

1945

Present: Rose J.

SHERIFF DEEN, Appellant, and THOMAS, Respondent.

1,033—*M. C. Colombo, 42,129.*

Criminal procedure—Witness recalled by Magistrate—Defence not allowed to cross-examine witness on matters elicited—Illegality—Criminal Procedure Code, s. 189 (2).

Where a Magistrate recalled a witness, who gave material evidence and Counsel for the defence was not allowed to cross-examine the witness on the matters further elicited,

Held, that the conviction could not be sustained in view of the provisions of section 189 (2) of the Criminal Procedure Code.

A PPEAL against a conviction by the Magistrate of Colombo—

Nihal Gunasekera (with him *P. Malalgoda*) for appellant.

T. S. Fernando, C.C., for the Crown.

February 16, 1945. ROSE J.—

This is a most unfortunate matter in which there would appear to be ample evidence on the record which would justify the conviction of the appellant. Counsel for the appellant however raises a point of law. It appears on page 10 of the proceedings that the complainant who alleged that his pocket was picked was recalled by the Magistrate and questioned because the Magistrate wished a certain point or points to be cleared up to the satisfaction of his own mind. The witness was recalled and described the position of the money Rs. 250 in his pocket. He described the bundles, how much was in each bundle, &c., and he says in addition that he had a note book which was separate, not tied to the cash bundles. Counsel for the defence then asked for permission to cross-examine the complainant on these points which he was clearly entitled to do under the provisions of section 189 (2) of the Criminal Procedure Code. The Magistrate refused his application.

The defence was a denial and when the Magistrate came to deliver his judgment he referred to these matters elicited when the witness was recalled, which indicates that he relied to some extent at any rate upon these matters.

Mr. Fernando has asked me to say that no injustice has followed as there was abundant evidence apart from those matters which would justify the conviction of this appellant. I feel, however, that in the absence of a section expressly giving an appellate court such a discretion it would be rather stretching section 425 of the Criminal Procedure Code to apply it to a case where the accused or his advocate was not permitted to cross-examine on material matters a witness recalled by a Magistrate.

It seems to me that in this particular case it is not open to the Crown to take the view that there was nothing material in the evidence so adduced, owing to the fact that the Magistrate referred to it and relied upon it in his judgment. For these reasons the appeal will be allowed and the case remitted for re-trial.

Appeal allowed.

Case remitted.

