1959 *Present :* **Sinnetamby, J.**

G. A. PERERA, Appellant, *and* JA-ELA POLICE, Respondent

S. C. 158—M. C. Negombo, 93374

Criminal procedure—Evidence recorded in the presence of the accused prior to framing of charge—Duty to recall the witnesses at the trial—Criminal Procedure Code, ss. 148 (1) (b), 151 (1) proviso ii, 152 (3), 187, 189 (2), 297, 425.

Evidence—Witness disbelieved in part—Can the rest of his evidence be acted upon ?

Where a Magistrate records evidence in the presence of the accused after service of summons on him and prior to framing of the charge, he should recall the witnesses after the charge is framed, re-examine them and tender them for cross-examination. Accordingly, a witness whose evidence is taken into consideration by the Magistrate in deciding to assume jurisdiction under section 152 (3) of the Criminal Procedure Code must be tendered at the trial for cross-examination.

Before a Magistrate who rejects parts of the evidence of a witness can act upon certain other parts of it, there should be strong corroborative evidence in support of those other parts.

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

S. B. Lekamge, for 2nd Accused-Appellant.

W. Paul, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 14, 1959. SINNETAMBY, J.—

The Police, in this case, filed in Court a report under Section 148 (1) (*b*) charging the three accused with robbery, voluntarily causing grievous hurt and with causing hurt in the course of robbery. The offences are punishable under sections 380, 316 and 382 respectively of the Penal Code. The Magistrate issued summons on the accused.

The Magistrate could have, at this stage, before issuing summons, had he so desired, recorded some evidence in terms of proviso 2 of section 151 (1) of the Criminal Procedure Code. He, however, did not do so. On the day the summons was returnable the accused were present. The Magistrate then proceeded to record the evidence of the prosecuting Inspector, presumably with a view to assuming jurisdiction under section 152 (3). In his evidence, the Inspector stated that Weerasinghe complained that he was assaulted by the three accused, robbed of a purse containing Rs. 64, a driving licence, fountain pen and a wristlet watch

valued at Rs. 200. The witness was not subjected to cross-examination and the Magistrate, thereupon, assumed jurisdiction as Additional District Judge.

Strictly speaking, if the Magistrate fails to record evidence under section 151 (1) proviso (ii) before the issue of summons, once the accused appears on a summons if it is a non-summary case, the Magistrate should take non summary proceedings but if it is a summary case, he should proceed in the matter indicated in section 187 onwards. I can, however, see no valid objection to his recording some evidence in order to assume jurisdiction as Additional District Judge, though he may do so after perusing any police reports that may have been submitted to Court. If he does record evidence it should, in my opinion, be evidence of witnesses to facts and not hearsay evidence of an Inspector who merely recorded the statement of such witnesses. Having recorded the evidence, the Magistrate is naturally affected by that evidence even in regard to the proceedings subsequent to the framing of the charge. Indeed it is after a consideration of that evidence that he decides to assume jurisdiction under section 152 (3). In this case, the Magistrate having assumed jurisdiction charged the accused in terms of the police plaint from a charge sheet. Thereafter, the prosecution led the evidence in support of the charges but the Inspector of Police was not recalled nor was he tendered for cross-examination. It is to be noted that even in the case of evidence recorded in the absence of the accused section 297 of the Criminal Procedure Code requires that such evidence should be at least read over in the presence of the accused and the witness tendered for cross-examination. If that evidence is taken in the presence of the accused section 297 has no application. In the case of *Isidor Fernando v. Roy Perera*[1] it was held that evidence recorded under section 187 (1) cannot be utilised by the Magistrate by merely recalling the witnesses and tendering them for cross-examination. Their evidence must be recorded *de novo* after the charge has been framed. In the case of a witness who gives evidence in the presence of the accused the ordinary rules of evidence as laid down in the Evidence Ordinance should be observed. Section 138 of the Evidence Ordinance provides that every witness shall be examined and then cross-examined if the adverse party so desires, vide also section 189 (2) of the Criminal Procedure Code. In the present case this was not done.

There is no doubt that prejudice would have been caused to the accused by the Judge acting on the evidence of the witness who spoke on robbery by the accused of a purse, fountain pen, and a wristlet watch. It was suggested that only witnesses called at the trial, i.e., after the charge had been framed, who need be tendered for cross-examination. I do not agree. To accede to that proposition it would mean that witnesses whose evidence is recorded in the absence of the accused must under section 297 of the Criminal Procedure Code be tendered for cross-examination but witnesses whose evidence is recorded in the presence of the accused need not be. The difficulty in the present case is caused by the fact that there is no express provision in the Code enabling a Magistrate

[1] *(1947) 48 N. L. R. 203.*

to record evidence after the issue of summons and prior to the framing of the charge. If he does so, he should at least recall the witness and re-examine him. In this case the Magistrate did not do so. One can conceive of a similar situation arising where on a summary charge an accused person is produced by the prosecutor otherwise than on a summons or warrant and the Judge is obliged to record some evidence under the provisions of section 151 (2). Before the amendment of the Code in 1938 there was express provision enabling the accused to cross-examine a witness who is so called. Now there is none.

How then should a Magistrate act when he finds himself in such a situation? The only proper course for him to adopt is to recall the witnesses after the charge is framed, re-examine them and tender them for cross-examination. Otherwise, in the event of an appeal, I am of opinion that the irregularity is not of a kind that can be regarded as cured by the provisions of section 425 of the Code. The appeal in the present case must on this ground alone be allowed but it seems to me that on the merits too the learned Magistrate has come to a wrong conclusion.

The injured man Weerasinghe in his evidence says that the 3rd accused came drunk with some others earlier in the day at about 7.00 p.m. and tried to assault him in his brother-in-law's house. Subsequently, at about 11.45 p.m. when he was coming home a van drove up and a party of people from that van including the three accused began to assault him. In regard to the 1st accused, he said that he dealt a blow with a knife which he warded off but which had alighted on the left ear severing it. He then grappled with the 1st accused when the 2nd accused, a lad of 18 years, brought a log from the car and struck him on the leg fracturing it. He says he was then taken in a passing jeep to the Police Station. The 1st accused also had some injuries one of which according to the Doctor was a lacerated wound 3½ inches long skin deep on the left thigh. The injured man Weerasinghe had a lacerated wound 1½ inches long across the left ear. The Doctor expressed the view that the lacerated wound could not have been caused by a knife for he says that it is a result of a club blow. The complainant was unable to account for the injuries on the 1st accused. Two witnesses were called, namely, Aron Appuhamy and Albert Silva and neither of them could say anything about the fight itself. Albert Silva was awakened by cries and when he came near the scene he saw Weerasinghe getting into a military jeep and going away. He did not speak to Weerasinghe and find out what the trouble was. The other witness Aron Appuhamy says he saw the injured complainant limping and going towards Negombo and the jeep subsequently taking him away. Curiously enough he too did not speak to the injured person nor did the injured man speak to him or tell him who had assaulted him. The 2nd accused alone gave evidence. According to him when he and two others were travelling in the van the accused jumped across the van and stopped it. Then he pulled out the 1st accused and stabbed him with a knife. They struggled and fell down. He thereupon got down and struck Weerasinghe with a log but on the ear. Upon this evidence the learned Magistrate discharged the 1st and 3rd accused but he convicted the 2nd accused of causing grievous hurt. If he was not

prepared to accept the evidence of Weerasinghe in regard to the 1st accused, it is difficult to see on what basis he accepted it as against the 2nd accused. This is particularly so, having regard to the nature of Weerasinghe's evidence that the 1st accused used a knife which severed his ear : a fact which has been established to be untrue by the medical evidence. As against this the injury on the ear is consistent with the evidence of the 2nd accused, namely, that he struck the injured man with a club which alighted on the ear. It is also curious that when the Doctor was in the witness box the prosecution case appears to have been that injury No 1 on the 1st accused was caused by the blunt side of a manna knife. That question was put to the Doctor by the prosecuting officer. Apparently then it was the prosecution case that a manna knife had been used on the 1st accused, presumably by the injured man. It was not suggested that injury No. 1 was inflicted in the course of the struggle because it was only in regard to the other injuries that the doctor was asked if they were caused in the course of a struggle.

The learned Magistrate after reciting the evidence of Weerasinghe in his judgment states that the two witnesses Albert Silva and Aron Appuhamy both corroborated Weerasinghe. That certainly is not correct. They only corroborate him in regard to the cries he raised and are not in any way helpful in establishing the charge. The Magistrate also states that Dr. Fernando corroborates Weerasinghe which again is an incorrect statement. Dr. Fernando far from corroborating contradicts Weerasinghe for he says that the injury No. 1 on the ear was caused by a blunt instrument and not as suggested by Weerasinghe by a knife.

In rejecting the two accused's evidence the Magistrate observes that the 2nd accused stated that he had gone to the Kandana and Ja-ela Police to lodge a complaint and that no evidence was led in support of this but if only the Magistrate had recalled the Inspector after charging the accused, as he should have done, the evidence would most certainly have been forthcoming either in answer to questions asked by the accused or by the Magistrate himself if he desired to ascertain the truth of the 2nd accused's evidence.

In my view, before a Magistrate who rejects parts of a witness's evidence can act upon certain other parts of it, there should be strong corroborative evidence in support of those other parts. The Magistrate in more than one place states that Weerasinghe is supported by his two witnesses and the Doctor : the contrary is the case. On this point the Magistrate has obviously misdirected himself and his conclusions cannot therefore be permitted to stand. The chief objection, however, is the fact that the Inspector's evidence was taken into consideration by the Magistrate in deciding to assume jurisdiction but the same evidence was not subjected to cross-examination. To what extent this evidence influenced the Magistrate in arriving at his verdict, it is difficult to say.

The conviction and sentence of the 2nd accused are accordingly set aside and he is acquitted.

Appeal allowed.