1949 *Present :* **Canekeratne, Dias and Basnayake JJ.**

RASIAH, Appellant, *and* SUPPIAH (S. I. Police), Respondent

S. C. 1,310—M. C. Batticaloa 5,954

Criminal Procedure—Trial in Magistrate's Court—Evidence of defence witness—Contradicted by previous statement to Police—Right to prove such statement—Evidence in rebuttal—Impeaching credit— Evidence Ordinance, Section 155.

Where, in a summary trial before a Magistrate, a witness gives evidence which differs materially from a previous statement made by him to the Police, it is open to the prosecution to prove such statement. This is not evidence in rebuttal but an exercise of the right given by section 155 of the Evidence Ordinance to impeach the credit of the witness.

Welipenna Police v. Pinessa (1943) 45 N. L. R. 115 not followed.

APPEAL from a judgment of the Magistrate, Batticaloa. This appeal was referred to a Bench of three Judges by Windham J.

N. Kumarasingham, with *B. C. Ahlip* and *M. A. M. Hussein*, for accused appellant.—After the defence was closed, Police Constable De Hoedt was called to produce a previous statement made by defence witness Kidnapillai, in order to discredit him. It is submitted that that procedure is irregular and illegal in that such evidence was evidence in rebuttal. Evidence in rebuttal after the defence is closed is not permitted in a summary trial before the Magistrate under our law.

The procedure for summary trials before a Magistrate is prescribed in Chapter 18 of the Criminal Procedure Code. Section 189 enacts that the Magistrate shall take, in the manner provided, all such evidence as may be produced for the prosecution and defence respectively.

There is no provision for leading evidence in rebuttal, in the Criminal Procedure Code or anywhere else, in summary trials before a Magistrate. In the District Court evidence in rebuttal may be led under section 212 of the Criminal Procedure Code, and section 237 (1) permits the leading of evidence in rebuttal in the Supreme Court.

The omission of a similar provision in a summary trial before a Magistrate is significant and is capable of one meaning only and that is that the Legislature omitted such similar provision deliberately and that the Legislature did not permit the leading of evidence in rebuttal in a summary trial in the Magistrate's Court.

This position has been accepted by this court in *Welipenna Police v. Pinessa* [1] where Moseley J. states that there is no provision for calling of evidence in rebuttal in the Magistrate's Court. In *Saibu v. Jayasena* [2] Keuneman J. agrees with the decision in *Welipenna Police v. Pinessa (supra)*. Dias J. also followed that decision in *Roslin Nona v. Perera* [3] but queried the soundness of that decision in *Wijeratne v. Ekanayake* [4].

[1] *(1943) 45 N. L. R. 115.*
[2] *(1944) 45 N. L. R. 91.*
[3] *(1946) 47 N. L. R. 523.*
[4] *(1947) 48 N. L. R. 306.*

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Under sections 190 and 429 of the Criminal Procedure Code, a Magistrate has power to call evidence on his own motion and at any stage, but this court has taken the view, following English cases, that that right should not be exercised by judges to fill in the gaps of the prosecution case or to place the accused at an unfair advantage—see *David v. Idroos* [1]; *Fernando v. Sargeant Samath* [2]; *G. S. Theas, Police Vidane v. Thalimai* [3]; *The King v. Dora Harris* [4].

T. S. Fernando, Crown Counsel, with *G. P. A. Silva, Crown Counsel,* and *A. E. Keuneman, Crown Counsel* for the Attorney-General.—The procedure followed by the Magistrate is perfectly regular. Section 165 of the Evidence Ordinance gives the Magistrate power to ask any questions of any witness and to order the production of any document at any time to obtain proper proof of relevant facts.

As to the cases cited for the appellant, only *Welipenna Police v. Pinessa* (*supra*) supports the appellant on this point. Almost all the other cases deal with the question whether it was proper for the Magistrate to call evidence to fill in the gaps of the prosecution case. The question when rebutting evidence is permissible was considered by the Court of Criminal Appeal in *The King v. Aiyadurai* [5].

The evidence that has been led in this case is clearly evidence relevant under section 155 (*c*) of the Evidence Ordinance. As to how relevant evidence in such a case is to be led there is clearly an omission in Criminal Procedure Code. Therefore English law is applicable in such a case.

The evidence that has been led may be evidence in rebuttal, though not substantive evidence, but even if it is evidence in rebuttal such evidence was permissible under the principles enunciated in *King v. Aiyadurai* (*supra*) as, clearly, necessity for such evidence arose unexpectedly.

Under section 429 of the Criminal Procedure Code the duty is cast on the judge to call the evidence necessary for a just decision of the case. See *Daniel v. Soysa* [6] and the Indian decisions reported in *37 Crim. L. J. 522; 25 Crim. L. J. 217; 31 Crim. L. J. 198.*

Cur. adv. vult.

March 11, 1949. CANEKERATNE J.—

The appeal comes before us on a point reserved. The appellant was convicted of driving an omnibus on the highway in a dangerous manner, contrary to section 82 (2) of Ordinance No. 45 of 1938. No argument of any substance was advanced before the learned Judge in appeal, "except for one, that the trial Judge had no power to allow the prosecution to call evidence and prove that the chief defence witness, the conductor of the omnibus, had made to the Police, a statement differing in a material particular from his evidence in the witness-box". The main contention of Mr. Kumarasingham was that a Magistrate had no power under the Criminal Procedure Code to allow rebutting

[1] *(1944) 45 N. L. R. 300.*
[2] *(1944) 45 N. L. R. 548.*
[3] *(1938) 2 C. L. J. 297.*
[4] *L. R. (1927) 2 K. B. 587.*
[5] *(1942) 43 N. L. R. 289.*
[6] *(1908) 3 A. C. R. 50.*

evidence to be called, and he referred to six decisions, *Welipenna Police v. Pinessa* [1], *Saibu v. Jayasena* [2], *Rosalin Nona v. Perera (S. I. Police)*,[3] *Wijeratne v. Ekanayake* [4], *David v. Idroos* [5], *Fernando v. Sergeant Samath* [6], only the first of which supports him. There in a very short judgment the learned Judge states,—

"There is no provision for the calling of evidence in rebuttal in the Magistrate's Court."

Had there been as full and clear an argument before him as before us he would probably have come to a different conclusion. To ascertain whether testimony of this kind can be received one must resort to the rules of evidence in Ceylon which are found in Chapter 11 of the Ceylon Legislative Enactments, the Evidence Ordinance, the law contained therein, with the exception of certain provisions, applies in criminal cases; it is necessary next to see whether there is any provision expressly or impliedly modifying the evidentiary rules in the Criminal Procedure Code (Chapter 16 of the Ceylon Legislative Enactments). Section 135 of the Evidence Ordinance lays down that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Criminal Procedure, and in the absence of any such law by the discretion of the court. The credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. (Section 155 (3).) If it is intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the matter, one would generally ask the witness in cross-examination as to what he is supposed to have said or declared on a previous occasion as to any fact material to the issue; if the witness admits the words or declarations imputed to him, proof on the other side becomes unnecessary; if he denies the utterance proof in contravention will be received at the proper season. The other side may prove that fact as it is at liberty to prove any fact material to the issue. It may be a statement, verbal or written, but when the statement is in writing the provisions of section 145 of Chapter 11 apply.

Provision is made for a trial in a Magistrate's Court in Chapter 18, in the higher courts in the two succeeding chapters. The absence of a provision in Chapter 18 like that contained in section 212 or in section 237 (1), it is argued, is fatal to a right of rebuttal. The significance of the absence of a power in one chapter as importing a change of substance, though material, may easily be exaggerated. The rule of exclusion is only a subsidiary rule of construction, and it is not a rule of universal application. The principle remains as expressed by Lopes L.J. in *Colquhoun v. Brooks* [7].

"The maxim is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusion is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice."

[1] *(1943) 45 N. L. R. 115.*
[2] *(1944) 45 N. L. R. 91.*
[3] *(1946) 47 N. L. R. 523.*
[4] *(1947) 48 N. L. R. 306.*
[5] *(1944) 45 N. L. R. 300.*
[6] *(1944) 45 N. L. R. 548.*
[7] *(1888) Q. B. D. 52, 65.*

The order of production and examination of witnesses is regulated in the case of trials before the District Court and before the Supreme Court, by some of the sections in Chapters 19 and 20 respectively. A trial in one of these courts is a formal trial and almost elaborate provisions are contained in these chapters. There has been an inquiry into the charge in another court; the accused knows the evidence against him and has been served with a copy of the indictment. The prosecution is conducted by the Attorney-General, generally through a Crown Counsel or other lawyer. A trial in a Magistrate's Court is regulated by Chapter 18, it is a non-formal trial. No express positive rule as regards the order of production and examination of witnesses is found here. There is really one section relating to the procedure on trial (section 189), which however is not a comprehensive section on the procedure. It only provides for certain matters. The other sections are 187, 188, 189 and 190. The Magistrate besides having full control over the proceedings is entrusted with certain powers; often there may be no lawyer appearing for the prosecution. The rules to be observed in a summary trial cannot be gathered from the provisions of the Criminal Procedure Code alone, one must read the provisions of the law of evidence into the Code to evolve the rules to be observed. By so reading one can find three phases. First the prosecution case—the complainant can open his case : secondly the case for the defence, the accused can open his case and if he adduces evidence and closes his case he can address the Magistrate. Subsequent to this, (*a*) evidence may be called by the Magistrate himself (sections 190 and 419). (*b*) where it is necessary to impeach the credit of a person, this may be called proof in rebuttal, if the word rebuttal is used in a very wide sense, but it is speaking strictly not rebutting evidence. After his adversary has closed his proof, a party having the affirmative can only be heard in adducing proofs contradictory of statements of the other side or directly rebutting the proofs given by his adversary.

It is necessary first to see whether he can claim to have a right. Section 155 (3) permits the credit of a witness to be impeached by proof of any statements inconsistent with any part of his evidence which is liable to be contradicted. Testimony "liable to be contradicted" has, it may be said, to be read with reference to the position of the party at the time when he tenders the evidence. If so, testimony can be brought on the record to impeach a prosecution witness almost always, but the prosecution can hardly ever bring evidence to impeach a defence witness because at that time he has already closed his case. This seems an impractical view. The evidence ought to be relevant and material to the issues in the case. Cross-examination upon immaterial matters for the purpose of contradicting a witness is disallowed because a witness cannot be presumed to come forward to defend himself on such collateral questions and otherwise the issues in a cause would be multiplied indefinitely and the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points. The prosecution can claim to have a right to impeach the credit of a defence witness, under this section. How can he assert this claim? It is a question of practice and must be left to the discretion of the court trying the case. If the court grants permission to call a witness for this purpose, the witness is a prosecution

witness. (c) Next come cases where the prosecution is not entitled as of right to call any evidence, all that the complainant can do is to make an application to the court to exercise its powers under section 419 (such as one where proof in rebuttal, used in the proper sense, seems necessary, &c.). Further provisions about a case are these—witnesses called by the prosecution, or by the defence can be cross-examined by the adverse party, or be re-examined by the party calling. The witnesses called by the court can also be cross-examined. There are thus three classes of witnesses. Next the conviction or acquittal must turn upon the evidence given by the prosecution, the defence, and the evidence taken by the court on its own motion, not on statements made to a Magistrate out of court (section 190). A headman was called by the Magistrate in *Jonklaas v. Silva* [1], another witness, after the defence counsel began his address, in *Daniel v. Soysa.* [2] Section 419 applies to all Courts. It is divisible into two parts, a permissive and an obligatory, the former enables a Court at any stage to, among other things, summon any person as a witness. Where, however, the evidence of any person appears to be essential to the just decision of the case, it must summon and examine the person. Under section 190 a Magistrate might, on reading the evidence or reading an authority submitted by one side, take the view that evidence on a particular point should be produced, he would then be acting on his own motion. One side or the other may file a list containing the name or names of new witnesses [3], as seems to have been done in some of the cases in India, or make an application and suggest to the Magistrate that it is a proper case for the exercise of his discretion. The Indian cases [4] quoted by Mr. Fernando are cases where a Judge acted under the section corresponding to section 419 of Chapter 16. Two of them appear to be cases where rebutting evidence was allowed, the other case too is probably of the same class. They are not cases where evidence was called to impeach the credit of a witness. Two of the cases quoted by Counsel for the appellant are instances where the Court did not exercise its discretion under section 419.

There was no opportunity to lead the evidence objected to in this case before the prosecution case was closed. There seems to be no reason why the matter which arose while the case for the defence was being conducted may not be answered by contrary evidence on the part of the prosecution when the prosecution has the right to impeach such evidence. It is said that such evidence would prejudice the defence; it may be inconvenient to a party to discover that his witness has made an inconsistent statement earlier, but what prejudice can there be in such a case? It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the Court where it has discretionary powers to summon that witness, merely because that evidence supports the case of the prosecution, and not that of the accused. As counsel said there is no other ground in support of the appeal, the appeal should be dismissed.

[1] *(1904) 7 N. L. R. 181–182.*
[2] *(1908) 3 A. C. R. 50.*
[3] *Section 419 of Chapter 16.*
[4] *25 Cr. L. J. R. 217.*
31 Cr. L. J. R. 198.
37 Cr. L. J. R. 522.

DIAS J.—

I agree. In view of the practical importance of the question raised, I desire to deal with two points :

In the first place, when the credit of the prisoner or of a defence witness is impeached by the prosecution under section 155 (*c*) of the Evidence Ordinance " by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ", and when the case for the defence is closed, the prosecution moves formally to prove the previous statement which the witness denied on oath—such evidence cannot, in my opinion, be called " rebutting evidence ".

It is a matter of legal history that for a great many years defending counsel in criminal cases in this Island made free use of the Magisterial depositions in order to " discredit " prosecution witnesses under section 155 (*c*) of the Evidence Ordinance. Despite a few protests from individual Judges, counsel were freely allowed to confront the witness without having to prove such statements, if the witness denied having made them, and without losing the highly prized right of reply in consequence. The matter, however, was placed beyond all doubt by the decision of a Bench of three Judges in *R. v. Graniel Appuhamy* [1]. Since that decision it has been the invariable practice " to prove " the alleged inconsistent statement by calling the person who recorded the alleged statement or to whom it was made. The contention now advanced is that, while this can be done in the Supreme Court or in a District Court, it cannot be done in a Magistrate's Court. The answer to this contention is that section 155 of the Evidence Ordinance, while it lays down a rule of " adjective law ", does not lay down a rule of " criminal procedure ". It is a rule of evidence, and is found in the Evidence Ordinance. *R. v. Graniel Appuhamy* (*supra*) was not laying down a principle of criminal procedure but was explaining the scope of section 155 of the Evidence Ordinance. Therefore, when *in any Court* to which the Evidence Ordinance applies a witness under cross-examination denies having made a previous statement which is inconsistent with his present testimony, the cross-examiner, if he desires to pursue the matter further, must formally " prove " that inconsistent statement. In the case of a prosecution witness, the defence will prove the inconsistent statement as part of the defence. In the case of a defence witness, including an accused-witness, the prosecution at the close of the case for the defence must be given the opportunity, if it desires to do so, of proving that statement. I fail to see how this can be called " evidence in rebuttal ". The trouble appears to have arisen by the misuse of the expression in *Welipenna Police v. Pinessa* [2].

In the second place, section 189 of the Criminal Procedure Code does not lay down any general rules regarding the order in which witnesses are to be examined in a summary trial before a Magistrate. Section 189 (1) provides that " When the Magistrate proceeds to try the accused, he shall take *in manner hereinafter provided* all such evidence as may be produced for the prosecution or defence respectively ". The only rules " hereinafter provided " are (*a*) the right of the prisoner to cross-examine all witnesses for the prosecution and called or recalled by the

[1] *(1935) 37 N. L. R. 281.* [2] *(1943) 45 N. L. R. 115.*

Magistrate ; (*b*) the complainant and the accused or their pleaders can "open" their respective cases ; and (*c*) the complainant or his pleader shall not be entitled to make any observations in reply *upon the evidence* given by or on behalf of the accused. I am unable to agree with the submission that, because special reference has been made to evidence in rebuttal in criminal trials before the Supreme Court and District Courts by sections 212, 237 (1) of the Criminal Procedure Code, therefore, by implication no evidence in rebuttal can be led in a summary trial before a Magistrate.

In criminal trials in England the prosecution is allowed to lead evidence in rebuttal when, during the evidence led for the defence, something transpires which takes the prosecution by surprise, and which, in the opinion of the trial Judge, in the interests of truth and justice, the prosecution should be allowed to rebut or nullify, if it can do so. The law was laid down in the judgment of Darling J in the Court of Criminal Appeal in *R. v. Crippen* [1]. The prosecution begins its case. After the case for the prosecution is closed, the Crown as a general rule cannot be allowed to support its case by calling fresh evidence simply because they are met by certain evidence of the defence which contradicts the case for the Crown. The prosecution as a rule stands or falls by the evidence led for the prosecution. But there is an exception to this general rule. If any matter arises *ex impriviso* which no human ingenuity can foresee, there is no reason why that matter which arose *ex improviso* may not be answered by contrary evidence on the part of the prosecution. This rebutting evidence must be admissible evidence. If so, it then becomes a question for the trial Judge to determine in his discretion whether the evidence, not having been tendered in chief, ought to be given as rebutting the case set up by the defence. I can see no grounds in reason or in justice why this rule of evidence should not be equally applicable to a summary trial before a Magistrate. There is nothing in the Criminal Procedure Code which prohibits it. In *Wijeratne v. Ekanayake* [2] I ventured to give some examples of this rule in action.

I, therefore, agree with the order proposed by my brother Canekeratne.

BASNAYAKE J.—

I have had the advantage of reading the judgment of my brother Canekeratne, and I agree with him that this appeal should be dismissed. But, as I wish to rest my decision on section 155 of the Evidence Ordinance, I think I should not content myself with expressing my bare concurrence with the order proposed.

This appeal comes up for decision by a bench of three judges on the following order made by my brother Windham :

"The appellant, a bus driver, was convicted of driving a bus on the highway in a dangerous manner, contrary to section 82 (2) of Ordinance No. 45 of 1938. No argument of any substance has, in my view, been advanced except for one, namely, that the learned Magistrate had no power to allow (as he did) the prosecution to call rebutting

[1] *(1910) 5 C. C. A. Reports at pp. 265–267.*
[2] *(1947) 48 N. L. R. at p. 308.*

evidence to prove that the chief defence witness, the bus conductor, had made to the Police a statement differing in a material particular from his evidence in the box. From the learned Magistrate's judgment it is clear that this rebutting evidence, which he accepted, may well have affected his decision. This question whether a Magistrate has power to allow the prosecution to call rebutting evidence in such circumstances, or at all, in the absence of any specific enabling provision in the Criminal Procedure Code, has been the subject of decisions by Moseley S.P.J. and Dias J. reported in 45 N. L. R. 115 and 47 N. L. R. 523, respectively, to the effect that he has no such power. In a later decision reported in 48 N. L. R. 306, however, Dias J. himself expressed, *obiter*, considerable doubts as to the correctness of this view, and suggested that the question merited consideration by a bench of two judges or a Divisional Court. In view of the importance of the point, the doubt as to the legal position, and the desirability of a clear ruling, I agree that it is one which should be reserved for the decision of two or more judges of this court, and I so reserve it accordingly, acting under the powers conferred by section 48 of the Courts Ordinance ".

Shortly the facts material to the decision of this appeal are as follows :

In the course of his evidence for the defence, one M. Kidnapillai stated when cross-examined : " I did not tell the Police . . . . coming fast behind the bus and that the accused did not allow it to overtake thinking that the van would collect passengers on the road. I deny that I said that at this time the accused increased speed and then the bus toppled. The Police Officer only asked me at what speed the bus was driven and I said 25 miles. He asked me whether I saw a van following and I said ' No, I did not notice '. "

The defence was closed after his evidence. The sub-inspector who conducted the prosecution thereupon sought to discredit the witness Kidnapillai by proving the statement he had made to Police Constable De Hoedt. In that statement the witness appears to have said : " When the bus had just passed the Padiruppu coconut estate past the old Food Control Barrier in Kaluvanchikudy a van came from behind and the bus quickened its speed and was travelling at about 30 m.p.h. approximately as we did not want to allow the van to get ahead and pick up passengers, when suddenly the bus toppled. "

Objection is taken to the evidence given by Police Constable De Hoedt and the production of the statement made to him by the witness Kidnapillai on the ground that Chapter XVIII of the Criminal Procedure Code does not permit the prosecution to call evidence in rebuttal. Learned counsel points to sections 212 and 237 of the Criminal Procedure Code where, in trials before the District Court and the Supreme Court respectively, special provision is made whereby the prosecuting counsel is permitted with the leave of the Court to call witnesses in rebuttal. Learned counsel bases his argument on the absence of a corresponding provision in the chapter that deals with the procedure to be followed in cases triable summarily by a Magistrate.

In my view the evidence that the prosecution sought to adduce in this case is not evidence in rebuttal. Evidence in rebuttal is evidence produced in refutation of testimony previously introduced by an opponent in a trial. In the instant case the prosecution sought not to lead evidence in rebuttal but to exercise the right given to an adverse party by section 155 of the Evidence Ordinance. That section reads :

> " The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him :
>
> (*a*) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;
>
> (*b*) by proof that the witness has been bribed or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ;
>
> (*c*) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;
>
> (*d*) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. "

It is a well-established rule of interpretation that when a right is granted everything indispensable to its proper and effectual exercise is impliedly granted. A witness for the defence can be discredited in the manner provided by section 155 (*c*) of the Evidence Ordinance only after he has given evidence. The right under that provision to prove former statements made by a witness for the defence may therefore be exercised at the close of the evidence for the defence. In the instant case it was only after Kidnapillai had given evidence that it became apparent that what he stated under cross-examination was inconsistent with his statement to Police Constable De Hoedt. The prosecution thereupon became entitled to prove the latter. As it was a statement reduced to writing, proof of it could properly be given only by the production of the writing by a witness competent to give evidence in regard to it. The statement has therefore been duly proved by its production and by the evidence of Police Constable De Hoedt.

If learned counsel's contention were correct, in cases summarily triable by a Magistrate the prosecution would be denied the right granted by section 155 of the Evidence Ordinance, for, proof of former statements inconsistent with the evidence of the witnesses for the defence can only be given after the defence case is closed. I can find no authority in the Evidence Ordinance or any other enactment relating to Criminal Procedure for placing such a limitation on that section, nor has learned counsel been able to support his contention by reference to any statutory provision or judicial decision.

Appeal dismissed.