1944 *Present:* **Keuneman J.**

SAIBU Appellant, and S. P. JAYASENA, Respondent.

915—M. C. Gampaha, 19,223.

Evidence—Right of Magistrate to call evidence after the close of the defence—Evidence essential for a just decision—Criminal Procedure Code, ss. 190 and 429.

Where, after the defence was closed, the Magistrate called into the witness box a police officer to prove a statement made by one of the accused's witnesses to the Police, which contradicted his evidence,—

Held, that the evidence was admissible provided it was essential for a just decision of the case; and that the procedure was justified by the provisions of sections 190 and 429 of the Criminal Procedure Code.

APPEAL from a conviction by the Magistrate of Gampaha.

S. P. Wijewickreme, for accused, appellant.

D. Jansźé, C.C. for complainant, respondent.

Cur. adv. vult.

February 2, 1944. KEUNEMAN J.—

The point raised in this appeal is that the Magistrate, after the case for the defence was closed, called into the witness box a Police Officer to prove a statement made by one of the accused's witnesses to the Police, which contradicted his evidence. This witness, the father-in-law of the accused, deposed that he, and not the accused, caused the injuries, in respect of which the accused was charged, while to the Police he stated he did not know who stabbed, and failed to say that he stabbed. The cross-examination of the witness was directed to this statement, which the witness, however, denied.

Reliance was placed by defence Counsel on the authority of *Welipenna Police v. Pinessa*[1], where Moseley J. decided that in the Magistrate's Court there was no power reserved to the prosecution to call evidence in rebuttal. The learned Judge drew attention to section 212 and section 237 (1) of the Criminal Procedure Code, where in trials before the District Court and the Supreme Court this power is reserved to the prosecution, subject to permission. There is no similar section relating to the Magistrate's Court. With respect I agree with that decision.

But the problem here is different, for the Magistrate himself called the evidence at his own instance. Crown Counsel refers me to sections 190 and 429 of the Criminal Procedure Code. Section 190, in my opinion, contemplates the calling of evidence by the Magistrate " of his own motion " even after the defence has been closed, and I think in the Magistrate's Court it was intended that the power to call evidence under these circumstances was to reside in the Magistrate alone, and that it was not intended that the prosecution should have this power. Authority for the exercise of this power is provided by section 429, and it can be exercised " at any stage of an inquiry, trial, or other proceeding ", provided that the evidence appears to be essential to the just decision of the case. Under the corresponding section of the Indian Criminal Procedure Code, namely, section 540, it has been held that the Court has power to admit rebutting evidence for the purpose of rebutting evidence adduced on behalf of the defence, if the Court thinks it essential for the just decision of the case; see *Nayan Mandal v. The Emperor*[2]. See also *Daniel v. Soyza*[3].

In this particular case, I can see no element of unfairness in the admission of the further evidence. The witness had been cross-examined on the point, and the previous statement revealed. There had been no previous indication that the witness would give any evidence of the kind he did. This aspect of the matter has been fully discussed in *The King v. Aiyadurai*[4]. I think it can be said in this case that this was a matter which arose " ex improviso ", and that no injustice was done to the accused by the admission of the further evidence.

The appeal is dismissed.

Affirmed.

[1] *26 C. L. W. 72.*
[2] *A. I. R. (1930) Calc. 134.*
[3] *A. C. R. 50.*
[4] *43 N. L. R. 289.*