1937 *Present :* **Abrahams C.J.**

VANDENDRIESEN *v.* HOUWA UMMA

161—P. C. Kandy, 51,644.

Criminal procedure—Reception of evidence after close of prosecution—Identification of accused—Proper method to be followed.

Evidence for the prosecution should not be taken after the case for the prosecution has been closed when such evidence would have the effect either of filling the gap left in the evidence or resolving some doubt in favour of the prosecution.

Identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right but must also be given every reasonable chance of being wrong.

APPEAL from a conviction by the Police Magistrate of Kandy.

Gratiaen, for accused, appellant.

Pulle, C.C., for the Crown.

August 4, 1937. ABRAHAMS C.J.—

The appellant was convicted by the Police Magistrate, Kandy, on November 20 last year for the offence of having in her possession on May 18, 1936, 1,286 grains of opium without having obtained a licence, in breach of section 74 (5) (*a*) of Ordinance No. 17 of 1929 as amended by Ordinance No. 43 of 1935. She was fined Rs. 500 or in default six weeks' simple imprisonment. The Magistrate believed that he was inflicting the maximum fine which is in fact Rs. 1,000. This was a first offence. The Magistrate ordered half of the fine to be paid to the Police Rewards Fund.

It was alleged by the prosecution that on May 18 last year Sub-Inspector VandenDriesen, Police Sergeant Ratnam, Police Sergeant Marso, Police Constables Silva and Mohideen, went into a house in King street, Kandy, owned by one Idroos. Presumably in anticipation of discovering illicitly possessed drugs in the premises, some of the police entered from the front and the others went round to the back. As entry was effected, a woman was seen to run through the house towards the back and to throw something she had in her hand on to the roof. This was found to be a packet containing 1,286 grains of opium. The woman was detained and the police officers proceeded to search the house with no further result. Idroos, who was in the house, was then arrested and taken to the Police Station, but the Sub-Inspector left the woman in the house as he thought she was pregnant and was in too delicate health to be further troubled. She gave her name as Maideen Beebee, and the police accepted Idroos as surety for her appearance. Idroos was brought up a few days later, but the police were unable to find any woman called Maideen Beebee until September 8, when a woman of that name appeared and said that she was not the woman who was found in the house, and this denial the police accepted. No further action was recorded until November 20, 1936, when Police Sergeant Ratnam went to Gampola and arrested the appellant who is the wife of one Abdul Hamid and the

sister-in-law of Idroos. The Police Sergeant said that when he entered her house she bolted and took shelter in a house some distance away, and was subsequently surrendered by the residents in the house. She and Idroos were brought up for trial on January 20, *i.e.*, seven and half months after the alleged offence. It was manifest at an early stage of the evidence of the first witness that there was no case against Idroos, and it is a little difficult to see why he was ever put on his trial. The Magistrate then and there discharged him. Sub-Inspector Vanden Driesen purported to identify the appellant as the woman who was in the house. Police Sergeant Ratnam said that he identified her when he arrested her at Gampola, and P. C Mohideen seems to have identified her by necessary inference from his evidence. The evidence of these three witnesses was the only evidence brought up against the appellant. She gave evidence on her own behalf and completely denied that she was the woman concerned when the house was raided. She admitted her relationship to Idroos but said that she never went to his house without being accompanied by her husband. She said that she had only one child who was seven years old. She also denied that she ran away when Police Sergeant Ratnam entered her house in Gampola. Her husband also gave evidence and supported his wife's statement that she never left Gampola unaccompanied by him.

During the evidence of the Sub-Inspector the proctor for the appellant cross-examined him with a view to showing that in a previous drug case he had been disbelieved by the Court. The questions were disallowed by the learned Police Magistrate who gives no reason for this action which was certainly unjustified, as the questions were obviously intended to go to the credibility of a witness, and the credibility of a police officer has no greater sanctity than that of any other witness. The only limitations on this form of cross-examination are those imposed by sections 149, 151, 152, and 153 of the Evidence Ordinance. It is not necessary, in view of what I am about to say in regard to the other merits of the case, to discuss what bearing the disallowance of these questions might have had upon the learned Police Magistrate's decision.

At the close of the case for the defence, the Magistrate recorded that he was visiting the scene of the offence the next day, and directed the Sub-Inspector, Police Sergeant Ratnam, and Police Constable Mohideen to be present. There is nothing on the record to indicate that the appellant or his proctor was invited to be on the spot to witness the further proceedings that were to be carried out. The learned Magistrate directed the police officers to reproduce certain of their activities in the raid and actually timed the movements of Police Constable Mohideen, recording his opinion that they seemed to bear out what he said he had done on the day of the raid. This seems to me to have been a great irregularity. It has been said more than once in this Court that evidence for the prosecution should not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or resolving some doubt in favour of the prosecution, but here again I mention this fact rather for the benefit of Magistrates in general than to calculate what bearing it had on the result of the trial.

It is obvious that the case against the appellant must stand or fall on the question of identification, and on this the learned Police Magistrate says very little. He says, "I accept the evidence of the first accused's identity. The back compound would have been quite bright at 5.45 P.M. and as first accused was uncovered, identification would have been easy. It does tell against first accused that she is the sister-in-law of second accused Idroos." He says later that the first accused was caught red handed in the act of throwing away these slabs of opium, and that "I see nothing improbable in her presence in this house and when these witnesses identify her on oath I believe them." I am compelled to say that the Magistrate seems to have proceeded on the ground that the features of the woman in the house had been easily discernible on the night in question, and comes to the conclusion that because the witnesses identified on oath a woman whose features had been easily discernible therefore they must be believed. But it is not only a question of credibility, it is also a question of accuracy. Proper identification is always difficult. It is a matter into which the Court must probe with the greatest care. The learned Magistrate does not discuss the possibility of the witnesses being mistaken after so long a period as is indicated in these proceedings, although when it is a question of errors made by the police officers, in describing the topography of the house raided, he finds an excuse in view of the lapse of time and the unfamiliarity of the witnesses with the house. It is not even suggested that there was any peculiarity of feature, form, movement, or voice, that could be pointed out to the Court as a means of identifying the woman after so long a time had expired. That being so, with all this uncertainty of mind, how can it be said that the woman was properly identified by Police Sergeant Ratnam who went to arrest a woman who was obviously suspected of being the woman wanted, or was properly identified by the Sub-Inspector and Police Constable Mohideen who merely saw her in Court. Irregular and improper methods of identifying accused persons have more than once been the subject of unfavourable comment by the Court of Criminal Appeal in England. In the case of *Williams* (*vol. 8, C. A. R. 84*) the Court quashed a conviction which depended on the identification of a man who was seen by the identifying witness in the Police Station, not having been placed among others. The Court said that the mode adopted was not a proper one and the identification could not be said to have been satisfactory. In the case of *John Cartwright* (*10 C. A. R. 219*) the Court said that the prisoner was not put among a number of other men so that a witness might be able to identify this man as the guilty man and that it would have been infinitely better had this been done.

It seems to me that this case is stronger in favour of the appellant than either of the two cases cited. As the identifying witnesses were all police officers engaged in a raid, with all credit given for fair-mindedness, they could not be said to be uninterested. I say most emphatically that an identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right but must also be given every reasonable chance of being wrong. This identification was all one way. The fact also that the appellant was the sister-in-law of Idroos seems to have

helped the Magistrate towards a conclusion unfavourable to her, but that fact could only have any weight if the identification had been reliable. In this case any female relation of Idroos might have been charged for the same reason. On the matter of identification alone the appellant is in my opinion entitled to succeed, but there is another defect in the trial which calls for some comment. The defence was completely ignored in the judgment. It is elementary that the defence must always be considered, and must be considered in this way, namely, that it is sufficient if the accused without absolutely convincing the Magistrate of his innocence does enough to produce a reasonable doubt of his guilt. The appellant denied her presence, denied that she was the woman wanted, said that she was 25 years of age, whereas the Sub-Inspector said that the woman in the house was a young girl, and she said that she only had one child who was 7 years of age whereas the Sub-Inspector had believed the woman in the house to be pregnant. She also said that she never left Gampola without her husband, and this fact was supported by her husband. On the mere fact that the woman was accused of an offence and that her only witness is her husband, there is no ground for disregarding their evidence completely. If an accused or the spouse of an accused is to be treated as a merely formal witness then the provisions of law made for such persons to give evidence are completely stultified.

The trial was completely unsatisfactory. It may have been a difficult case to prove in any event, but that is no ground for requiring a very restricted mode of proof. It is of course thoroughly desirable that cases of illicit dealing in opium and dangerous drugs should be sternly suppressed, and that is all the stronger reason for handling these cases in such a way that the public may not have any cause for feeling that the Courts are not impartial or the police are not acting fairly. As was said by the present Lord Chief Justice of England, it is essential that not only should justice be done but it should appear to be done.

I quash the conviction, and acquit the accused.

Set aside.