[COURT OF CRIMINAL APPEAL]

1942 *Present :* **Howard C.J. (President), Keuneman and de Kretser JJ.**

THE KING *v.* AIYADURAI *et al.*

19—M. C. Mallakam, 22,965.

Evidence called by Judge—Comment by Counsel on absence of Crown witness —Matter arising ex-improviso—Fairness to accused—Criminal Procedure Code, s. 429.

In the course of his address to the Jury, Counsel for the defence told them that a certain witness, whose name appeared on the back of the indictment, had not been called and that he was entitled to ask them to draw an inference adverse to the Crown from that fact. He also asked the Jury to infer that Crown Counsel had not called him because he knew that his evidence would be inconsistent with the case for the Crown.

***Held,* that the Judge was justified in the circumstances in calling the witness himself and allowing him to be cross-examined by the Counsel for the defence.**

Fresh evidence called by a Judge, except upon a matter which arises *ex-improviso,* is irregular and will vitiate a trial unless such evidence was not calculated to prejudice the accused.

The power given to Courts under section 429 of the Criminal Procedure Code is not incompatible with the principle laid down by the English Courts.

THIS was a case heard by a Judge and Jury before the first northern Circuit.

N. Nadarajah, K.C. (with him *S. Nadesan* and *M. M. Kumarakulasingham*), for all the accused, appellants.—The right of the Judge to call fresh evidence, after the close of the case for the defence, is limited to something arising *ex-improviso—R. v. Charles*[1]. No situation arose *ex-improviso* in the present case which could justify the calling of further evidence. The remarks of defending Counsel in regard to the failure of the Crown to call Aiyadurai and to the inference that could be drawn from it were relevant under section 114 (*f*) of the Evidence Ordinance. If those remarks were misleading, the learned Judge could have stated so in the summing-up. The calling of the witness, Aiyadurai, after defending Counsel had begun to address the Jury, was not only unnecessary but also caused serious prejudice to the accused and tended to strengthen the case for the prosecution.

There was no proper direction as to the onus of proof or that the accused was entitled to the benefit of a reasonable doubt. See *Lawrence v. The King*[2].

E. H. T. Gunasekera, C.C., for the Crown.—There are two reasons why *R. v. Charles* (*supra*) cannot help the appellants. Firstly, the witness Aiyadurai was called by Court in consequence of a situation which arose *ex-improviso.* Secondly, *R. v. Charles* is a decision which may well be reconsidered.

[1] *(1941) 42 N. L. R. 409.*

[2] *A. I. R. 1933, P. C. 218. 13 C. L. Rec. 111.*

There is a difference between English law and our law in regard to the point under consideration. Our law is contained in two statutory provisions, viz., section 429 of the Criminal Procedure Code and section 165 of the Evidence Ordinance. These two sections show that in Ceylon a criminal trial preserves an "inquisitorial" character. See *Kenny's Outlines of Criminal Law (1936) p. 170 footnote (1) ; Woodroffe and Ali's Law of Evidence (1931) p. 1044 ; 29 Cr. L. J. 740 ; 31 Cr. L. J. 768 ; 25 Cr. L. J. 354.* Even in England the *dictum* of Tindal C.J., in *Frost,* although it was followed in *Dora Harris*[1], *Stanley Liddle*[2] *Mc. Mahon*[3] and *Norman Day*[4], was not invariably followed. See, for example, *R. v. Crippen*[5] ; *Isaac Foster*[6], *William Jackson*[7] (Counsel was stopped by the Court).

N. Dadarajah, K.C., in reply, cited *Ponniah v. Abdul Cader*[8] and *Vandendriesen v. Houwa Umma*[9].

Cur. adv. vult.

May 25, 1942. HOWARD C.J.—

This case involves appeals on questions of law and applications for leave to appeal under section 4 (b) of the Criminal Appeal Ordinance by the three appellants who were convicted of voluntarily causing grievous hurt and thereby committing offences punishable under section 317 of the Penal Code, read with section 32 of the said Code. Various grounds have been raised by Counsel in support, both of the appeals and the applications. Some of these grounds are without substance and we think it is only necessary to deal in this judgment with those which are not without merit.

Mr. Nadarajah, on behalf of the accused, has contended first of all that the action of the learned Judge in calling, after Counsel for the accused had commenced to address the Jury, the witness, Bryant Aiyadurai, vitiated the convictions. The circumstances in which this witness was called are as follows :—The name of Bryant Aiyadurai, who was a teacher, appeared on the back of the indictment. During the cross-examination of Inspector Caldera, Crown Counsel stated that he was not calling Bryant Aiyadurai. In the course of his address to the Jury Counsel for the defence told the Jury that a certain witness—Bryant—had not been called and that they were entitled to draw an inference adverse to the Crown case. It would appear, moreover, from the Judge's charge to the Jury, that Counsel for the defence also stated that the Jury would infer that Crown Counsel had not called Bryant because he knew that Bryant's evidence would be inconsistent with the case for the Crown. After intimating to Counsel for the defence that having read the deposition of this witness it was highly improper for him to make such a submission to the Jury, the learned Judge stated that he would himself call Bryant Aiyadurai. He proceeded to do so and Bryant Aiyadurai was examined by the Judge himself and subsequently cross-examined by Counsel for the defence.

[1] *(1927) 20 Cr. App. R. 86.*
[2] *(1928) 21 Cr. App. R. 3.*
[3] *(1933) 24 Cr. App. R. 95 at 97.*
[4] *(1940) 27 Cr. App. R. 168 at 171.*
[5] *(1911) 5 Cr. App. R. 255 at 265.*
[6] *(1911) 6 Cr. App. R. 196.*
[7] *(1919) 14 Cr. App. R. 41.*
[8] *(1937) N. L. R. 281.*
[9] *(1937) 39 N. L. R. 65.*

In submitting that the action of the learned Judge in calling Bryant Aiyadurai vitiated the convictions, Mr. Nadarajah has relied on the case of *The King v. Charles*[1]. In this case, the learned Judge called a new witness after the case for the prosecution and the defence had been closed. This Court expressed its opinion that it would have been better if the evidence of this witness had not been put before the Jury. The Court also held that the applicant had not been in any way prejudiced nor had any injustice been done to him by the evidence of this witness. In my judgment in that case I referred to the fact that the principles on which a Judge should be guided when he has recourse to the calling of a new witness were laid down in the case of *Dora Harris*[2], in which case Avory J. cited with approval the *dictum* of Tindal C.J. in *Frost*[3]. This *dictum* was to the effect that if any matter arises *ex-improviso,* which no human ingenuity can foresee, on the part of a prisoner in a criminal case, there was no reason why that matter which arises *ex-improviso* may not be answered by contrary evidence on the part of the Crown. Avory J. held that the same principles apply when a Judge calls a witness. In *The King v. Charles* (*supra*) this Court without calling for argument from Crown Counsel held that the applicant had not been in any way prejudiced. On the hearing of this appeal, however, Mr. Gunasekera has invited our attention to various other authorities, indicating that the *dictum* of Tindal C.J., in *Frost* (*supra*), fettered the discretion of a Judge within limits that were too narrow and has not been followed in certain cases. Thus in *R. v. Crippen*[4] Darling J., who gave the judgment of the Court, stated as follows:—

> "We do not feel inclined to lay down the rule in the words of Tindal C.J., in Frost's case above."

After setting out the rules as laid down by Tindal C.J., Darling J. proceeds as follows:—

> "We should not put the rule in those words. In the first place, the rebutting evidence must be evidence admissible in the case. Supposing it to be admissible, it then becomes a question for the Judge at the trial to determine in his discretion whether the evidence not having been given in chief ought to be given as rebutting the case set up by the defence. In coming to his decision, he should have regard to what had been laid down in the cases cited by Mr. Tobin. The matter, however, was one within the discretion of the Judge presiding at the trial, who was of course in a much better position than any Court of Appeal to determine whether it was really fair to allow it to be given, and whether it did or did not expose the defence to a disadvantage to which they ought not to be exposed. It does not appear to have been laid down in any case that, if a Judge exercises his discretion in a way different from that in which a Court of Appeal would have exercised it, that fact alone is sufficient ground for quashing a conviction. No doubt the question was one for the discretion of the Judge at the trial, who was necessarily in a far better position to exercise it than the Court of Criminal Appeal could possibly be.

[1] *42 N. L. R. 409.*
[2] *20 Cr. App. R. 86.*
[3] *4 St. Tr. N. S. 86.*
[4] *5 Cr. App. R. 255.*

All we can say is this, the evidence admitted in rebuttal was admissible evidence, and the Lord Chief Justice saw no reason why, in fairness to the defence, it should not have been given. He has exercised his discretion, and, even granting that we have the power to do so, we see no reason why we should interfere with it.

But we wish to add a few words to what has been said. If it were shown that the prosecution had done something unfair—had set what had been called a trap—which resulted in an injustice to the prisoner, this Court reserves to itself full power to deal with the matter. It is only necessary to say that in such a case we should probably come to the conclusion that there had been a miscarriage of justice, and exercise the powers given to us by section 4 of the Criminal Appeal Act, 1907. But there is no reason to suppose that anything of that kind has taken place here."

The principle stated in *R. v. Crippen* (*supra*) was cited with approval in *R. v. Isaac Foster*[1] where the Lord Chief Justice stated as follows :—

"The calling of witnesses after the close of the defence was in the discretion of the Judge at the trial, and that discretion must be exercised with a due regard to the interests of the defendant. If it were shown that the prosecution had done something unfair—had set what has been called a trap—which resulted in an injustice to the prisoner, the Court reserved to itself full power to deal with the matter."

The law was again considered in the case of *R. v. Stanley Liddle*[2] when Hewart L.C.J., in giving the judgment of the Court, gave particular consideration to the judgment of Avory J., in *R. v. Dora Harris* (*supra*). In connection with the latter case he cited the following passage from Avory J.'s judgment:—

"In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial, after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular and was calculated to do injustice to the appellant Harris."

Lord Hewart then dealt with the facts in *Liddle's* case and stated as follows :—

"In the circumstances it appears to us that neither of the conditions laid down in the case of Harris was here fulfilled. Nothing had suddenly emerged which required the calling of witnesses, and the circumstances in which the witnesses were called were such as gravely to imperil the defence and to put the defence to an unfair disadvantage. If the same reasoning were to apply, it would have been perfectly open for the defendant, on the second of these, adjourned hearings to require a further adjournment in order that he might call, in his turn, rebutting evidence, and so the inquiry might wander on indefinitely.

It seems to us that the course which was taken was irregular, was not rendered necessary by any emergency, and was likely to cause injustice to the accused. In these circumstances we think that this appeal must succeed and this conviction must be quashed."

[1] *6 Cr. App. R. 196.*

[2] *21 Cr. App. R. 3.*

In *R. v. McMahon*[1] Lord Hewart referred to his judgment in *Liddle's* case and as in that case held that evidence was wrongly admitted and it was not possible to say that injustice had not been done to the accused. The matter was again considered in the judgment of Hilbery J., in *R. v. Day*[2], when the conviction was quashed on the ground that the supplementary evidence did not arise *ex-improviso* and it could not be said that such evidence did not prejudice the accused. It is unfortunate that no reference was made in the judgments of the Court of Criminal Appeal in the cases of *Dora Harris, Liddle, McMahon* and *Day* (*supra*) to the cases of *Crippen* and *Isaac Foster* (*supra*). Treating the cases I have cited as a comprehensive whole, we are of opinion that they formulate the principle that fresh evidence called by a Judge *ex proprio motu*, unless *ex-improviso*, is irregular and will vitiate the trial, unless it can be said that such evidence was not calculated to do injustice to the accused.

Applying the principles laid down in the cases that I have cited, we are of opinion that in the circumstances of the present case nothing in the way of a trap had been set for the accused. To use the words of Lord Hewart in *Liddle's* case, something had suddenly emerged which required the calling of Bryant. No injustice was done to the accused by the calling of this witness, nor was the defence thereby put to an unfair disadvantage. Mr. Gunasekera also contended that, even if the calling of Bryant by the learned Judge was not within the principle laid down by the English decisions, section 429 of the Criminal Procedure Code allowed a Judge in Ceylon a wider discretion in the matter. In fact it imposed on him a duty to call a witness if he considers further evidence essential to the just decision of the case. Section 429 of the Ceylon Criminal Procedure Code follows section 540 of the Indian Criminal Procedure Code. That section has been interpreted in various Indian cases. I need only mention *Maung Po Hmyin v. J. B. Bhattacharjee and Emperor*[3] where it was held that if the new evidence appears to the Court essential to the just decision of the case, and this must depend entirely on the particular circumstances of each case, the Court has no choice, but it bound to take the evidence. On the contrary it follows from this that, if the evidence puts the defence at an unfair disadvantage, it is not essential to a just decision and must be rejected. The power given by section 429 is not therefore incompatible with the English rule.

The only other ground of appeal that merits attention is the complaint that the learned Judge in his charge to the Jury did not tell the latter that it was incumbent on the prosecution to prove the guilt of the accused beyond all reasonable doubt or that the accused are entitled to the benefit of any reasonable doubt. We have given careful consideration to the charge as a whole and have come to the conclusion that the Jury could have had no doubt as to the burden of proof and the evidence necessary to discharge that burden.

For the reasons I have given the appeals and applications are dismissed.

Appeal dismissed.

[1] *24 Cr. App. R. 95.*

[2] *27 Cr. App. R. 168.*

[3] *25 Cr. Law J. 217.*