1944 *Present:* **Wijeyewardene J.**

DAVID, Appellant, *and* IDROOS, Respondent.

295—M. C. Colombo, 22,096.

Criminal Procedure—Power given to a Magistrate to examine witness—Evidence called after close of defence—Criminal Procedure Code, s. 429.

The power given by section 429 of the Criminal Procedure Code to a Magistrate to summon and examine a witness at any stage of the trial should not be exercised in order to call evidence after the defence is closed, if such evidence puts the accused at an unfair disadvantage.

APPEAL from a conviction by the Magistrate of Colombo.

L. A. Rajapakse, K.C. (with him *S. W. Jayasuriya*), for the accused, appellant.

P. S. W. Abeyewardene, C.C., for Crown, respondent.

Cur. adv. vult.

June 19, 1944. WIJEYEWARDENE J.—

The accused was charged with the theft of 1½ measures of rice and 9 biscuits from the possession of Sapper Appuhamy of the Ceylon Engineers, in the alternative, with the dishonest retention of those articles which were alleged to be stolen property. The Magistrate convicted him on the charge of theft and sentenced him to a term of imprisonment.

Three witnesses—Sathasivam, Somasena and Sekhar—gave evidence for the prosecution. According to that evidence, Sathasivam sent Somasena on the day in question to fetch the accused, as he

was leaving the military camp with a bundle of soiled linen which was given to. him to be washed. When the accused was brought back to the camp, the rice and biscuits were found in the bundle he was carrying, and these were identified by Sekhar as the property of the Ceylon Engineers. Their evidence proved, further. that Appuhamy was a cook at the camp and ration orderly and that he had access to the store where rice and biscuits were kept. Both Sathasivam and Somasena denied under cross-examination knowledge of any statement made by the accused, at the time of his arrest, that Appuhamy gave him the alleged stolen articles. Sekhar, however, admitted that the accused made such a statement.

The defence called Police Constable Rasanayagam who said that the accused stated that the articles were given to him by Appuhamy. If the accused was not called as a witness to prove his defence, this evidence, of course, would not have been admissible for that purpose. But, on the other hand, the evidence of Rasanayagam proved beyond doubt that the prosecution was made aware of the defence of the accused shortly after he was arrested.

After giving the evidence as stated above, Rasanayagam proceeded to say:—" Appuhamy's statement was recorded. " At that stage Mr. L. D. S. Gunasekera, Proctor for the accused, objected to the witness giving the statement of Appuhamy. The Magistrate overruled the objection and made the following order:—

> " I allow it as in view of the defence adopted by the accused. I propose to call Appuhamy into the witness box at the conclusion of the defence to satisfy my own mind on this point. "

Rasanayagam stated then that Appuhamy denied having given any rice or biscuits to the accused. Thereafter, Mr. Gunasekera said that he was not going to call any further evidence, and the Magistrate postponed the trial and issued summons on Appuhamy. When Appuhamy appeared on a subsequent date, Mr. Gunasekera objected to his evidence being recorded. The Magistrate overruled that objection also and recorded the evidence of Appuhamy who said that he did not give the rice or the biscuits to the accused.

I hold that the procedure adopted by the Magistrate was irregular and was not rendered necessary by any emergency as contemplated in *Liddle's case*[1] and that it caused injustice to the accused.

In the course of his judgment the Magistrate said in support of his rulings on the objections raised by the defence:—

> " Mr. Gunasekera promptly objected to Appuhamy's statement to the constable going in as Appuhamy had not been called by the prosecution or defence. Although the failure of the defence to call Appuhamy as a witness to support the statement of the accused could have been interpreted by me under section 114 (*f*) of the Evidence Ordinance as an indication that if called the witness would not support the accused, I felt that in the interests of justice, I should hear Appuhamy's evidence myself and even if he denied having given the rice

[1] *21 Criminal Appeal Reports 3.*

and biscuits to the accused thus giving the lie to the accused's allegation to the Police, and satisfy myself whether Appuhamy was speaking the truth, after he had been tested by his evidence being subjected to cross-examination. ''

This passage has to be examined carefully. The inference referred to by the Magistrate would have been innocuous and irrelevant unless he meant that he would have proceeded from that inference to another inference, namely, that the defence was untrue. Such a process of reasoning would show a misapprehension as to the scope and nature of the presumption permissible under section 114 of the Evidence Ordinance. That section enacts that '' the Court may presume the existence of any fact which it thinks *likely to have happened, regard being had to* the common course of natural events, *human conduct*, ... in their relation to the facts of the particular case ''. (The words have been underlined by me.) These presumptions are not presumptions of law but presumptions of fact and the Magistrate could have drawn an inference of guilt only if he thought it was likely, having due regard to human conduct, that Appuhamy would have been ready to admit that he gave the articles in question to the accused if, in fact, he gave them to the accused. But could it be reasonably believed that Sapper Appuhamy, cook of the Ceylon Engineers, was likely to be so great a lover of truth that he undeterred by the probability of a criminal charge or fear of dismissal would admit that he gave the rice and biscuits to the accused in violation of the orders received by him not to give to outsiders any articles issued to him by the military authorities? The Magistrate could not have reasonably expected Appuhamy to state that he gave the articles to the accused. The Magistrate knew Appuhamy's denial to the Police before he examined Appuhamy. Moreover, it was highly improbable that the accused would have refrained from calling Appuhamy if he was going to support the defence. In fact, the Magistrate appears to have expected that Appuhamy would be '' giving the lie to the accused's allegation to the Police ''. What was the Magistrate going to do then ? If he accepted Appuhamy's evidence, then the summoning of Appuhamy would necessarily have prejudiced the accused. If he rejected Appuhamy's evidence, the case would have had to be decided entirely on the evidence of the three prosecution witnesses. Was he then going to utilize the fact of his calling Appuhamy as a witness to do away with the argument that there was a gap in the prosecution story ? It should be remembered in this connection that the defence was made known to the Magistrate before the close of the case for the prosecution.

The Magistrate then proceeds to state in his judgment:—

'' This witness (Appuhamy) has not been called by me either to close gaps in the prosecution evidence or to dispel doubts which would operate in favour of the accused, but purely to enable me to satisfy myself fully whether the defence put forward by the accused is true or false and thereby come to a just decision of this case as contemplated by the latter half of section 429 of the Criminal Procedure Code. As I have stated earlier in this judgment, I wanted to test the veracity of this witness Sapper Appuhamy after hearing his evidence and listening to him. ''

While I accept without the slightest hesitation the statement of the Magistrate as to the reasons which, he believes, prompted him to call Appuhamy as a witness, I have no doubt whatever that the examination of Appuhamy by the Magistrate has, in fact, served to fill the gaps in the case for the prosecution and to cause serious prejudice to the accused.

On the charge of theft it was desirable that the prosecution should have called Appuhamy from whose possession the goods were alleged to have been stolen, as none of the other witnesses were able to give evidence on that point, and it was on this charge that the accused was ultimately convicted. On the alternative charge of retention of stolen property, it was known to the prosecution that the defence was that the accused received the articles from Appuhamy, and in these circumstances it was incumbent on the prosecution to meet that defence without waiting to lead evidence in rebuttal (see *Kandiah v. Podisingho*[1]). The prosecution failed to call Appuhamy and the Magistrate has unintentionally but effectively filled the gaps in the case for the prosecution by summoning and examining Appuhamy.

Again if the Magistrate had no reasonable doubt as to the guilt of the accused before Rasanayagam was permitted to say what Appuhamy told him, then there was no purpose in the Magistrate summoning Appuhamy. The accused would have listed Appuhamy as a witness, if he thought that Appuhamy could be relied upon to help him. Could it be reasonably thought that the accused was keeping out of the witness box a material witness who was ready and willing to help him? On the other hand, if the Magistrate had a reasonable doubt at that stage as to the guilt of the accused, the examination of Appuhamy by the Magistrate must have operated to dispel those doubts, as, in fact, the accused was convicted after Appuhamy gave evidence. Thus it will be seen that the examination of Appuhamy was distinctly unfair and unjust to the accused.

The Magistrate had to decide whether the charges were proved and he had to reach that decision on the evidence placed before him. No application was made to him by the defence that Appuhamy should be called. In those circumstances the Magistrate was not called upon to pronounce his opinion as to the " veracity " of Sapper Appuhamy who had not given evidence before him when the prosecution closed its case.

The powers given by section 429 of the Criminal Procedure Code and referred to by the Magistrate are very wide, but, for that very reason, it is necessary that Magistrates should exercise a great deal of caution in having recourse to it. That section, no doubt, empowers a Magistrate to summon and examine a witness at any stage of the trial, if it appears to him " essential to the just decision of the case ", but it should be remembered that " if the evidence puts the defence at an unfair disadvantage, it is not essential to a just decision and must be rejected. " (See *Aiyadurai's case*[2]).

The Magistrate should not have allowed Rasanayagam to give hearsay evidence as to what Appuhamy stated to him and should not have called Appuhamy as a witness after the prosecution and the defence closed their cases. By permitting Rasanayagam to give that hearsay evidence,

[1] *(1921) 23 N. L. R. 337.*

[2] *(1942) 43 N. L. R. 289.*

the Magistrate created the difficult situation which rendered it necessary for him to consider whether he could summon Appuhamy in the exercise of his powers under section 429 of the Criminal Procedure Code.

The conviction of the accused cannot stand, and the only question that remains is whether the proceedings should be quashed or the accused acquitted. I think it right to take into consideration the fact that the Magistrate admitted the evidence in question in spite of the objections of the accused's Proctor who submitted to him some of the latest decisions of the Court of Criminal Appeal, Ceylon. The Magistrate thought he could distinguish those cases from the case he was considering and thus justified to himself the irregular procedure adopted by him. I do not think that in all the circumstances of this case it would be fair to ask the accused to face the expense and anxiety of a fresh trial.

I allow the appeal and acquit the accused.

Set aside.