1940 *Present :* **Howard C.J.**

VANDERSTRAATEN *v.* MRS. N. M. PERERA *et al.*

697–703—M. C. Colombo, 7,930.

Police Ordinance, ss. 76 (2) and 97 (Cap. 43)—Failing to disperse when ordered by Police Officer—Trial by Magistrate—Absence of certificate by Attorney-General—Fatal irregularity.

Where a charge under section 76 (2) of the Police Ordinance is tried by a Magistrate, the want of a certificate by the Attorney-General or a competent Crown Counsel as required by section 97 of the Ordinance is a fatal irregularity.

Sourjah v. Pannaloka (2 C. W. R. 133) followed.

APPEAL from a conviction by the Municipal Magistrate of Colombo.

H. V. Perera, K.C. (with him *S. Nadesan*), for the accused, appellant.

R. G. C. Pereira, for the second accused, appellant.

J. R. Jayawardana (with him *S. N. W. Wijekoon*), for the fourth accused, appellant.

S. de Zoysa, (with him *P. H. W. de Silva*), for the fifth accused, appellant.

N. M. de Silva, for the sixth accused, appellant.

R. N. Ilangakoon, for the seventh accused, appellant.

S. Nadesan, for the eighth accused, appellant.

J. W. R. Ilangakoon, K.C., A.-G. (with him *Nihal Gunasekera, C.C.*), for the complainant, respondent.

[1] *(1874) L. R. 7, H. L. 348.*

[2] *39 N. L. R. 459.*

December 4, 1940. HOWARD C.J.—

In this case the eight accused were charged (1) with failing to disperse when ordered to do so by Police Officers specified in the charge and thereby committing an offence punishable under section 76 (2) of the Police Ordinance (Cap. 43), and (2) with behaving in a riotous or disorderly manner on the public highway and thereby committing an offence punishable under section 2 of the Vagrants Ordinance (Cap. 26).

Objection is taken to the first charge on the ground that the Magistrate had no jurisdiction to try such a charge by reason of the provisions of section 97 of Chapter 43. Section 97 is worded as follows:—"Whereas the punishments assigned to certain offenders under this Ordinance are beyond the jurisdiction of Magistrates' Courts, but it would be frequently more advantageous that such offences should be brought to trial before such Courts in order that the punishment of offenders may be more prompt even though it should be less severe. It is therefore enacted that in case of any person committing an offence under this Ordinance and which offence could not otherwise be cognizable by a Magistrate's Court by reason of the punishment to which the same is subject, a certificate shall be presented to any Magistrate's Court, signed by the Attorney-General or by some competent Crown Counsel to the effect that such officer is content that such offence or act shall be prosecuted before such Court, it shall be competent to such Court to take cognizance of such offence or act and to award in respect thereof so much of the punishment assigned thereto as Magistrates' Courts are empowered by law to award". There was no certificate signed by the Attorney-General or by some competent Crown Counsel as required by this section. The Attorney-General has argued that this is a mere technical objection curable by section 425 of the Criminal Procedure Code inasmuch as a competent Crown Counsel conducted the prosecution before the Magistrate. But it is obvious that the Crown Counsel had not applied his mind to this section, otherwise he would most certainly have mentioned to the learned Magistrate that a certificate was required and would have undertaken to produce one in the course of the case. It is significant, moreover, that the learned Magistrate had not appplied his mind to this provision because in spite of the final words of the section he imposed a fine of Rs. 200, the maximum fine designated by section 76 (2) but one which he was not empowered by law to award. It was obvious, therefore, that neither he nor the Crown Counsel had addressed their minds to the provisions of this section. It therefore cannot be said that the objection is a mere technical one. Moreover, it cannot be regarded as technical because the accused were deprived of the advantages which would accrue to them by having their case tried in a non-summary manner.

I am of opinion that this defect cannot be cured by section 425 of the Criminal Procedure Code. The Attorney-General agrees that it does not come under paragraph (*b*) where the words "of the want of any sanction required by section 147" are employed, and obviously it cannot come under this paragraph inasmuch as this paragraph refers to sanctions with regard to certain offences under the Penal Code. He has argued that it does come within the words of paragraph (*a*) which read "of any

error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code". In this connection he maintains that such an irregularity has not occasioned a failure of justice. I am of opinion that this irregularity is not curable under paragraph (*a*). If it was so curable, the point would have been taken in the case of *Sourjah v. Pannaloka*[1]. In this case de Sampayo J. decided that the want of a certificate under this section of the Police Ordinance cannot be cured by section 425 of the Criminal Procedure Code because (1) the sanction there referred to is the sanction required by section 147 and (2) because it is only the judgment of a Court of "competent jurisdiction" that can be sustained by operation of that provision. The point was not even argued in this case that paragraph (*a*) would apply. Moreover, so far as this case is concerned a Magistrate's Court without the certificate of the Attorney-General, cannot be regarded as a Court of competent jurisdiction.

For these reasons I am of opinion that the contention of Counsel for the appellants that the Magistrate had no jurisdiction to try the first charge must prevail.

The point that now remains for consideration is whether the conviction of the Magistrate on the second charge can stand in view of the fact that he had no jurisdiction to try the first charge. Mr. Perera has argued that he had no jurisdiction to try the second charge inasmuch as there was a misjoinder of charges. He argued that a charge which a Magistrate had jurisdiction to try could not be joined with a charge which he had no jurisdiction to try. Moreover, he contends that there was a misjoinder of persons inasmuch as these eight accused were charged in one charge, whereas they were not accused of committing this offence jointly. I do not propose to decide these two points for the reason that it is clear on a scrutiny of the judgment of the learned Magistrate that he has confined himself to the facts as they affected the first charge. There is no finding on his part that these accused either jointly or separately behaved in a riotous or disorderly manner on the public highway. In fact, there is nothing in the judgment to show that he had applied his mind to coming to a conclusion on the question whether the ingredients which constitute this offence had been established by the prosecution. Therefore even if I find that the facts do establish the charge, I think it is more satisfactory that there should be a re-trial.

In these circumstances I quash the convictions and sentences on both charges and remit the case to the Magistrate to take non-summary proceedings. After the case has been remitted to the Magistrate, it is open to the Attorney-General, if he sees fit, to confer jurisdiction on the Magistrate to try the case summarily under the provisions of section 97 of the Police Ordinance. I need hardly say that the case must be heard by a different Magistrate.

Quashed.

[1] *2 C. W. R. 133.*