

1959

Present : T. S. Fernando, J.

K. M. DON LAZARUS, Appellant, and W. W. WAAS
(Sub-Inspector of Police), Respondent

S. C. 242—M. C. Colombo, 10621/C

Criminal Procedure Code—Section 429—Power of Court ex proprio motu to examine a person present.

Fresh evidence called by a Judge *ex proprio motu*, unless *ex improviso*, is unauthorised by the provisions of section 429 of the Criminal Procedure Code.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Ananda Karunatileke, for the 1st accused-appellant.

P. Nayendran, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 30, 1959. T. S. FERNANDO, J.—

After the case for the defence had been closed the learned Magistrate decided to call a witness named Albert. Albert had been in attendance at the trial as he had been summoned on behalf of the prosecution. His

name appears in the list of witnesses attached to the section 148 (1) (b) report presented to court. The evidence of Albert having been taken, the Magistrate made order convicting the appellant and in his statement of reasons for the conviction observed that he could not accept the evidence of the appellant and of his witness because their evidence was contradicted by the evidence of Albert.

The material question at the trial which was one in respect of a charge of retention of stolen property was whether the appellant's explanation for the possession of the stolen articles was a reasonable one. It has been held unreasonable because it was contradicted by Albert. The prosecution was at all times aware of the evidence Albert was in a position to give but refrained from calling him. It is contended on the appellant's behalf that in these circumstances the introduction into the case of Albert's evidence was irregular and unauthorised by the provisions of section 429 of the Criminal Procedure Code. A number of cases have been referred to before me, but it is sufficient to mention only one of them. In *The King v. Aiyadurai*¹, Howard C.J. formulated 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". The only use to which Albert's evidence was put was to discredit the appellant's explanation of an innocent possession of the stolen articles. The discrediting in this manner of the appellant's explanation was not a matter that arose *ex improviso*, and the use to which Albert's evidence has been put by the learned Magistrate is, in my opinion, irregular.

I would for this reason quash the conviction and sentence of the appellant and direct that he be acquitted.

Appeal allowed.

¹ (1942) 43 N. L. R. 289 at 293.