May 29, 1911

Present : Wood Renton J.

MANUEL *v.* KANAPANICKAN.

285—*P. C. Batticaloa*, 31,123.

Unsworn statements of witnesses made after their examination—Irregular admission of evidence—Irregularities in criminal trial—Criminal Procedure Code, s. 425, and Evidence Ordinance, s. 167.

WOOD RENTON J.—It is no doubt quite a common practice in criminal courts to recall witnesses to give further evidence on their original oath or affirmation. But it would be most unsafe to regard an original oath or affirmation as investing with the qualities of sworn evidence every desultory remark that may be openly made in Court by a complainant, already examined, while another witness is under examination.

Irregularities in criminal proceedings constitute no ground for the reversal or alteration of sentences on appeal, unless there has been a failure of justice.

" We have no power, even if we had the will, to ignore either the letter or the spirit of the provisions of section 425 of the Criminal Procedure Code and section 167 of the Evidence Ordinance."

THE facts are fully set out in the judgment.

Elliott, for the accused, appellant.

No appearance for the respondent.

Cur. adv. vult.

May 29, 1911. WOOD RENTON J.—

The accused-appellant was charged in the Police Court of Batticaloa with having committed mischief by shooting and killing a buffalo worth Rs. 50, in contravention of section 412 of the Penal Code. The learned Police Magistrate convicted him and sentenced him to six months' rigorous imprisonment, and also to pay a fine of Rs. 50, or in default of payment to undergo an additional period of two months' rigorous imprisonment. If the fine was paid, the whole of it was to go to the owner of the buffalo as compensation for the loss that he had suffered. The evidence, which there is no reason to distrust, proves beyond all doubt the commission by the appellant of the offence charged ; and his counsel mainly relied, in supporting the appeal, on the alleged admission by the Magistrate of an unsworn statement by the complainant, suggesting a motive for the killing of the buffalo, as evidence in the case. The statement in question, which appears from the record to have been interjected by

the complainant during the examination of another witness for the prosecution, was in these terms : " The accused offered to buy the animal from the man who sold it to me ; that is why he did this. " Although the appellant was defended by a proctor, no exception was taken to the statement, nor was any application made to the Magistrate that the complainant should be recalled to verify it on oath and submit himself, if necessary, to cross-examination upon the point. I felt, however, at the argument that the appellant's proctor may well have been unaware that the complainant's interlocutory observation had been recorded as evidence, or that the learned Magistrate would rely upon it, as he has done in his judgment. I therefore sent the case back to the Police Court, and invited the Magistrate to state, firstly, the circumstances under which the observation in question came to be entered on the record, and in the next place, whether he had taken account of it in fixing the amount of punishment. The learned Magistrate says that (as one would gather indeed from the record) the complainant's statement was voluntarily interposed while another witness was giving evidence ; that, as the complainant had already been affirmed, he regarded the subsequent statement as forming part of his evidence ; and that he did take account of it in fixing the amount of punishment, for otherwise, in the absence of malice, a fine would have met the justice of the case. It is no doubt, as the learned Magistrate says, quite a common practice in criminal courts to recall witneses to give further evidence on their original oath or affirmation. But it would be most unsafe to regard an original oath or affirmation as investing with the qualities of sworn evidence every desultory remark that may be openly made in Court by a complainant, already examined, while another witness is under examination. The complainant in this case ought to have been at once checked when he interrupted the proceedings, and no notice should have been taken of what he said, unless he was recalled at a later stage to make that statement as a witness. Had the statement been tested by cross-examination, it would probably have been found to be mere hearsay. I attach no importance to the fact that it was not challenged by the defence. I hold that there has been in this case an improper admission of evidence. The appellant has been prejudiced as regards his punishment. In any event, the sentence must be modified. So much is clear. There remains, however, the wider and more important question, whether the improper admission of the complainant's statement as evidence in the case is a ground for setting aside the conviction. In view of the terms of section 167 of the Evidence Ordinance (No. 14 of 1895), I should have said, if I had had to decide the case without argument, that the conviction must stand. The evidence improperly admitted bears directly on the question of motive. The fact that the appellant did shoot a buffalo of the value of Rs. 50 belonging to another man is proved by eye-witnesses, believed by the Police

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Magistrate, who has recorded both the evidence and the reasons for his judgment with care, and no justification or excuse for that act has been furnished by the appellant, who, indeed, denies that he shot the buffalo. On the face of the record there is no reason why the witnesses for the prosecution should not have been believed. The appellant's counsel urged me strongly, however, to set the conviction aside, and said, in effect, that the Bar looked to the Supreme Court to instruct the Judges of first instance as to their duties by object lessons of this kind. I have heard this argument suggested before. But this is the first time that it has been presented to me in a definite form, and as there is nothing else to be said in support of the appeal against the conviction, I propose to consider it. For the Supreme Court to act on any such principle, as the argument that I have stated seeks to lay down for its guidance, would, in my opinion, be quite wrong. In matters of this kind a judicial tribunal must take account of the whole body of conditions under which justice has to be administered. The conditions that we have to deal with in Ceylon are of such a character that the interference of the Supreme Court with criminal proceedings on the ground of mere technical irregularities would most seriously injure the best interests of the Colony. I am assuming for the present, what is not the case, that the Legislature has left to us such a right of interference. The case with which in early days criminal proceedings could be quashed in England on the ground of errors of form was at no time a creditable feature of English jurisprudence. But in England it has at least a meaning. The technicality of the old English criminal procedure had its roots struck deeply into the past. It sprang from the English conception of a criminal trial as a lawsuit between the prosecutor and the accused. When one realizes that fact there is no difficulty in seeing how all the subtlety that we find in the old English civil procedure obtained a footing in the region of the criminal law. Strangely enough, in Scotland, where criminal procedure was inquisitorial and not litigious, the same vicious system was introduced and reached a ranker growth. Both in England and in Scotland, however, lawyers have long been alive to its mischievous results, and have been acting on the principle that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceedings, and the attainment of that substantial justice which should be their only aim. I may refer in this connection to the Summary Jurisdiction Act, 1848 (12 *and* 13 *Vict. c.* 45), the Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. c.* 35), and the Summary Jurisdiction (Scotland) Act, 1908 (8 *Ed.* VII. *c.* 65). In Ceylon a system like the old strict English law of criminal procedure is meaningless, and its introduction here, at the very time when it is being abandoned in England and Scotland, would be a retrograde step in the development of the law. Moreover, we are bound to

remember that in very many of the courts of first instance in this Colony the criminal law has to be administered by Judges who are not professional lawyers, or who, even where they have been admitted to the Bar here or in England, have not always had the advantage of practising in our Courts. If the Supreme Court were not merely to be (as it ought to be) careful to mark what seems amiss in the criminal proceedings that come before it in appeal, but to punish the Magistrates—and, be it added, the Colony—for formal errors, in cases where substantial justice has been done, the practice would be productive of results which I am afraid that those who address to us arguments of the sort that I am considering imperfectly realize. It would make the administration of criminal justice a mere lottery, and offer to people who delight already to gamble with litigation an irresistible temptation to gamble also with crime. Here, as in India, the Legislature has foreseen these points, and has expressly provided that irregularities in criminal proceedings shall be no ground for the reversal or alteration of sentences on appeal, unless there has been a " failure of justice," and that no new trial or reversal of any decision shall be allowed in any case on the ground of the improper admission of evidence if it appears that independently of the evidence so admitted there are sufficient materials to justify the conclusion at which the trial Judge arrived. In Ceylon the rule above stated as to irregularities which existed under the old Code of Criminal Procedure, 1883, has been reproduced in the present Code. The rule as to the improper admission of evidence is embodied in the Evidence Ordinance (No. 14 of 1895). We have no power, even if we had the will, to ignore either the letter or the spirit of these statutory provisions. There are, of course, irregularities the mere presence of which imports prejudice, such as the trial of a man for a number of different offences at the same time, or the failure of the Courts to give accused persons a chance of defending themselves before exercising the summary powers of punishment for contempt. But with these we are not here concerned. I desire to add that, in my opinion, there is nothing in the present condition of the courts of first instance which could offer any excuse for the kind of intervention on the part of the Supreme Court with which I have been dealing in this judgment. Mistakes are made there, as I have no doubt they are made here. Sometimes one feels in hearing appeals that mistakes have been made which ought to have been avoided. But the first instance criminal work of this Colony is, on the whole, carefully, conscientiously, and correctly done. In the present case I affirm the conviction, but set aside the sentence and direct that the appellant pay a fine of Rs. 100, or in default thereof undergo six weeks' rigorous imprisonment. If the fine is paid, one-half of it must be paid to the complainant as compensation for the loss of the buffalo.

Sentence varied.