1940 *Present :* **Nihill J.**

THE KING *v.* AHAMADU ISMAIL.

5—M. C. Ratnapura, 26,161.

Evidence—Statement by accused to Police denied—Right of Crown to prove statement—Evidence in rebuttal—When the Judge's discretion should be exercised—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, s. 155 (c).

Where an accused denies in cross-examination statements made by him to the Police, the prosecution is entitled to call evidence to prove them.

In exercising his discretion under section 237 of the Criminal Procedure Code whether the prosecution should be allowed to call evidence in rebuttal the Judge should take the following considerations into account:—

(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.

CASE heard before Judge and jury at the 4th Western Circuit.

V. F. Gunaratne (with him *S. R. Wijayathilake* and *P. Malalgoda*), for the accused.

G. E. Chitty, C.C., for the Crown.

December 20, 1940. NIHILL J.—

Counsel for the prosecution has 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 on October 16, 1939. These passages were put to the accused when he gave evidence in cross-examination and were denied by him. (2) The prosecution also wishes to call one Fareed to rebut the suggestion made by the accused that on October 16 the accused went to Jalaldeen's boutique for the purpose of selling gems to Jalaldeen at the instance of Fareed. The learned Counsel for the defence has submitted that to neither of these should permission be given. The matter is one within my discretion under section 237 of the Criminal Procedure Code.

With regard to (1) I have no hesitation in allowing the evidence. The accused elected to give evidence and his statement which was put to him in cross-examination did not amount to a confession. He chose to deny certain passages in that statement and the prosecution is bound by those denials unless it is given an opportunity to prove the contrary. The statement not being a confession, the prosecution having used it to contradict the evidence of the accused, must be given the opportunity of proving it. This the prosecution is entitled to do under section 122 (3) of the Criminal Procedure Code and under section 155 (c) of the Evidence Ordinance.

With regard to (2) the matter is somewhat more difficult. The accused in his first statement did give an explanation as to how he came to be in possession of a considerable sum of money. He said that he had gone to a certain boutique on October 16 and sold gems there and that he could identify a boy in that boutique if he saw him who had seen the transaction. He did not mention the name of Fareed at all. In his evidence in this trial he has given the name of this boy as Fareed, and stated that he went to the boutique on that particular day—October 16—at Fareed's suggestion in order to sell the gems to Fareed's Mudalali. The prosecution therefore did have some notice that with regard to the accused's possession of a large sum of money which the prosecution suggests is the hire money for his crime. The accused had an explanation, and I think therefore it cannot be said that the prosecution has been taken completely by surprise by this part of his defence.

The question is whether my discretion in allowing evidence in rebuttal is limited wholly to matter which has taken the prosecution by surprise. It is submitted by Counsel for the prosecution that he could not have called Fareed as a witness for the prosecution because at that stage there was no relevant evidence which he could give. Mr. Chitty has called my attention to the case of *King v. Crippen* [1] in which the question

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

when rebutting evidence can be properly called was considered by the Court of Criminal Appeal. It was there laid down that in exercising the discretion a Judge should consider *inter alia,* whether there has been surprise, whether the rebutting of the evidence could have been given in chief, whether it does or does not surprise the defence, and whether it places the defence at a disadvantage. In the present case with regard to the evidence of Fareed it seems to me that the prosecution could not have given it as a part of its case against the accused. It was only after the accused had given evidence on the point that the evidence became relevant. The accused himself has purported to give a certain account of his movements on the day following the burning of the deceased and the reason why he went to a particular village at a particular time. Furthermore, he has stated what he did in that village and how it was that he went there. In that connection he has stated that his presence there was due to the invitation of the man Fareed. If the prosecution is in a position to prove that this part of the accused's explanation of his conduct and movements after the crime is false, I consider that that is a matter which can properly be proved by way of rebuttal.

I therefore allow the prosecution to call the evidence under both heads.