

1947

Present : Wijeyewardene J.

ISIDOR FERNANDO, *et, al.*, Appellants, and ROY PERERA  
(Inspector of Police), Respondent.

65-66—M. C. Negombo, 48,382.

*Criminal procedure—Evidence of witness taken prior to framing of charge—  
Should be recorded de novo at trial—Criminal Procedure Code, ss. 189,  
297.*

The statement of the complainant or any other person recorded by the Magistrate prior to the framing of the charge against the accused cannot be used as evidence at the trial unless it is recorded *de novo*, although it had been taken down in the presence of the accused.

**A** PPEALS against two convictions from the Magistrate's Court, Negombo.

Stanley de Zoysa, for the accused, appellants.

Boyd Jayasuriya, C.C., for the Attorney-General.

*Cur. adv. vult.*

April, 1947. WIJEYWARDENE J.—

On May 23, 1946, the Police filed a report under sections 121 (2) and 131 of the Criminal Procedure Code and produced in custody the three accused—the two appellants and one Walter Fernando. The Magistrate remanded the accused till the following day when they were released on bail. On May 27, the Police instituted the present proceedings by filing a written report under section 148 (b), stating that the accused had committed offences under sections 314 and 315 of the Penal Code. The accused were present on that day. On June 17, Kaithan, the victim of the alleged assault, was examined in the presence of the accused who were represented by Counsel. Thereupon, the Magistrate framed a charge under section 315 against the accused and they all pleaded not guilty.

The evidence given by Kaithan on June 17 was presumably recorded under section 187 (1) of the Code which enacts that "Where the accused is brought before the Court otherwise than on a summons or warrant the Magistrate shall after examination directed by section 151 (2) . . . frame a charge against the accused". In recording this evidence the

Magistrate followed the procedure laid down in section 150 (2) which is made applicable to an examination under section 151 (2) by section 151B.

On September 6, Kaithan was recalled, and he was put a few questions in examination-in-chief and was then cross-examined by Counsel for the accused. Among other witnesses called for the prosecution on that date was Alice who gave definite evidence against the appellants. After hearing the evidence for the defence, the Magistrate convicted the appellants and acquitted Walter Fernando.

It is contended in appeal that the conviction is vitiated by the fact that on September 6, the Magistrate failed to record *de novo* the evidence of Kaithan given on June 17. It is urged that the trial in a case commences only after a charge is read and that the Magistrate has to follow then the procedure laid down in section 189 which reads:—

- “ (1) When the Magistrate proceeds to try the accused he shall take in manner hereinafter provided all such evidence as may be produced for the prosecution or defence respectively.”
- “ (2) The accused shall be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate.”

The section as cited above is section 189 of the Code of 1898 as amended by section 13 of Ordinance No. 13 of 1938. Before the amendment section 189 read:—

- “ (1) When the Magistrate proceeds to try the accused he shall read over to him the evidence (if any) recorded under section 150 [corresponding to the new section 151 (2) and 151 B] and take in manner hereinafter provided all such further evidence as may be produced for the prosecution or defence respectively.”
- “ (2) The accused shall be permitted to cross-examine any person whose evidence has been recorded under section 150 and all witnesses called for the prosecution and called or recalled by the Magistrate.”

The deliberate omission in the amended section 189 of any reference to evidence recorded under the new sections 151 (2) and 151 (B) supports the argument of the defence Counsel that the Magistrate should not have acted on the evidence of Kaithan given on June 17 in convicting the accused. It is, however, argued by Crown Counsel that the Magistrate could have acted on that evidence in view of the provisions of section 297 which reads:—

“Except as otherwise expressly provided all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader :

Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon.”

Clearly the proviso to section 297 does not apply to the present case as the evidence was taken in the presence of the accused. According to the context in which the words "except as expressly provided" occur, those words refer to circumstances where the Code provides for the taking of evidence in the absence of the accused. Thus we are left with that part of the section which says "all evidence taken at the inquiries or trials under this Ordinance shall be taken in the presence of the accused . . . . pleader". But the question still remains when should the Magistrate take such evidence in the presence of the accused so as to be able to act on that evidence for convicting the accused and not merely for the purpose of framing a charge. The answer to that question appears to me to be given in clear terms by the amended section 189 which contemplates evidence taken when the Magistrate proceeds to try the accused and omits all reference to any evidence taken earlier, thus departing from the provisions of the old section 189.

I would, therefore, hold that the Magistrate should not have used the evidence of Kaithan given on June 17, to reach a decision against the appellants.

There is, however, the evidence of Alice which has been accepted by the Magistrate. That evidence justifies the conviction of the appellants. I see, therefore, no reason for reversing the finding of the Magistrate (*vide* section 167 of the Evidence Ordinance).

I dismiss the appeals.

*Appeals dismissed.*

