

1954

*Present : Gunasekara J.*

JAMALDEEN, Appellant, and P. J. DE SILVA (S. I. Police),  
Respondent

*S. C. 1590—M. C. Colombo, 35,755/A*

*Criminal Procedure Code—Proviso to section 297—Scope of its applicability—Sections 151 (1), proviso 2, 151B, 407.*

By Section 297 of the Criminal Procedure Code,

“ 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 is 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 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. ”

*Held*, that the proviso does not enable the prosecution to utilize as part of its case at a trial evidence taken in the accused's absence before he was charged.

**A**PPEAL from a judgment of the Magistrate's Court, Colombo.

No appearance for the accused appellant.

*V. S. A. Pullenayagam*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

August 16, 1954. GUNASEKARA J.—

The appellant was convicted, after a summary trial under section 152 (3) of the Criminal Procedure Code, on a charge of having dishonestly retained a stolen radio receiving set valued at Rs. 250, knowing or having reason to believe it to be stolen property, and was sentenced to 12 months rigorous imprisonment. The evidence that was taken at the trial in the presence of the appellant is clearly insufficient to support the conviction. The learned crown counsel agrees that by itself it is insufficient, but he has sought to eke it out with some evidence that was taken in the appellant's absence, under section 407 of the Criminal Procedure Code. The evidence of each witness who was examined on that occasion was read over to the appellant at the trial in the presence of the witness and the appellant was given an opportunity of cross-examining the witness on that evidence. The learned crown counsel contends that by reason of the provisions of section 297 of the Code the evidence so read to the appellant was thereby made a part of the case against him.

The proceedings in the magistrate's court were instituted on the 28th January, 1953, upon a police report under section 148 (1) (b) of the Criminal Procedure Code. The evidence taken in the appellant's absence was taken on the 25th March. He appeared before the court for the first time on the 23rd November, and on that day the learned magistrate decided to try the case summarily and framed a charge against him in terms of the allegation in the police report. He pleaded not guilty, and the trial was postponed to the 7th December. The trial was held on that day and the appellant was convicted.

Section 297 of the Criminal Procedure Code is in these terms :

“ 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 is 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 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 main part of the section lays down the rule that evidence must be taken in the presence of the accused or his pleader except in those cases in which the law has expressly provided for evidence to be taken in their absence. The proviso relates to one class of these exceptions, namely, where an inquiry or trial, as the case may be, has been proceeded with in the absence of an accused whose attendance has not been dispensed with, and who is therefore absent in breach of an obligation to be present. What is enacted in the proviso is a procedure for giving the accused an opportunity of dealing with evidence that has been made a part of the case against him in his absence. I do not agree with the view contended for by the learned crown counsel that it is a procedure which enables the prosecution to put in at an inquiry or trial evidence that was taken in the accused's absence before the commencement of that inquiry or trial.

As I read the proviso it does not enable the prosecution to utilize in one proceeding, whether an inquiry or trial, evidence that was taken in another, by merely having it read to the accused so that he may cross-examine the witness.

Support for a contrary view was sought in the judgment of Soertsz J. in *Musafer v. Wijesinghe*<sup>1</sup>, where he decided that certain depositions that were taken before the trial in the absence of the accused must be held to have been taken under the second proviso to section 151 (1) of the Criminal Procedure Code upon an oral complaint made under section 148 (1) (a), and that therefore the reading over of those depositions to the accused at the trial was justified by the proviso to section 297. The question that was discussed appears to be whether in the circumstances of that case the taking of the depositions in the absence of the accused was justified by any provision of law; and it appears to have been assumed that if the case fell within any exception to the general rule, that evidence must be taken in the presence of the accused (or his pleader), the proviso to section 297 would justify the reading of the depositions at the trial. Possibly the reason for this assumption is to be found in the procedure that was prescribed by the Code before it was amended by Ordinance No. 13 of 1938; for before the amendment the magistrate was required to read over to the accused at the commencement of a non-summary inquiry or a summary trial any depositions taken before the issue of process and recorded under section 150 (1). But this procedure was expressly laid down by sections 156 (1) and 189 (1) in regard to non-summary inquiries and summary trials respectively, and is not referable to section 297. Depositions now taken under the second proviso to section 151 (1) of the Code as amended, and recorded as required by section 151B, would, before the amendment, have been taken under section 149 (1) and recorded as required by section 150 (1). The provisions for the reading over of these depositions to the accused, that were contained in sections 156 (1) and 189 (1) before the amendment, find no place in the Code as amended. With all respect to the view expressed by Soertsz J., it seems to me that there is no justification for reading these provisions now into section 297, which has not been amended. Moreover, it is not to every exception to the general rule laid down in section 297 that the proviso applies, but only to those cases where evidence is taken in the absence of an accused whose attendance has not been dispensed with. There can be no question of the attendance of an accused person being or not being dispensed with until the proceedings have reached a stage at which the accused is under an obligation to attend unless his attendance is dispensed with. Clearly that stage has not been reached when the question for decision is whether process should issue, that is to say, whether the accused should be required to attend.

The learned crown counsel has also cited two other cases as throwing light on the present question. In the first of these, *James Singho v. Ratnapura Police*<sup>2</sup>, Basnayake J. held that a deposition taken under section 407 could not be put in evidence by its being read at the trial in the presence of the accused and the witness being cross-examined. But,

<sup>1</sup> (1941) 43 N. L. R. 61.

<sup>2</sup> (1949) 39 C. L. W. 79.

as was pointed out by Nagalingam J. in *Fernando v. S. I. Police, Welikada*<sup>1</sup>, which is the other case cited by crown counsel, it does not appear that the provisions of section 297 were considered by Basnayake J. It was held by Nagalingam J. in the latter case that the proviso to section 297 was applicable to certain evidence that had been recorded under section 407 in the absence of the accused, and that the procedure adopted at the trial, of reading that evidence to the accused in the presence of the witness and giving the accused an opportunity of cross-examining the witness, was unexceptionable. It is not clear, however, whether the evidence in question had been taken after the accused had pleaded to the charge (as in *James Singho v. Ratnapura Police*<sup>2</sup>) or before. In any event, the question that arises in the present case, whether the proviso to section 297 can apply to evidence taken in the accused's absence before he was charged, was not considered. In the view that I take of the proviso the evidence that was taken on the 25th March, 1953, before the commencement of the trial, was not made a part of the case against the appellant at the trial by its being read to him in the presence of the witnesses and by his being given an opportunity of cross-examining them on that evidence. With all respect to my brother Nagalingam, I am unable to agree with the view expressed in *Fernando v. S. I. Police, Welikada*<sup>1</sup>, that the proviso "embodies a rule laying down a general principle of legal admissibility of evidence recorded in the absence of an accused person". In my opinion what it lays down is an imperative rule of procedure for informing the accused of the evidence taken in his absence and giving him an opportunity of cross-examination, and not a rule governing admissibility of evidence. It can only apply to evidence that has already been admitted at an earlier stage of the same inquiry or trial.

I allow the appeal and acquit the appellant.

*Appeal allowed.*

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