[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present:* **Basnayake, C.J. (President), Sansoni, J., and Sinnetamby, J.**

THE QUEEN *v.* A. M. JAMES

Appeal No. 144 of 1961 with Application No. 151

S. C. 13/B—M. C. Colombo, 34492/B

Trial before Supreme Court—Discharge of accused before verdict of jury—Trial of witness on indictment for giving false evidence—Legality—Procedure for trial of a witness for perjury—Criminal Procedure Code, s. 439(1) (3).

It is illegal to indict a witness under section 439 of the Criminal Procedure Code before a trial is concluded by a verdict of the jury.

When subsection (1) of section 439 of the Criminal Procedure Code provides that "the accused may be tried by the same jury" it contemplates that the witness would be tried then and there by jurors who are still undischarged and in whose minds the evidence in the case would still be fresh. The adjournment contemplated in subsection (3) of section 439 cannot extend beyond the end of the period of service of the panel.

In the course of a trial before the Supreme Court the jury were discharged on 22nd May 1961 before the trial was concluded by the verdict of the jury. A month later, the appellant, who was a witness at the abortive trial, was arraigned and tried before the same jury under section 439 of the Criminal Procedure Code for having given false evidence.

Held, that, inasmuch as the main case had ended abruptly on 22nd May 1961 and not with a verdict of the jury, the Judge had no power to arraign the appellant and bring him to trial under section 439 of the Criminal Procedure Code for giving false evidence.

Held further, that the trial of the witness by the jury a month after they had been discharged was not warranted by the provisions of section 439 of the Criminal Procedure Code.

APPEAL against a conviction of a witness for perjury in a trial before the Supreme Court.

Colvin R. de Silva, with *Prins Rajasooriya* and *K. Viknarajah* (assigned), for Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for Attorney-General.

Cur. adv. vult.

February 12, 1962. BASNAYAKE, C.J.—

The appellant who was a witness in a criminal trial before the Supreme Court in which the jury was discharged in the course of the trial was on 22nd June 1961 indicted under section 439 of the Criminal Procedure Code. He was found guilty by a unanimous verdict of the jury and sentenced to undergo 7 years rigorous imprisonment.

2—R 4860—1,883 (9/62)

The indictment alleged that the appellant—

(*a*) when asked in the Supreme Court whether he knew the 1st accused Kompannage Albert Fonseka stated, "No, I did not know the first accused", and when asked whether he knew the 2nd accused Jassim Zain said, "No", whereas on 30th June 1960 while giving evidence before the Magistrate at the inquiry under Chapter XVI of the Criminal Procedure Code he stated, "I know the 1st and 2nd accused. 1st accused is a bus driver and the 2nd accused was working in the bus line when I was in the bus company. I have known the 1st accused for the last 3 years and the 2nd accused for 1½ years as a C. T. B. officer."

(*b*) when asked in the Supreme Court whether he did not go to meet the 1st accused at his house at Narahenpita and whether on that occasion the 1st accused did not show him an impression of a key on a piece of soap and whether he did not request him (appellant) to get a key made which was to be used to open a safe in the C. T. B. stated, "It is true I said so in Court but I did not go to meet the 1st accused", whereas while giving evidence before the Magistrate at the inquiry under Chapter XVI of the Criminal Procedure Code he said, "It was about 2 o'clock in the afternoon the 1st accused told me about the preparation at Narahenpita at his house. I went there at the request of the 1st accused. I went and met him. He showed me an impression of a key on a piece of soap and asked me to get a key made like that. . . . . I agreed and questioned him why he wanted a key made like that. He said that the key was made to open a safe in the C. T. B. I had sent in an application for a job in the C. T. B. The 1st accused agreed to get me a job there. So, I agreed to get a key made."

The trial at which the appellant gave the evidence in respect of which he was indicted ended abortively on 22nd May 1961. The accused was tried on 22nd June 1961 by the same jurors who were empanelled to try the accused in the abortive trial.

The first question that arises for consideration is whether it is legal to to indict a witness under section 439 before a trial is concluded by a verdict of the jury. In the instant case the jury were discharged in the course of the trial before the stage for the return of their verdict had arrived. The material portion of section 439(1) reads—

"If in the course of a trial in any District Court or of a trial by jury before the Supreme Court any witness shall on any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the Magistrate, it shall be lawful for the presiding judge, upon the conclusion of such trial, to have the witness arraigned and tried on an indictment for intentionally giving false evidence in a stage of a judicial proceeding. In a trial before the Supreme Court the indictment shall be prepared and signed by the Registrar, and the accused may be tried by the same jury."

There is force in the learned counsel's submission that as the jury had been discharged before they returned their verdict there has been no " conclusion of the trial ". Chapter XX which prescribes the procedure for trials before the Supreme Court has sub-headings such as " Preliminary ", " Commencement of Trial ", " Choosing a Jury ", " Trial to close of Case for Prosecution and Defence ", " Conclusion of Trial ", " Retrial of Accused after discharge of Jury ", and " Procedure in Case of Previous Conviction ". In the scheme of the Code an order for the re-trial of the accused after the discharge of the jury is not the conclusion of the trial. The expression " conclusion of such trial " is not a term of art but it means the conclusion or the coming to an end of a trial by a verdict of conviction or acquittal in accordance with the procedure prescribed in the sections grouped under the heading " Conclusion of Trial ". In the instant case the trial having ended abruptly and not with a verdict of the jury, the Judge had no power to arraign the appellant and bring him to trial. The consequences of arraigning a witness or witnesses under section 439 where a re-trial of the main case has been ordered can be disastrous to the prosecution where the witness or witnesses are convicted especially if they are witnesses whose evidence is material. At the re-trial the prosecution would be forced to rely on the evidence of witnesses who have been proved before that very Court to be unworthy of credit. The course adopted by the learned Commissioner would render a re-trial almost useless. It is most unlikely that the legislature intended that such consequences should flow from the use of the power conferred by section 439.

The next question is whether there has been a proper trial of the appellant. The jurors who heard the main case were discharged on 22nd May 1961 ; but they were summoned for 22nd June 1961 and they tried the appellant. Such a course is not warranted by section 439. When subsection (1) provides that the accused may be tried by the same jury it contemplates that he would be tried then and there by jurors who are still undischarged and in whose minds the evidence in the case would still be fresh. It does not contemplate a case in which the jurors are discharged and are brought back after a month. Jurors once discharged are *functus* and cannot be empanelled again to try a case except after they have been summoned in the manner provided in the Criminal Procedure Code. The adjournment contemplated in subsection (3) of section 439 cannot extend beyond the end of the period of service of the panel. When the jury are discharged in the main trial, a trial under section 439 cannot legally be held before the same jurors and must necessarily be held before another jury. In a case in which the trial ends by the return of a verdict the jury are not discharged until their period of service comes to an end. Even in such a case it is not possible to delay a trial under section 439 beyond the period left for the jury to serve. In the instant case at least two panels of jurors must have been summoned between 22nd May and 22nd June. The instant case is not a case of an

adjournment. The trial commenced on 22nd June 1961 with the reading of the indictment and the recording of the accused's plea, and not on 22nd May 1961 when the jury were discharged in the abortive trial.

The appellant also complains that his defence has been handicapped by the refusal of his application for a certified copy of the abortive proceedings and the sudden illness of his senior counsel and the refusal of time to retain other senior counsel. He also urges that in the main trial evidence of his bad character was given before the very jurors who tried him in this case and that he was thereby prejudiced. There is substance in these submissions and they constitute additional reasons why his conviction should not be permitted to remain.

The appellant's conviction is vitiated by the illegalities referred to above. His conviction was therefore quashed at the end of the hearing of this appeal and we directed that a judgment of acquittal be entered.

In view of the conclusion we have reached on the two main points, it is not necessary to deal with the other matters raised in the notice of appeal.

Conviction quashed.