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

PIYASENA, Appellant, *and* EPHRAMUS (Inspector of Police), Respondent.

S. C. 374—M. C. Gampola, 12,823.

Criminal Procedure—Accused produced by Police—Procedure to be adopted by Magistrate—Irregularity—Proof—Charge—Criminal Procedure Code, s. 151 (1) proviso ii., s. 151 (2).

Where an appellant seeks relief on the ground that the procedure adopted by the Magistrate was irregular, the burden is on him to establish such irregularity. There is an initial though rebuttable presumption that judicial acts are correctly performed.

Where proceedings are initiated under section 148 (1) (b) of the Criminal Procedure Code, and the accused voluntarily appears without a summons or warrant, there is no necessity for the Magistrate to act under proviso (ii) to section 151 (1) which is merely the procedure preliminary to the issue of process. In such a case, there is no necessity for the Magistrate to act under section 151 (2) because that provision only applies when the accused is brought before the Court in custody without process, under section 148 (1) (d).

APPEAL against a conviction from the Magistrate Court, Gampaha.

N. E. Weerasooria, K.C. (with him *S. W. Jayasuriya*), for accused, appellant.

Boyd Jayasuriya, C.C., for the Crown.

Cur. adv. vult.

June 30, 1947. DIAS J.—

The sole question submitted for decision is whether the Magistrate has correctly followed the procedure laid down by law in regard to the framing of the charge against the appellant. It is contended that he failed to do so, and that, therefore, the conviction is bad and necessitates a new trial.

The material facts which can be ascertained from the record are these : A number of persons alleged to have been indulging in unlawful gaming had been arrested by the police and brought under arrest to the police

station at about 6 P.M. on January 26, 1947. The appellant, who was the worse for liquor, came to the police station in order to stand surety for one of the arrested persons under section 127 of the Criminal Procedure Code. It was then that the offence with which he was charged and convicted is alleged to have been committed. He was overpowered, and as he was violent he was handcuffed and placed in a cell. At about 7 P.M. on the same day the medical officer saw the appellant in the cell. There is nothing to show what happened to the appellant thereafter. The next thing we know is that on the following day, January 27, 1947, the police filed a plaint against the appellant in terms of section 148 (I) (*b*) of the Criminal Procedure Code. There is nothing on the record to show that the appellant had in the interval remained in police custody or that he was produced in custody before the Court. On the contrary, the Magistrate has recorded under date January 27, that the appellant was present in Court and was represented by a proctor. The Magistrate then without examining any witnesses, drafted a charge and called upon the appellant to plead thereto. After that the case was fixed for trial.

It is argued that the Magistrate's procedure is wrong. It is contended that the appellant was produced before the Magistrate in custody under section 148 (1) (*d*) of the Criminal Procedure Code, and that, therefore, in terms of section 151 (2), before the Magistrate framed the charge, he should have examined the person who brought the appellant before the Court, and any other person who may be present in Court and able to speak to the facts of the case.

The trouble, however, is that there is nothing on the record to justify the contention that the appellant was produced in custody before the Court. It is for the appellant to show that the procedure adopted by the Magistrate is irregular. There is an initial though rebuttable presumption that judicial acts are correctly performed.

The offence with which the appellant stands charged (section 323/490 of the Penal Code) is bailable. Therefore, under section 127 of the Criminal Procedure Code the appellant, who had gone to the police station with the express intention of acting as a bailsman for another man, might well have demanded, after his intoxicated state had ceased, that he should be let out on police bail. Section 127 says that where the offence for which a man is held in police custody is bailable, and the accused is able to give security, the police officer "shall take security for his appearance before such court". That being the law, the offence being bailable, and the appellant having gone to the police station for the purpose of standing as surety for another person might well have tendered, or some friend on his behalf may have tendered bail, in which event the police had no right to detain him any further. This view is to some extent borne out by the record, because the Magistrate does not record that the accused was present in custody, but merely that he was present and represented by his proctor.

The position was recently reviewed in the case of *The Sub-Inspector of Police Moratuwa v. Dias*[1]. I agree with counsel for the appellant that

[1] *349 M. C. Panadure, 44,986 (S. C. M. June 27, 1947).* [See *48 N. L. R. 301*—Ed.]

if the facts are as he states them to be, namely, that the appellant was brought in custody before the Court in terms of section 148 (1) (d), and that the Magistrate without examining the persons named in section 151 (2) proceeded to frame a charge against him, an irregularity was committed—*Varghese v. Perera*[1]. There however appears to be a difference of opinion whether under such circumstances the defect would be fatal to the conviction or not. In *Varghese v. Perera* (*supra*) the irregularity was held to be fatal. On the other hand, in *Assen v. Maradana Police*[2] on facts almost identical with those in *Varghese v. Perera* (*supra*) it was held that the defect was not fatal to the conviction.

It is, however, unnecessary in the present case to decide which of these authorities should be followed, because I am not satisfied that there are facts before me to justify the finding that the appellant was, in fact, brought before the Court in custody in terms of section 148 (1) (d). The record does not show that, but merely that the appellant at the time the police plaint under section 148 (1) (b) was filed, was present in Court without any summons or warrant having been issued for his presence. The case therefore comes within the principle laid down in *Cader v. Karunaratne*[3] and *The Sub-Inspector of Police, Moratuwa v. Dias* (*supra*).

There was no necessity for the Magistrate to act under section 151 (1) *proviso* (ii) because there was no need to issue a summons or warrant on an accused who is physically present in Court, and who is ready and willing to participate in the proceedings. There was no necessity for the Magistrate to hold the examination required by section 151 (2) because, as I have pointed out, there is nothing in the record to show that the appellant had been produced in custody in terms of section 148 (1) (d).

The case of *Thomas v. Inspector of Police, Kottawa*[4] is distinguishable on the facts. In that case the accused had been arrested and sent to the Magistrate under section 126A of the Criminal Procedure Code before the police plaint under section 148 (1) (b) had been filed. Therefore, at the time the plaint was filed the accused was already on remand in the custody of the Fiscal. There is no proof that such a thing happened in this case. It is to be noted that in those circumstances it was held that the failure of the Magistrate to hold the examination required by section 151 (1) *proviso* (ii) or section 151 (2) of the Criminal Procedure Code was not a fatal irregularity which vitiated the conviction.

The case falls under section 187 (1) because the appellant was present "otherwise than on summons or warrant". As required by that section the Magistrate drafted a charge. I can, therefore, see no irregularity in the procedure adopted by the Magistrate.

The appeal is dismissed.

Appeal dismissed.

[1] (*1942*) *43 N. L. R. 564.*
[2] (*1943*) *45 N. L. R. 23.*
[3] (*1944*) *45 N. L. R. 263.*
[4] (*1945*) *47 N. L. R. 42.*