that he did this in view of the submission made by learned counsel that a summary of the statements made by each witness should also be submitted with the report made to the Court under section 126A. The Magistrate proceeds as follows :—" These suspects were arrested late last night. They had to be produced in Court without delay . . . . Considering the circumstances of this matter and the large number of statements recorded, it was impossible for the police to have submitted a summary of each one of these statements to the Court with the report made when the suspects were produced in Court, that is to say, the time at their disposal was too short for that purpose. Another reason for my perusing these statements was to find out if the information is well founded. If the information was not well founded, I would have vacated the order remanding these suspects. I am satisfied that the information is well founded ". It has been submitted that something done *ex post facto* cannot regularise something irregularly done earlier. I am inclined to agree with that submission as a general proposition. I have looked at the Magistrate's minute not in order to regularise that which is irregular, but in order to satisfy myself whether there were in existence statements of witnesses which should have been summarised and appended to the report under 126A. The Magistrate's minute indicates that there are such statements. Therefore, the question narrows itself down to this. There has been a breach of the provisions of section 126A inasmuch as the report to the Court was not accompanied by a summary of the statements of the witnesses. I am also satisfied that the reason for this omission is that the time allowed by law between the arrest of the suspects and their production before the Magistrate was insufficient to allow such a summary to be made. Whatever the reason, there has been a breach of the provisions of section 126A of the Criminal Procedure Code.

But does it necessarily follow that in the circumstances I am face to face with, such an irregularity which vitiates the orders of remand ? I am of opinion that no fatal irregularity has been caused because there

has been no prejudice whatever caused to the suspects. Section 36 of the Courts Ordinance (Chapter 6) provides :

> " No judgment, sentence or order pronounced by any Court shall on appeal or revision be reversed, altered or amended on account of any error, defect or irregularity which shall not have prejudiced the substantial rights of either party ".

In my opinion this is a case to which the provisions of section 36 of the Courts Ordinance may well be applied.

I consider it is proper to draw attention to a matter which appears frequently to be overlooked in Magistrates' Courts. No police officer or Magistrate investigating a criminal case can be compelled to divulge from whence he obtained information as to the commission of an offence—see section 125 of the Evidence Ordinance. This prohibition extends not only as regards the identity of the informant, but also to the channels through which such information reaches the authorities. Furthermore, section 122 (3) of the Criminal Procedure Code absolutely prohibits any statements recorded in the course of a Chapter XII enquiry from being seen by or disclosed to an accused person or his agents. I am of the view that when a report under section 126A (1) contains a summary of the statements recorded in the course of a Chapter XII enquiry, this summary must not be inspected by or made available to the suspect, the accused, or their legal advisers ; for the summary of the statements referred to under section 126A (1) refers to statements recorded in the course of a Chapter XII enquiry. I am further of opinion that the summary of the statements referred to in section 126A (1) must not be incorporated in the report and should under no circumstances be stitched into or appended or annexed to the Court record. Under no circumstances should certified copies of this summary be supplied under section 434 of the Criminal Procedure Code. I have been informed that it is the practice in most Magistrates' Courts to file such statements in the record and to furnish copies of them to the defence. In my opinion, this is not only irregular but illegal as such a practice contravenes the provisions of the Criminal Procedure Code. Police officers should record the summary of the statements referred to in section 126A on a separate sheet of paper, and this together with the report should be forwarded to the Magistrate under confidential cover and should be in the Magistrate's personal custody or in his safe or in some place where neither his staff nor anyone else can have access thereto. I note that the proceedings in the present case have already been numbered 1035 as a record of the case. It is a question meriting administrative attention as to whether a Magistrate's Court case should be numbered as a record until proceedings have been initiated under section 148 of the Criminal Procedure Code. I believe in District Courts, until the indictment is received from the Attorney-General, no District Court criminal record is opened or numbered, and in my opinion this is what should be done in Magistrate's Court cases too. Until proceedings are initiated under section 148 there can be no case record.

The application is dismissed.

Application dismissed.