1955 *Present :* Gunasekara, J.

SIRISENA PERERA, Appellant, *and* H. G. THEDIAS (Inspector of Police), Respondent

S. C. 785—M. C. Colombo, 2,916/B

Summary trial of non-summary offence—Appeal preferred by accused—Right of Crown to object to summary proceedings on ground of gravity of offence—Criminal Procedure Code, ss. 152 (3), 338 (2)—Penal Code, s. 457.

In a prosecution for forgery punishable under section 457 of the Penal Code the accused-appellant was tried summarily under the provisions of section 152 of the Criminal Procedure Code. The appellant had no objection to his having been tried summarily, and the Crown had no objection either until after the appellant had demonstrated that he was entitled to have his conviction set aside on the merits.

Held, that in the circumstances the gravity of the offence with which the accused was charged was not by itself a sufficient ground for remitting the case for a non-summary investigation.

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

Colvin R. de Silva, for the accused-appellant.

Arthur Kenneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1911) 42 N. L. R. 472.*

July 11, 1955. GUNASEKARA, J.—

The appellant was tried summarily under the provisions of section 152 (3) of the Criminal Procedure Code on a charge of having committed an offence punishable under section 457 of the Penal Code by fraudulently or dishonestly using as genuine a document which he knew or had reason to believe to be a forged document. He was convicted of this offence and sentenced to one year's rigorous imprisonment.

According to the case for the prosecution the appellant had been occupying a house belonging to one M. E. Perera as the latter's tenant and had left it in August, 1953, after Perera had filed an action against him in the court of requests to recover arrears of rent and to have him ejected. The document in question (P1), which is dated the 4th August, 1953, purports to be signed by the appellant and M. E. Perera and states that the appellant had been living in a house belonging to Perera and had on that day "given over the keys to him without having to pay any arrears". There is no evidence as to the custody from which P1 was produced before the magistrate's court, but it was stated in evidence by both Perera and the proctor who appeared for him in the civil action that it had been produced by the appellant at the trial of that action on the 23rd November, 1953, and Perera stated further that it was not a document signed by him or by his authority. Perera was also permitted to say in his evidence in chief that "P1 was sent to the E. Q. D. with some other documents". (One surmises that the letters E. Q. D. stand for Examiner of Questioned Documents.) The only other witness called in the case was the record keeper of the Magistrate's Court of Colombo who produced, marked P2, the record of the action in the court of requests (without stating how he came by it) and also produced, marked P3, "the report of the E. Q. D." that was filed in that case.

The report P3 is inadmissible hearsay, and, no doubt for this reason, the learned magistrate does not refer to it in his judgment. The only matter to which he refers as evidence on the issue of forgery is that the existence of P1 is not mentioned in the appellant's answer in the civil action, which was filed in September 1953. He holds that if the document had been in existence at the time it would have been mentioned in the answer. With all respect to the learned magistrate, I am unable to agree that an omission to plead evidence can be a ground for a conclusion that the evidence did not exist at the time. Moreover, the answer filed by the appellant in the civil case was not in evidence in this case; for although the entire record P2 was produced the only portion of it that was put in evidence was the report P3.

The only evidence there is in the case to prove that P1 is a forgery is Perera's statement that the document was not signed by him or by his authority. This evidence is not discussed or mentioned in the learned magistrate's judgment, and it does not appear whether he would have acted upon it without corroboration. The conviction must therefore be quashed.

It was conceded by the learned crown counsel that the conviction could not be supported, but he maintained that a charge of so grave an

offence should not have been tried summarily and that the case should therefore be remitted to the magistrate's court for non-summary proceedings. In support of this contention he cited the cases of *Sheldon (Inspector of Police) v. Ayosingho* [1] and *Sahabandu v. Wijeman Singho* [2], in which convictions of offences involving forgery or the dishonest use of a forged document were quashed on the ground that in those cases the charges should not have been tried summarily under the provisions of section 152 (3) of the Criminal Procedure Code, and the magistrate was directed to take non-summary proceedings. In each of those cases, however, the accused had appealed on this ground, contending in effect, that if he was to be tried he was entitled to the advantage of a trial on indictment after a preliminary magisterial inquiry. In the present case the appellant has no objection to his having been tried summarily, and the Crown had no objection either until after the appellant had demonstrated that he was entitled to have the conviction set aside on the merits. Until then it appears that both parties were satisfied with the procedure that the learned magistrate adopted in the exercise of his discretion. Neither of them raised any objection at the trial, the accused has not made it a ground of appeal that he should not have been tried summarily, and the Attorney-General has not appealed although he has a right of appeal in terms of section 338 (2) of the Criminal Procedure Code. I do not think that in these circumstances the gravity of the offence charged in this case is by itself a sufficient ground for making an order, in the exercise of the powers of revision vested in this court, remitting the case for a non-summary investigation.

The conviction of the appellant and the sentence passed on him are set aside and he is discharged.

Conviction set aside.

[1] *(1931) 1 C. L. W. 132.*

[2] *(1941) 22 C. L. W. 12.*