1972 *Present :* **Deheragoda, J.**

SIMON SILVA, Appellant, *and* KARONCHIHAMY, Respondent

S. C. 467/71—M. C. Matara, 48845

Criminal procedure—Magistrate's Court—Trial of indictable offence with offences triable summarily—Failure to assume jurisdiction under s. 152 (3) of Criminal Procedure Code—Illegality—Criminal Procedure Code, ss. 152 (3), 180 (1), 425—Penal Code, ss. 368 (b), 433, 436.

[1] *(1948) 50 N. L. R. 310.* [2] *(1937) A. I. R. Rangoon 67.*

Where an accused person is charged in a Magistrate's Court on two or more counts and, although one of the counts relates to an indictable offence, the Magistrate goes through the trial without "assuming jurisdiction" under section 152 (3) of the Criminal Procedure Code, the whole of such proceedings are invalidated. In such a case the provisions of section 425 of the Code are not applicable.

Joseph v. Wootler (72 N. L. R. 213) not followed.

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

L. B. Rajapakse, for the accused-appellant.

Malcolm Perera, with *Clarence de Silva* and *John Kitto*, for the complainant-respondent.

June 2, 1972. DEHERAGODA, J.—

Learned counsel for the complainant-respondent quite properly brought to my notice that Count 3 in the charge is not triable summarily by a Magistrate, and that the learned Magistrate has not "assumed jurisdiction" under section 152 (3) of the Criminal Procedure Code in respect of this count. Count 3 reads as follows :—

"That at the same time and place and in the course of the same transaction the accused did commit criminal intimidation to the complainant by threatening to kill the complainant with intent to cause alarm to her and that the accused did thereby commit an offence punishable under section 486 of the Ceylon Penal Code."

In Counts 1 and 2 the accused is charged with offences punishable under sections 433 and 368 (*b*) respectively of the Ceylon Penal Code which are triable summarily by a Magistrate. The learned Magistrate, after trial, convicted the accused on all three counts and sentenced him to three months' imprisonment on each count, the sentences to run concurrently.

The question whether, when there are two or more counts in a trial in a Magistrate's Court and one of them is not triable by a Magistrate and the Magistrate goes through the trial without "assuming jurisdiction" under section 152 (3) of the Criminal Procedure Code, the whole of such proceedings are invalidated has been considered in three reported cases, namely, *Ramasamy v. Gunaratne*[1] (72 N. L. R. 187), *Joseph v. Wootler*[2] (72 N. L. R. 213), and *William v. Inspector of Police, Mirigama*[3] (72 N. L. R. 406).

In the first of these cases Pandita-Gunawardene, J., considered the question whether section 425 of the Criminal Procedure Code could be availed of to regularise such proceedings. He holds the view that such failure on the part of the Magistrate to act in terms of section 152 (3) of the Criminal Procedure Code is an illegality and not an irregularity, which only is curable under section 425 of the Criminal Procedure Code.

[1] *(1968) 72 N. L. R. 187.* [2] *(1969) 72 N. L. R. 213.*
[3] *(1969) 72 N. L. R. 406.*

In the second of these cases de Kretser, J., disagrees with this view. He relies strongly on the Full Bench case of *Madar Lebbe v. Kiri Banda*[1] (18 N. L. R. 376) which held that there is no objection to a Magistrate applying section 152 (3) to a case where the accused is charged with several offences, some of which are triable by the Magistrate's Court and others not, provided he inflicts no higher punishment in respect of the lower offences than he has in his ordinary jurisdiction to impose. This does not support the proposition that a Magistrate can *without "assuming jurisdiction" under section 152 (3) of the Criminal Procedure Code* try at one trial an accused on a charge containing a count, which is not summarily triable by him, together with other counts which are summarily triable. De Kretser, J., appears to have taken the view that there is no objection to following such a procedure so long as the punishment imposed in respect of the lower offences is within the ordinary jurisdiction of the Magistrate. His reason for holding such a view is that the offences which are summarily triable are separable from the offences for the trial of which a Magistrate has to "assume jurisdiction" under section 152 (3) of the Criminal Procedure Code. In the third of these cases Wijayatilake, J., follows the judgment of Pandita-Gunawardene, J., and does not agree with de Kretser, J. Referring to the objection taken by learned counsel for the appellant in that case, Wijayatilake, J., in 72 N. L. R. at page 408 (*supra*) states as follows :—

> "In my opinion this is a substantial objection. The mere fact that the accused was acquitted under this particular count is of no consequence if the proceedings in Court do not constitute a 'trial' within the meaning of the Criminal Procedure Code."

He is of the view that the trials in respect of the five counts in that case were not severable. He goes on to say :

> "It is one trial and the Magistrate has purported to so record the evidence in respect of all the counts. If the Magistrate had no jurisdiction to do so in respect of count 1 and he proceeded to record evidence at this trial clearly he was acting illegally. I do not think such an illegality can be cured by resorting to section 425 of the Criminal Procedure Code."

I might mention at this stage that de Kretser, J., in the judgment reported in 72 N. L. R. at page 213 (*supra*) does not consider the question whether a situation of this kind is curable under section 425 of the Criminal Procedure Code. Wijayatilake, J., agrees with Pandita-Gunawardene, J., that it is not possible to separate an illegal trial from the trial on the counts triable by a Magistrate where there has been a joinder of charges under section 180 (1) of the Criminal Procedure Code, and that an illegality of this nature is not curable under section 425 of the Criminal Procedure Code. He does not see how the principle set out by Ennis, J., in the case of *The King v. Jayasingha*[2] (18 N. L. R. 374) which has been referred to by de Kretser, J., in his judgment could salvage that case, the proceedings at that trial being illegal *ab initio*. He concludes that if it

[1] *(1915) 18 N. L. R. 376.* [2] *(1915) 18 N. L. R. 374.*

was an illegality or irregularity in regard to the sentences, the provision of section 425 of the Criminal Procedure Code could have been invoked ; but it cannot be so done where there has been no trial as the Magistrate had no jurisdiction.

The impact on the accused of following such a procedure is that he has had to fight a battle on two fronts at one and the same time, namely, in respect of offences which are not considered serious enough to warrant an indictment and that in respect of which under the normal rules of procedure he is entitled to the benefit of a non-summary inquiry. He would therefore be handicapped in his defence to Counts 1 and 2 as well.

I would, therefore, prefer to follow the view taken by Wijayatilake, J., and Pandita-Gunawardene, J., and accordingly I quash the proceedings of this " trial " on the ground of the failure of the learned Magistrate to " assume jurisdiction " under section 152 (3) of the Criminal Procedure Code, and set aside the conviction and sentence.

The next question that arises for consideration is whether a re-trial should be ordered in this case. The learned Magistrate in giving reasons has stated that the accused-appellant had admitted in partition proceedings of the District Court that the complainant-respondent was in possession of Lots 18, 19 and 20 depicted in the plan filed of record in that case, and that the accused appellant who was the plaintiff in that case admitted it to be so. Apart from that there is the serious charge made against the accused-appellant that he threatened to kill the complainant in the course of the transaction which is the subject-matter of this charge.

I am, therefore, of the view that this case should go back for a re-trial, and I accordingly send the case back for proceedings *de novo* before another Magistrate.

Case sent back for proceedings de novo.