1948 *Present :* **Basnayake J.**

KIRI MUDIYANSE *et al.*, Appellants, *and* POTUHERA POLICE Respondent.

S. C. 57-59—M. C. Kurunegala, 36,944.

Criminal Procedure Code, section 152 (3)—Non-summary offence—House-breaking and theft—Triable summarily—Power of Magistrate—Penal Code, section 443.

There is no objection to a Magistrate trying the offence of house-breaking and theft summarily in his capacity as District Judge under section 152 (3) of the Criminal Procedure Code.

Smith v. Peleck Singho (1942) 23 C. L. W. 76 referred to.

APPEAL from a judgment of the Magistrate, Kurunegala.

S. R. Wijayatilake, for the accused-appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 22, 1948. BASNAYAKE J.—

The accused appellants have been convicted of offences punishable under sections 443 and 369 of the Penal Code. The first and third appellants have been sentenced to undergo one year's rigorous imprisonment for each offence, the sentences to run concurrently. The second appellant who has been previously twice convicted of offences specified in the Schedule to the Prevention of Crimes Ordinance has been sentenced to undergo two years' rigorous imprisonment and to be subject to the supervision of the police for a period of 2 years on the expiration of his term of imprisonment.

The prosecution case is that somewhere between two and three in the morning of March 21, 1947, the three appellants entered the house of one Ausadahamy and removed a box containing Rs. 60 in cash, and clothes and jewellery to the value of Rs. 238. The occupants of the house at the time were Roslin Nona the wife of Ausadahamy, and his daughter Baby Nona. Ausadahamy himself was that night at the threshing floor near by and came up on hearing his wife's cries of distress. Both Roslin Nona and Baby Nona identified the three appellants by the aid of a lamp that was alight. The first held Roslin Nona by her neck and asked her not to shout, the second

took the box and the third held an electric torch on to the face of her daughter Baby Nona who was awake at the time the appellants entered the house. Complaint was made to the headman at four thirty in the morning and all three appellants were mentioned. The defence is a complete denial of the charges. It is alleged that the headman and Ausadahamy have fabricated the story in order to pay off a grudge against the first apellant.

The learned Magistrate who accepted the evidence of the prosecution witnesses has in my view rightly convicted the apellants.

Learned counsel for the appellants submits that the learned Magistrate who tried the appellants under section 152 (3) of the Criminal Procedure Code in his capacity as District Judge should not in the circumstances of this case have done so. He relies particularly on the case of *Smith v. Peleck Singho and another* [1] wherein it was held that a Magistrate should not summarily try a charge under section 443 even in his capacity as District Judge.

Section 152 (3) provides that where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of opinion that such offence may properly be tried summarily, he may try the same summarily, following the procedure laid down in Chapter XVIII and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose. I can find no authority in this provision for laying down any hard and fast rule as to the kind of offence a Magistrate may try thereunder. The legislature has left it to the discretion of the Magistrate subject of course to review by this Court. For my own part I do not wish to fetter that discretion by specifying the offences a Magistrate should not try under this sub-section. The principle that should guide Magistrates in acting under section 152 (3) of the Criminal Procedure Code as stated by Wood Renton J. in the case of *Hodgson v. George* [2] commends itself to me if I may say so with respect. He says, "There is no doubt as to the general principle that where a case presents unusual difficulty, in regard either to the facts or to the law, it is not desirable that the powers conferred on Police Magistrates by section 152 (3) of the Criminal Procedure Code should be exercised". When applying some of the earlier dicta of this Court in regard to the class of case a Magistrate should not try under section 152 (3) of the Criminal Procedure Code it must be borne in mind that a Magistrate's ordinary jurisdiction *qua* Magistrate has been considerably widened since 1938. He has been given power to try summarily a number of offences which he had no power to try before.

In the present case I am not prepared to hold that the learned Magistrate has not exercised his discretion properly. The case is not one that presents unusual difficulty in regard to facts or law. I find myself unable to agree with the judgment cited by learned counsel.

The appeals are dismissed.

Appeal dismissed.

[1] *(1942) 23 C.L.W. 76.*

[2] *(1909) 1 Current Law Reports 177 at 181.*