

1959

Present : K. D. de Silva, J.

M. A. PIYASENA, Appellant, *and* S. I. POLICE, CRIMES,
MARADANA, Respondent

S. C. 513—M. C. Colombo, 5285/C

Criminal Procedure Code—Section 189 (2)—Duty of Court to permit cross-examination of prosecution witness who gave evidence prior to framing of charge.

Where, for the purpose of framing a charge against the accused, the Magistrate had recorded the evidence of a police officer but, at the trial, this witness was not tendered to the accused for cross-examination—

Held, that the failure to comply with the provisions of section 189 (2) of the Criminal Procedure Code was not merely an irregularity but amounted to an illegality.

¹ (1884-85) 14 Q. B. D. 141.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *D. C. W. Wickremasekera*, for the Accused-Appellants.

Ian Wikramanayake, Crown Counsel, for the Attorney-General.

July 14, 1959. K. D. DE SILVA, J.—

In this case the first, second, and third accused who are the appellants were charged along with the fourth accused, who has not appealed, on six counts. After trial they were convicted on the first three counts, and the appellants were each sentenced to two years' rigorous imprisonment while the fourth accused was sentenced to one year's rigorous imprisonment.

For the purpose of framing a charge against the four accused the learned Magistrate recorded the evidence of Police Sergeant Gunaratna. Sir Lalita Rajapakse who appears for the appellants submits that this witness was not tendered to the accused for cross-examination and therefore the convictions cannot be sustained. Mr. Wikramanayake, the learned Crown Counsel concedes that this is so. Under section 189 (2) the accused must be permitted to cross-examine all the witnesses called for the prosecution. The failure to comply with the provisions of the section is not merely an irregularity but amounts to an illegality. The convictions of the appellants cannot therefore be allowed to stand. Although the fourth accused has not appealed I would, acting in revision, set aside his conviction also.

The case will now go back to the court below for trial *de novo* according to law.

Sent back for re-trial.
