1938 *Present :* **Koch J.**

ABDEEN *v.* J. A. PERERA *et al.*

248 and 249—P. C. Negombo, 20,295.

Criminal procedure—Case and counter case—Evidence in one imported into the other—Irregularity.

It is irregular for a Judge to import into a trial before him evidence which has been given in a counter case and permit himself to be influenced thereby.

APPEAL from a conviction by the Police Magistrate of Negombo.

Cyril E. S. Perera, for accused, appellants.

E. H. T. Gunasekara, C.C., for Crown, respondent.

Cur. adv. vult.

June 22, 1938. KOCH J.—

There were four accused in this case. The first accused was charged under section 316 of the Penal Code with having caused grievous hurt to one Marceline Perera by hitting him with a stone and fracturing his nasal bone and also under section 314 with having caused hurt to the said Marceline Perera by striking him with a stone.

The second accused was charged under section 314 with voluntarily causing hurt to one Eugin Nona by striking her with a club and a stone. Both the first and the second accused were further charged under section 409 with committing mischief by causing damage to the house of Marceline Perera.

It is not necessary to state the charges against the third and fourth accused as they were acquitted at the close of the case for the prosecution for insufficiency of evidence against them.

The first and the second accused were duly called upon for their defence. The lst accused did not give evidence on his own behalf but the second accused did. Two other witnesses were called, namely, Dr. T. S. Nair and B. Abdeen, the Inspector of Police, Negombo.

The Magistrate then proceeded to convict both accused, the first under sections 316 and 314, and the second under section 314. The first accused was sentenced to three weeks' rigorous imprisonment under section 316 and to 1 week's rigorous imprisonment under section 314, the sentences to run consecutively; and the second accused was sentenced to pay a fine of Rs. 20 in default to two weeks' rigorous imprisonment.

It would appear that the first accused had instituted a counter case in connection with the incidents complained of in this one, and that that case was also fixed for trial on the same day as this. The first accused had given evidence in the counter case at some previous date. The learned Magistrate in giving his reasons for convicting the accused has at various stages of his judgment made references to what the first accused stated in the counter-case and has compared that evidence with the evidence given by the second accused in this case, and by doing so has held that "it is impossible to reconcile the evidence of the second accused with that of the first accused related in the connected case over the same incident". He also says that "the second accused's evidence is a tissue of lies giving a different story to that of the first accused related in the connected case". He further comments on the fact that the first accused was not called to give evdence on his own behalf as he would have been confronted with the evidence he had given in the counter case.

It is clear therefore that the Magistrate has imported into this case evidence which has been led in a counter-case and that that evidence has materially contributed to his having rejected the defence. It would also appear from the petition of appeal that exception was taken by accused's Counsel to such a proceedng. Whether objection was taken or not, it has been held by this Court in a series of decisions that it is highly irregular for a Judge to import into a trial before him evidence which has been given in a counter-case and thus permit himself to be influenced thereby—vide (1) *Hamiappu v. Babappu*[1] (2) *The Queen v. Tissera*[2]; (3) *Karthie v. Velupillai*[3]; (4) *Marikar v. Hanifa*[4].

It has also been held by this Court that a Judge is not permitted to comment adversely on the failure of an accused to give evidence on his own behalf.

Crown Counsel who appears for the respondent very frankly admits that he is unable to sustain the convictions owing to this serious irregularity and does not also press for a new trial.

I do not myself see why the appellants should be put to the expense and anxiety of another trial. Had the Magistrate ignored the evidence in the counter-case and brought an unprejudiced mind to bear it is quite possible that the story for the defence might have been accepted and the accused acquitted. In these circumstances I will not order another trial.

The convictions must be set aside and the accused acquitted.

Set aside.

[1] *1 S. C. R. 120.*
[2] *1 N. L. R. 108.*
[3] *5 Tamb. 42.*
[4] *14 C. L. Rec. 202.*