1940 *Present : Hearne J.*

NAIR *v.* YAGAPPAN.

519—M. C. Hatton, 284.

Criminal Procedure Code, s. 152 (3)—Summary trial by Magistrate of offence without jurisdiction—Objection to trial by accused—Assumption of jurisdiction by Magistrate—Judicial discretion wrongly exercised—Proceedings irregular.

Proceedings commenced against the accused on a written report under section 148 of the Criminal Procedure Code, and, after the evidence of the complainant was recorded, a warrant was issued against the accused on March 4, 1940. The accused appeared before the Magistrate who proceeded to try the case summarily as Magistrate. The complainant was recalled, his previous evidence was read and he was cross-examined by the accused. The trial was postponed to April 1, 1940, on which day the accused's counsel pointed out to the court that the offence was not one triable by the Magistrate ; whereupon the Magistrate assumed jurisdiction as District Judge under section 152 (3) and proceeded to try the accused. The complainant was recalled, his previous evidence read over and eventually the accused was convicted.

[1] *2 C. W. R. 2.*

[2] *3 A. C. R. X.*

Held, that the conviction was bad as it was based partly on evidence which was recorded by the Magistrate at a time when he was acting without jurisdiction.

The decision by a Magistrate who is also District Judge as to whether or not an accused person should be tried summarily must be the result of the exercise of a judicial discretion vested in him by law; and that discretion must be exercised at the proper stage.

APPEAL from a conviction of the Magistrate of Hatton.

S. Vagiswara Aiyar (with him *T. Kanapathipillai*), for accused, appellant.

Nihal Gunesekera, C. C., for complainant, respondent.

Cur. adv. vult.

October 9, 1940. HEARNE J.—

In M. C. Hatton, 284, proceedings were commenced against the accused by a written report under section 148 of the Criminal Procedure Code in which he was charged, under the latter portion of section 486, the Penal Code with an offence which was not triable by a Magistrate. This was on February 10, 1940. On the same day the Magistrate recorded the evidence of the complainant in the absence of the accused and ordered a warrant to issue for his arrest. He was before the Court on March 4 when the Magistrate proceeded to hold a trial in his capacity as Magistrate. The complainant was recalled, his previous evidence was read, and he was cross-examined at length by the accused's Counsel. The 1st April was then fixed for the further hearing of the case. On the 1st April Counsel for the accused pointed out to the Magistrate that he had acted without jurisdiction, that the offence was one which he was incompetent to try as Magistrate, and requested him to take non-summary proceedings. In answer to this the Magistrate replied that he would assume jurisdiction as District Judge under section 152, C. P. C., to which Counsel for the accused objected. The Magistrate stated that the objection had been taken too late. The complainant was recalled, the evidence he had previously given on February 10, and March 4 was read again, he was cross-examined and a trial by a Magistrate became a trial by a Judge. The accused was convicted and has now appealed.

The problem presented in this appeal of whether the Magistrate could and should have acted as he did, after his initial mistake had been brought to his notice, does not appear to be covered by authority. At any rate the decisions of this Court cited by Counsel for the appellant have no bearing on it. In those cases[1] the Magistrate began non-summary proceedings and after a lapse of time assumed jurisdiction as a District Judge. The principle that was laid down was that, where he does this, it should be done at an early stage. For the angle from which a committing Magistrate views the material before him is not the same angle from which he views the same material as a trial Magistrate. That principle has no application in the present case. There was no difference in the point of view of the Magistrate as Magistrate and as District

[1] *4 N. L. R. 1 4 C. L. J. 162.*

Judge. On the other hand while, when a Magistrate takes non-summary proceedings and later assumes jurisdiction as a District Judge, he can properly act on the evidence he has recorded as committing Magistrate (it must be read over, &c), it cannot I think be said here that as District Judge, the Magistrate could have acted on evidence he had improperly recorded as Magistrate. This in fact is what he did.

It is to be noted that on the 4th March a formal trial, or what purported to be a formal trial, was held; at that stage, in holding such trial, the Magistrate was acting without jurisdiction; all that he purported to do on that day was a nullity. And yet the evidence which had been irregularly recorded was incorporated in the trial by the Magistrate, after he had assumed jurisdiction as District Judge. In part at least, therefore, the conviction of the accused was founded upon evidence which had been improperly recorded but which, nevertheless, became part and parcel of a fresh trial.

Apart from this, however, it is clear from the interpretation placed on section 152 of the Criminal Procedure Code by this Court that the decision by a Magistrate, "being also a District Judge", as to whether or not an accused person should be tried summarily, must be the result of the exercise of a judicial discretion vested in him by law. On the 4th March, he did not exercise his discretion at all. That was the stage at which he should properly have exercised it. He took summary proceedings for no reason other than that he had mistakenly assumed he had jurisdiction, while, on the 1st April, he would I think have been better advised to have acceded to the application made by Counsel for the accused. It seems to me more desirable that, as it was necessary for the accused to be tried by a District Judge, the trial should take place before a substantive Judge, rather than that, after the confusion that had been introduced into the case and the original proceedings had reached an impasse, a fresh trial should be started before the same Magistrate in a different capacity. In entering on the trial at that stage it is possible he did so with preconceptions based on the evidence which had already been led. Difficulties will always arise when the provisions of section 152 are invoked belatedly. In the determination of whether the accused is or not guilty he is, I feel, entitled to an inquiry that is more straightforward, uninterrupted and precise. To add to his troubles, his Counsel did not appear on the last day of trial and a postponement, rightly or wrongly (I do not propose to enter into the merits of this matter) was refused.

The appeal is allowed and the case remitted for proceedings to be taken *de novo* before another Magistrate. It has been pointed out to appellant's Counsel that the new Magistrate may commit and that, whether he so decides or not, his client may possibly receive a heavier sentence than has been passed upon him. But he tells me that he has warned the appellant in these terms.

Set aside. Case remitted.