

1946

*Present : Dias J.*

PANCHA, Appellant, and VELOO (S. I., Police), Respondent.

*1,176—M. C. Gampaha, 31,891.**Housebreaking by night—Summary trial under Criminal Procedure Code, s. 152 (3)—No ground by itself for setting aside conviction—Penal Code, s. 443.*

The summary trial, under section 152 (3) of the Criminal Procedure Code, of a case of housebreaking by night is not by itself sufficient ground for setting aside the conviction of the accused.

**A** PPEAL against a conviction from the Magistrate's Court, Gampaha.

*H. W. Jayewardene, for the accused, appellant.**J. G. T. Weeraratne, C.C., for the Attorney-General.**Cur. adv. vult.*

October 29, 1946. DIAS J.—

The appellant was charged with the offences of housebreaking by night and theft from a dwelling house under sections 443 and 369 of the Penal Code. These offences are not summarily triable. The Magistrate, however, assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and after trial convicted and sentenced him to undergo six months' imprisonment in the aggregate.

<sup>1</sup> (1941) 22 C. L. W. 57.

The only point taken in appeal is that the Magistrate should have taken non-summary proceedings and committed the appellant for trial before a higher Court.

There are conflicting authorities on this point. In *Dankia v. Donhamy*<sup>1</sup> and *Smith v. Peleck Singho*<sup>2</sup> it was laid down that a charge of house-breaking by night cannot be dealt with summarily under section 152 (3). On the other hand, in *Appu v. Babun*<sup>3</sup> Ennis A.C.J. said :—" Although it is a counsel of perfection that ordinarily cases under section 443 of the Penal Code should not be tried summarily, and this has been commented on over and over again by the Supreme Court, at the same time it does not by itself afford necessarily a sufficient ground for setting aside the conviction and sending the case back for non-summary trial". In *Kotiyagala v. Alagiri*<sup>4</sup> Poyser J. held that an offence under section 443 could be tried under section 152 (3). In the unreported case *S. C. 776 M. C., Colombo, No. 47,232 (S. C. Min. November 24, 1942)* Keuneman J. following *Appu v. Babun (supra)* held that such a trial does not by itself vitiate a conviction for housebreaking. In *Nadarajah v. Gopalan*<sup>5</sup> Dalton J. queried whether the summary trial of an offence of housebreaking under section 152 (3) of the Criminal Procedure Code would have to be discontinued because the accused was a "reconvicted criminal". The order made by the learned Judge is interesting :—" The proceedings, therefore, will be set aside . . . and the case remitted for non-summary proceedings before another Magistrate. If, on a trial following such non-summary proceedings, a plea of *autrefois convict* is upheld, *these proceedings and the conviction, the subject matter of this application, will stand*".

I think the point of law fails. I have read through the proceedings and can find no sufficient grounds for setting aside these proceedings and sending the case back for non-summary proceedings. The appeal is dismissed.

*Appeal dismissed.*