

1963

Present : H. N. G. Fernando, J.

M. A. M. RISHARD, Petitioner, and S. MASHOOR MOULANA and
4 others, Respondents

S. C. 356/62—Application in Revision in M. C. Galle, 23114

Issue of summons against an accused person—Power of Court to recall the summons before it is served—Criminal Procedure Code, ss. 148 (1) (a), 151 (1) proviso 2.

The issue of summons against an accused person is an *ex parte* act, and the Magistrate is entitled to recall the summons so long as it has not been served.

Accordingly, where, in a prosecution by private parties, the Magistrate has failed *per incuriam* to take note of proviso 2 of section 151 (1) of the Criminal Procedure Code when issuing summons against the accused, he may recall the summons, before it is served, and notice the complainant to lead evidence before the issue of process.

APPPLICATION to revise on order of the Magistrate's Court, Galle.

Colvin B. de Silva, with *Issadeen Mohamed* and *A. R. Mansoor*, for
Complainant-Petitioner.

A. H. C. de Silva, Q.C., with *A. H. Mohideen*, for Accused-Respondents.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General, on
notice.

April 5, 1963. H. N. G. FERNANDO, J.—

This was a plaint filed under Section 148 (1) (a) of the Criminal Procedure Code by private parties. It was filed on 30th July, 1962 on which date the learned Magistrate ordered summons to issue for 8th September 1962. There is a further journal entry dated 31st July, 1962, "Issue summons". The absence of a further entry as to the summons in the journal indicates that the summons has not in fact been served.

On 2nd August, 1962 there is a journal entry to the effect that Counsel appeared in Chambers on behalf of the suspects and drew the attention of the Magistrate to section 151 (1) proviso 2 which empowers a court to call any evidence before the issue of process. This minute of the Magistrate satisfies me that on 30th July, 1962 the Magistrate has omitted to direct his mind to the question whether he should record evidence or not before he issued summons. When the provision of law was brought to his notice he decided that he should record some preliminary evidence and he, therefore, recalled the summons and noticed the complainant to lead evidence in terms of section 151 on 16th August, 1962.

The complainant has not been able to make out any reason why he was unable to comply with this notice or to point to any prejudice arising by reason of the Magistrate's decision.

But Counsel for the complainant now argues that the Magistrate had no power to recall the summons. I do not agree. The issue of summons against the accused person is an *ex parte* act and so long as summons has not been actually served, it is, so to speak, a document still within the control and custody of the Court. The order of recall is, therefore, merely a direction to the Fiscal not to carry out the Court's earlier order. It would appear that *per incuriam* the Magistrate failed to take note of section 151 on the first occasion and he has subsequently merely decided to correct his own error. The application to set aside the order of 2nd August, 1962 is refused; but in the circumstances, the Magistrate will have to fix a fresh date for the complainant to lead evidence. He will, thereafter, decide whether or not to issue summons.

Application refused.