1968 *Present :* **Weeramantry, J.**

K. V. SUBRAMANIAM, Petitioner, *and* THE INSPECTOR OF POLICE, KANKESANTURAI, Respondent

S. C. 274 of 1968—Application in Revision in M. C. Mallakam, 4001

Criminal procedure—Non-summary proceedings—Right of accused to be represented by pleader—Scope—Importance of an accused person's right to have the prosecution witnesses cross-examined by Counsel—Non-summary proceedings—Revisionary jurisdiction of Supreme Court—Criminal Procedure Code, ss. 5, 157 (3), 189, 287—Courts Ordinance, ss. 19, 21, 40—Evidence Ordinance, s. 33.

An accused person is entitled to be defended by a pleader at the stage of non-summary proceedings. This fundamental right of representation by a pleader, which is assured to all persons by section 287 of the Criminal Procedure

Code, includes the right of an unrepresented accused, who has been in police custody from the time of his arrest, to retain counsel and have a prosecution witness cross-examined by such Counsel even after the witness has been already questioned by the accused in terms of section 157 (3) of the Criminal Procedure Code. " In testing, in a given case, whether the right assured by section 287 of the Criminal Procedure Code has in fact been enjoyed, a Court will guide itself by the spirit of the law rather than by a regard to technicalities, and will not conclude that the right has been afforded unless it has been effectively afforded. "

Opportunity must be given to an accused person to get proper legal advice before he is called upon to cross-examine the prosecution witnesses, especially when he has been in custody from the time he was arrested.

It is within the province of the Supreme Court, in its revisionary jurisdiction, to make orders in regard to non-summary proceedings pending before a Magistrate.

The accused-petitioner, who was arrested on suspicion of having committed murder, was produced in police custody the next morning before the Magistrate. When non-summary proceedings commenced on the same day, the accused was unrepresented when the deposition of one Kandasamy, the first witness for the prosecution, was recorded. The witness, who claimed to have seen the accused firing the fatal shot at the deceased person, was questioned by the accused in terms of section 157 (3) of the Criminal Procedure Code. After the questioning of Kandasamy was concluded, a Proctor appeared for the accused and was present when the deposition of another person, who also claimed to be an eye-witness, was recorded. On the application of the Proctor who stated that he did not have the necessary instructions, the cross-examination of the second witness was postponed. On the next date the accused was represented by Counsel, on whose cross-examination the second witness went back completely upon his claim to have been an eye-witness and admitted that he did not see the shooting. A third witness was then called by the prosecution, but he denied having seen the shooting and in fact stated that he saw a person other than the accused with a gun in hand immediately after the incident. On a resumed date of the inquiry, application was made by Counsel on behalf of the accused that the first witness Kandasamy be re-called for further cross-examination on certain matters vital to the defence ; Counsel stated that the accused was unrepresented on the first day of the inquiry and, having been brought from the police cell, did not know the nature of the proceedings. The Magistrate refused the application for the reasons (1) that he feared that the other witnesses for the prosecution had been suborned and that witness Kandasamy too would " succumb to the same sort of pressure ", and (2) that the accused would have an opportunity of cross-examining Kandasamy later at the stage of trial.

Held, that, in the circumstances, the Magistrate's refusal to permit the witness Kandasamy to be cross-examined by Counsel was in effect a denial to the accused of his fundamental right of representation by a pleader. The fact that the accused questioned the witness in terms of sections 189 and 157 (3) of the Criminal Procedure Code could not result in a forfeiture of his right to be defended by a pleader, for circumstances did not permit him on his own to retain a lawyer previously. Moreover, the reasons given by the Magistrate in support of his refusal to permit cross-examination were clearly not sustainable.

APPLICATION to revise an order of the Magistrate's Court, Mallakam.

Colvin R. de Silva, with *S. Sharvananda*, *R. R. Nalliah*, *Bala Nadarajah* and *Ananda Paranavitane*, for the Accused-Petitioner.

L. D. Guruswamy, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 11, 1968. WEERAMANTRY, J.—

This application raises a matter of fundamental importance in our criminal law, for it involves the right of an accused person to be defended by a pleader at the stage of non-summary proceedings.

In this case the accused stands charged with the murder of one Raman who is alleged to have been shot dead by the accused on the 9th of April 1968. That same evening the accused and two others were arrested but these two others were released and the accused was detained overnight in police custody and produced in custody the next morning before the learned Magistrate.

Plaint was filed before the learned Magistrate at the scene on the morning of the 10th April charging the accused with the murder of Raman and on that same day the prosecution led the evidence of Raman Kandasamy the son of the deceased. This witness claimed to have seen the accused firing the fatal shot.

During the recording of the deposition of this witness the accused was unrepresented. The record shows however, that the witness has been questioned on his deposition and this was presumably done by the accused in terms of section 157 (3) of the Criminal Procedure Code.

After the questioning of the first witness was concluded a proctor appeared for the accused and was present during the recording of the deposition of Kathirapillai, a brother of the deceased who was called by the prosecution as its second witness. This witness too claimed to have seen the accused levelling his gun at the deceased and firing the fatal shot.

After the conclusion of Kathirapillai's deposition the proctor appearing for the accused stated to the learned Magistrate that he would like to cross-examine this witness later, as he did not at that stage have the necessary instructions. This application was allowed and on the next date the accused was represented by learned Queen's Counsel who cross-examined Kathirapillai. Under cross-examination Kathirapillai went back completely upon his claim to have been an eye-witness and admitted that he did not see the shooting. He further admitted specifically that

his statement to the learned Magistrate that he had seen the accused levelling the gun and firing at the deceased was false. He attributed the untruthful evidence he had earlier given to his anger at the incident that had occurred.

The son of this witness, a boy by the name of Ambikaipathy, was called next. He did not claim, however, to have seen the shooting and in fact stated that he saw a person other than the accused with a gun in hand immediately after the incident.

The matter was adjourned and on the resumed date of enquiry the accused was represented by learned Counsel who made an application that the first witness Kandasamy, who had given evidence at the scene, be recalled for further cross-examination as it was necessary to cross-examine him on certain matters vital to the defence. Learned Counsel stated also that the accused had not been in a position on that day to ask these questions as he had had no assistance from his Counsel and had not known the nature of the proceedings. It was also stated to the learned Magistrate that the accused had been unaware of the fact that by asking a few questions he ran the risk of depriving himself of the right of cross-examining the witness. The attention of the learned Magistrate was also drawn to the fact that the accused had been brought to the scene from the police cell.

The learned Magistrate reserved his order upon this application and made order subsequently refusing this request of the defence. It would appear also from the order of the Magistrate, though there is no record to that effect in the proceedings themselves, that on the date when learned Queen's Counsel appeared he too had made an application that the witness Kandasamy be recalled by Court and tendered for further cross-examination. It is observed by the Magistrate in the course of his order that at that stage he had indicated to Queen's Counsel that after hearing the other two eye-witnesses he would recall Kandasamy if he felt that it was necessary to do so in the interests of justice.

This order of the learned Magistrate is now canvassed on the ground that in the circumstances of this case the Magistrate's refusal to permit Kandasamy to be cross-examined by Counsel is in effect a denial to the accused of the fundamental right of representation by a pleader, which is assured to all accused persons by section 287 of the Criminal Procedure Code.

The order of the learned Magistrate sets out certain reasons for his refusal to permit the cross-examination requested by the defence. One of these reasons is that the witness Kathirapillai who went back on his evidence had done so " too obligingly " and for reasons best known to him, the implication of this observation being that the witness had been suborned. The learned Magistrate in view of this circumstance expressed a fear that the witness Kandasamy if recalled in that court would

"succumb to the same sort of pressure". The learned Magistrate observed that he did not feel justified in exercising his discretion and recalling this witness.

A further reason adduced by the learned Magistrate was that since the accused would have an opportunity of cross-examining Kandasamy later on, no grave prejudice would be caused to the accused if Kandasamy was not recalled at that stage. The learned Magistrate finally observed that in view of the circumstances set out by him he felt justified in refusing the application although ordinarily he would have recalled this witness and permitted Counsel to cross-examine him.

Before I consider the main question involved in this application I should state preliminarily that it is undoubtedly within the province of this Court to make orders in regard to non-summary proceedings pending before a Magistrate. It is of course clear that this Court will not lightly interfere in non-summary matters but at the same time it is unquestionable that the powers of this Court under sections 21 and 40 of the Courts Ordinance may be exercised in respect of non-summary proceedings and that, to quote Nagalingam J., this power exists in the case of non-summary offences " through the entire gamut of non-summary proceedings in the Magistrate's Court ".[1]

I need not dwell further on this aspect of the matter except to refer finally to the judgment of a Divisional Bench of this Court in *The Attorney-General v. Don Sirisena*[2] where this Court used its revisionary power and directed a Magistrate to comply, in non-summary proceedings, with the instructions of the Attorney-General. The Court held that section 19 of the Courts Ordinance read with section 5 of the Criminal Procedure Code was wide enough to afford powers of revision in relation to non-summary proceedings.

I come now to the main question which I must determine, namely whether there has been a denial to the accused of the right conferred on him by section 287 of the Criminal Procedure Code, a right which this Court has described as being " now ingrained in the rule of law and recognised in the law of criminal procedure of most civilised countries "[3]. In testing, in a given case, whether the right so assured has in fact been enjoyed, a Court will guide itself by the spirit of the law rather than by a regard to technicalities, and will not conclude that the right has been afforded unless it has been effectively afforded. It seems to me therefore that the question to be answered in the present case is whether the accused has had in substance and in fact rather than in the niceties of legal theory the right of representation by a pleader when Kandasamy deposed before the learned Magistrate.

[1] *Attorney-General v. Kanagaratnam (1950) 52 N. L. R. 121 at 126-7; see also Alles v. Palaniappa Chetty (1917) 19 N. L. R. 334.*

[2] *(1968) 70 N.L.R. 347.*

[3] per T. S. Fernando J. in *Premaratne v. Gunasekera, (1964) 71 N. L. R. 113.*

It needs little reflection to realise that the right we are here considering is a many faceted one, not truly enjoyed unless afforded in its many varied aspects. Thus the right to a pleader means nothing if it is not associated with the time and opportunity to retain one [1], nor can there be a true exercise of this right where a pleader has in fact been retained but been clearly afforded insufficient time for the preparation of his case and for obtaining instructions from the accused [2]. Indeed this Court has, despite the complainant, a foreign tourist, being scheduled to leave the country within 24 hours, nevertheless held that an accused person who was in police custody from the time of his arrest, should be granted time to retain a lawyer [3]. Hence the right does not mean merely that an accused person is entitled in theory to be defended by a p'eader but also that he must enjoy all those concomitant privileges without which the right is reduced to a cipher.

The remarkable speed with which plaint was filed in this case renders it extremely doubtful that the accused had the opportunity of consulting or retaining a lawyer to appear for him at an inquiry held the morning after his arrest, and following on a continuous period of police custody. In an uncontroverted affidavit before this court the accused-petitioner has stated that the proctor who eventually arrived at the scene of inquiry that morning had been retained by his relatives and I see no reason to think that in the circumstances of this case the accused himself had had any opportunity of consulting, instructing or retaining a lawyer himself. It is also significant that the proctor when he first appeared brought it to the Magistrate's notice that he had not obtained necessary instructions from his client.

The scope of the privilege of representation by counsel as examined in somewhat greater detail by the Indian and American courts may here be briefly noticed.

Section 340 of the Indian Code of Criminal Procedure which contains a provision corresponding to that we are now considering, has been construed to mean that full opportunity should be afforded to the accused to get proper legal advice and assistance before he is called upon to cross-examine the prosecution witnesses.[4]. Thus where an accused person has been arrested and placed in custody and is then suddenly called upon to conduct his case without an opportunity having been given to him of obtaining legal assistance, there is in effect a denial of the right to Counsel.[5] In the case referred to the accused had been kept in detention for a period of ten days with the result that he had had no opportunity of obtaining legal assistance. I see no distinction between such a case and the present, where there has

[1] *The Queen v. Prins (1962) 61 C. L. W. 26.*
[2] *The Queen v. Peter (1961) 64 N. L. R. 120.*
[3] *Jayasinghe v. Munasinghe, (1959) 62 N. L. R. 527.*
[4] *In re Rangasamy Padayachi (1916) 16 Cr. L. J. 786.*
[5] *Rajbansi v. The Emperor (1921) 22 Criminal Law Journal 228.*

been an equal denial of opportunity inasmuch as from the time of his arrest till the time of his production before the Magistrate the accused was in police custody. As was observed in *Agarawal v. Emperor*[1], a Magistrate is bound to give an accused person sufficient facility to be represented by a lawyer especially when he is in custody from the time he was arrested and accused of an offence.

The Indian Courts have taken the principle of representation so far as to hold it to be essential at the stage of examination in-chief no less than in cross-examination, for the reason that the skill and knowledge of a lawyer confer real advantages on an accused person at the stage of examination-in-chief, through objection being taken to inadmissible and irrelevant evidence and to leading questions.[2]

Likewise, in recent years the American Supreme Court has handed down some outstandingly important decisions relating to the scope of the right to the assistance of Counsel, as provided in the Sixth Amendment to the American Constitution. This Amendment provides that " In all criminal prosecutions the accused shall have the right . . . to have the assistance of Counsel for his defence. "

The right has been given a progressively extended interpretation taking it back to the stage of arraignment (*i.e.* formal framing of charges)[3], the stage of preliminary examination prior to arraignment[4] and to the stage of police investigation itself[5] at which, after attention has begun to focus on a particular suspect, even interrogation is not permissible in the absence of a defence attorney[6].

So also in America the introduction of evidence given at a previous hearing not held at a time and under circumstances affording the petitioner through Counsel an adequate opportunity to cross-examine the witness has been held to be a denial of the fundamental right essential to a fair trial[7].

It will thus be seen that a liberal attitude underlies the modern approach to the right of representation. This is in conformity with an appreciation that the Rule of Law lies at the basis of this right, a principle which as already observed, has been recognised by this court[8]. It would be in accordance with this view of the scope and basis of section 287 that the lack of effective opportunity for the exercise of the right which it assures should be viewed as a denial of the right itself.

[1] *(1947) A. I. R. Allahabad 436.*
[2] *Re Manargan, (1925) 27 Criminal Law Journal 33.*
[3] *Hamilton v. Alabama (1961) 368 U. S. 52.*
[4] *White v. Maryland, (1963) 373 U. S. 59.*
[5] *Escobedo v. Illinois (1964) 378 U. S. 478.*
[6] *Miranda v. Arizona (1966) 384 U. S. 436.*
[7] *Pointer v. Texas 380 U. S. 400.*
[8] *Premaratne v. Gunasekera*, supra.

It is true that an accused person cannot neglect to assert his right to retain Counsel and thereafter complain at a later stage that he has not had the opportunity of representation by Counsel. It is said that in the present case the accused has not merely not exercised his right to retain Counsel but has also made use of the opportunity afforded to him under section 189 of questioning the witness concerned. It is submitted therefore that the accused having already enjoyed the right of questioning the witness cannot as of right demand a further opportunity for cross-examination.

It cannot be said in the present case that the accused had delayed in availing himself of his right to retain a lawyer, for circumstances did not permit him on his own to retain one prior to the proceedings before the Magistrate on the 10th. The failure to have a pleader appearing for him at the time the first witness made his deposition and was questioned is not therefore a circumstance that can result in the view that the right to be represented at that stage of the proceedings has been forfeited by default.

In regard to the exercise by the appellant himself of the right to question the witness it would not be correct to hold such questioning to be in any way a substitute for cross-examination by a lawyer.

The advantages of representation by a trained lawyer need no elaboration here. No layman however well-informed and self-possessed can in the matter of presenting his defence and safeguarding his interests bring to his benefit such resources of knowledge, training and skill as are peculiarly the attributes of the legal profession. Far less may a person defend himself adequately when he is himself subject to the mental turmoil and emotional stress resulting from the pendency against him of a charge of grave crime, and suddenly learns that he may put questions to a witness. I should here advert to the petitioner's averment in his affidavit that, being 66 years of age and having spent the previous night in a police cell, he was not in a fit condition physically or mentally to cross-examine Kandasamy effectively on the morning of 10th April.

In the circumstances I do not think that the questions asked by the accused result in a loss of the statutory right to be defended by a pleader.

Learned Counsel for the Crown has submitted that the question of recall of a witness for cross-examination is entirely one of discretion on the part of the learned Magistrate in as much as the witness had already been tendered to the accused for questioning.

The question of recall of a witness as opposed to the tendering of a witness for cross-examination for the first time is always, he points out, a matter of discretion for a trial Judge. [1]

[1] *Wigmore on Evidence, vol. 6, section 1898.*

Learned Crown Counsel submits that this being a matter of the exercise of a discretion vested in the Judge, this Court would not ordinarily interfere in the exercise of that discretion unless that discretion has been exercised on some wrong principle of law and should have been exercised in a contrary way and in fact a miscarriage of justice has resulted. The discretion should in his submission be presumed to be rightly exercised. In support of these principles he cites the case of *Ratnam v. Cumarasamy* [1].

It would appear, however, that even upon the basis of this submission there is still the need for interference by this Court inasmuch as all the requisites so specified are here present.

An examination of the reasons adduced by the Magistrate in support of the refusal to permit cross-examination shows that they are clearly not sustainable, and all the more so because, to judge from his order, he would ordinarily have exercised his discretion in favour of granting the application.

One reason adduced by the learned Judge, as already observed, carries the implication that the witness had been suborned and might therefore go back on his evidence. I do not think that the fact that one witness is thought by the learned Magistrate to have been suborned is a reason for presuming that all the other witnesses or at any rate the other crucial witnesses have also been suborned.

Furthermore, it seems quite apparent that the duty of a Judge is to decide the case upon the evidence before him. If a witness should go back upon his evidence in cross-examination, a fact which the Magistrate will have to take into account in determining the issue before him will be that, whatever his reason for so doing, the witness has now given an altered version. Witnesses may go back upon their evidence in consequence of subornation or weak-mindedness or plain untruthfulness, among other reasons, but there is no warrant for assuming in advance the falsity of an altered version which may emerge in cross-examination or the truth of the original version elicited in examination-in-chief. It seems unthinkable therefore that the right to cross-examine should be denied lest the resulting evidence will not accord with the initial version given by the witness. Evidence both in chief and in cross-examination must be viewed in its totality if the Judge is to ascertain the truth. Indeed for this purpose, as has so often been said, cross-examination is the most powerful weapon in the armoury of our legal procedure. The placing of a shield between this weapon and a witness is certainly not conducive to the ascertainment of truth and may well result in entrenching falsehood.

If the Magistrate takes the view that a witness has been dishonest or has perjured himself he will no doubt deal with him for such conduct but upon the issue before him he must decide only upon the evidence before him.

[1] *(1965) 1 W. L. R. 8.*

It is also questionable whether the learned Magistrate had before him sufficient material on which to arrive at a finding that the witness had been subjected to some illicit form of pressure. It may well be that it was in consequence of skilful cross-examination at the hands of learned Queen's Counsel that the witness decided to go back upon his testimony and unless he has very strong reasons for arriving at the conclusion of subornation the Magistrate would generally incline in favour of the view that it is the process of cross-examination rather than the use of illicit pressure which has resulted in a witness' change of front.

Cross-examination will of course be curbed by Court if it transcends the limits allowed by law but within these limits the right to cross-examination cannot be denied or curtailed. It therefore seems scarcely a tenable reason for denying cross-examination that it is expected to be effective, for this is the very end and purpose of the cross-examiner's skill.

Learned Crown Counsel submits that in considering whether there has been the opportunity to cross-examine, we can derive guidance from cases decided under section 33 of the Evidence Ordinance relating to the admissibility of evidence given in a prior judicial proceeding. One of the requisites to the admissibility of such evidence is that in the former proceeding the adverse party should have had the right and the opportunity to cross-examine. In applying this section the question whether the right or opportunity has been effectively used is immaterial so long as the right and opportunity did exist. Indeed even if the right and opportunity have not been used the requisites of section 33 would still have been satisfied. On this basis it is submitted that when we consider section 157 (3) of the Criminal Procedure Code we should consider whether the opportunity was afforded to the accused rather than the question whether the opportunity was effectively used.

I do not think the analogy of section 33 holds good when testing whether section 157 (3) has been satisfied. When applying section 33 of the Evidence Ordinance, the Court's concern is only with the technical requisite that there should have been opportunity, for more than this can scarcely be stipulated to meet the situation which has unavoidably arisen, of a witness being unable to depose again. In regard however to section 157 (3) read in relation to section 287, it is not a technical requisite that must be satisfied but the fundamental question whether the right of representation conferred by section 287 has been truly and substantially enjoyed.

Another reason given by the learned Magistrate, namely that no grave prejudice will result in view of the opportunity to cross-examine in the higher Court, does not again bear examination.

It is the right of every accused person in non-summary proceedings to hope and expect with confidence that if the evidence against him proves insufficient to justify a committal, the Magistrate will discharge him without putting him through the unnecessary ordeal of trial in the higher

Court on a charge of grave crime. Where such an opportunity of discharge by a Magistrate does exist, it would be a serious violation of the right of the accused to deny him that which is his right merely because the superior Court will undoubtedly go through the normal process of trial. Magistrates would do well to bear in mind the long period of incarceration and the expense and pain of mind resulting from unnecessary commitments.

For these reasons I consider that in the circumstances of this case the refusal by the learned Magistrate to permit cross-examination of the witness Kandasamy by Counsel was wrong. Acting in revision I accordingly reverse the order of the learned Magistrate and direct that the witness Kandasamy be tendered for cross-examination by Counsel for the accused.

Order reversed.