1933 *Present :* **Drieberg J.**

LEBBE *v.* LEBBE.

860—P. C. Gampola, 1,354

Perjury—Witness charged summarily—Criminal Procedure Code, s. 440.

Where a witness is charged with perjury under section 440 of the Criminal Procedure Code it is no topen to the Court to base the charge on depositions other than those in the proceedings.

A proctor should no tbe allowed to contradict the evidence of his own witness by deposing to what the witness had told him at a consultation.

APPEAL from a conviction by the Police Magistrate of Gampola.

H. E. Garvin, for appellant.

February 24, 1933. DRIEBERG J.—

The appellant was a witness for the defence, the charge being one of unlawful assembly against the first accused Abdul Rahiman Saibo and five others. A point to which attention was directed at the inquiry was whether the first accused had gone to the Walauwa of the Ratemahatmaya to make his complaint at about 1 or 1.30 P.M. The complainant said he had gone there at about that time and it was apparently a matter of some importance whether the first accused too had gone there at about the same time. The Magistrate acquitted all the accused and called, or recalled, a witness Abdul Rahiman Saibo Idroos. He is apparently the person who gave evidence before but it is not so stated; but this does not matter. The Magistrate then charged the appellant under section 440 (1) of the Criminal Procedure Code with having given false evidence in making the following statements :—" I did not tell Mr. Kanagasabai that the first accused came to the Walauwa at 1 or 1.30 P.M. The first accused came there at 5 P.M. This was the first time ". The Magistrate convicted the appellant and fined him Rs. 50 and he has appealed.

The case against the appellant must be considered apart from the evidence of Abdul Rahiman Saibo Idroos when called after the verdict. He was called after the accused were acquitted and the case concluded. The falsity of the evidence in regard to which this summary procedure is available should be manifest in the course of those proceedings and it is not open to the Court to base the charge of false evidence on depositions other than those in the proceedings, *Achchi Kannu v. Ago Appu*[1]. The charge against the appellant must therefore be considered in the light of the evidence given before the verdict.

The first part of the charge is that he falsely stated that he did not tell Mr. Kanagasabai that the first accused came to the Walauwa at 1 or 1.30 P.M. The appellant is the Ratemahatmaya's clerk. This statement was made in these circumstances. The appellant was called by Mr. C. N. D. Jonklaas who was appearing for the defence. He began

[1] *(1901) 5 N. L. R. 86.*

his evidence by stating that the first accused came twice that day to meet the Ratemahatmaya. Thereafter and apparently in answer to a question as to what he had told Mr. Kanagasabai he went on to say "I did not tell Mr. Kanagasabai that the first accused came to the Walauwa at 1 or 1.30 P.M.". He then gave particulars of the two visits of the first accused; he came for the first time at 5 P.M., waited on at the garage and then came again at 6 P.M. Mr. Jonklaas then asked that Mr. Kanagasabai be called. Mr. Kanagasabai is a proctor who was appearing for the defence with Mr. Jonklaas. This was allowed though objected to by complainant's proctor, and Mr. Kanagasabai gave evidence that Mr. Jonklaas asked him to find out what the appellant's evidence was going to be. Mr. Kanagasabai was apparently not very confident of himself and he asked Mr. Jonklaas to be present. He asked this, he says, knowing the witness as he did. Mr. Jonklaas could not be present, so he questioned the appellant in the presence of A. R. S. Idroos. Mr. Kanagasabai said that the appellant told him that the first accused came to him at about 1 P.M. or so, just after the complainant. After pronouncing judgment the Magistrate examined A. R. S. Idroos who confirmed what Mr. Kanagasabai had said. As I have pointed out, the case against the appellant must be considered without regard to A. R. S. Idroos' evidence given after the verdict and there is therefore only the evidence of Mr. Kanagasabai against that of the appellant regarding what passed at this interview. The appellant consequently has been convicted on the uncorroborated evidence of Mr. Kanagasabai. Such a conviction is bad, as has been pointed out in *Police Sergeant, Dematagoda v. Aruma*[1]. I wish to point out however the grave objections which exist to the extraordinary course adopted in this case of a proctor asking to be allowed to contradict the evidence of his own witness by giving evidence of what that witness had told him at a consultation or when preparing his case. If, as in this case, the proctor is believed it means that the Court rests its decision not on what the witness says but on what his proctor says the witness told him.

The other statement of his alleged to be false is that the first accused came to the Walauwa for the first time at about 5 P.M. This is in direct conflict with the first accused who says he went to the Walauwa at about 1 or 1.30 P.M. and met the appellant there. The only evidence which might possibly be corroboration of his statement is that of his son A. R. S. Idroos, who lives in Kandy. He says he was in Kandy that day. He received the telegram D 3, despatched from Gampola at 1.30 P.M., informing him that there was objection to his father praying at the Mosque and asking him to come. He went to Gampola and he says his father there told him that he had been to the Ratemahatmaya's Walauwa once at 1 P.M. and again at 6 P.M. This was evidence given in the course of the proceedings. This is insufficient as corroboration for he does not say that the first accused told him that he met the appellant there when he went at 1 P.M. The conviction on this charge too must fail for the reason that there is against the statement of the appellant only the uncorroborated testimony of the first accused.

I set aside the conviction and acquit the appellant.

Set aside.

[1] (1925) 27 N. L. R. 417