

1944

Present: **Howard C.J.**

ASSEN, Appellant, and MARADANA POLICE. Respondent.

141—M. C. Colombo, 27,994.

Criminal Procedure—Report from Police Officer—Failure to examine Police Officer—Not a fatal irregularity—Criminal Procedure Code, s. 148 (b).

Where the accused was charged under section 450 of the Penal Code on a report presented by a Police officer in terms of section 148 (b) of the Criminal Procedure Code and the Magistrate without examining on oath the Police officer who brought the accused before the Court in accordance with section 151 (2) of the Criminal Procedure Code tried the accused and convicted him,—

Held, that the failure of the Magistrate to examine the Police officer on oath was not a fatal irregularity.

A PPEAL from a conviction by the Magistrate of Colombo.

E. D. Cosme for the accused, appellant.

E. H. T. Gunasekera, C.C., for the complainant, respondent.

Cur. adv. vult.

March 30, 1944. HOWARD C.J.—

In this case the accused was brought before the Magistrate, Colombo, on November 18, 1943, charged under section 450 of the Penal Code with being found within the premises No. 198/19, Panchikawatta road, Maradana, and failing to give a satisfactory account of himself. A Police officer also presented a report to the Magistrate in terms of section 148 (b) of the Criminal Procedure Code. The Magistrate, without examining on oath the Police officer who brought the accused before the Court in accordance with section 151 (2) of the Criminal Procedure Code, charged the accused and took his plea of "not guilty". The case was then adjourned to December 21, 1943, when the accused was found guilty. On December 27, 1943, he was sentenced to three months' rigorous imprisonment.

It is contended on behalf of the appellant that, having regard to the failure of the Magistrate to examine the Police officer on oath, there was a fatal irregularity in the proceedings which must be quashed. In this connection my attention has been invited to the judgment of Soertsz J. in *Vargheese v. Perera*¹. In that case the requirement of section 151 (2) was also disregarded and the accused was charged from a report which Soertsz J. observed could only be done after observing section 151 (2) and only if the offence disclosed was one punishable with not more than three months' imprisonment. In the case before Soertsz J. the offence was punishable with more than three months' imprisonment. In the present case the offence was punishable with three months' imprisonment. To this extent the facts differ. No doubt strict compliance has not been made with section 151 (2). But is this irregularity fatal? In *Superintendent, Dea Ela Estate v. Mudalihamy*² proceedings were initiated on the written report of the Korale and at the same time the accused was

¹ 43 N. L. R. 564.

² 1 C. W. R. 216.

produced in the custody of a peace officer. Neither the Korale nor the Superintendent of the Estate, the complainant, was examined on oath, but only a watcher of the complainant. Wood-Renton C.J. held that he would not be prepared to hold that the failure of the Magistrate to comply with the requirement of the section would be a fatal irregularity. He said in this connection:—

“ If that were so, we would have to consider the effect of sub-section 4 of section 149, which provides that, where a person is brought before a Magistrate in custody, the Magistrate shall forthwith examine on oath the person who has brought the accused before the Court, and any other person who is present in Court able to speak to the facts of the case. I should not be prepared to hold that the failure of the Magistrate to comply with the requirement of this section, in a case like the present, where the evidence of the watcher was immediately available and where no kind of prejudice resulted to the accused from the non-examination of the peace officer, would be fatal to the proceedings.”

The same view appears to have been taken by Schneider A.J. in *de Silva v. Davith Appuhamy*¹. In that case the Magistrate failed to make the examination as directed by the section (then 149 (4)—(now 151 (2)) and also to frame a charge. The learned Judge held that the failure to frame a charge was a fatal irregularity. He did not, however, hold that the failure to comply with section 149 (4) was a fatal irregularity.

As the accused has not in any way been prejudiced, the failure to comply with section 151 (2) was not a fatal irregularity. I, therefore, affirm the conviction and, in view of the fact that the accused has two previous convictions, I am not prepared to vary the sentence. The appeal is dismissed.

Affirmed.