1942

Present : **Howard C.J.**

ABEYSINGHE *v.* MENIKA.

347—M. C. Matale, 9,225

Criminal Procedure—Report to Magistrate—Accused absconding—Examination of complainant—Assumption of jurisdiction by Magistrate as District Judge—Reading over of complaint's evidence at trial—Criminal Procedure Code, s. 151 (1), proviso (ii), and s. 297.

On a report made under section 148 (b), a Magistrate, after recording that the accused was absconding, proceeded to hear the evidence of the complainant.

When the accused appeared, the Magistrate, after informing him, assumed jurisdiction as Additional District Judge and proceeded to trial.

The complainant was recalled and his previous evidence was read over to him and he was subsequently cross-examined by the accused's Counsel.

***Held*, that the proceedings were regular and that the Magistrate acted in accordance with the provisions of section 151 (1), proviso (ii), and section 297 of the Criminal Procedure Code in reading out the evidence of the complainant to the accused.**

Musafer v. Wijeysinghe (43 *N. L. R.* 61), *followed.*

APPEAL from a conviction by the Magistrate of Matale.

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

G. E. Chitty, C.C., for the complainant, respondent.

Cur. adv. vult.

June 18, 1942. HOWARD C.J.—

The appellant in this case appeals from his conviction by the Magistrate, Matale, on charges of housebreaking and theft. It has also been urged on his behalf that, inasmuch as the appellant was a first offender, the sentence errs on the side of severity. The main ground of this appeal is based on a question of law. Proceedings against the appellant were set in motion by a report made on January 19, 1942, by Police Sergeant Abeysinghe, under section 148 (*b*) of the Criminal Procedure Code. On that report being made, the Magistrate, after recording that the accused was absent absconding, proceeded to hear the evidence of the complainant. He then issued a warrant on the accused under sections 440 and 369 of the Penal Code for February 2. On February 2, the accused appeared. The Magistrate then stated that he was hearing the case as Additional District Judge under section 152 (3) of the Criminal Procedure Code and the accused was so informed. On April 13, the Magistrate proceeded with the trial. The complainant was recalled and his previous evidence read over to him. His examination-in-chief was continued and he was subsequently cross-examined by Counsel for the accused. Further evidence for the prosecution and evidence for the defence was taken and the accused was found guilty. It has been contended by Counsel for the appellant that the trial is vitiated by the

fact that on February 13 the Magistrate did not start "de novo", but merely read over the previous evidence of the complainant which had not been taken in the presence of the accused. He relies for this contention on the case of *K. H. Don Dionis and another v. W. B. Piyoria and others*[1], decided by Hearne J. on March 23, 1942. In this judgment, Hearne J. cited the recent case of *Musafer v. Wijeysinghe*[2], where it was held that, when evidence is properly recorded in the absence of the accused, *i.e.*, under section 151 (1), proviso (ii), section 297 applies. Hearne J. then went on to consider the position that would arise in regard to evidence which has been recorded under section 151 (2) in the presence of the accused. He held that, as there is no section similar to section 297, covering such evidence, the answer is that it can only be used when it forms part of the trial. Hearne J. then proceeded to consider whether the evidence subsequently read over to two of the witnesses formed part of the trial. The charge against the accused included one of rioting, which was not triable by a Magistrate. Four of the accused were present when the evidence of these witnesses was taken. On a subsequent date the Magistrate assumed jurisdiction as District Judge. In these circumstances, Hearne J. held that the proceedings taken as they were under section 151 (2) could not be imported into the trial itself and merely read to the accused. These proceedings did not form part of the subsequent trial. The decision of Hearne J., that the evidence recorded under section 151 (2) could not be used unless it formed part of the trial because it was recorded in the presence of the accused, seems to me to be rather artificial. This, however, is not the occasion to consider the correctness of that decision as I have satisfied myself that it has no bearing on the facts of the present case. The report of the Police Sergeant was made in this case under section 148 (1) (*b*). The Magistrate then examined the complainant and afterwards issued a warrant. This indicates conclusively that he acted under section 151 (1), proviso (ii). There can, therefore, be no doubt that this evidence was quite properly recorded in the absence of the accused. Hence *prima facie* section 297 becomes applicable in accordance with the decision of Soertsz J., in the case of *Musafer v. Wijeysinghe* (*supra*). It has been contended that the decision in the latter case has no application inasmuch as the accused was charged in that case with an offence triable summarily, whereas in this case he was charged with a non-summary offence. As the evidence taken comes within the ambit of section 297, I do not consider that the two cases can be distinguished on this ground. The provisions of this section have the effect of making the evidence of the complainant, taken by the Magistrate before he assumed jurisdiction as Additional District Judge, together with the evidence subsequently taken, part of one and the same trial. I can find nothing contrary to this conclusion in the decision of the Full Court in *Thennakone v. Maradumuttu and others*[3].

Counsel for the appellant has also invited my attention to section 392 (2) of the Criminal Procedure Code which provision has, with regard to the evidence of the complainant taken on January 19, placed on the Magistrate the onus of conducting the prosecution. The fact that the

[1] *43 N. L. R. 236.* [2] *43 N. L. R. 61.* [3] *43 N. L. R. 169.*

Magistrate occupied this position must, so it is contended, have prejudiced the appellant. I agree with the dictum of Nihill J. in *Mediwaka v. Gunasekera*[1], that it is difficult to reconcile this provision with the amendments introduced by Ordinance No. 13 of 1938. The matter merits consideration by the Legislature. If the contention of Counsel for the appellant is correct, the decision of a Magistrate committing an accused person for trial under section 163 of the Code is open to the same objection. In these circumstances, I find myself unable to accept this contention. The appeal of the appellant on the ground of law, therefore, fails.

As there was evidence to support the conviction, I am not prepared to disturb the finding of the Magistrate on the facts. Nor do I consider, having regard to the gravity of the offence, that the sentence errs on the side of severity. The appeals on these grounds also fail.

Affirmed.