1963 *Present:* Tambiah, J.

M. MURUGIAH, Appellant, *and* T. B. OUTSCHOORN (Inspector of Police), Respondent

*S. C. 677/62—M. C. Badulla-Haldumulla, 36,222*

*Criminal procedure—Summary trial—Conclusion of case for defence—Right of defence to address Court—Criminal Procedure Code, ss. 6, 189 (2), 189 (3), 235, 296 (2), 296 (3).*

When, in a summary trial, Counsel for the defence wishes to address Court at the conclusion of the case for the defence, the Magistrate is not entitled to tell him that he has no right to do so.

*Sumanasekere v. Sub-Inspector of Police, Ella* (61 N. L. R. 424) distinguished.

APPEAL from a judgment of the Magistrate's Court, Badulla-Haldumulla.

*Colvin R. de Silva,* with *D. R. Wijegoonewardene* and *N. M. S. Jayawickrema,* for Accused-Appellant.

*R. I. Obeyesekere,* Crown Counsel, for Attorney-General.

*Cur. adv. vult.*

February 12, 1963. TAMBIAH, J.—

The appellant was charged in the Magistrate's Court with having voluntarily caused grievous hurt to one Andy of Kalupahana Estate, Haputale, by assaulting him with a club. The learned Magistrate, after trial, found the appellant guilty and sentenced him to a term of six months' rigorous imprisonment. At the conclusion of the case for the defence, the appellant's counsel wished to address Court and the learned Magistrate indicated to him that he could have only five minutes for this purpose. Counsel then stated that he could not point out the contradictions in the case within five minutes, whereupon the learned Magistrate informed counsel that the latter could not address Court

at that stage as a matter of right and proceeded to give his verdict. The appellant has appealed from the learned Magistrate's verdict, inter alia, on the ground that the procedure adopted by the learned Magistrate is not only contrary to principles of natural justice but also is unwarranted by the provisions of the Criminal Procedure Code and consequently the appellant has suffered prejudice.

No proposition has been more clearly established than that a man cannot incur the loss of liberty for an offence in a judicial proceeding until he has had a fair opportunity of presenting his case. This sacrosanct right, founded on the plainest principles of natural justice, has been one of the cherished possessions of every individual in a democratic society and continues to be one of the corner-stones of our criminal jurisprudence even today. An examination of the salutary provisions of the Criminal Procedure Code, and other enactments pertaining to criminal law, show that the Legislature, far from imposing any curb on this cardinal principle, has in many instances impliedly recognised it or has taken it for granted.

The Criminal Procedure Code (Cap. 20) (hereinafter referred to as the Code), after stating that an accused shall, in summary trials, be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate (vide section 189 (2)), proceeds to enact that, in such cases, "the complainant and accused or their pleaders shall be entitled to open their respective cases, but 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." (vide section 189 (3)). Since no curb has been placed on the defence counsel to make any observations regarding the case for the prosecution and the defence, the right of an accused to comment on the prosecution case has been tacitly assumed in this provision.

Even in trials before the Supreme Court, the defence is given the right to address the jury at the end of the case for the defence (vide sections 235 and 296 of the Code). It must be noted, in this connection, that the rule that the defence counsel, in his address to the jury, cannot be deprived of his right to comment on the prosecution evidence, has acquired the hard lineaments of law, despite the fact that no express provisions to this effect could be found in the Criminal Procedure Code.

Section 296 (2) of the Code, which applies to summary and non-summary trials alike, enacts as follows :

> "When at any trial the evidence for the defence consists only of the evidence of the person or persons charged, as the case may be, the prosecution shall not have the right of reply."

A right of reply presupposes a previous address by the defence and, therefore, the above section assumes that the defence has the right to address court even in a summary trial.

The Code also provides that the failure at any trial of any accused, to give evidence shall not be made the subject of adverse criticism by the prosecution (vide section 296 (3) ). By implication, therefore, the failure of an accused to give evidence at his trial could be a matter of comment by not only the judge (vide *The King v. Peiris Appuhamy* [1]; *The King v. Geekiyanage John Silva* [2]), but also by the defence. Indeed, if the Legislature desired to prohibit an address or comment by the defence counsel, it would have said so in clear express terms.

Further, the rules to be observed in a summary trial cannot be gathered merely from the provisions of the Criminal Procedure Code alone. In a summary trial, for example, where 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, although no express sanction for this procedure could be found in the Criminal Procedure Code (vide *Rasiah v. Suppiah (S. I. Police)* [3]). In *Rasiah v. Suppiah* Canekeratne J., said (at page 268) :

> " 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 (vide 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."

In this dictum the right of the defence to address Court in a summary trial is clearly stated. Dias, J., in the same case, characterises the right of reply as " highly prized " (vide page 270). Basnayake J. (as he then was), after referring to the right given by section 155 of the Evidence Ordinance to impeach the credit of a witness in certain ways, states (vide at page 273) :

> " 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."

The right to cross-examine prosecution witnesses is specifically granted by the provisions of the Evidence Ordinance (vide Cap. XII). Therefore, the right to point out the discrepancies in the prosecution evidence is also impliedly granted by the legislature.

[1] *(1942) 43 N. L. R. 412.*
[2] *(1949) 50 N. L. R. 265.*
[3] *(1945) 46 N. L. R. 73.*

In *Rowel v. Perera* [1], counsel urged that there was nothing in the Criminal Procedure Code which expressly conferred on the defence the right to comment on the prosecution evidence. Meeting this contention, Bertram C.J., observed (vide at page 457) :

> " Nothing is expressly said of the right of the pleader for the defence to comment on the evidence of the prosecution, but in many cases a pleader cannot effectually open his case without commenting on the evidence of the prosecution. It is impossible to believe that the Code intended to impose an artificial restriction on advocacy."

Again, the right of the defence counsel to address Court, in a summary trial, is not only impliedly recognised by the Code, but also receives sanction by the introduction of English law on this matter. Section 6 of the Code enacts : " Where no special provisions have been made by the Code, or by any other law for the time being in force in Ceylon, the law relating to Criminal Procedure for the time being in force in England shall be applied." Many rules of English procedure have been adopted by virtue of this section. Thus, the English practice whereby a prisoner has the right to make an unsworn statement from the dock, instead of giving evidence from the witness box, has been adopted in Ceylon, although there is no provision on this subject in the Code (vide *The King v. Vallayan Sittambaran* [2]).

In England, the right of the defence to address Court was first recognised by the Criminal Procedure Act of 1865 (vide Benham's Act, 28 and 29 Vict. Cap. 18, section 2), and continues to be one of the treasured rights of an accused person even today. This right is available in Ceylon in view of section 6 of the Code which enacts that the English Law will be applicable if the Code is silent on any matter.

As Cockburn, C.J., observed in *Reg. v. Wainwright and another* [3], the prisoner's counsel, in summing up the evidence for the defence, is not to be restricted merely to remarks on the witnesses, but if anything occurs to him as desirable to say on the whole case, he is at liberty to say it.

The learned Crown Counsel urged that the ruling in *Sumanasekere v. Sub-Inspector of Police, Ella* [4] supports the view of the learned Magistrate. After a careful examination of that case, I am inclined to think that it could be distinguished from the facts of the instant case and supports the proposition that the defence has the right of reply. In that case, the Magistrate gave the defence counsel the right to address the Magistrate. After the Counsel had addressed the Magistrate for about half an hour, the Magistrate made the following minute : " I am refusing to hear Mr. Nadarajah further as he has addressed me for about half an hour ", and then proceeded to find the charges proved. In appeal, H. N. G. Fernando, J., stated (vide at page 425) :

> " It would seem therefore that the right of an accused or his pleader to be heard after the close of the case for the defence in a Magistrate's Court is not statutory, but arises from practice which has apparently

[1] *(1922) 24 N. L. R. p. 456.* [2] *(1918) 20 N. L. R. 257 (F.B.).* [3] *(1875–1877) 13 Cox's Criminal Law Cases at p. 173.* [4] *(1957) 61 N. L. R. 424.*

hardened into a rule. But there must be in reason a residuum of discretion in the Court to impose a time limit on the length of the address having regard to the circumstances of each particular case."

I respectfully agree with Fernando J.'s observation that " there must be a residuum of discretion in the Court to impose a time limit on the length of the address having regard to the circumstances of each particular case ". If a judge cannot have control over his judicial proceedings, then judicial work would come to a standstill. But in a summary trial, a Magistrate is not entitled to tell counsel for the defence that the latter has no right to address him.

In the instant case, however, I am of opinion that the learned Magistrate has erred in taking the view that the defence counsel had no right to address court. Further, by limiting the counsel's address to a mere five minutes, the accused has been made to suffer prejudice. For these reasons, I set aside the order of the learned Magistrate and direct that there should be a fresh trial before another Magistrate.

*Case sent back for a fresh trial.*