1969 *Present :* de Kretser J.

W. JOSEPH, Appellant, *and* F. A. WOOTLER (S. I. Police), Respondent

S. C. 140/69—M. C. Dambulla, 15,776

Criminal Procedure Code—Section 152 (3)—Trial before Magistrate's Court—Joinder of a charge relating to an offence summarily triable with a charge relating to an indictable offence—Failure of Magistrate to assume jurisdiction under s. 152 (3) —Effect—Penal Code, ss. 219, 323.

Two offences were alleged to have been committed by the accused-appellant in the course of the same transaction. One of them was triable summarily and the other was triable only by a District Judge. The Magistrate, who was also District Judge, convicted the appellant of both offences without assuming jurisdiction under section 152 (3) of the Criminal Procedure Code.

Held, in appeal, that it was permissible to separate the illegal trial of the indictable offence and sustain the conviction on the remaining summarily triable count. In such a case it cannot be contended that the entire trial is vitiated by reason of the failure of the Magistrate to assume jurisdiction under section 152 (3) of the Criminal Procedure Code.

Ramaswamy v. Gunaratne (72 N. L. R. 187) not followed.

APPEAL from a judgment of the Magistrate's Court, Dambulla.

V. Karalasingham, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 11, 1969. DE KRETSER, J.—

The Magistrate of Dambulla (Mr. Siva Selliah) convicted the appellant on 15.1.68 on charges framed against him : (1) That he had voluntarily caused hurt to P.C. Wimal a Public Servant in the discharge of his duty, an offence punishable under section 323 of the Penal Code. (2) That he had offered resistance to his lawful apprehension by S.I. Wootler and P.C. Wimal an offence punishable under section 220A of the Penal Code.

Counsel for the appellant submitted and Counsel for the Crown agreed that the charge under section 220A was triable only by a District Judge and as the Magistrate had not assumed jurisdiction as D.J. in terms of section 152 (3) of the Criminal Procedure Code the conviction was bad in law. He further submitted and Crown Counsel agreed with him that the failure of the Magistrate to assume jurisdiction on the charge under 220A vitiated the conviction under section 323 as well which was otherwise

triable by a Magistrate summarily. He relied for this proposition on the case of *Ramasamy v. Gunaratne*[1] decided by Pandita Gunawardene J. said Pandita Gunawardene J., "The question to which I have to address myself is whether it is permissible for me to quash the conviction and sentence on count 3 and proceed to consider the remaining counts which are properly triable by the Magistrate.....Neither the researches of Counsel nor my own into this aspect of the matter has resulted in the discovery of any authority for the proposition that in circumstances such as are present here it is permissible to separate the illegal trial of the offence under count 3 and consider the remaining summarily triable counts. It would appear that the basic principle which militates against such a is that the trial course by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences which have been joined together under section 180 (1) as forming part of the same transaction."

It would appear a pity that the joint research of all concerned failed to discover the case of the *King v. Jayasinghe*[2] in which Ennis J., held that a Police Magistrate may in the *same case*, exercise jurisdiction for the trial of one offence as Magistrate and for the trial of another offence under section 152 of the Cr. P. C. Apart from the authority of the *King v. Jayasinghe*[2], with great respect I find myself unable to agree with the reasoning in *Ramasamy v. Gunaratne*[1]. For while it is true that there is one trial in the sense of one proceeding it appears to have lost sight of the fact that the accused was being tried for several offences which the law allows to be tried in the same proceeding in terms of the chapter on the Joinder of Charges in the Criminal Procedure Code.

At one stage there was doubt whether where an accused was charged in the same proceedings with several offences some of which were triable summarily by the Magistrate's Court and others were not it was possible to make use of section 152 (3) at all, and that if the Magistrate gave himself jurisdiction under that section a conviction for all or any of the offences was wholly bad. These doubts were removed by the decision of the Full Bench in *Mardar Lebbe v. Kiri Banda*[3] which hold there is no objection to a Magistrate applying section 152 (3) to a case where an accused is charged with several offences, some of which are triable by the Magistrate's Court and others are not *provided he inflicts no higher punishment in respect of the lower offences than he has ordinary jurisdiction to impose.* The words I have underlined in my view clearly point to the recognition of the fact that the Magistrate's jurisdiction in regard to offences which he could try as Magistrate always remains and was in no way affected by the assumption of higher punitive powers assumed under section 152 (3) in regard to an offence not otherwise triable by him which he found convenient by this device to try in the same proceeding. Equally the failure to assume higher punitive

[1] *(1968) 72 N. L. R. 187; 75 C. L. W. 85.* [2] *(1915) 18 N. L. R. 374.*
[3] *(1915) 18 N. L. R. 376.*

powers in regard to offences not summarily triable by him could not in any way affect the trial of offences he had the right to try and had tried summarily in the same proceeding. It is useful to note what De Sampayo J., said in a case now to be found at page 379 of 18 N. L. R. "Misleading language is often employed to describe the nature of the proceedings authorised by section 152 (3). The Police Magistrate, for instance, is said 'to act as District Judge', but this is wholly incorrect. The Police Magistrate acts and can only act as Police Magistrate, the only difference being that, being also a District Judge, he has power to impose a sentence which ordinarily a District Judge may impose..... The wrong application of section 152 (3) involves a mere irregularity." It would appear to me that not making use of section 152 (3) would also be no more than an irregularity which would need setting right by the Supreme Court in revision in regard to the offence in reference to which the Magistrate should have assumed those powers if he dealt with it. For these reasons I have not the slightest doubt in affirming the conviction under section 323 in the instant case which the Magistrate was competent to try and in regard to which I see no blemish in the Magistrate's finding of fact. But I am of the view that the submission of Counsel for the appellant with which Crown Counsel agreed, that a charge under 220A can only be tried as District Judge, is not correct. The confusion appears to have arisen as a result of what should have been a charge under section 219 of the Penal Code being wrongly laid under section 220A.

In order to see whether a Magistrate has the right to try a chargo under section 220A one must consult the first schedule to the Cr. P. C. and in doing so one finds that the offence under section 220A is triable in the District Court as well as in the Magistrate's Court and the maximum sentence is six months' R. I. or a fine. If a Magistrate has jurisdiction to try a charge summarily he could not under section 152 (3) assume jurisdiction to punish it more severely, *vide* the *King v. Jayasinghe* 18 N. L. R. at page 374. So that if the charge was correctly laid under section 220A I am of the view that the Magistrate was right when he decided that he had correctly tried the charge summarily. But it appears a pity that the very crudity with which the charge is set out in the Charge Sheet did not make him look into the question whether there was in fact a charge made out under section 220A which was enacted to cover the cases not provided for under sections 219, 219A, and 220 of the Penal Code, e.g, a case where the lawful apprehension was not for an offence but for any other purpose. A perusal of the facts appears to me to indicate that the charge against the accused was wrongly laid under this section. The evidence of S.I. Wootler that he explained the charge (presumably the charges of House-breaking and Robbery) to the accused who in spite of his doing so offered resistance to his apprehension appears to point to an offence, if any, under 219 and of course if the offence was under 219 it would be column 8 of the First Schedule of the Cr. P. C. as Soertsz J., pointed out in *Uparis v. The Police* [1] which would determine

[1] *(1946) 47 N. L. R. 378.*

the jurisdiction of the Court. A reference to column 8 shows that the Magistrate could not try this offience if the person resisting lawful apprehension had been charged with an offence not cognisable by the Magistrate's Court. In the instant case on the scanty evidence led on this aspect of the matter the offence appears to be House-breaking by night and Robbery of guns over Rs. 500 in value, so that the offence would appear to be under section 219 and triable by the District Court. The conviction under 220A is set aside by me for the reason that the charge should not have been laid under that section. I do not direct that the case should go back to the Magistrate either to take non-summary proceedings or to act under section 152 (3) for in my view the punishment imposed by the Magistrate for the offence under section 323 plus the punishment imposed under the Prevention of Crimes Ordinance appears to be adequate in a case in which the offences have happened in the same transaction and largely turn on the same facts.

The appeal of the accused is allowed from the conviction under section 220A. The appeal is dismissed in regard to the conviction and sentence under 323 and section 6 of the Prevention of Crimes Ordinance.

Appeal partly allowed.