

## ACHCHI KANNU v. AGO APPU.

1901.  
April 22.

P. C., Ratnapura, 20,026.

*False evidence—Summary punishment—Criminal Procedure Code, s. 440.*

Per MONCREIFF, J.—Section 440 of the Criminal Procedure Code was not meant to be used in cases of conflict of evidence merely, but in cases where the falsity of the evidence of a witness appears from something which has taken place in the course of the trial.

It is irregular to exercise the powers conferred by this section where the knowledge and proof of the alleged false evidence is obtained from some source exterior to the case in which the evidence was given.

IN the course of the trial of this case, one of the witnesses deposed as follows:—"I did not tell the police sergeant that I had seen the complainant go to the accused's boutique;" and another witness, in the course of his evidence, deposed:—"I did not tell the sergeant I saw her go inside the accused's boutique, or that she took rice from there. I am quite sure I did not say so." These statements were not called in question by any evidence given during the trial, nor were they conflicting with anything that had been said by the two witnesses. But after judgment pronounced, the Police Magistrate called the police sergeant, who contradicted the statements which the two witnesses had made in the course of their evidence, by speaking to other statements made by them out of Court. Thereupon the Police Magistrate ordered the first appellant to pay a fine of Rs. 25, or in default to be imprisoned for a month, and he inflicted a similar sentence upon the second appellant.

On appeal—

*Bawa*, for appellants.—The two appellants were witnesses convicted under section 440 of the Procedure Code. The punishment for the offence of perjury is under section 190, and in the schedule of the Criminal Procedure Code it is enacted that only a District Judge shall try summarily under section 190. In the present case there is no perjury. Perjury implies absolutely false statement, but there is no proof here that the statements alleged were really false. The Magistrate has held a summary inquiry for a non-summary offence and convicted the appellants, purporting to act under section 440. The Magistrate was *functus officio*, so to speak, as soon as he had convicted the accused in the case, and up to that point he had no reason to think that these witnesses had spoken untruths. He had no right to begin a trial after the conviction of the original accused. He might begin a separate non-summary inquiry. The perjury is not patent as it ought to be. It requires the evidence of the sergeant to show it; the appellants

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could not be convicted without his evidence; therefore *ex facie* there was no false statement; he has no jurisdiction under section 440. Even if he had jurisdiction, his proceedings are irregular, because the appellants were not informed before the sergeant was called of the nature of the proceedings, so as to be able to cross-examine the policeman, who referred to statements of the witnesses not made on oath and made out of Court. The accused, if put on their trial properly, could have shown that the previous statement was immaterial as it was not sworn testimony, and that it was not intentionally false. The conviction of these witnesses is an abuse of section 440 (*Andris v. Juanis*, 2 N. L. R. 74, and *Balthazar v. Baba Appu*, 3 N. L. R. 63).

MONCREIFF, J.—

In my opinion, the materials upon which this matter was brought within the 440th section of the Criminal Procedure Code were somewhat meagre. I am disposed to doubt whether it was a case in which a witness should be punished for giving false evidence under that section.

But there is another objection to the course taken by the Police Magistrate, and that is this. It was contended by Mr. Bawa, and I think with reason, that the falsity of a witness' evidence should appear from something which has taken place in the course of the trial, and should not be prompted by some considerations which had not been brought out in the course of the proceedings. I agree with the learned counsel and with the decisions which he quoted, that this section was not meant to be used in cases where we are confronted by a conflict of evidence; and I agree that unless there is something in the conduct and testimony of witnesses, there is no ground for proceeding against them under this section; for what the Police Magistrate has done is not to make use of section 440, but substantially to try the two appellants on a charge of giving false evidence, knowledge and proof of which were obtained from some source exterior to the case with which he was dealing.

I am of opinion that this is a proceeding which does not fall within section 440, sub-section 1, of the Criminal Procedure Code. No doubt the suggestion made by Mr. Bawa is a very correct one, that the Magistrate might have availed himself of sub-section 4. Now, I am not aware that there is any other power inherent in the Magistrate by virtue of any other section enabling him to proceed against the appellants in the way in which he did. Section 188 of the Penal Code is a section which appears to me only available in the District Court.

I therefore think that this conviction must be set aside.