

1959

Present : Weerasooriya, J.

TIKIRI BANDA, Appellant, and T. PERIMPANAYAGAM (S.I., Police),
Respondent.

S. C. 790—M. C. Kurunegala, 42487

Criminal Procedure Code—Presence of accused “on Police bail”—Charge framed on hearsay statements—Irregularity—Sections 151 (2), 187 (1).

Where an accused person is brought before a Magistrate's Court otherwise than on a summons or warrant, the requirement of section 187 (1), read with section 151 (2), of the Criminal Procedure Code that the Court should examine on oath a person or persons able to speak to the facts of the case excludes hearsay statements being acted upon. In such a case, therefore, it would be a fatal irregularity if the Magistrate frames a charge solely upon the statement on oath of a police officer who speaks only of information received by him from other persons of the commission of an offence by the accused.

APPPEAL from a judgment of the Magistrate's Court, Kurunegala.

A. Nagendra, with *D. W. Abeykoon*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, with *P. Nagendran*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 7, 1959. WEERASOORIYA, J.—

The accused-appellant was convicted of offences punishable under sections 43 and 44 of the Excise Ordinance (Cap. 42) and sentenced to six months' rigorous imprisonment in respect of each offence, the sentences to run concurrently. As he pleaded guilty to the charges no appeal lies against the convictions except on a matter of law. The only point of law certified in the petition of appeal is without any substance and the appeal must, therefore, be dismissed.

But learned counsel for the accused, relying on the decision in *Mohideen v. Inspector of Police, Pettah*¹, submitted that notwithstanding the plea of guilty tendered by the accused his convictions are vitiated by reason of the Magistrate's failure to comply with the provisions of section 187 (1) of the Criminal Procedure Code in regard to the framing of the charges, and on that ground invited me, in the exercise of my powers of revision, to set aside the convictions and remit the case for a fresh trial in accordance with law.

¹ (1957) 59 N. L. R. 217.

It appears from the record that on the 17th November, 1958, when the trial took place, the accused was present "on Police bail" and, therefore, otherwise than on summons or warrant. Section 187 (1) of the Criminal Procedure Code requires the Magistrate in such a case to hold the examination directed by section 151 (2) and to frame a charge thereafter if he is of opinion that there is sufficient ground for proceeding against the accused. The examination directed under section 151 (2) is an examination on oath of the person who has brought the accused before Court and of any other person who may be present in Court able to speak to the facts of the case. Purporting to act under section 151 (2) the Magistrate examined Police Sergeant Perera of the Kurunegala Police who was present and whose evidence is as follows:—

"On 14.11.58 whilst P. C. 5307 and 2256 were on patrol duty they received information to the effect that this produced accused was manufacturing arrack. They proceeded to Hanwella and at a distance they noticed some smoke going up from the jungle and they quietly approached the place and found the accused manufacturing arrack. They arrested the accused in the act with utensils and also found 6 drums of arrack. The accused was taken into custody with productions and produced at station."

On this evidence, which is plainly hearsay, the Magistrate proceeded to frame the charges to which the accused pleaded guilty.

Mr. Nagendra for the accused submitted that in order to frame a charge under section 187 (1) there should be legally admissible evidence on which the Magistrate can form an opinion that there is sufficient ground for proceeding against an accused. Crown Counsel contended, on the other hand, that in holding an examination under section 151(2) the Magistrate may act on hearsay evidence. No previous decision of this Court directly in point was cited to me by counsel, but despite the absence of authority I have no hesitation in taking the view, on a consideration of the relevant provisions of law, that the procedure adopted by the Magistrate in the present case is irregular.

Sections 150 and 151 of the Criminal Procedure Code set out the steps to be taken by the Court after the institution of proceedings and before the issue of process. Section 150 provides that where the offence alleged in any proceedings instituted under section 148 (1) (a) or section 148 (1) (b) is an indictable one the Magistrate may, although no person by name is accused of having committed such offence, examine on oath the complainant or any other person able to speak to the facts of the case. Such examination may be held in private. If after such examination the Magistrate considers there are sufficient grounds for proceeding against any person, he is required to issue process against such person. Section 151 (2) provides that where proceedings have been instituted on any person being brought before a Magistrate's Court in custody without process accused of having committed an offence which such Court has jurisdiction to inquire or try, the Magistrate shall forthwith examine on

oath the person who has brought the accused and any other person present and able to speak to the facts of the case. Under section 151B such examination may be held in private.

In my opinion these provisions, in which the emphasis is on an examination on oath of a person or persons able to speak to the facts of the case, exclude hearsay statements being acted upon for the purpose of any action that may be taken under them. Therefore, section 187 (1) of the Criminal Procedure Code, which requires the holding of the examination directed by section 151 (2), was not complied with by the Magistrate when he proceeded to frame a charge against the accused on the evidence of Police Sergeant Perera. If there was no person present in Court able to speak to the facts of the case the Magistrate should have secured the attendance of such a person and examined him before framing a charge against the accused.

In *Mohideen v. Inspector of Police, Pettah*, (*supra*) it was held that non-compliance with section 187 (1) is a fatal irregularity. Acting in revision I set aside the convictions of the accused and the sentences passed on him and I send the case back for a fresh trial before another Magistrate.

Case sent back for a fresh trial.