1935 *Present :* **Maartensz J.**

THE KING *v.* PODIHAMY *et al.*

148-9—D. C. (Crim.) Kegalla, 2,530.

Criminal Procedure—Accused remanded by District Judge as Police Magistrate —Inquiry held by another Magistrate—Trial before District Judge— Regularity.

An accused person was produced before a District Judge, who was also Police Magistrate, and the Judge in the latter capacity ordered him to be remanded and certain finger impressions to be taken.

Thereafter the accused was charged before another Magistrate, who held the non-summary inquiry and committed him for trial.

***Held,* that it was competent for the District Judge to try the accused.**

APPEAL from a conviction by the District Judge of Kegalla.

Rajapakse (with him *D. J. R. Gunawardene*), for accused, appellant.

Pulle, C.C., for the Crown.

March 14, 1935. MAARTENSZ J.—

This is an appeal from a judgment of the District Judge of Kegalla convicting the first and second accused in the case of criminal trespass, robbery, and causing hurt whilst committing robbery—offences punishable under sections 437, 380, and 382 of the Penal Code.

I see no reason to dissent from the learned Judge's finding of facts and the only question for decision is one of law. The legal objection taken here and in the District Court was as stated in the petition of appeal that " the learned Judge should not have tried the case since he as Police Magistrate had made orders in connection with the non-summary inquiry."

I think the words " in connection with the non-summary inquiry " and not the words " in the non-summary inquiry " were advisedly used, for the orders were made before the plaint was filed against the accused.

The plaint was filed on September 18, 1934, and from that stage the inquiry was held by the regular Magistrate. The offences are alleged to have been committed on September 8. On September 10 these two accused and four others were produced before the District Judge who was

also a Police Magistrate, and he ordered the accused to be remanded till September 14, and their finger impressions to be taken for comparison with some impressions found on certain articles in the house which was broken into.

It was submitted that in terms of section 392 of the Criminal Procedure Code the District Judge was the prosecutor on those dates and was therefore disqualified to try the accused after committal. I do not think that submission is applicable in every case, for a Police Magistrate, who is also a District Judge, may under the provisions of section 152 (3) of the Code try summarily as District Judge an offence after commencing the proceedings as a non-summary inquiry, where the offence though triable by a District Court appears to the Magistrate to be one which he may try summarily. Bonser C.J. held in the case of *Queen v. Uduman*[1] that the discretion should be exercised by a Magistrate immediately after hearing the complainant or other witnesses as required by section 149, and that it was not competent for him to take all the evidence for the prosecution as committing Magistrate and then try the case as District Judge. The Chief Justice applied to section 152 the rule contained in section 18 of the Code that "no District Judge shall, except with the express consent of the accused, try any case which he had committed for trial as Police Magistrate". This section, in my opinion, contemplated that the inquiry would be held to conclusion and the accused committed for trial by the same Magistrate. Under section 157 of the Code the Magistrate when an inquiry is completed sends the case to the Attorney-General with a view to the accused being committed for trial if he finds that there are sufficient grounds for committing the accused for trial. It would be manifestly unfair to the accused for the Magistrate to try him subsequently as District Judge as he has already formed an opinion with regard to the effect of the evidence for the prosecution.

The case would be very different where the Magistrate who committed accused for trial was not the Magistrate who held the inquiry and sent the record to the Attorney-General. But he would not be competent to try the accused except with his express consent for he would be violating the provisions of section 18. Nor in my opinion would it be competent for the Magistrate who held the inquiry and forwarded the record to the Attorney-General to try the case although he did not commit the accused for trial, since it could be urged against him that he had formed an opinion with regard to the evidence and the witnesses in the case.

The orders made by the District Judge in this case as Police Magistrate are of a purely formal character which did not involve the exercise of any discretion with regard to the credit to be attached to the evidence against or available against the accused and it cannot possibly be said that he could not do justice to the accused or that the accused had reason to think that the exercise of justice was not free from suspicion.

I am of opinion, therefore, that the District Judge was not disqualified by the orders he made as Police Magistrate from trying the case, and I dismiss the appeal.

Appeal dismissed.

[1] *(1900) 4 N. L. R. 1.*