1933 *Present :* **Dalton J.**

FERNANDO *v.* SILVA.

858—P. C. Kalutara, 9,912.

Accused—Trial in Police Court—Evidence by accused—Power of Court to recall accused—Criminal Procedure Code, s. 429.

Where, at a summary trial in the Police Court, the accused gives evidence, the Court has the right to recall him under the powers given to it by section 429 of the Criminal Procedure Code.

APPEAL from a conviction by the Police Magistrate of Kalutara.

Colvin R. de Silva (with him *T. S. Fernando*), for accused, appellant.

Peter de Silva (with him *V. R. de S. Gunasekera*), for plaintiff, respondent.

December 18, 1933. DALTON J.—

The appellant has been convicted on a charge of using a pair of bullocks in a double bullock cart when they were unfit to be so used on account of lameness, emaciation, and injuries to their legs. He was sentenced to pay a fine of Rs. 40 or in default to two months' rigorous imprisonment.

The evidence shows that the accused is the employee of a Public Works Overseer at Nagoda, the latter being the owner of the bulls. There is ample evidence that he was using the bulls, as set out in the charge, on the day in question for the purpose of transporting earth, and the condition of the bulls is deposed to both by the Inspector of the S. P. C. A. at Panadura and the veterinary surgeon who was called. The evidence for the prosecution, which has been accepted by the Magistrate, amply supports the charge, and this is not contested on the appeal.

The ground upon which the appeal was argued was that the Magistrate was wrong in recalling the appellant into the witness box after the close of the appellant's case. The appellant had given evidence himself in support of his defence. When his last witness had left the witness box, the Magistrate recalled the appellant. He had stated in his evidence in chief that he had taken the bulls to the working place from the P. W. D. lines, tied at the back of his cart, because there was no one in the lines to look after and feed them during the day. The Magistrate recalled him and asked him some questions on this matter, and about his hours of work. Counsel argues that the Magistrate is not empowered to recall an accused person who has given evidence, although he can recall any other witness for re-examination.

Section 429 of the Criminal Procedure Code provides that any Court may at any stage of a trial summon any person as a witness or examine any person in attendance. That does not include an accused person, whose rights are governed by the provisions of section 120 (6) of the Evidence Ordinance, 1895, as amended by Ordinance No. 16 of 1925. He may decide that he does not wish to give evidence and in that event the Court is not entitled to put him into the witness box. The section then proceeds that the Court may recall and re-examine any person already examined. It seems to me that this gives the Court power to recall and re-examine any person who has already given evidence,which would necessarily include an accused person who has given evidence. To give the words "any person already examined" the meaning that counsel gives them, one would have to insert some such words as these: "any such person as aforesaid who has been already" between "re-examine" and "examined" in the fourth and fifth lines of the section, but that is not what the section says. If an accused person has given evidence on his own behalf, he does so with the like effect and consequence as any other witness, as provided by section 120 (6) above quoted, and, in my opinion, the Court has power to recall him under the powers given to the Court by section 429. I should like to

point out that this power may and should, if necessary, be exercised on behalf of the accused. It is not difficult to imagine a case, in which an accused person who is undefended may be recalled in his own interests by the Court to clear up a point which his evidence has left in doubt.

The case of *King v. Thuriappa*[1] cited in course of the argument is one in which the District Judge called and examined three of the accused, although they were unwilling to go into witness box. The appeal Court held that whilst the accused is a competent witness on his own behalf and may call himself as a witness, he cannot be called by anyone else against his will. Moncreiff A.C.J. held, however, that the conduct of the trial Judge in this respect was an irregularity, which under the circumstances of the case, was not sufficient to prejudice the accused in their defence. He, however, allowed the appeal on other grounds. That case does not assist towards the interpretation of section 429 of the Code, but it would appear to support the proposition that, assuming there has been an irregularity by the Magistrate in respect of his powers of calling witnesses, a Court of Appeal is entitled to inquire and ascertain, before giving effect to it, whether the irregularity has prejudicially affected the accused in their defence.

The case of *Inspector of Police v. Nadar*[2] is certainly one which supports the contention of appellant's counsel, for there de Sampayo J. does express the opinion that under section 429 the Court cannot summon or examine any person who is an accused. I gather from the circumstances of the case, although it is not explicitly so stated, that he also held that the Court could not recall and re-examine an accused person who had already given evidence. I regret I am unable for the reason I have given to come to the same conclusion, so far as regards the power of the Court to recall a person who has been already called and examined. It is to be noted, however, that the procedure adopted by the Magistrate to which de Sampayo J. took exception would certainly seem to be open to objection and strong comment, even if it were not contrary to the provisions of the Code. The accused there was charged with dishonestly receiving stolen property knowing the same to have been stolen. Evidence was led for the prosecution; the accused then gave evidence in his own behalf and called certain witnesses. The proctor for the accused thereupon addressed the Court. After the termination of that address, the Magistrate called the accused into the witness box again and put him through a long examination and cross-examination, and thereafter convicted the accused, largely basing his opinion on the statements elicited by him when the accused was called a second time. If I may be allowed to express an opinion on the facts disclosed in that case, I would say that the procedure adopted by the Magistrate, if not contrary to the exact words of the Code, was certainly contrary to the spirit of it, and the circumstances show that there was some doubt as to the accused having had a fair trial. The Magistrate would seem to have misused the power given him by section 429. de Sampayo J. held, however, as I have stated, that the Magistrate had no power to recall an accused person who had given evidence, and he set aside the conviction sending back the case for trial *de novo*.

[1] 8 *N. L. R. 70.* [2] 23 *N. L. R. 167.*

I would hold that the Magistrate had power to recall and re-examine the appellant, since he was a person who had been already examined at the trial. It is not suggested that if he had that power, he here made any misuse of it. The appellant was recalled to clear up two matters to which he had referred in his evidence, and even if there had been any irregularity (which I hold there was not), counsel has failed to show that it in any way prejudicially affected the appellant in his defence.

The appeal must be dismissed and the conviction affirmed.

Appeal dismissed.