1975 *Present :* **Malcolm Perera, J., Ismail, J. and Vythialingam, J.**

V. PREMARATNE and four others, Accused-Appellants, *and* the *Republic of Sri Lanka,* Complainant-Respondent

S. C. 6—10/74—D. C. (Crim.) Anuradhapura No. 1228—M. C. Anuradhapura No. 5902

Criminal Procedure Code—Accused undefended at the trial—Duty of Trial Judge—Effect of S. 296 (1)—Provisions therein imperative.

Held : S. 296 (1) of the Criminal Procedure Code impose upon the Trial Judge the duty of informing the undefended accused person of the right to give evidence on his own behalf and, if the accused elects to give evidence on his own behalf, the Trial Judge should call the attention of the accused person to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them. These provisions are imperative and the Trial Judge must strictly conform to them.

APPEAL against conviction.

Sarath Dissanayake for the 2nd appellant.

Bala Nadarajah with *Miss S. Senaratne* and *S. Subramaniam* for the 3rd Accused-Appellant.

(1st, 4th and 5th Accused-Appellants are absent and unrepresented)

T. Wickremasinghe, State Counsel for the State.

Cur. adv. vult.

February 11, 1975. MALCOLM PERERA, J.—

In this case, the five accused-appellants were indicted at the instance of the Attorney-General, and the charge against them read as follows : " That on or about the 22nd day of November, 1964, at Karavilgoda, Balalwewa, within the jurisdiction of this Court, you did commit robbery of motor car bearing registered No. EN 2657 valued at Rs. 7,000 being property in the possession of Uyanwattage Jamis and that you have thereby committed an offence punishable under section 380 of the Penal Code. "

At the conclusion of the trial, the learned District Judge accepted the prosecution evidence and convicted the five accused-appellants. A sentence of eighteen months' rigorous imprisonment was imposed upon each of the accused persons. The accused-appellants appealed against this conviction and sentence in these appeals.

It has been submitted on behalf of the 2nd accused-appellant that he was undefended in the lower Court and that there is nothing on the face of the record to indicate that the learned Trial Judge informed the accused of his right to give evidence on his own behalf, and if he had elected to give evidence on his own behalf, whether he called his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them. The point that arises for determination is whether the learned District Judge's failure to comply with section 296 (1) is fatal to the conviction. In the case of *King v. Roma* (7 Ceylon Weekly Reporter p. 14), it was held that where the accused was not represented by a pleader and at the close of the case for the prosecution the Judge informed him of his right to give evidence and he elected to do so, the omission to call the attention of the accused to the principal points in the evidence for the prosecution which told against the accused did not vitiate the conviction as the evidence given by the accused showed that he was quite aware of the effect of the evidence against him and was not prejudiced by the omission.

Schneider A. J. said : " In the present case the evidence shows that the accused were quite aware of the effect of the evidence against them. They have not complained that they have in any way been prejudiced. I would follow the decision in *Somaliya v. Kaluwa* (4 C.W.R. p. 121) and affirm the conviction and sentence. But I do so with some hesitation as I am not sure that the failure to observe the provisions of section 296 is an irregularity or omission of the kind contemplated in section 425 of the Criminal Procedure Code. It seems to me to be something more. It is an illegality. But I do not feel justified in the present case in not following the precedent of *Somaliya v. Kaluwa*. I would, therefore, dismiss the appeal. "

In the case of *Somaliya v. Kaluwa* (Supra), Wood Renton C. J. said : " The only point of law taken in support of the appeal was that the conviction was bad inasmuch as the record did not show affirmatively that the Police Magistrate had explained to the accused who was not represented by an Advocate or Proctor the main points in the case against him in conformity with the provisions of section 296 (1) of the Code of Criminal Procedure. There is no doubt that the Police Magistrate complied with the principal provisions in that sub-section. He had informed the accused of his right to give evidence and the accused elected to do so and his evidence shows that he perfectly understood both the nature and the details of the charge against him. Moreover, there is no allegation to the contrary in the Petition of Appeal. It does not appear to me that in these circumstances there is

anything in the case of *Fernando v. Perera* (16 N.L.R. p. 477) which makes the conviction bad. At the same time I would venture to point out to the Police Magistrate the great importance of obviating difficulties of this kind by making in every instance a short note in the record itself showing that the requirements of section 296 (1) of the Criminal Procedure Code have been complied with. "

In the case of *King v. Joseph* (36 N.L.R. p. 416), it was held where in criminal proceedings the accused is undefended and the record does not contain an entry to the effect that the Trial Judge has complied with the provisions of section 296 of the Criminal Procedure Code, the Supreme Court will not infer from the mere fact that no record has been made that the section has not been complied with.

Where the petition of appeal does not make the failure to comply with the section a ground of appeal, there should be material before the Court that the accused was not informed of his rights under the section.

In the case of *Fernando v. Perera* (Supra), the accused-appellant alleged in his Petition of Appeal that he was not defended by a pleader at the trial and that he was unaware of his right to give evidence and that if he had had an opportunity of placing his version of the circumstances before the Court, the result would or might have been very different. The accused himself admitted that he was asked by the Magistrate whether he had anything to add to his original statement when he was charged. There was nothing on the face of the record to show whether the provisions of section 296 (1) of the Criminal Procedure Code which entitled the accused person to be expressly informed of his right to give evidence on his own behalf and as to what are the principal points against him, were complied with Wood Renton J. observed : " In these circumstances I think the accused is entitled to a new trial. I set aside the conviction and sentence and send the record back for this purpose. "

In the instant case there is nothing on record to indicate that the learned Trial Judge conformed with section 296 (1). At Page 68, marginal 72, there is a note by the learned Trial Judge : දෙවෙනි චුදිතයා තමාගේ නඩුව පිළිබඳව කිසිවක් නොකියන බව ප්‍රකාශ කරයි. " " The 2nd accused informs that he will not make a statement regarding his case. " On an examination of the Petition of Appeal, it is clear that the accused has not urged as a point for consideration by this Court the failure of the learned Trial Judge to conform to section 296 (1) of the Criminal Procedure Code. However, in my view, the plain wording of section 296 (1)

imposes upon the Trial Judge the duty of informing the undefended accused person of his right to give evidence on his own behalf, and if the accused elects to g ve evidence on his own behalf, the Trial Judge shall call the attention of the accused person to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them. These provisions are imperat.ve ; the Trial Judge must strictly conform to them. In the present case, what was most telling against the accused person was the presence of finger-prints.

I find support for my view in the case of *Sumanapala v. Jayatillake* (33 C.L.W. p. 46) where Dias J. observed as follows : "There are two chains of authority under this section, one of which takes the view that the failure to comply with section 296 (1) of the Criminal Procedure Code is a fatal irregularity rendering the conviction liable to be quashed. The other chain of authority suggests that even where the record does not show that the provisions of section 296 (1) were complied with, yet if it is clear that the accused was aware of the points he has to meet, such irregularity would not be fatal to the conviction.

Mr. Ameer submits that the Court will follow the latter chain, but there is nothing in the proceedings to show that the accused was aware of his rights or the points made against him. I am not prepared to apply the presumption that judicial acts were regularly performed in this case, nor am I prepared to send the case back to the Magistrate to inquire whether in fact he complied with the provisions of this section. *I am in the presence of a fatal irregularity which, I do not think, can be cured.* I therefore quash the conviction and direct that the accused be re-tried before another Magistrate."

In the case of *Wilbert v. Tharmarajah* (42 C.L.W. 69) Basnayake J., (as he then was) said : "Learned Counsel for appellant submits that the accused-appellant was not represented by a pleader at the trial and that the learned Magistrate has omitted to comply with that provision of section 296 (1) of the Criminal Procedure Code which requires him to call the attention of an unrepresented accused who elects to give evidence to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them. In the instant case, the accused has given evidence, but there is no record that the learned Magistrate called his attention, before he did so, to the principal points in the evidence for the prosecution which tell against him. That is a provision enacted in the interests of justice and is therefore imperative.

In my opinion, the omission to observe that requirement of the Criminal Procedure Code is fatal to the conviction of the accused. My view finds support in the case of *Fernando v. Perera* (16 N.L.R. p. 477) and in the opinion of Schneider A. J. in the case of *King v. Roma* (7 C.W.R. p. 14). With great respect. I find myself unable to agree with the case of *Somaliya v. Kaluwa* (7 C.W.R. p. 121). I set aside the conviction and order a re-trial before another Magistrate."

In the case of *N. A. Jayasena v. S. I. Police, Akmeemana* (61. N.L.R. p. 306), where the accused stood charged under sections 287 and 486 of the Penal Code and sentenced to three months' rigorous imprisonment for each offence and where he was undefended at the trial and at the close of the case for the prosecution, the Magistrate had made the following note in the record: "I comply with section 296 of the Criminal Procedure Code. Mudaliyar informs accused accordingly. The accused elects to give evidence."

Weerasooriya J. observed as follows: "This would appear to indicate that section 296 (1) of the Criminal Procedure Code was complied with only to the extent of informing the accused of his right to give evidence on his own behalf." In that case, it was submitted by learned Counsel for the accused that it would be highly unsafe to conclude from these entries that when the accused elected to give evidence, his attention was called by the Magistrate to the principal points in the evidence for the prosecution which told against the accused, which is a further requirement under section 296 (1). With these submissions Weerasooriya J. agreed and he went on to say: "The question is whether in view of this omission the conviction of this accused can be allowed to remain. A number of previous decisions of this Court were cited to me by learned Counsel for the accused as well as learned Counsel for the Crown. Some of these authorities are in conflict with the others cited. Following the decision in *Sumanapala v. Jayatillake,* S.I. Police (33 C.L.W. p. 46) and Wilbert *v. Tharmarajah* S.I. Police, Fort, (42 C.L.W. p. 69), I would set aside the conviction of the accused and the sentence passed on him and remit the case for a fresh trial before another Magistrate."

In the instant case, I hold that the learned Trial Judge has not conformed to the imperative provisions of section 296 (1) of the Criminal Procedure Code. This is a fatal irregularity which vitiates the trial. I set aside the conviction of the 2nd accused-appellant. In the circumstances of this case, I think it would be in the interests of justice to set aside the convictions of the 1st, 3rd, 4th and 5th accused—appellants also. Therefore I set aside the convictions of all the accused-appellants and remit the case for re-trial before another Judge.

ISMAIL, J.—I agree.

VYTHIALINGAM, J.—I agree.

Case remitted for re-trial.