1971 *Present:* de Kretser, J.

J. W. TILAKARATNE and 5 others, Appellants, *and*
INSPECTOR OF POLICE, GANEMULLA, Respondent

S.C. 18-23/70, with Applications in Revision—M. C. Gampaha, 21385/A

Criminal Procedure Code—Section 152 (3)—Scope and effect—Trial of an indictable offence with an offence triable summarily—Omission of Magistrate to assume jurisdiction under s. 152 (3)—Resulting position.

Where a Magistrate who is also a District Judge has tried summarily an offence which the Schedule to the Criminal Procedure Code shows is triable by the District Court, he must be presumed to have acted correctly and therefore in the exercise of the discretion given by section 152 (3) of the Code. The failure to place on record his opinion that it could properly be summarily tried, with his reasons for that opinion, is an irregularity which does not make the trial itself an illegality, for it would be open to the Supreme Court, in an appeal or in revision, to consider whether in the particular circumstances of the case it was an offence which could have been properly so tried and to set aside the conviction and sentence and order the Magistrate to take non-summary proceedings if the Supreme Court thinks it should have been tried summarily. *Silva v. Silva* (7 N.L.R. 182) considered.

Where there is a joinder, at one summary trial, of an indictable offence in respect of which the Magistrate has failed to assume jurisdiction under section 152 (3) of the Criminal Procedure Code, with an offence summarily triable by him, it is permissible to separate the illegal trial of the indictable offence and sustain the conviction on the remaining summarily triable count. In such a case, the allegation that the two offences were committed in the course of the same transaction does not make a difference to the legal position. *William v. Inspector of Police, Mirigama* (72 N. L. R. 406) not followed.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

E. R. S. R. Coomaraswamy, with *C. Chakradaran* and *S. C. B. Walgampaya*, for the 1st to 4th and 6th accused-appellants.

5th accused-appellant unrepresented and absent.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 23, 1971. DE KRETSER, J.—

The six accused were tried before the Magistrate of Gampaha (Mr. W. P. N. de Silva) on the following charges :—

(1) Fifth accused with robbery of a wrist watch valued at Rs. 180 and a purse with 65 rupees in it belonging to one K. E. Jayawardene—Section 380 ;

(2) All the accused in the course of the same transaction with causing hurt to K. E. Jayawardene in the committing of that robbery—Section 382 ;

(3) In the alternative to count 2 all the accused in the course of the same transaction with causing simple hurt to K. E. Jayawardene—Section 314.

The Magistrate convicted the 5th accused on counts 1 and 2 and taking into consideration his antecedents and age sentenced him to pay fines of Rs. 400 and Rs. 200 respectively, the default sentence being three months' rigorous imprisonment on each count. He had formed the opinion that the fifth accused had acted independently in committing the robbery. He convicted the 1st, 2nd, 3rd, 4th and 6th accused on the alternative count of causing simple hurt. He fined each of them 100 rupees. All the accused have appealed.

The schedule to the Criminal Procedure Code shows that robbery of property valued at over two hundred rupees and the causing of hurt in committing such a robbery are triable by the District Court. Section 152 (3) of the Criminal Procedure Code permits the Magistrate, who is also a District Judge, to try such offences summarily if he is of opinion that they may properly be so tried.

In the instant case, when the Magistrate charged the accused on 18.4.69 on which date the amended plaint was filed, there is nothing to show on the record or on the charge sheet that he was aware that counts 1 and 2 were ordinarily indictable offences which, he had formed the opinion, could in this case, be properly tried summarily by him. In consequence, it is urged on behalf of the 5th accused that his trial was on illegality. On behalf of the other accused, it is submitted that the joinder at one summary trial of an indictable offence with offences tried summarily vitiates the entire proceedings if the Magistrate omits to assume jurisdiction in terms of Section 152 (3). Section 152 (3) reads as follows :—

> " 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 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."

It will be seen that it is not all District Court cases that are triable summarily but only such as a Magistrate, who is also a District Judge, considers may properly be so tried. It will also be seen that the section does not require a Magistrate to place on record his opinion that the offence before him may properly be so tried nor does it require him to place on record his reasons for forming such opinion.

It was the Acting Chief Justice Moncrieff in his judgment in *Danhia v. Donhamy* [1] reported in 2 Browne's Reports at 230 who pointed out that the Magistrate should state his opinion and intention in order to show that he is not trying a non-summary case in a summary manner by mistake.

Justice Middleton in the Full Bench case *Silva v. Silva* [2] which met to give its opinion on the scope and effect of Section 152 (3) cited with approval this observation of Moncrieff A. C. J. and went on to say " . . . . and I think for his own sake he ought to give his reasons for holding his opinion so that this court may judge on the soundness of that ".

In *Silva v. Silva* it was decided that the question whether the case may be properly tried summarily under Section 152 (3) is within the province of the Supreme Court to review on appeal and that it was the duty of the Magistrate acting under that section to state his reasons for his opinion that the offence may be properly tried summarily.

[1] *(1901) 2 Browne, at 230.*

[2] *(1904) 7 N. L. R. 182.*

It was also pointed out that in a case which cannot be tried shortly and rapidly in point of matter and time, which involves complexity of law, fact or evidence, and double theory of circumstances or difficult question of intention or identity or knowledge or the punishment ought really to exceed two years is one that is not properly tried summarily. Sampayo A. J. in the course of his order in *Silva v. Silva* said "I do not see how any general rule could be laid down. The exercise of the jurisdiction is a matter of discretion with the Magistrate and each case must depend on its own circumstances. . . . In my opinion the discretion vested in the Magistrate should be reasonably exercised and may need in individual cases to be reviewed by the appellate court which has ample powers for this purpose ".

It appears to me that where a Magistrate who is also a District Judge has tried summarily an offence which the schedule shows is triable by the District Court, he must be presumed to have acted correctly and therefore in the exercise of the discretion given by Section 152 (3). The failure to place on record his opinion that it could properly be summarily tried with his reasons for that opinion which is what the Full Bench in *Silva v. Silva* laid down he should do is in my opinion an irregularity which may have its repercussions on him personally but does not make a trial itself an illegality for it would be open to the Supreme Court in an appeal or in revision to consider whether in the particular circumstances of the case it was an offence which could have been properly so tried and to set aside the conviction and sentence and order the Magistrate to take non-summary proceedings if the Supreme Court thought it should not have been tried summarily.

An examination of the record in the instant case shows that when the original plaint had been filed about an year earlier according to which it was the first accused who had committed the robbery the Magistrate had recorded evidence and had formed the opinion that it was an offence which could properly be tried summarily and had given his reasons for that opinion. It appears to be sheer inadvertence that when the amended plaint was filed according to which it was the 5th accused who had committed the robbery he did not make a similar entry when he charged the accused. The sentence he imposed shows clearly that he was aware he was trying summarily what was an offence triable by the District Court. An examination of the evidence satisfies me that it was a case which the Magistrate could properly have tried summarily. On a consideration of the evidence which the Magistrate has accepted it appears that the assault on the complainant took place first and was not with the object of robbing him but that the 5th accused took advantage of the melee to steal the watch and purse of the complainant. I therefore alter the conviction on count 1 to one of theft. I sentence the 5th accused on this count to pay a

fine of Rs. 300, in default three months' rigorous imprisonment. If the fine is paid I direct that two hundred rupees to be paid to the complainant. I set aside the conviction on count 2 and convict him on count 3 of causing simple hurt and I sentence him to pay a fine of Rs. 100, in default three months' rigorous imprisonment.

Two judgments—*Ramasamy et al. v. Gunaratne*[1] and *William v. Inspector of Police, Mirigama*[2]—are relied on for the submission made on behalf of 1st, 2nd, 3rd, 4th and 6th accused that the joinder at one summary trial of an indictable offence in respect of which the Magistrate has failed to assume jurisdiction with an offence summarily triable by him vitiates the proceedings *ab initio*. The first of these cases was considered by me and I refused to follow it when I wrote the judgment in *Joseph v. Wootler*[3] in which I held it was permissible to separate the illegal trial of an indictable offence and sustain a conviction on the remaining summarily triable counts. I have perused the judgment of Wijayatilake J. in *William v. Inspector of Police, Mirigama* which was written after he had the advantage of reading my judgment in *Joseph v. Wootler*. I could find nothing in it that persuades me that my reasoning and the conclusion I have arrived at in *Joseph v. Wootler* is erroneous for I am quite unable to share his view that there will be difficulty in distinguishing the evidence in support of the respective offences one of which was indictable nor do I share his view that the offence being committed in the course of one incident makes a difference to the legal position. All that remains for me to consider is whether the Magistrate was right in convicting these men on the evidence available before him on the charge of simple hurt. The evidence establishes that the incident started off with a fight between the 5th accused and the complainant who according to the evidence is a bigger and stronger man than the 5th accused. The evidence is that there was no previous illwill between the complainant and the accused. It is the case for the 1st, 4th and 6th accused that they only intervened to stop the fight. It is the case for the 3rd accused that he was never there. It is the case for the 2nd accused that this incident happened in front of his boutique and all that he did was to protest at what was happening. There is insufficient evidence to establish that all these accused were actuated by a common intention to assault the complainant and as such they will be only responsible for what each of them is proved to have done. It is quite possible that in intervening in a fight some of those intervening also struck blows. Be that as it may, in the prompt first complaint the complainant made he did not allege that the 4th accused struck him and Sumanadasa the only witness called to corroborate his evidence does not specifically say that the 4th accused struck the complainant. It therefore appears to me that 4th accused should be given the benefit of the doubt and should be acquitted. I therefore allow his appeal. In

[1] *(1968) 72 N L.R. 187.*
[2] *(1969) 72 N.L.R. 406.*
[3] *(1969) 72 N.L.R. 213.*

regard to the other accused the Magistrate who had the advantage of hearing and seeing the witnesses has accepted the testimony of the complainant that he was struck by these persons. I therefore see no reason to interfere on the question of fact. It appears to me, however, that having regard to the fact that there was nothing against them previously and that this was an incident that happened on the spur of the moment they may be treated as first offenders. I therefore set aside the order convicting them and I order that without proceeding to conviction each of them should be directed to enter into a bond in a sum of Rs. 200 personal in terms of Section 325 of the Criminal Procedure Code to be of good behaviour for a period of one year. A condition of the bond would be that each of them should pay Rs. 100 as Crown costs within three months of entering into the bond. Subject to the variation in sentence I have set out, the appeals of 1st, 2nd, 3rd and 6th accused are dismissed. The appeal of the 5th accused is dismissed subject to the variation I have made in regard to sentence as set out in this order. The appeal of the 4th accused is allowed and he is acquitted.

Appeal of 4th accused allowed.

Appeals of the other accused dismissed, subject to variation in sentence.