1940 *Present* : **Nihill J.**

MEDIWAKA *v.* GUNASEKERE.

656—M. C. Matara, 23,649.

Criminal Procedure Code—Non-summary offence—Decision to try offence summarily—Magistrate should decide at outset of inquiry—Discretion improperly exercised—Criminal Procedure Code, s. 152 (3).

Under section 152 (3) of the Criminal Procedure Code a Magistrate, who is also District Judge, should exercise his discretion as to whether or not the accused should be tried summarily at the outset of the inquiry.

Where a period of four months had elapsed between the appearance to summons and the assumption of jurisdiction and where by that time the bulk of the evidence had been led,—

***Held*; that the discretion had not been properly exercised and that the irregularity was not cured by section 425 of the Criminal Procedure Code.**

***Queen v. Uduman* (4 *N. L. R.* 1) followed.**

APPEAL from a conviction by the Magistrate of Matara.

R. L. Pereira, K.C. (with him *C. V. Ranawake* and *S. W. Jayasuriya*) for accused, appellant.

Nihal Goonesekere, C.C., for complainant, respondent.

Cur. adv. vult.

February 21, 1940. NIHILL J.—

This is an appeal from a conviction for cheating—offences under section 403 of the Penal Code. The value of the property in respect of which it was alleged the offence had been committed did not exceed Rs. 200 and the offences could therefore have been tried summarily by the Magistrate in the first instance, except for the fact that counts were also included embodying charges under section 392 relating to the same transaction.

He therefore started non-summary proceedings and then, after the bulk of the evidence for the prosecution had been led, assumed jurisdiction as a District Judge and proceeded to try the case summarily in that capacity under section 152 (3) of the Criminal Procedure Code. He did not record any reasons for so doing.

It has been argued before me that the Magistrate assumed jurisdiction so late in the case that his action was highly prejudicial to the accused and that on this ground alone the conviction cannot stand.

I have not considered the merits of this appeal apart from this preliminary point. Mr. Nihal Goonesekere for the Crown was content to take up the position that if an irregularity had occurred it was curable by the application of section 425 of the Criminal Procedure Code. Before considering that aspect of the matter, however, I must first consider whether the Magistrate did in fact go outside the proper ambit of section 152 (3) in assuming jurisdiction of a District Judge when he did.

It will perhaps be convenient to state the facts in some detail. On January 24, 1939, report was made to the Magistrate under section 148 (1) (*b*) alleging that the appellant and one other (since acquitted) had dishonestly drawn certain sums from the Assistant Government Agent at

Matara for the purpose of paying for the lighting of a lamp at Hakmana market during the period March-August, 1937. The report alleged that in fact no lamp was lit during the period. The appellant was named as the Chairman of the Village Committee. Summons was issued and the accused appeared before the Magistrate on February 10, when the charges were read over to them in accordance with the provisions of section 156. A remand on bail was granted until February 27 and the evidence for the prosecution was started. The preliminary inquiry had begun. It continued with various adjournments until May 30, when the Magistrate decided to try the case summarily as a District Judge and trial was fixed for June 15. Up to this date nine witnesses had been called, their cross-examination having been reserved. On June 15 these witnesses were recalled for cross-examination. Their evidence-in-chief was not taken *de novo*, although further evidence-in-chief was elicited from some of them. After two further witnesses had been called, the prosecution was closed.

After hearing evidence for the defence the Magistrate convicted the appellant on July 13 on two counts relative to section 403 and sentenced him to two terms of six months' rigorous imprisonment to run concurrently. It should be noted here that the conviction was in respect to the offences which the Magistrate could have tried summarily in the first instance.

Now, is there a stage in a preliminary inquiry beyond which the Magistrate cannot retrace his steps and elect to try the case himself as a District Judge? In *Queen v. Uduman*[1], Bonser C.J. quashed a conviction on the ground that the serious offence of housebreaking by night was not one which a Magistrate should try summarily. In that case the Magistrate had heard all the evidence for the prosecution and the Chief Justice in the course of his judgment at page 3 said:—

> "Even if the offence was one which he could try summarily, which it was not, it seems to me that it was late for him to exercise the power given him by section 152. It is quite clear from the whole of Chapter XV., in which that section occurs, that the Magistrate is to make up his mind whether he will try summarily as District Judge or not after hearing evidence under section 149. It is not competent for him to take all the evidence for the prosecution as a committing Magistrate, and then, after various remands, say suddenly: 'All this time I have not been acting as a committing Magistrate, but trying the case as District Judge'. That is what it comes to."

In 1904 the scope and effect of section 152 (3) came before a Bench of three Judges but the question as at what stage of the proceedings the Magistrate should act or beyond what stage he could not act was not considered. See *Silva v. Silva*[2]. Their Lordships in that case held against the view that the jurisdiction was confined to Magistrates who were also the District Judge of the District and they held also that the exercise of the discretionary power of Magistrates was not conclusive and could be reviewed by the Supreme Court on appeal. As a corollary to that they indicated that Magistrates should give reasons for their opinion that the offence might properly be tried summarily.

[1] *4 N. L. R. 1.* [2] *7 N. L. R. 182.*

The question as to the stage at which the Magistrate's decision should be taken did not arise probably because in the case which formed the basis of the submission to the full Bench it had been taken at a very early stage, that is to say, when the Magistrate had partly heard the evidence of the complainant.

In the same year however Layard C.J. sitting alone held in *Punchirala v. Don Cornelis*[1], that it was too late for the Magistrate to change his mind after he had taken the evidence of the complainant in full but he stated that it might be different "if he had recalled the complainant after he had made up his mind to try the case as District Judge".

This case together with *Queen v. Uduman* (*supra*), is authority for the view that the assumption of the jurisdiction should take place at an early stage. I would mention, however, that in the present case as the accused appeared before the Magistrate on summons, it was not imperative in view of amendment to section 149 (now section 151) effected by section 5 of Ordinance No. 13 of 1938 that he should take the evidence of the complainant or some material witness or witnesses before issue of the summons.

Under section 149 of the Code as before amendment the Magistrate would have had to have heard evidence forthwith before issuing his warrant as the report had disclosed a non-summary offence. Now under the Code as amended, the Magistrate has a discretion in such cases either to issue a warrant in which case he must examine the complainant or some material witness or witnesses on oath, or to issue a summons. If he decides on the latter course it is again in his discretion whether he shall or shall not forthwith take evidence on oath. The question I think arises whether this amendment in procedure has not to some extent altered the position as it stood when Bonser C.J. and Layard C.J. gave the judgments I have cited. It seems to me that the view expressed in these judgments amounts to this—that the Magistrate must make up his mind very early, in fact before the real inquiry in the presence of the accused begins. Once the inquiry is under-weigh it should not be turned into a trial.

Now in cases such as the one we are considering I think it can reasonably be urged that the Magistrate must take some evidence after the accused has answered the summons before he can be in a position to exercise his discretion. If that be so it is doubtless difficult to draw a line and to say thus far and no further. Nevertheless I consider it important that the principle should be maintained that proceedings which have continued for some time on one basis cannot in fairness to the accused be suddenly turned into proceedings of a different nature.

It must be remembered that the assumption of a Judge's power by a Magistrate is not one that the accused can resist. In that sense it differs from what might be termed the converse procedure provided for by section 166. Under that section the Magistrate assumes no additional jurisdiction, he remains a Magistrate and tries a non-summary case summarily because, having regard to the character and antecedents of the accused, the nature of the offence and all the circumstances of the case, he thinks it expedient to do so. In sub-section (3) of that section it is

[1] *8 N. L. R. 58.*

expressly provided that he may make up his mind to try the case summarily during the hearing of the case and after he has become satisfied by the evidence that it is a proper one for the application of the section. But the accused cannot possibly be prejudiced because the Magistrate cannot move without his consent.

In section 152 the Magistrate can so move and it is important therefore that Magistrates should not apply the section in a way under which even an appearance of prejudice to an accused person may be manifested. I do not consider therefore that the amendments to Chapter XV introduced in 1938 warrants any substantial change in the view hitherto held with regard to section 152. A Magistrate must address his mind to the matter at the outset of the inquiry and quickly form his opinion thereon, because that is the only way in which an appearance of prejudice can be avoided. It will not do for him to meander through the evidence as an inquiry Magistrate until at a late stage it is driven into his consciousness that it is a case which he might have tried himself from the start.

In the present instance nearly four months elapsed between the appearance to the summons and the assumption of the jurisdiction and by that time the bulk of the evidence for the prosecution had been recorded, and when he did exercise his power he gave no reasons.

I have no hesitation therefore under all these circumstances in holding that on this occasion he exercised his discretion improperly.

Now there remains the question whether this irregularity is curable under section 425. If prejudice has in fact been caused to the accused then clearly it is not. On the face of it such prejudice may be difficult to detect. The accused who was represented made no objection at the time and he has been convicted only of those offences which the Magistrate could have tried summarily as a Magistrate and he has not received sentence greater than the Magistrate as a Magistrate could have imposed.

It has been urged for the appellant however that a Magistrate when conducting a preliminary investigation has a character different from that of a trial Judge and my attention was drawn to section 392 (2). I must confess I find it difficult myself to reconcile the provisions of that section with the amendments introduced by Ordinance No. 13 of 1938. How a Magistrate can conveniently "conduct the prosecution" and at the same time address himself judicially to the question as to whether the case warrants committal is not easy to see. The position was of course formerly quite otherwise as committal then lay only on the instructions of the Attorney-General. Whilst I do not believe for a moment that this provision of the law did in fact affect the Magistrate's attitude of judicial impartiality I cannot overlook that it is open for the appellant to say that up till May 30, the Magistrate was, to put it at its lowest, acting as a *quasi*-prosecutor. After that date the evidence in chief of the prosecution witnesses was not taken afresh, so we are left with the position that the evidence upon which the Magistrate ultimately convicted as a trial Judge was evidence which had been extracted from the witnesses by his diligence as an inquiring Magistrate. That being so I cannot overlook the possibility of prejudice having been caused and I decline therefore in this instance to invoke the aid of section 425.

The case must go back for rehearing before another Magistrate. If the charges are confined to those counts which can be tried summarily the Magistrate can of course dispose of the matter himself.

With regard to the other accused who was acquitted my order will not affect him. He was acquitted for reasons which would have been equally good as against his committal for trial and it would not be fair that he should be placed in jeopardy again.

Case remitted for rehearing.