[COURT OF CRIMINAL APPEAL]

1950 *Present:* **Dias J. (President), Windham J. and Gunasekara J.**

S. PEDRICK SINGHO *et al.*, Appellants, *and* THE KING, Respondent

APPEALS 63-65 WITH APPLICATIONS 168-170 OF 1949

S. C. 33—M. C. Horana, 7,848

Court of Criminal Appeal—Perjury—Burden of proof—Measure of punishment—Depositions—Effect of irregularity in taking down depositions—Calling evidence after case for prosecution is closed—Criminal Procedure Code, ss. 299, 429, 439.

In a charge, under section 439 of the Criminal Procedure Code, for giving false evidence, the burden of proof is on the prosecution to establish beyond reasonable doubt (*a*) that the witness made the statements set out in the indictment in the Court of trial and in the Magistrate's Court, (*b*) that such statements were made on oath or affirmation, (*c*) that such statements were on " material points ", and (*d*) that either expressly or by necessary implication the statement made by the witness in the Court of trial contradicts that given before the Magistrate. It is not necessary for the prosecution to go further and either allege or prove which of the two statements is false. The evidence, however, must be legally admissible evidence.

Where the deposition of a witness has been irregularly recorded by the Magistrate in breach of the provisions of section 299 of the Criminal Procedure Code, such a deposition is not legal evidence upon which the Court or jury can act in order to convict the witness. A conviction based on such evidence is liable to be quashed.

It is, however, open to the prosecution, where such an irregularity exists, to prove by other evidence in terms of section 299 (6) that the requirements of section 299 were, in fact, complied with. This can be done by calling the Magistrate and the interpreter of the Magistrate's Court, or by the cross-examination of the witness.

It is, however, irregular, after the case for the prosecution is closed, for evidence to be led under section 299 (6) in order to fill up gaps or to remedy defects in the case for the prosecution.

Under section 439 several witnesses should not be tried together, Each witness should be indicted and tried separately.

The provisions of section 439 are intended to provide a prompt punishment for perjury. A Judge of Assize may award a sentence up to the maximum prescribed by section 190 of the Penal Code. There is no warrant for giving the provisions of section 439 of the Criminal Procedure Code a restricted interpretation. *R. v. Podiappuhamy (1927) 29 N. L. R. 103*, not followed.

APPEALS, with applications for leave to appeal, against certain convictions in a trial before a Judge and Jury.

M. M. Kumarakulasingham, with *L. C. Gooneratne*, for the appellants.

J. A. P. Cherubim, Crown Counsel, for the Crown.

Cur. adv. vult.

January 30, 1950. DIAS J.—

W. Aron Singho stood his trial for the murder of his wife Baby Nona. Amongst the prosecution witnesses were these three appellants.

W. D. Jinadasa is the brother of Aron Singho. S. Pedrick Singho and Sopihamy were the brother and sister of the deceased woman. These persons are said to have been dependent on Aron Singho's bounty for their maintenance.

The trial of Aron Singho commenced before Basnayake J. and an English-speaking Jury on November 21, 1949, and was concluded on the following day, when the jury unanimously acquitted him. The three appellants were the chief witnesses for the prosecution. It is alleged that the appellants at the trial before the Supreme Court retracted or contradicted the evidence given by them before the Magistrate in material respects and thereby made it impossible for the jury to reach any verdict other than one of acquittal.

After the verdict of the jury had been recorded, the witnesses W. D. Jinadasa, S. Sopihamy and S. Pedrick Singho were called up. The learned Judge addressing them said:

> " I have directed the Registrar of this Court to indict you under section 439 of the Criminal Procedure Code for giving contrary evidence. I remand you till you are indicted. "

In making this order the learned Judge was exercising the discretion conferred upon him by section 439 of the Criminal Procedure Code, which reads as follows:—

> " (1) 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 such 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. In a trial in a District Court the indictment shall be prepared and signed by the Secretary of such court.
>
> (2) At such trial it shall be sufficient to prove that the accused made the contradictory statements alleged in the indictment, and it shall not be necessary to prove which of such statements is false.
>
> (3) The presiding Judge may, if he considers expedient, adjourn the trial of such witness for such period as he may think fit, and may commit such witness to custody or take bail in his own recognizance or with sureties for his appearance. In the Supreme Court such adjourned trial shall be before the same or any other jury as the Judge shall direct."

There is no section corresponding to s. 439 in the Indian Criminal Procedure Code upon which our own Code is based. In the Ceylon Criminal Procedure Code of 1883, there was no section corresponding to s. 439 which first came into existence in 1898 when our present Code

became law. That section only applied to trials before the Supreme Court. In view of certain judicial decisions, by Ordinance No. 2 of 1906, that section was repealed, and a new section in its present form was substituted, making it applicable both to criminal trials in the Supreme Court and in the District Court.

It is convenient to consider the cases of these appellants together, although they were correctly charged and tried separately.

Appeal 63 1949—S. Pedrick Singho:

The proceedings against this appellant Pedrick Singho commenced on November 22, 1949. He was undefended. Crown Counsel appeared, presumably as *amicus curiae*, to support the indictment which was in the name of the presiding Judge. The indictment was signed by the Clerk of Assize who under s. 442A (3) of the Criminal Procedure Code exercises the power, duties and functions of the Registrar of the Supreme Court.

The prosecution commenced and ended with the evidence of the Clerk of Assize. He produced a copy of the evidence given by the appellant at the trial before the Supreme Court and also the Magistrate's record of the non-summary inquiry.

At the trial of Aron Singho before the Supreme Court this appellant stated on oath:

> " The accused (Aron Singho) did not come to the cattle shed at about 10 p.m. He did not tell me that a certain man had visited the house earlier and ask me to be on the watch. The accused did not tell me that the deceased was pregnant, and that he must find out who is responsible for it. I do not know whether the knife P1 belongs to the accused."

It is common ground that this was material evidence.

The Clerk of Assize further stated:

> " At the Magisterial inquiry this prisoner (i.e., the appellant Pedrick Singho) has said ' The accused (Aron Singho) came to the cattle shed and told me a certain man had visited his house earlier and asked me to be on the watch. The accused told me that the deceased was pregnant and that he must find out who was responsible for it. The knife P1 belongs to the accused '."

In a proceeding under s. 439 of the Criminal Procedure Code the burden of proof rests on the prosecution to establish beyond reasonable doubt (*a*) that the witness made the statements set out in the indictment in the Court of trial and in the Magistrate's Courts, (*b*) that such statements were made on oath or affirmation, (*c*) that such statements were on " material points ", and (*d*) that either expressly or by necessary implication the statement made by the witness in the Court of trial contradicts that given before the Magistrate. It is not necessary for the prosecution

to go further and either allege or prove which of the two statements is false—s. 439 (2). The evidence, however, must be legally admissible evidence—*R. v. Aziz* [1].

Unfortunately, this appellant was undefended. It now transpires that the deposition of this appellant in the Magistrate's Court has been recorded irregularly.

S. 299 of the Criminal Procedure Code provides the procedure to be followed by Magistrates when recording depositions in a non-summary inquiry. The evidence of each witness must be read over to the witness by the Magistrate in the presence of the accused person, if in attendance, or of his pleader, if he appears by pleader, and shall be corrected, if necessary, either when the evidence is completed, or at some time before commitment—s. 299 (1). In the case of witnesses who do not understand English, the evidence given by them must be interpreted to them in the language in which it was given—s. 299 (3). Thereafter, it is the duty of the Magistrate to append a certificate in the prescribed form to the deposition—s. 299 (5).

Such a certificate has not been appended to the documents purporting to be the depositions of the appellants.

S. 299 (6) of the Criminal Procedure Code provides that:

> " The absence of such a certificate in a deposition shall not be a bar to the deposition being received in evidence in any case in which it is desired to tender the deposition in evidence, *if it is proved by other evidence* that the other requirements of this section were, in fact, complied with."

There is, however, no proof at all in the case of two of these depositions that they were, in fact, read over or interpreted to the two male appellants in the presence of the accused, Aron Singho, or at all—s. 299 (1). There is no proof that the Sinhalese letters appended to two of the depositions are the signatures of the male appellants—s. 299 (4). The provisions of s. 424 of the Criminal Procedure Code cannot apply to the deposition *of the appellant Pedrick Singho* because no extrinsic evidence was tendered to remedy the defect. S. 80 of the Evidence Ordinance also has no application to the facts of this case.

The authorities show that a defective deposition of this kind cannot be utilised in order to convict a person of perjury. It was held in *R. v. Gossami* [2] under the corresponding section of the Indian Criminal Procedure Code that the failure to observe the provisions of the section is an informality which renders the deposition inadmissible in a subsequent prosecution for perjury. In *R. v. Mohendra* [3] where the deposition was not read over to the witness in the presence of the accused, it was held that no prosecution for perjury would lie against the witness. The decisions in *R. v. Jyotish* [4] and *R. v. Rakhal* [5] are to the same effect.

[1] *(1927) 9 Cey. L. Rec. 54.*
[2] *6 Cal. 762.*
[3] *12 C. W. N. 845.*
[4] *36 Cal. 955.*
[5] *36 Cal. 808.*

It might have been possible when this appellant gave evidence for the prosecution in cross-examination to have proved the regularity of the deposition, but this was not attempted. The appellant was not even asked whether the signature in the Magisterial record is his signature.

We are, therefore, constrained to hold that the statement of the appellent Pedrick Singho in the Magistrate's Court has not been proved. Therefore, there was no case for this appellant to meet, because an essential ingredient necessary to establish the charge against him was not established. The statement on oath in the Magistrate's Court which this appellant is alleged to have contradicted was never proved. The conviction of the appellant must, therefore, be quashed. We, however, leave it open to the authorities, should they desire to do so, to take any further steps against the appellant for his alleged perjury.

Appeal 64/1949—W. D. Jinadasa:

The trial against the appellant W. D. Jinadasa began on November 22, 1949, and was continued on November 24, 1949. The prisoner had the advantage of being defended by learned counsel.

The Clerk of Assize stated that at the trial before the Supreme Court the appellant stated on oath:

> " The accused (Aron Singho) did not occupy my bed on the verandah on the night of the 23rd August, 1949. The accused did not wake me at 12.30 or 1 a.m. The accused did not tell me that he found Baby Nona with another man and that he stabbed Baby Nona with the knife P1. The accused did not tell me that he was going to the Police Station with the knife P1."

The Clerk of Assize also produced the Magistrate's record and stated that in that Court Jinadasa stated:

> " Last night I slept inside the house with Sopihamy and the accused (Aron Singho) occupied my bed in the verandah. At about 12,30 or 1 a.m. the accused woke me and told me that he found Baby Nona with another man, and that he stabbed Baby Nona with the knife P1. The accused told me that he was going to the Police Station."

This deposition is inadmissible for the reasons we have already given.

After the Clerk of Assize had given evidence Crown Counsel stated " That is my case ". Therefore, the prosecution began and ended with the evidence of the Clerk of Assize. The appellant then gave evidence and the trial was adjourned until November 24, 1949.

On that date counsel for the appellant discovered the irregularity in the depositions. It was then suggested that the Magistrate and his interpreter should be called, but learned counsel for the defence objected to this being done at that stage. The Court, however, overruled the objection, and called the Magistrate and the Interpreter Mudaliyar.

The point taken in this appeal is that the learned Judge was not justified in calling the Magistrate and the interpreter after the prosecution had closed its case and the accused had given evidence in order to fill up gaps or to remedy defects in the prosecutor's evidence. We consider there is substance in this contention.

Under section 429 of the Criminal Procedure Code any Court *may*, at any stage of an inquiry, trial or other proceedings under this Code, summon any person as a witness, or recall and re-examine any person already examined; and the Court *shall* summon and examine, or recall and re-examine any such person, if his evidence appears to it essential to the just decision of the case.

The matter is one which is within the discretion of the presiding Judge. If a Judge exercises his discretion in a manner different from that in which a Court of Appeal would have exercised it, that fact *per se* is not a sufficient ground for quashing a conviction—*R. v. Aiyadurai*[1]. The same case decided that what is done should not operate as a trap which results in injustice to the accused. The Judge's discretion must be used with a due regard to the interests of the prisoner. He must not be placed at an unfair disadvantage. It has also been laid down that the provisions of section 429 must not be used so as to supply gaps or deficiencies in the case for the prosecution—*Ponniah v. Abdul Cader*[2], *Vandendriesen v. Houwa Umma*[3]. The facts of the unreported case *68, 69/1947 2 M. C. Batticaloa, 2,269* (decided by the Court of Criminal Appeal on September 22, 1947) bear a strong resemblance to the facts of the present case. In that case the Crown closed its case. The counsel for the defence stated that he was not calling the prisoners, but that he would be calling the Clerk of Assize to prove certain contradictions which had been elicited. The Court then adjourned for the day. On the following day Crown Counsel sought the permission of the Court to call a certain witness who had not been called, although his name was on the back of the indictment. He also moved to recall another prosecution witness. The trial Judge allowed the application, despite objection from the defending counsel. The Court of Criminal Appeal held that this was irregular. The conviction was quashed and a new trial was ordered. We think the principle there laid down applies with equal, if not with greater, force to a proceeding under section 439. In such a case the trial Judge at whose direction the charge was initiated occupies a position different from that of a Judge of Assize trying an indictment or an information presented by the Attorney-General. It is, therefore, all the more necessary that he should strictly follow, not only the procedure laid down by section 439, but also see that nothing happens which may embarrass or prejudice the accused. The failure to do so may result in vitiating a conviction—see *R. v. Silva*[4], *Sivakolandu v. Chelliah*[5].

We are of opinion that the calling of this fresh evidence at this stage of the case was not justified. These witnesses were not called to rebut evidence which had been called for the defence; nor were they called to prove something which arose *ex improviso*. They were called to supply

[1] *(1942) 43 N. L. R. at. p. 291.*
[2] *(1937) 38 N. L. R. 281.*
[3] *(1937) 39 N. L. R. 65.*
[4] *(1915) 1 C. W. R. 84.*
[5] *(1910) 13 N. L. R. p. 290.*

a missing link in the case for the prosecution. In the circumstances, it is impossible to say that the appellant was not prejudiced by this procedure. We are not prepared to say that this was a case in which it was essential to the just decision of the case that the Magistrate and the Interpreter should be called at that stage. Normally the prosecution must stand or fall by the evidence led before the case for the prosecution is closed—see *Rasiah v. Suppiah* [1].

We, therefore, quash the conviction of this appellant but leave it open to the authorities, should they desire to do so, to take further steps against him for his alleged perjury.

Appeal 65/1949—S. Sopihamy :

At the Supreme Court trial Sopihamy stated on oath:

> " I did not come to know that the deceased was on intimate terms with the accused (Aron Singho). I did not hear a row at any time between the accused and his wife over the deceased. The accused did not sleep on Jinadasa's bed in the verandah on the night on which Baby Nona was killed. I was not awakened by the accused. He did not tell me he found the deceased with Guneris, and he stabbed the deceased with a knife. The accused did not show me and Jinadasa P1 or a knife like P1. The knife P1 does not belong to the accused. The accused did not say he was going to the Police Station, and he was taking the knife P1 with him."

The Clerk of Assize also stated that in the Magistrate's Court record the appellant is recorded to have stated on oath:

> " I came to know that the deceased was on intimate terms with the accused. I heard a row one day between the accused and his wife over the deceased. The accused slept on Jinadasa's bed in the verandah. About 12 or 1 a.m. I was awakened by the accused, and he told me that he found the deceased with Guneris, and he stabbed the deceased with a knife. The accused showed me and Jinadasa a knife like P1. The knife P1 belongs to the accused. The accused said he was going to the police station and took the knife with him. "

This deposition has the same infirmities which the other two depositions possess. Before the case for the prosecution was closed, however, both the Magistrate and the Interpreter Mudaliyar were called. They have sworn that the deposition appearing in the magisterial record is that made by this appellant, that it was recorded by the Magistrate, and that it was interpreted to the appellant before she affixed her thumb impression thereto. In spite of the absence of the certificate, and in spite of the irregularities committed by the Magistrate when recording the deposition, there is thus other evidence which proves, as the jury has found, that the requirements of section 299 have, in fact, been complied with. This was conceded by learned counsel for the appellant.

The jury having convicted the appellant, her counsel pleaded in mitigation of sentence. The learned Judge sentenced her to undergo two

[1] *(1949) 50 N. L. R. p. 271.*

years' rigorous imprisonment, observing that he could not overlook the seriousness of her offence. He added that if what she told the Magistrate was true, her evidence before the Supreme Court had enabled a guilty person to evade the law through her perjury. On the other hand, if what she stated in the Magistrate's Court was false, then she had placed an innocent man in jeopardy.

Learned counsel for the appellant renewed his plea for a reduction of the sentence. He submitted that the appellant was a first offender, that she was forty years of age, that she was a helpless female who was entirely beholden to Aron Singho, and that if she gave untrue evidence at the trial it was due to her desire to help her benefactor. He, therefore, suggested that a sentence of 6 months rigorous imprisonment would be an adequate punishment for this offence.

The appellant on her conviction became liable (in the Supreme Court) to be punished with imprisonment of either description for a term which may extend to seven years, and also to a fine—see section 190, Penal Code. We must bear in mind the circumstances under which this perjury was committed by the appellant. It was admittedly with the intention of saving Aron Singho from a capital conviction, or from having to undergo a long term of imprisonment if he was convicted of a lesser offence. We have to take into consideration the circumstance which the Divisional Court pointed out in 1896 [1] that " perjury is rife in our Courts " and that it is necessary, when a person has been proved to have committed the offence, that an adequate punishment should follow.

Our attention has been drawn to the case of *R. v. Podiappuhamy* [2] where Schneider J. in dealing with an appeal from a conviction under section 439 in a District Court expressed the view that the provisions of section 439 should not be invoked in cases where the offence is one of a grave nature calling for a heavy sentence. We are unable to place this restrictive interpretation on section 439 which the Legislature designed for the prompt and speedy punishment of persons who deliberately retract or contradict the evidence given before the Magistrate. We are likewise unable to subscribe to the view that the powers of punishment under section 439 are restricted. The Legislature has made it clear that under section 439, upon conviction, a Judge of Assize is vested with a discretion to award a sentence up to the maximum prescribed by section 190 of the Penal Code. A Court of Appeal will not lightly interfere with the discretion vested in the trial Judge, except in cases where such discretion has been manifestly exercised wrongly or on wrong principles. Each case must be decided upon its peculiar facts and circumstances.

We agree with the learned trial Judge that the offence committed by this appellant is a serious one. We are further of opinion that a sentence of two years rigorous imprisonment cannot be considered to be too severe when the nature of this perjury and the circumstances under which the offence were committed are taken into account. This appeal is dismissed.

Convictions of 1st and 2nd appellants quashed.
Appeal of 3rd appellant dismissed.

[1] *(1896) 2 N. L. R. 74. (Div. ct.)*

[2] *(1927) 29. N. L. R. 103.*