[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Howard C.J., Moseley S.P.J. and Hearne J.**

THE KING *v.* DINGIRI BANDA.

4—M. C. Kurunegala, 2,916.

Evidence—Clerk of Assize called to produce record of Magistrate's proceedings—Evidence with regard to witnesses summoned to prove alibi—*Improper admission—Evidence Ordinance, s. 91.*

The Clerk of Assize was called by the accused to prove certain inconsistencies between the evidence given by one of the witnesses for the prosecution at the trial as compared with the evidence tendered by that witness at the Magisterial inquiry.

In cross-examination by Crown Counsel the witness proceeded to say that according to the Magistrate's record the accused wished certain witnesses to be summoned to prove an *alibi*.

The defence of the accused was that he was acting under grave and sudden provocation. No comment was made by the learned Judge with regard to the alleged request of the accused to call witnesses to establish an *alibi*. The Jury were not asked to disregard this evidence.

Held, that the Magistrate should have been called to give evidence if it was desired to prove that the accused had said that the witnesses were to be called to prove an *alibi* and that the evidence of the Clerk of Assize on the point, which was improperly admitted, may have affected the verdict.

The Magistrate, in recording the words "to prove an *alibi*", has gone further than the duty imposed upon him by law, which was merely to record whether the evidence to be tendered by the witnesses was as to fact or as to character.

CASE heard before a Judge and Jury at the Midland Circuit.

V. F. Guneratne, for the appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

March 31, 1942. HOWARD C.J.—

The only point that arises in this case is whether certain evidence which was tendered by Mr. Sinnatamby, Clerk of Assize, was properly admitted. Mr. Sinnatamby was called by the appellant to prove certain

inconsistencies between the evidence given by one of the witnesses for the prosecution at the trial as compared with the evidence tendered by that witness at the Magisterial inquiry. In cross-examination by Crown Counsel Mr. Sinnatamby was referred to the record of the proceedings of the Magistrate's Court in the case. He then proceeded to say that according to the Magistrate's record the accused elected to be tried by an English-Speaking Jury and wished the following witnesses to be summoned: Herath Mudiyanselage Podi Appuhamy of Waduwewa, and G. K. William Silva of Waduwewa, to prove an *alibi.* The point is taken by Mr. Gunaratne that the alleged statement of the accused that these witnesses were to be called to prove an *alibi* has not been properly proved. It is contended that if it was desired to prove this statement of the accused the Magistrate himself should have been called. Mr. Gunasekera, on the other hand, maintains that it was the duty of the Magistrate to record the names of the witnesses and also whether they were witnesses to fact or witnesses to character. Having made that record, it was admissible under section 91 of the Evidence Ordinance in view of the fact that it was the duty of the Magistrate to record this statement of the accused.

It seems to us that the Magistrate in recording the words "to prove an *alibi*" has gone further than the duty imposed upon him by law, which was merely to record whether the evidence to be tendered by the witnesses was as to fact or as to character. He has purported to distinguish the particular point on which evidence as to fact was to be given. Moreover, it is not clear whether the Magistrate recorded the words of the accused or merely his own opinion as to the nature of the testimony the accused intended to call. In these circumstances, we are of opinion that, if it was desired to prove that the accused has said that the witnesses were to be called to prove an *alibi,* the Magistrate should have given evidence himself as to that fact or someone who heard what the accused had said should have testified thereto. This evidence was therefore improperly admitted.

No exception has been taken to the summing up of the learned Judge, particularly with regard to the question as to whether the accused was acting under grave and sudden provocation. No comment was made by the learned Judge, in the course of his unexceptionable charge, with regard to the alleged request of the accused to call witnesses to establish an *alibi.* The Jury were not asked to disregard this evidence. This evidence was before the Jury and it may be that they came to the conclusion that the defence of gravs and sudden provocation was put forward at the last moment and was therefore not *bona fide.* It is impossible to say that this evidenc, which was not proved in accordance with legal requirements, could not have affected the verdict of the Jury. In these circumstances, the conviction of the accused cannot be supported. The verdict of the Jury is set aside and there will be a fresh trial before another Jury.

Verdict set aside.

Fresh trial ordered.