1945 *Present:* **Cannon J.**

DE SILVA, Petitioner, *and* AMARASEKERE, *et al.*, Respondents.

In Revision M. C. Hambantota, 10,051.

Criminal Procedure—Prima facie *case made out by complainant—Duty of Magistrate to call upon the defence—Criminal Procedure Code, s. 191.*

Where, although a *prima facie* case had been made out by the complainant, the Magistrate, purporting to act under section 191 of the Criminal Procedure Code, dismissed the case without calling upon the defence—

Held, that there was a denial of justice to the complainant. What the Magistrate has to decide at the close of the case of a complainant is whether he has made a *prima facie* case. He will decide whether the case is proved or not only after he has heard what the defence has to say about it.

THIS was an application to revise an order of the Magistrate of Hambantota.

G. P. J. Kurukulasuriya, for the petitioner.

D. W. Fernando (with him *G. T. Samarawickreme*), for the respondent.

July 12, 1945. CANNON J.—

In this case the Chairman and Vice-Chairman of a Village Committee and a third person who is a market trader were summoned for trespass and mischief. The evidence of the complainant and a boy named Daluwatte who was present, was to the effect that the three accused came to him at about 11 A.M. and asked him to vacate one of the three stalls of which he was the lessee. The complainant demurred, whereupon the first and second accused told the third accused to remove the complainant's goods from one of the three stalls. The complainant at once left to get help of the village headman and when he returned he found that his goods had been removed from one of the three stalls and damaged, a sales platform and some earthenware vessels, among other things, being broken. They had been removed by second and third accused at the instigation and in the presence of first accused. The Magistrate, without calling upon the defence, dismissed the case. Among the reasons he gave for doing so are—(1) That the first and second accused were actually outside the market when they instigated the third accused to evict the goods of the complainant. (2) That the complainant had broken the regulations by putting up a so-called partition of gunny bags around his stores. (3) That the only evidence against the accused was that of Daluwatte. (4) That it was clear from the nature of the damage that no wanton damage had been caused. (5) That all that had been done was to find room for third accused. (6) That it seemed to him the first and second accused had acted *bona fide;* and (7) that on the evidence of Daluwatte alone it was not sufficient to convict.

Mr. Kurukulasuriya is obviously justified in submitting that the Magistrate had not appreciated in this case either the facts or the law. This is not a case where corroborative evidence is required; and the Magistrate was not, in fact, in the position of having to act on the evidence of Daluwatte alone, because the complainant himself gave evidence and he and Daluwatte were both eye-witnesses. As regards the breach of regulations, that was a matter for the market-keeper to deal with, by taking appropriate proceedings. The Magistrate's statement that all that had been done was to find room for the third accused seems to imply that if one person wants the room of which another person is in lawful possession, he is entitled to evict him. The Magistrate's finding that the first and second accused acted *bona fide* is made without any evidence being submitted to support it and is in any event irrelevant to the issue. The evidence is that a sales platform and earthenware vessels were broken. It is difficult to reconcile this with the Magistrate's statement that no wanton damage was done.

This application is made in revision. Mr. Kurukulasuriya says this procedure became necessary because the Attorney-General's Department had refused leave to appeal. It occurred to me that this refusal was probably for some technical reason but Mr. Fernando for the respondent tells me that there are no grounds for such an inference.

This is by no means the only case, coming up for appeal, in which although a *prima facie* case had been made out by the complainant, the Magistrate has dismissed the case without calling upon the defence, purporting to act under section 191 of the Criminal Procedure Code. That is a power which is given to all tribunals. It is not, however, intended to be exercised when a *prima facie* case has been made out, until after the defence has been called upon. What the Magistrate has to decide at the close of the case of the complainant is whether he has made a *prima facie* case, *i.e.*, whether there is a case to answer. He will decide whether the case is proved or not only after he has heard what the defence has to say about it. In this case there seems to have been a denial of justice to the complainant. It must be re-tried before another Magistrate.

Sent back for re-trial.