1943 *Present* : **Jayetileke J.**

KARUNATHILLEKE, Appellant, *and* AMEEN, Respondent.

5—*M. C. Colombo, No. 18,401.*

Accused compelled to give evidence for prosecution—Illegality—Fatal to proceedings.

An accused person cannot be compelled to give evidence for the prosecution.

APPEAL from a conviction by the Magistrate of Colombo.

O. L. de Kretser (Jr.) for accused, appellant.

No appearance for respondent.

Cur. adv. vult.

February 19, 1943. JAYETILEKE J.—

In this case the accused was charged under section 2 of the Nuisance Ordinance (Cap. 180) with having kept premises bearing assessment No. 157, Prince of Wales' avenue, belonging to him, in a filthy and unwholesome state so as to be a nuisance to or injurious to the health of persons.

He was convicted and sentenced to pay a fine of Rs. 10. In order to prove that the accused was the owner of the said premises the prosecution called the accused into the witness-box.

Mr. O. L. de Kretser (Jr.), who appeared for the accused in the Magistrate's Court, states that he objected to the accused being called as a witness. He contends that an accused is an incompetent witness and cannot be examined by the prosecution at all. There can be no room for doubt that his contention is sound.

From the time of the Charter our law has been that in a criminal case the onus of proof is on the prosecution to establish by evidence all the facts and circumstances which are essential to the offence with which the accused is charged. That onus never changes, for every man is presumed to be innocent till his guilt is established by the prosecution. This is one of the most important basic principles of Criminal Law in England established by centuries of traditions and precedents, and it is on the principles of the English Law that our own system is based. That onus cannot be discharged by calling the accused as a witness.

Under the Common Law of England a person charged with the commission of an indictable offence or any offence punishable on summary conviction was incompetent to testify. This Common Law rule has been in force in this Island from the time of the British occupation.

In 1895 the Legislature recognising the inconvenience and injustice of this rule which prevented an accused person from giving evidence in his own behalf removed the disability by enacting in section 120 (4) of the Evidence Ordinance (Cap. 15) that in criminal cases the accused shall be a competent witness in his own behalf and may give evidence in the same manner and with the like effect and consequences as any other witness. In *Rex v. Ukku Banda*[1], a divisional Bench interpreted this sub-section as meaning that the accused may go into the box as an ordinary witness and give such evidence as he thinks fit on his own side.

This sub-section did not alter the Common Law rule that an accused person cannot, in a criminal case, be called as a witness by the prosecution or by a co-accused. Indeed, it may even be said that the sub-section by specifying the case in which an accused person shall be competent to testify impliedly enacted that he shall in all other cases be incompetent to testify. It seems to me quite impossible to take any other view on any proper principle of construction.

The question arose in a different form in the case of *Siman Appuhamy v. Rowel Appu*[2]. In that case the Magistrate called the accused into the box after the case for the prosecution had been closed and Layard C.J. held that the Magistrate has no power to do so and acquitted the accused.

There is no law or principle which supports the course adopted by the prosecution in this case. I would, therefore, set aside the conviction and sentence and acquit the accused.

Set aside

[1] *24 N. L. R. p. 327.*

[2] *1 Bal. Rep. p. 44.*