1927.

Present: Schneider J.

THE KING *v.* PODI APPUHAMY

76—D. C. (Crim.) Kandy, 3,995.

Perjury—Two contradictory statements—Materiality—Criminal Procedure Code, ss. 439 and 440.

A witness can be convicted for giving false evidence under section 439 of the Criminal Procedure Code only where he contradicts the evidence given by him previously on a material point.

Section 439 is not intended to be applied to cases where the offence is of a grave nature and calls for a heavy sentence.

The scope and application of sections 439 and 440 of the Criminal Procedure Code explained.

APPEAL from a conviction by the Additional Judge of Kandy. The facts appear from the judgment.

Mervyn Fonseka, C.C., for the Crown.

August 12, 1927. SCHNEIDER J.—

There are two appeals in this case by two witnesses who were convicted upon two indictments in one proceeding under section 439 of the Criminal Procedure Code in connection with the trial of this case and each of whom has been sentenced to undergo 18 months' rigorous imprisonment and to pay a fine of Rs. 1,000, and in default of payment to undergo a further term of 18 months' rigorous imprisonment. They are both ordinary carters, and in all probability are not in a position to pay the fine, and will therefore each have to undergo in all three years' rigorous imprisonment. I notice that their petitions of appeal have been prepared and lodged in Court by the Jailer of the Bogambra jail. The petitioners are therefore already suffering imprisonment under the order of the District Judge. The sentences imposed being so startling by their very severity, I felt that I ought to examine the whole of the evidence in the case. There was no appearance for the appellants. I am indebted to Mr. Crown Counsel Fonseka for the assistance he rendered to me as *Amicus Curiae*, not only in studying the facts of the case, but for the references to certain authorities. The appellants are Kalu Banda and Rattaranhamy, two of the witnesses for the prosecution. The charges against the accused in this case were that on April 25, 1927, he committed housebreaking by entering into a rice store, and also committed theft of rice at the same time from that store. The accused was a carter employed by the occupiers

of the store, whose business would appear to have been forwarding rice to estates. On the night in question there were seven carts in the " gala," or halting place for carts, which adjoined the store. All the carters had received their loads, and the poonac for their bullocks, and should have been ready to start at an early hour the next morning. The watchman of the store, when going his rounds at about 9.30 P.M., discovered the accused near one of the doors of the store, and that a space between the shutters of the door was held open by a wedge of wood, driven in between the two shutters. He also saw in the hands of the accused the spoke of a wheel, which had probably been used in forcing the shutters apart to insert the wedge. The opening was large enough to insert a hand and to reach some bags of rice. He seized the accused and called out to the other carters. Only the two witnesses, who were also carters and whose carts were in the " gala " that night, came up. The watcher says that three bags containing rice had been cut, and he found about quarter of a bushel of rice spilt inside and outside the room and that he pointed out the spilt rice to the appellants. The bags, he says, were all inside. Kalu Banda said in the District Court that when he went up the watcher showed him and Rattaranhamy some spilt rice outside and a larger quantity spilt inside. Under cross-examination he said on this point that he saw the bags distinctly and that the watcher showed him and Rattaranhamy the cuts in them, and that there were only a few grains of rice inside. In the District Court Rattaranhamy stated that he saw the bags, but did not see if they were cut; but that the watcher told them that the bags were cut, but did not show him the cut bags. The indictment against Kalu Banda was that he had made two contradictory statements, to wit:—

In the Police Court on May 2, 1927,, " I did not see any rice on the ground outside, and I cannot remember whether watcher told us that the bags had been cut," and in the District Court on June 9, " The watcher showed us some spilt rice outside, and I saw the bags distinctly and the watcher showed us cuts in them." To this indictment he pleaded " I forgetfully said so."

The indictment against Rattaranhamy was that he too made two contradictory statements. One in the Police Court on May 2, 1927, " Watcher showed me and Kalu Banda these cut bags," and the other in the District Court on June 9, 1927, " The watcher did not show the cut bags to me." To that indictment he pleaded " I do not remember."

The reasons given by the learned District Judge for holding the appellants guilty are that the case against the accused was an entirely false one, fabricated by the watcher, which the appellants

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had agreed to support by their evidence, and that the statements are certainly contradictory the one of the other. Those reasons alone are not sufficient to sustain a conviction. It is obvious that the District Judge had failed to notice that the special procedure provided in section 439 is applicable only in those cases where the witness contradicts the evidence previously given on "any material point." He has failed to find expressly that the appellants contradicted their previous evidence upon any material point. Does his finding that the two statements made by each of the appellant's are in fact contradictory one of the other amount to such a finding? I do not think it does. The mere fact that the statements are contradictory is not all that must be taken into consideration. There are several other facts which have a material bearing. The offence was alleged to have been committed on April 25, and within a few minutes of its detection it is alleged that the watcher took the accused before the manager of the store and that the appellants accompanied him. The manager reported the theft to the Police immediately. The Police Sergeant, who was called as a witness at the District Court trial, stated that he visited the scene of the offence the next morning and found the wedge in the position described by the witnesses, and spilt rice inside, and outside, the room. He must have questioned the watcher and the appellants, so must the manager before he wrote to the Police. The watcher and the appellants very likely discussed the case both before and after the Police Court inquiry amongst themselves and with others. There was an interval of nearly five weeks between the inquiry and the trial. In the circumstances, unless the witnesses were specially tutored, is it to be wondered that there should appear in their testimony the contradictions mentioned in the indictment? Is there any unreasonableness in their plea that the contradictions in question are really due to what they call forgetfulness, but which might more correctly be dedscribed as a confusion of recollections as to what was seen and what heard by them at different stages when the facts were inquired into, or they were questioned as to their knowledge, and as to what had actually been said or done? I find no difficulty in accepting the explanations offered by the witnesses in answer to the indictment. In my opinion their explanations should have been accepted, and for that reason their conviction is bad. In my opinion the contradiction by them in the District Court of the evidence they gave at the inquiry by the Police Magistrate was not on any material point. If their explanations be accepted, it would appear that they stood by their statements made at the inquiry. In fairness to them, the contradictions in the District Court should have been expressly put to them while they were giving evidence. If that had been done it would seem that they would have stated that what they said at the inquiry

must be correct, and not what they, through forgetfulness, said in the District Court. I see no reason why their explanations should not have been accepted. There is absolutely nothing to show why the watcher should have made a false charge against the accused or why the appellants should have " agreed," as the District Judge puts it, to support him. The accused himself does not say that the watcher or any one else had made the charge falsely against him. He has not disclosed what his defence is. He has been content to confine his plea to a bare " not guilty." From some statement made by his Counsel at the trial it would appear that the defence admitted that the accused had gone to the verandah of the store, and that he had been seen there. I find it difficult to believe that the charge against the accused was *primâ facie* a false one, but even if it be false I do not think the appellants should have been convicted upon the materials before the District Judge. I set aside their convictions and acquit them.

There is another reason for which their convictions might be set aside, and that is that both the accused were tried together although upon separate indictments. The charges were different. But that procedure, it might be argued, has not prejudiced them. Even so I think that the irregularity was of such a grave nature that the convictions should be set aside on that ground too. If they had been set aside on that ground, the proper order would have been for a fresh trial. I prefer therefore to rest my decision on the other reasons given by me.

These appeals call for some observations upon the procedure provided in section 439 of the Criminal Procedure Code and the penalty to be imposed upon a conviction under that procedure.

The Penal Code of 1883 in section 188 defined what giving false evidence was, and provided the penalty in section 190. In 1895 there came into operation the Oaths Ordinance, No. 9 of 1895. In section 12 it provided for a person to be punished summarily as for a contempt of the Court if he gave false evidence, in the opinion of the Court, in any judicial proceeding before it. The penalty imposable upon a conviction under that section was light—compared to the penalty imposable under section 190 of the Penal Code. The provision in section 12 was embodied verbatim except for a few verbal adaptations in the present Criminal Procedure Code, No. 15 of 1898, which came into operation in March, 1899, superseding the Code No. 3 of 1883. But section 12 was left untouched even as to the references to the sections of the repealed Code leaving those to be governed by the general provision in section 3 of the present Criminal Procedure Code. In 1900 in the case of *The Queen v. Jasik Appu*,[1] Browne A.P.J. held that an indictment charging an accused person with having intentionally

[1] *4 N. L. R. 18.*

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given false evidence by making two irreconcilable statements without stating which was false, was good, and that it was unnecessary to offer any evidence to negative either statement. This decision was overruled by the decision of the Collective Court in 1903 in *The King v. Dias*.[1] There it was held that such an indictment was bad, and that the offence was not established except upon proof in terms of sections 188 and 190 of the Penal Code. In the judgments of Layard C.J. and Middleton J., section 439 of the present Criminal Procedure Code is referred to as granting power only to the Supreme Court to punish for giving false evidence in cases of two contradictory statements. From these judgments I conclude that the present form of section 439, which includes District Courts, was given to it after the date of that judgment, and by an amendment introduced probably by section 2 of the Ordinance No. 2 of 1906. I am unable to verify the correctness of this conclusion with the Ordinances to hand in my own library, which are the only ones available to me at present. If my conclusion be correct, it would suggest that the present form of section 439 was given to it to meet in some degree the effect of the decision of the Collective Bench by conferring on District Courts also a power which till then was confined to the Supreme Court.

It seems to me that there is a close connection between sections 439 and 440 of the Criminal Procedure Code inasmuch as both contain special provisions for the summary trial of persons giving false evidence within the meaning of the same section of the Penal Code—section 188. Section 440 appears to have been intended for cases of a more venial nature than those for which section 439 was intended. In proceedings under section 440 the Court must have reasons for coming to the opinion that the accused has given false evidence, not from evidence the Court might call for the special purpose of proving that false evidence was intentionally given, but from what has taken place in connection with the judicial proceeding held before the Court. The fact that the accused made two irreconcilable or contradictory statements would not be sufficient. See *Sivakolunthu v. Chelliah*.[2] Under section 439 the trial must be upon an indictment indicating that the procedure has to be more formal, but while under section 440 the offence is made punishable as a contempt of the Court and the penalty is prescribed. Under section 439 the offence is described as intentionally giving false evidence, and no special provision is made as regards penalty. Obviously, the inference from that omission is, that the penalty imposable is that prescribed generally in the Penal Code for intentionally giving false evidence. But it introduces a material variation as regards the necessary evidence by permitting the proof of the charge to be made by the inference to be drawn from the

[1] *6 N. L. R. 358.*

[2] *(1910) 13 N. L. R. 289.*

two contradictory statements that the one or the other must be false either to the knowledge or belief of the accused, or that he does not believe one or the other of them to be true. Section 440 contains an express provision that the Court, in lieu of exercising the power given by the section, might transmit the record to the Attorney-General or proceed under the provisions of section 380 of the Criminal Procedure Code. That provision does not appear in section 439. That is another indication that the proceedings under section 439 were intended in the special circumstances to take the place of the inquiry and trial necessary for proceedings upon a charge under section 190. Such being the case, I do not think it would be correct to say that upon a conviction on an indictment under section 439, the penalties prescribed by section 190 cannot be imposed. But I do think that section 439 was not intended for those cases where the offence is of a grave nature and calling for a heavy sentence. No Court can take cognizance of an offence punishable under section 190, except with the previous sanction of the Attorney-General, or on the complaint of another Court. See section 147 (1) (*b*) of the Criminal Procedure Code. That means an inquiry and a committal upon an indictment in the name of the Attorney-General. Those safeguards have no existence in proceedings under section 439, and it therefore does seem desirable that in those cases calling for a deterrent punishment a Court should not exercise its powers under section 439.

Set aside.