1947 *Present :* **Dias J.**

DIAS, Appellant, *and* NADHARAJA (S. I. Police), Respondent.

349—M. C. Panadure, 44,986

Criminal Procedure—Charge—Proceedings against accused on police report—Voluntary appearance of accused on police bail—Charge framed without prior examination under s. 151 of Criminal Procedure Code—Procedure not defective—Criminal Procedure Code, ss. 148 (1) (b), 551, 187 (1).

Proceedings were initiated against the accused under section 148 (1) (b) of the Criminal Procedure Code. The accused, who was on police bail under section 127, voluntarily appeared before a summons or warrant was issued. The Magistrate thereupon framed a charge and, after taking the plea, proceeded with the trial.

Held, (i.) that the procedure was lawful. *Cader v. Karunaratne (1943) 45 N. L. R. 23, followed.*

(ii.) Section 151 (1) of the Criminal Procedure Code has no application when an accused voluntarily appears before the Court without process.

APPEAL against a conviction from the Magistrate's Court, Panadure.

H. W. Jayewardene, for the accused, appellant.

J. G. T. Weeraratne, C.C. for the Attorney-General.

Cur. adv. vult.

June 27, 1947. DIAS J.—

I see no reason to interfere with the Magistrate's findings of fact.

The appeal, however, is pressed on a point of law. It is contended that although the Magistrate framed a charge against the appellant in terms of section 187 (1) of the Criminal Procedure Code, he erred in doing so without first examining on oath the complainant or some material witness or witnesses in terms of *proviso (ii)* to section 151, and that, therefore, the conviction is vitiated.

Various authorities have been cited to show that the framing of the charge in a summary trial is beset with so many pitfalls that the Magistrate is as likely to commit some blunder, as to steer his way safely through the dangers which exist.

The material facts are these: The appellant had been enlarged on "police bail" under section 127 of the Criminal Procedure Code. The bail bond probably was conditioned on the appellant appearing before the Magistrate on December 17, 1946. The police filed a plaint in terms of section 148 (1) (*b*), and on that day the appellant was present in Court in terms of his bail bond without process having been issued on him. The Magistrate then drafted the charge himself. To this the appellant pleaded "Not guilty". Thereafter the trial proceeded.

Before the authorities are examined the relevant sections of the Criminal Procedure Code should be considered. The proceedings were initiated under section 148 (1) (*b*). This brought into operation the provisions of section 151 (1)—that is to say, when the accused is "not in custody", and is not physically before the Court, the Magistrate will issue either a summons or a warrant in order to secure his attendance.

Obviously, this is unnecessary when the accused is present in Court either on remand as was the case in *Thomas v. Inspector of Police, Kottawa*[1], or voluntarily appears before the process is served on him, or when he is on police bail and voluntarily comes forward as was the case here. For the same reason, the *proviso* (*ii*) to section 151 (1) can have no application either, because it merely says that in cases initiated under section 148 (1) (*a*) or (*b*) the Magistrate shall, before *issuing a warrant*, and may, *before issuing a summons*, examine on oath the complainant or some material witness or witnesses. Where the issue of a summons or a warrant is rendered unnecessary—as in the present case—by reason of the fact that the accused is already physically before the Court, there is no need to invoke the provisions of *proviso* (*ii*) to section 151 (1). Where the accused is brought before the Magistrate in custody without process, it is section 148 (1) (*d*) and not section 148 (1) (*b*) that applies. In such cases section 151 (2) provides that it is the Magistrate's duty forthwith to examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case. These provisions can have no application to the present case. In my opinion, section 151 has no application whatever to a case where the accused voluntarily appears before the Court without process.

The next section which comes into action is section 187 which relates to the framing of the charge in a summary trial. Two situations are envisaged: (*a*) where the accused is before the Court otherwise than on a summons or warrant, and (*b*) where the accused is present on summons or warrant. In the former case the Magistrate shall "after the examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused". With the object of saving time, the *proviso* to section 187 says that where the prosecution commenced on a written report under section 148 (1) (*b*) and the offence disclosed is punishable with not more than three months' imprisonment or a fine of Rs. 50, the Magistrate may, without drafting a charge himself, read such report as a charge to the accused and call upon him to plead. This *proviso* has no application to the present case, because the Magistrate did not act under it. He drafted and framed a charge himself.

There was no need for the Magistrate to hold the examination directed by section 151 (2), because that section only applied when the accused is brought before the Court in custody without process.

It is to be noted that section 187 (1) was amended by section 12 of Ordinance, No. 13 of 1938, which substituted the words "by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused" for the words "by section 149 (4), if he does not discharge the accused under section 151 (1).". Having regard to the previous wording of section 187 (1) and the words of the amendment, it seems that the words "if he is of opinion that there is sufficient ground for proceeding against the accused" refer to the examination under section 151 (2). I do not think the Legislature intended to say that in all cases before the Magistrate frames a charge in a summary trial, he must be of

[1] *(1945) 47 N. L. R 42.*

opinion that there are sufficient grounds for proceeding against the accused. As I have pointed out, when the accused appears before the Court voluntarily and without process, section 151 has no application when the offence alleged against him is one summarily triable. The instances where the Magistrate must examine witnesses before framing a charge are provided for in the earlier sections, *e.g.*, section 150 (indictable offences only), section 151 (1) *proviso* (*ii*) (in order to issue process on the accused), section 151 (2) (where the accused is brought before the Court in custody without process).

Section 187 (1) applies to cases where the accused is present before the Court "otherwise than on a summons or warrant", while section 187 (2) deals with the case where the accused appears before the Court on process. Obviously, the present case falls under section 187 (1) for he did not come before the Court on a summons or warrant. There was no necessity to hold any preliminary examination and the Magistrate drafted a charge to which the appellant pleaded "Not guilty". Thereafter the trial proceeded. Nevertheless, it is contended that the procedure is defective.

The case of *Cader v. Karunaratne* [1] is exactly in point. The proceedings were initiated under section 148 (1) (*b*), and the accused appeared, probably on police bail, before process was issued on him. The Magistrate without holding any preliminary examination framed a charge. It was held that the procedure was in order. I see no reason why I should not follow that decision.

I have carefully considered the other authorities which were cited at the argument. Each of these cases depends on its peculiar facts. For example in *Cader v. Karunaratne* [1] the case of *Varghese v. Perera* [2] was cited. As was pointed out by de Kretser J. *Varghese v. Perera* [2] dealt with an entirely different state of facts. There, the accused had been brought up in custody, *i.e.*, in terms of section 148 (1) (*d*), and, therefore, under section 151 (2) it was the duty of the Magistrate to have examined on oath the person who brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case. That decision was, therefore, irrelevant in regard to the question which arose in *Cader v. Karunaratne* [1] and to the question which I have to decide. I may observe in passing that *Varghese v. Perera* [2] appears to be in conflict with *Assen v. Maradana Police* [3], but it is unnecessary to go into that question here. In *Tennekoon v. Dahanayaka* [4] the facts are dissimilar to those which arise here. The plaint had been filed under section 148 (1) (*b*) and *summons was issued on the accused,* who appeared in Court before the process was served on him. The Magistrate without proceeding under section 187 (1) to frame a charge, *acted under the proviso to section 187* and explained the charge from the unserved summons. It was held that this was not a fatal irregularity. That case has no application whatever to the present case. In *Hendrick v. Pelis Appu* [5] a warrant had been issued for the arrest of the accused who could not be found and was proclaimed. He then appeared before the warrant had been executed, and the Magistrate

[1] (*1943*) *45 N. L. R. 23.*
[2] (*1942*) *43 N. L. R. 564.*
[3] (*1944*) *45 N. L. R. 263.*
[4] (*1938*) *40 N. L. R. 36.*
[5] (*1915*) *1 C. W. R. 194.*

without framing a specific charge, read it from the unexecuted warrant. It was held that no irregularity was committed. This case was considered in the leading three Judge decision of *Ebert v. Perera* [1]. Ennis J. said "I would also add that the case of *Hendrick v. Pelis Appu* [2] was apparently one falling within section 187 (2). An appearance in Court to show cause against a complaint when a summons or warrant has been issued is, in my opinion, an appearance on a summons or warrant, even although the summons has not been served or the warrant executed, the issue of the summons or warrant in such a case being the occasion of the appearance. If this be so, the statement in the summons or warrant could, under sub-section (2), be deemed the charge."

In my opinion there has been no irregularity in the Magistrate's procedure. I affirm the conviction and dismiss the appeal.

Appeal dismissed.