[COURT OF CRIMINAL APPEAL]

1970 *Present:* **Alles, J. (President), Weeramantry, J., and de Kretser, J.**

K. S. SEDIRIS, Appellant, *and* THE QUEEN, Respondent

C. C. A. 38/70, WITH APPLICATION 58/70

S. C. 361/68—M. C. Horana, 46406

Trial before Supreme Court—Evidence in rebuttal—Permissibility—Principles applicable—Criminal Procedure Code, s. 237 (1).

The following considerations are relevant for the exercise of the Judge's discretion in permitting evidence in rebuttal to be led under section 237 of the Criminal Procedure Code by calling of witnesses to rebut a defence raised *ex improviso* where the prosecution is taken by surprise :—

(1) Whether the prosecution has been taken by surprise.

(2) Whether the rebutting evidence could have been given in chief.

(3) Whether it does or does not surprise the defence.

(4) Whether it places the defence at a disadvantage.

A conviction will not be set aside in appeal if evidence in rebuttal wrongly admitted has not prejudiced the defence.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *Anil Obeysekera*, *C. Chakradaran*, *T. Joganathan*, *S. C. B. Walgampaya* and (assigned) *E. B. Vannitamby*, for the accused-appellant.

N. Tittawella, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

August 24, 1970. ALLES, J.—

The appellant, Sediris, was charged with the attempted murder of one Sirisena, the offence, according to the prosecution, having been committed on 24th August, 1967. After trial the appellant was unanimously convicted of attempted culpable homicide not amounting to murder and sentenced to three years' rigorous imprisonment.

Sediris, his brother Piyasena and their mother Soidahamy lived in a house a little distance away from the house where Obias, the brother of Sirisena, lived with his wife Baban Nona. On the day in question, Sirisena was also residing in the house of Obias. It is not in dispute that for some time prior to the date on which Sirisena was stabbed there had been ill feeling between the two families. According to Sediris the cause of the displeasure was because Obias suspected that the

appellant had given information to the authorities that Obias was selling kasippu. The prosecution however maintained that as Obias and three others were acquitted on a charge of murder of the appellant's brother, the members of the appellant's family were angry with Obias and Sirisena. Another brother of the appellant, Robias, lived in a separate house close to that of the appellant and he owned a number of boutiques, one of which he had rented to Piyadasa and another to one Lewis Singho.

Sirisena and Babun Nona, who were the main witnesses for the prosecution, stated that the appellant and Robias came to their house after dark: There is some contradiction as to whether they came about 7.30 p. m. or later about 10 p. m. According to Sirisena he was reclining on a bed on the rear verandah when the appellant called out to his brother Obias from the compound. Sirisena stepped down to the compound when the appellant saying "I do not want Obias. You are enough" stabbed him with a knife. Sirisena identified the appellant by the aid of a bottle lamp that was lit on the verandah. He cried out and in response to his cries, Lewis Singho who was inside the house came out and assisted him. He was rushed to the hospital where he made a statement to the Police at 11.15 p.m. In that statement he disclosed the name of the appellant as his assailant and also mentioned that Robias was present. Babun Nona who corroborated Sirisena stated that she identified the appellant from the verandah and saw him stab her brother-in-law.

The defence suggestion to Sirisena and Babun Nona in cross-examination was that there was an incident between Piyadasa and Lewis Singho at the latter's boutique about 2 p.m., in the course of which Sirisena intervened and struck Piyadasa; that Piyadasa came to Obias' house the same evening when there was a drinking bout in progress; that the injured man followed Piyadasa with a knife and in the darkness Sirisena was stabbed by some person whom he was not able to identify and that Sirisena and Babun Nona were falsely implicating the appellant as the assailant at the instance of Obias.

The prosecution also led the evidence of Inspector Karunaratne and Sergeant Wimaladasa to establish the absence of the appellant and Robias from the village shortly after the incident. Inspector Karunaratne stated that he visited the house of the appellant at 2.45 a. m. on 25th August but that the appellant was not in the house. Sergeant Wimaladasa, who assisted in the investigation, testified to the absence of the appellant from his house and the village on the 25th and 6th of September.

After the prosecution had concluded its evidence, the appellant gave evidence of an alibi. He referred to the earlier incident at the boutique and gave an account of his entire movements on the 24th and said that he remained at home the entire evening and the night. He specifically denied that any police officer came to his mother's house in search of him in the early hours of the morning of the 25th. According to him he was in the village until the 28th when he left for Balangoda. His

mother Soidahamy and his brother Piyasena gave evidence in support of the alibi. Robias gave detailed evidence of the quarrel between Piyadasa and Lewis and the part played by Sirisena in that quarrel and denied that any police officer came in search of him on the night of the stabbing.

On a consideration of the evidence led in the case there was, therefore, a direct conflict between the prosecution and the defence as to whether Inspector Karunaratne came to the house of the appellant in the early hours of the morning of the 25th in search of the appellant, a conflict which had to be resolved by the jury as judges of fact.

After the evidence of the prosecution and the defence was closed, Crown Counsel moved to call the evidence of Inspector Karunaratne in rebuttal. No application was made to the learned Commissioner by Crown Counsel for the exercise of the discretion of the Court to call this evidence and everyone in Court appears to have assumed that Crown Counsel was entitled to call such evidence as of right. After Inspector Karunaratne was recalled and his evidence led, Crown Counsel again led the evidence of Sergeant Wimaladasa without any application being made to call him. At the hearing of the appeal before us Mr. Tittawella did not seek to support the conduct of Crown Counsel in leading this evidence without first obtaining the leave of the Court, but since this evidence was led without objection, we must assume that the learned Commissioner exercised his discretion in permitting this evidence to be led.

The evidence in rebuttal consisted of the evidence of the two Police officers being led in greater detail about the steps they took to make search for the appellant and Robias on the morning of the 25th and on the 5th and 6th September. Crown Counsel also marked in evidence the productions "X", "Y" and "Z" being a note of the observations of the Police officers in regard to the search.

Learned Crown Counsel in appeal did not seek to support their production at the trial. The recorded observations of the Police officers could have been utilised only to refresh their memory or to contradict them.

Since we do not have the benefit of an order by the learned Commissioner we can only assume that the "rebuttal evidence" was led for the purpose of rebutting the evidence of the appellant's alibi. Even in regard to the alibi the evidence of Inspector Karunaratne only affects the movements of the appellant at 2.45 a.m. on the 25th, which was long after the time of the alleged stabbing. The learned Commissioner, however, in directing the jury told them that if they preferred to accept the evidence of the Inspector that the appellant was absent from his home at 2.45 a.m. on the 25th, it would seriously affect the credibility of the appellant in regard to his movements at the time of the stabbing be it 7.30 p.m. or 10 p.m. To this extent one might therefore urge that the conduct of the appellant in being absent from his home at 2.45 a.m. affected his

alibi. Be that as it may, in the view of the majority of us, the evidence in rebuttal should not have been allowed. It only served to repeat relevant evidence given by the prosecution as part of its case in chief in regard to the absence of the appellant from his house in the early hours of the morning of 25th August and his absence from the village on the 5th and 6th of September. It was a misconception to consider such evidence as evidence that could properly be led in rebuttal.

It seems apparent to the majority of us from the cross-examination of Sirisena and Babun Nona that the case for the defence was, that Sirisena was stabbed by an unknown man, and that the appellant was falsely implicated due to previous enmity. Although it was not directly suggested to the prosecution witnesses that the appellant was not present at the time of the stabbing, in the view of the majority of us, it was a fair inference that the defence envisaged in the course of the prosecution case was that of an alibi. The incident that took place at 2 p.m., which according to the defence prompted Piyadasa to come later that evening and create trouble, did not suggest that the appellant took any part in that transaction. The chief actors in that incident were Piyadasa, Lewis Singho and one Jayatunge. When Lewis Singho hit Piyadasa, Robias came and separated them. Thereafter Sirisena, Obias and Babun Nona came on the scene and after Sirisena assaulted Piyadasa, Obias and Babun Nona took him away. There was no reason for the appellant, on that version, to accompany Piyadasa and any others to the house of Obias that evening to create trouble.

Evidence in rebuttal is permitted to be led at the discretion of the trial Judge under Section 237 (1) of the Criminal Procedure Code. It is permitted in the interests of justice, when the prosecution has been taken by surprise by evidence being led on behalf of the defence which the prosecution could not reasonably anticipate. In such a case the prosecution, if it has evidence which runs counter to the defence case, is permitted to lead evidence in rebuttal. A good example of such rebuttal evidence is illustrated in *David Flynn*[1]. In that case the accused set up an alibi that he was at a swimming pool at the relevant time and called as a witness a girl who testified that she saw the accused at the pool. The evidence was concluded, speeches of Counsel were made and the trial adjourned for the summing up the following day. During the interval the prosecution obtained evidence that the girl was elsewhere at the material time and moved to call the girl's employer the following day to give evidence that the girl was in the shop at the time in question. The evidence was allowed to be led in rebuttal by the trial Judge and his decision was upheld by the Court of Criminal Appeal presided over by Lord Coddard. At p. 18 Lord Goddard stated—

> "In our opinion, if in the case of an alibi, evidence comes into the possession of the prosecution at a late stage, it ought, as a general rule, to be admitted, unless the alibi has been set up earlier."

[1] *(1957) 42 Cr. A. R. 15.*

Evidence in rebuttal will however not be permitted if the additional evidence did not relate to something which had arisen *ex improviso* in the course of the trial, but was evidence, the necessity for which should have been obvious from the outset. Thus in *Harold Norman Day*[1], after the defence of a prisoner charged with forgery and obtaining money by a forged instrument had been closed, the Judge permitted the prosecution to call a handwriting expert. Specimens of the prisoner's handwriting were in the possession of the prosecution from the commencement of the proceedings but the prosecution, in order to establish its case, depended only on the uncorroborated testimony of an accomplice. The Court of Criminal Appeal set aside the conviction, and Lord Hewart in the course of the judgment said—

> "It cannot be said .... that the evidence of the handwriting expert was evidence on any matter which arose *ex improviso*. Nor can it be said that it was evidence which no human ingenuity could foresee. It was evidence the necessity for which was obvious. It is true that, if a question arises in the course of a trial as to the proper time at which evidence should be received, the Judge may be called on to decide that question and in doing so to exercise a judicial discretion. This was not a case of that kind. This was a case where what was being done was to ask for the remedying of an obvious defect in the evidence called in support of the prosecution, not only after the prosecution had been closed, but also after the evidence of the defence had been heard. It was an endeavour to call that supplementary evidence although the material on which it was to be given had been in the hands of the prosecution from the beginning and although the evidence related to a branch of the case for the prosecution on which the prosecution must have realised that positive evidence ought to be given."

In Ceylon, evidence in rebuttal led under the provisions of Section 237 (1) of the Criminal Procedure Code, are of two types. Firstly, there is the evidence of Police officers who are called in rebuttal to give evidence of statements (not being confessions) made by accused persons under Section 122 (3) of the Criminal Procedure Code to contradict their evidence at the trial. In such a case, the Court of Criminal Appeal has held that it is not open to the prosecution to lead evidence in rebuttal, if such evidence could have been proved as an admission by the prosecution as part of their case.—*Thuraisamy*[2], *M. S. Perera*[3] and *Don Wilbert*[4]. In the latter case, however, the Court was inclined to take the view, following the decision in *Buddharakita Thera*[5], that statements made in the course of an investigation, even if they were admissions, cannot be used except to discredit a witness under Section 122 (3). This latter view appears to be supported by the decision of the Privy Council in

[1] *(1940) 27 Cr. A. R. 168.*
[2] *(1952) 54 N. L. R. 449.*
[3] *(1953) 57 N. L. R. 274.*
[4] *(1962) 64 N. L. R. 83.*
[5] *(1962) 64 N. L. R. 433.*

Ramasamy [1]. In the present case however, we are not considering evidonce in rebuttal of this type and it is therefore unnecessary to consider those decisions, except to state that there is implied in the decisions in *Thuraisamy* and *M. S. Perera* that evidence in rebuttal will not be permitted if such evidence is relevant and can be given in chief.

In the present case we are dealing with evidence in rebuttal of a different kind—the calling of witnesses to rebut a defence raised by an accused person at the trial which arises *ex improviso* and where the prosecution is taken by surprise. The only reported decision in which evidence in rebuttal of this type has been considered in Ceylon is a decision of Nihill J. at an Assize trial in 1940—*The King v. Ahamadu Ismail* [2] where the learned Judge followed the principles of the English law laid down in *King v. Crippen* [3]. In *King v. Ahamadu Ismail* the prosecution asked for leave to call witnesses in rebuttal—(1) to call the Inspector of Police to prove certain statements made by the accused to the Police to contradict him and (2) to call one Fareed to rebut the suggestion made by the accused that he went to Jalaldeen's boutique for the purpose of selling gems to Jalaldeen at the instance of Fareed. The prosecution was aware that the accused had gone to a certain boutique and sold gems and that the accused had stated that he could identify a boy in that boutique who had witnessed the transaction but he did not mention his name. At the trial he gave the name of the boy as that of Fareed and stated that he went at Fareed's suggestion to sell gems to Fareed's mudalali. The case for the prosecution was that the accused had a large sum of money with which he hired the assassins to commit the crime but he sought to give an explanation for the possession of this large sum in his hands. Nihill J. held, that it could not be said that the prosecution had been taken completely by surprise, but allowed the evidence of Fareed to be led in rebuttal. It was the Judge's view that the prosecution could not have led the evidence of Fareed as part of the prosecution case and it was only after the accused gave evidence that Fareed's evidence became relevant. The accused in giving evidence had given an account of his movemants in the village including the visit to Fareed's mudalali's shop and the learned Judge allowed the evidence of Fareed to be led in rebuttal to enable the prosecution to prove that this part of the accused's explanation of his conduct and movements after the crime was false.

In *Ahamadu Ismail* the Court laid down the following considerations as being relevant for the purpose of exercising the Judge's discretion under Section 237—

(1) Whether the prosecution has been taken by surprise.

(2) Whether the rebutting evidence could have been given in chief.

(3) Whether it does or does not surprise the defence.

(4) Whether it places the defence at a disadvantage.

[1] *(1964) 66 N. L. R. 265.*

[2] *(1940) 42 N. L. R. 297.*

[3] *(1911) 1 K. B. 149.*

In regard to the calling of Fareed in the above case, although the first condition stated above did not apply, the other considerations applied and the Court properly exercised its discretion in allowing Fareed to be called as a witness in rebuttal.

Applying the principles stated in *Ahamadu Ismail*, with which we respectfully agree, it cannot be urged in any view in the present case, that Crown Counsel was justified in recalling the Police witnesses to give evidence in rebuttal.

There only remains for consideration whether the calling of this evidence in rebuttal can be said to have prejudiced the defence. We think not. The evidence that was led, unlike the facts in *Day's* case (supra), was only repetitive of the evidence given in chief. The case depended on the degree of credibility which the jury were prepared to attach to the evidence of Sirisena and Babun Nona. Their evidence was fairly put to the Jury by the learned Commissioner and in spite of certain infirmities the Jury were apparently impressed by their evidence, to bring an unanimous verdict against the appellant. We do not think the calling of Inspector Karunaratne and Sergeant Wimaladasa after the close of the case for the defence in any way affected the decision of the jury to convict the appellant.

We therefore dismiss the appeal and affirm the conviction and sentence.

Appeal dismissed.