Present: Wood Renton C.J.

1915.

THE KING *v.* PERERA *et al.*

53 and 54—D.C. (Crim.) Kalutara, 2,814.

Witnesses named on the back of the indictment—Should the Crown call all the witnesses so named? — Right of accused to cross-examine witnesses not called by the Crown.

In a criminal prosecution the Crown should as an ordinary rule call the attention of the Court and of counsel for the accused to the fact that it does not propose to call certain witnesses as its own, should state the reason why this is considered undesirable, and should tender the witnesses in question to the accused for cross-examination. It is equally desirable that counsel for the accused should actively watch the proceedings of the Crown in this matter, and should ask that any witness whom the Crown does not propose to examine should be called, if he requires the evidence of that witness for any purpose. The Courts of first instance should enter as matter of record everything that has taken place in this connection.

[1] (1905) 2 *Bal.* 69.

[2] (1907) 1 *A. C. R.* Sup. IV.

[3] (1909) *Appeal Cases* 312.

1915.

The King v. Perera

THE accused in this case was convicted in the District Court of Kalutara of having caused grievous hurt to a girl Baba Nona and hurt to her mother Meihamy. The first accused was sentenced to six months' rigorous imprisonment on the first count and one month's rigorous imprisonment on the second. The second was sentenced to twelve months' rigorous imprisonment on the first count and one month's rigorous imprisonment on the second.

The accused appealed.

F. M. de Saram (with him *A. St. V. Jayewardene*), for the appellants.

V. M. Fernando, C.C., for the Crown.

April 29, 1915. WOOD RENTON C.J.—

His Lordship, after dealing with the other points raised, continued:—

The other point taken in support of the appeals is, however, more important, and as it is constantly raised both in the Courts of first instance, in the Supreme Court on the hearing of single judge appeals, and in the Assize Court, I propose to deal with it in detail, in the hope of being able to lay down certain principles which may be of practical use to the legal profession and to the Courts themselves. The point is made in the petition of appeal that the Crown had failed to call at the trial in the District Court a certain woman named Wasanahamy, who had been examined in the Police Court, and whose name was on the back of the indictment. In her deposition in the Police Court this woman had stated that she did not see the stabbing of the girl Baba Nona. The accused's counsel, Mr. F. M. de Saram, strenuously argued, in the first place, that the Crown was under a general obligation to call every witness whose name was on the back of the indictment; and, in the second place, that if this woman had been examined, her negative evidence in regard to the stabbing would have shaken the faith of the learned District Judge in the story of the other witnesses who gave positive evidence on the same point. If I had been persuaded that this latter contention were sound, I should certainly at least have sent the case back for further inquiry and adjudication. But I do not see anything in the evidence of Wasanahamy which is necessarily inconsistent with that of the other witnesses. She was at a distance of seven or eight fathoms from the struggle, and while she speaks to the use of a mamoty, which could easily be seen, she may well have not perceived the use of such an instrument as a knife. Moreover, this witness does say that she saw Baba Nona bleeding from her forehead, and the medical evidence establishes the fact that the injury on Baba Nona's forehead was caused by a sharp cutting instrument. But while this would be sufficient for the

purpose of disposing of these appeals, I desire to say something as to the position of the Crown in regard to the calling of witnesses whose names appear on the back of an indictment. The question was raised before me many years ago in the *Attygalle* murder case, and I dealt with it there, both in the form of an incidental ruling and, I think, also in my charge to the jury. So far as I am aware, however, there is no official report either of the argument or of my decision upon it in that case. By the law of England a prosecutor was never in strictness bound to call every witness whose name was on the back of the indictment (see *Rex v. Simmonds*[1]). But the practice was that all such witnesses should ordinarily be called so as to afford the prisoner's counsel an opportunity for cross-examining them, and if counsel for the prosecution declined to do so, the Judge might call the omitted witness or witnesses himself. Even where it was not the intention of the prosecution to call all the witnesses whose names appeared on the back of the indictment, the prosecutor was expected to have them all in Court, so that they might be called for the defence if they were wanted for that purpose. It is scarcely necessary to add that a witness for the prosecution, if called by counsel for the accused, became his own witness. So as to avoid the obvious inconvenience of this result to accused persons, the practice was for the prosecution, or, on the failure of the prosecution, for the Judge, to direct that any witness whom the prosecution did not propose to call in support of his own case, and whom the defence desired to be put into the box, should be tendered for cross-examination. These general rules are, however, subject to two qualifications. The Crown is under no obligation to call witnesses whose evidence it regards as unnecessary in view of evidence which has already been given. Nor, while it has no right to withhold a witness merely because his testimony may help the case for the defence, is it bound to adopt as its own witnesses whom it alleges to be dishonest. The latter part of this proposition rests upon clear and sound considerations of policy. If the prosecution were obliged to put forward at a criminal trial as its own every witness who may have been examined in the Police Court, or whose name may appear on the back of the indictment, it would not be difficult for the defence—and the suggestion, I may add, in the *Attygalle* case was that this had been done—to foist upon the prosecution a witness whose evidence was important, but at the same time was not only false, but demonstrably false. This false evidence would be destroyed by cross-examination at the trial, and would bring down along with it the whole fabric of what was otherwise a perfectly truthful case. These, as I understand them, are the rules in force in England in regard to the question with which I am now dealing. They are also in force in India. It will be sufficient for me in this connection to refer to the cases of

[1] (1823) 1 *Car. & Pay.* 84.

1913.

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Queen Empress v. Tulla [1] and *Queen Empress v. Durga.* [2] The only express authority bearing upon the question in Ceylon, apart from my unreported decision in the *Attygalle* case, is that of Sir Joseph Hutchinson C.J. in *Rex v. Fernando*[3]. But I have myself uniformly followed the English rules in practice here. Sir Joseph Hutchinson in *Rex v. Fernando* [3] indicates that he had taken the same course in regard to the tendering of witnesses for cross-examination, and I am inclined to think that the practice, at least in recent years, has been uniform on the same lines. It results from what I have said that in a criminal prosecution the Crown should, as an ordinary rule, call the attention of the Court and of counsel for the accused to the fact that it does not propose to call certain witnesses as its own, should state the reason why this is considered undesirable, and should tender the witnesses in question to the accused for cross-examination. It is equally desirable that counsel for the accused should actively watch the proceedings of the Crown in this matter, and should ask that any witness whom the Crown does not propose to examine should be called, if he requires the evidence of that witness for any purpose. The Courts of first instance also should, I think, enter as matter of record everything that has taken place in this connection. In the present appeals there is nothing on the record to show what happened at the trial. The accused do not allege in their petitions of appeal that they ever asked counsel for the Crown or the Court to put the woman Wasanahamy into the witness box, and the case has had to be argued here in the absence of any information upon that important point. As I have already said, if I had thought that the evidence of Wasanahamy could have, or probably would have, affected the view of the Judge with regard to the case as a whole, I should certainly have interfered. But I see no reason for thinking that this result would have followed if she had been examined.

The appeals must be dismissed.

Appeals dismissed.

[1] (1885) *I. L. R. 7 All. 904.*

[2] (1893) *I. L. R. 16 All. 84.*

[3] (1908) *2 Leader L. R. 81.*