1945 *Present:* **Jayetileke and Rose JJ.**

WILFRED, Appellant, *and* INSPECTOR OF POLICE, PANADURE, Respondent.

579—M. C. Panadure, 35,977.

Criminal Procedure—Evidence of witness in a non-summary case—Cannot be read over when the Magistrate decides to try case summarily as District Judge—Such irregularity vitiates the trial—Criminal Procedure Code, ss. 152 (3), 297, 425.

Evidence that is recorded by a Magistrate to enable him to decide whether he should exercise jurisdiction under section 152 (3) of the Criminal Procedure Code cannot be read over when he assumes jurisdiction and tries the case. Such evidence, when adduced, has to be recorded *de novo.*

An infringement of the requirement of section 297 of the Criminal Procedure Code that evidence shall be taken in the presence of the accused is not a mere error, omission, or irregularity which can be cured by section 425 of the Criminal Procedure Code.

APPEAL referred by Wijeyewardene J. to a Bench of two Judges, under section 48 of the Courts Ordinance. The question submitted for decision was whether evidence that is recorded by a Magistrate to enable him to decide whether he should exercise jurisdiction under section 152 (3) of the Criminal Procedure Code can be read over when he assumes jurisdiction as District Judge and tries the case summarily.

H. W. Jayawardene (with him *G. T. Samarawickreme*), for the accused, appellant.—In this case proceedings commenced before the Magistrate, under section 148 (1) (*b*) of the Criminal Procedure Code. The written report alleged that the accused had committed theft of a gold watch and chain valued at Rs. 750 belonging to one Soysa. The accused was produced before the Magistrate. The Magistrate first examined Soysa and then decided to try the accused summarily as Additional District Judge. He framed a charge against the accused. Soysa was recalled and his previous evidence was read over. It is submitted that this evidence is inadmissible. It is evidence which the Magistrate had no jurisdiction to record. The Magistrate, when he decided to try the accused summarily as Additional District Judge, should have commenced proceedings afresh. The evidence recorded earlier could not be imported into the trial by merely reading it over to the accused—*Nair v. Yagappen* [1], *Dionis v. Piyoris* [2], *Herath v. Jabbar* [3]. The case of *Musafer v. Wijesinghe* [4] is distinguishable as in that case the accused was not present.

J. A. P. Cherubim, C.C., for the Crown.—The sole question is whether the Magistrate imported into the trial the evidence recorded earlier. The cases cited for the appellant deal with evidence recorded in the absence of the accused. In the present case the accused was in Court. The only defect is that the evidence was not signed, but that is only an

[1] *(1940) 42 N. L. R. 185 at p. 186.*
[2] *(1942) 43 N. L. R. 236.*
[3] *(1940) 41 N. L. R. 217.*
[4] *(1941) 43 N. L. R. 61.*

irregularity—*Tennekoon v. Maradamuttu*[1]. Where the accused is absent evidence recorded can be read over—section 297. By implication that can also be done when the accused is present. See *The King v. Weerasamy*[2]. In any case English Law would apply under section 6 of the Criminal Procedure Code. *Herath v. Jabbar (supra)* can be distinguished as in that case evidence was improperly recorded in the inquiry, when the Magistrate had no jurisdiction. In any event no prejudice has been caused to the accused and the defect is only an irregularity which is curable under section 425 of the Criminal Procedure Code—*Ebert v. Perera*[3].

H. W. Jayawardene, in reply.—Disregard of an express provision of law as to the mode of trial is not a mere irregularity which can be remedied—*Subramania Ayyar v. King Emperor*[4]. With regard to the distinction between irregularities and illegalities see *Mudiyanse v. Appuhamy*[5], *R. v. Gee*[6], *The King v. Don William*[7].

Cur. adv. vult.

December 19, 1945. JAYETILEKE J.—

This appeal has been referred by Wijeyewardene J. to a Bench of two Judges. The point submitted for our decision is whether evidence that is recorded by a Magistrate to enable him to decide whether he should exercise jurisdiction under section 152 (3) of the Criminal Procedure Code can be read over when he assumes jurisdiction and tries the case.

On February 7, 1945, Inspector Somasunderam made a written report to the Magistrate under section 148 (1) (*b*) of the Criminal Procedure Code that the accused had committed theft of a gold watch and chain valued at Rs. 750 belonging to one Soysa, and produced the accused before him. Thereupon the Magistrate examined Soysa in the presence of the accused and decided to try the accused summarily as Additional District Judge. He then framed a charge against the accused, recalled Soysa, and read over the evidence previously recorded.

Learned Counsel for the appellant contended that the proceedings involved a violation of the provisions of section 297 of the Criminal Procedure Code by reason of the fact that the Magistrate read over the evidence of Soysa instead of recording it *de novo*. He said that there is no law which sanctions a departure from the procedure indicated in section 297 of the Criminal Procedure Code and that the Magistrate was under an obligation to record the evidence of Soysa *de novo*.

Section 297 reads—

" *Except as otherwise expressly provided* all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance has been dispensed with, in the presence of his pleader:

Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed

[1] *(1942) 43 N. L. R 169.*
[2] *(1941) 22 C. L. W. 57.*
[3] *23 N. L. R. 362.*
[4] *(1901) 25 I. L. R. Madras 61.*
[5] *(1920) 22 N .L. R. 169.*
[6] *(1936) 2 A. E. R. 89.*
[7] *(1920) 2 C. L. Rec. 192.*

with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon."

The language of the section is imperative that the evidence shall be taken in the presence of the accused, or in certain circumstances, in the presence of his pleader. The proviso is an excepting or qualifying proviso and it excludes from the application of the preceding portion of the section the case where evidence has been recorded in the absence of the accused. To satisfy the requirements of the section, it does not seem to be enough to read over the sworn statement of the witness recorded in the presence of the accused before the commencement of the inquiry or trial and treating it as examination-in-chief. The section requires that such examination-in-chief shall take place after the commencement of the inquiry or trial. Learned Counsel for the Crown contended that the proviso impliedly excludes from the operation of the section evidence that has been recorded in the presence of the accused. On a careful consideration of the terms of the section and of the effect of the proviso with reference to the substantive words of the section we are of opinion that there is no force whatsoever in this contention. One fundamental principle that governs the interpretation of Statutes is that an exception must be construed strictly. The effect of a proviso has been considered by the House of Lords in the case of *West Derby Union v. The Metropolitan Life Assurance Society*[1]. In that case it was sought to import into the substantive section certain words which were not there but which were thought to be implied from the terms of the proviso. Lord Herschell said—

> "I decline to read into any enactment words which are not found there and which alter its operative effect because of provision to be found in any proviso".

Lord Watson said—

> "I am perfectly clear that if the language of the enacting part of the Statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso".

The language of section 297 is clear and unambiguous and, according to the authority I have quoted, the construction that the proviso impliedly excludes evidence recorded in the presence of the accused from the operation of the section cannot be supported. We fully appreciate that it seems inconsistent that evidence recorded in the presence of the accused cannot be read over whilst evidence recorded in his absence can be read over. But we cannot be affected by it. All we can do is to construe the section. The matter may well be one for the attention of the Legislature to remedy the defect.

We agree with the view held by Hearne J. in *Diyonis v. Perera*[2] that in the absence of a proviso covering such evidence it has to be recorded *de novo*. The question we are considering seems to have arisen incidentally in the case of *Abeysinghe v. Menika*[3] and, in the course of his

[1] *1897 A. C. 647.*

[2] *43 N. L. R. 336.*

[3] *43 N. L. R. 419.*

judgment, Howard C.J. has dealt with the inconsistency we have referred to. He has, however, not decided the question. For these reasons we are of the opinion that Mr. Jayawardene's contention must be upheld.

Learned Counsel for the Crown argued that in any event the conviction should be affirmed, as the failure to record evidence *de novo* is, at best, an irregularity which is cured by section 425 of the Criminal Procedure Code. This question has been considered under the corresponding section of the Indian Penal Code which reads—

Section 350—

> "Expect as otherwise expressly provided. all evidence taken under Chapters XVIII., XX., XXI., XXII., and XXIII., shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his pleader."

There are a number of decisions referred to in Volume 2 of Chitaley at page 1862, where it has been held that a contravention of the provisions of this section is not a mere error, omission, or irregularity and that it cannot be cured by section 537. In the case of *Allu v. The Emperor* [1] which was followed in several cases, it has been held that section 537 of the Indian Code of Criminal Procedure, which corresponds with section 425 of our Code, does not apply to the infringement of a statutory requirement. It only applies to errors, omissions, and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by Statute.

In the well-known case of *Subramania Aiyar v. King Emperor* [2] it was held by the Privy Council that a disregard of the provisions of section 233 of the Indian Code of Criminal Procedure, which is practically identical with section 178 of our Code, was not a mere irregularity which could be overlooked if it had been productive of no substantive injustice. In delivering the judgment of the Privy Council Lord Halsbury said—

> "The remedy of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the Criminal Law to say that, when the code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the code comes within the description of error, omission or irregularity."

I may also refer to a judgment of a Divisional Bench of this Court in *Ebert v. Perera* [3] where De Sampayo J. said—

> "But the entire absence of a charge, when the Magistrate ought to have framed one, is not a mere irregularity which may be overlooked under section 425, but is a violation of the essential principle generally governing Criminal Procedure and vitiates a conviction."

We are of opinion that in this case there has been an infringement of the statutory requirement that evidence shall be taken in the presence of the accused, and that it is not covered by the provisions of section 425 of the Criminal Procedure Code.

[1] *A. I. R. 1924, Lahore 104.*

[2] *(1901) I. L. R. Madras 61.*

[3] *23 N. L. R. 362.*

We would accordingly set aside the conviction and the sentence and send the case back for a new trial, which as the Magistrate has formed his own opinion with regard to the evidence, must take place before another Magistrate.

Rose J.—I agree, and have nothing to add.

Case remitted for new trial.