

1964

Present : Tambiah, J.

W. D. BEDE, Appellant, and I. P. BOTEJU (S. I. Police),
Respondent

S. C. 844/1963—M. C. Kanuwana, 5751

*Criminal procedure—Accused person brought before Magistrate without process—
Failure of Court to examine person who brought the accused—Effect—Criminal
Procedure Code, ss. 148 (1) (d), 151 (2), 425.*

Where a person is brought before a Magistrate in custody without process accused of having committed an offence, the failure to examine, in terms of section 151 (2) of the Criminal Procedure Code, a person who produces the accused is not a fatal irregularity if his evidence is of no value in finding out whether there is a prima facie case against the accused.

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

N. E. Weerasooria (Jnr.), for the Accused-Appellant.

D. S. Wijesinghe, Crown Counsel, for the Attorney-General.

February 14, 1964. TAMBIAH, J.—

There is no reason for me to interfere with the finding on the facts in this case. Mr. Weerasooria has urged that the proceedings are null and void because the police officer who produced the accused in court had not

given evidence before the learned Magistrate before the proceedings in the case started. The accused was brought to court otherwise than on summons or on warrant. In view of the ruling of the Divisional Bench evidence has to be recorded before a Magistrate starts proceedings in a case.

The nature of the evidence that would have had to be led is laid down in a number of cases and that evidence should not be hearsay. In the instant case the person who received the stab injury was called and he testified before court that the accused stabbed him. The police constable who produced the accused was not called to give evidence before the commencement of the proceedings to convict the accused.

Section 151 (2) of the Criminal Procedure Code enacts as follows: "Where proceedings have been instituted under paragraph (d) of Section 148 (1) the magistrate shall forthwith examine on oath the person who has brought the accused before the court and any other person who may be present in court able to speak to the facts of the case".

Mr. Weerasooria contended that in view of the word 'shall' in Section 151 (2) of the Criminal Procedure Code it is imperative on the part of the Magistrate to call the person who brought the accused before his court. This word has been construed in a number of cases. The view that has been taken is that failure to call a person before the Magistrate is not a fatal irregularity but is one curable under Section 425 of the Criminal Procedure Code. Vide: 65 C. L. W. 29 *Aseervathan v. Kanthiah*; S. C. 54/1963 of 9th May, 1963; 65 N. L. R. 210, *Caldera v. Wijewardena*.

Mr. Weerasooria referred me to case No. S. C. 749/1963—M. C. Balapitiya No 25722, where Herat, J., took the view that it is imperative that the person who brought the accused before the court should be called in a case where that person had been brought to court otherwise than on summons or on warrant and if this is not adopted the whole proceeding is a nullity. I am afraid, I prefer the view that it is only a curable irregularity. The exact line of demarcation between irregularity and illegality has never been satisfactorily explained in any of the decisions of our courts or the Privy Council. The exact distinction between irregularity and illegality is difficult to define. But in the instant case the evidence of the police officer who brought the accused before the Magistrate will be of no value to the Magistrate in finding out whether a prima facie case is made out against the accused.

Section 151 (2) of the Criminal Procedure Code had been specifically enacted by the Legislature in order to ensure that when a person is brought to court otherwise than on summons or on warrant, a prima facie case should be made out against the accused person. This requirement is satisfied if the person who received the stab injury testified that the accused stabbed him. The mere use of the word 'shall' in Section 151 (2) does not mean that a failure to call the person who had produced the accused is such a fatal irregularity that it is not curable under

Section 425 of the Criminal Procedure Code. For these reasons I hold that the trial is not vitiated.

Mr. Weerasooria asks for the reduction of the sentence of six months rigorous imprisonment imposed on the accused-appellant by the Magistrate. In this case a public officer who was performing his duties was stabbed. This court should give protection to public officers. Therefore, I do not propose to interfere with the sentence of the case. For these reasons the appeal is dismissed.

Appeal dismissed.
