1923.

Present : Bertram C.J.

POLICE VIDANE, KANDANA, *v.* AMARIS APPU *et al.*

662—P. C. Panadure, 79,458.

Keeping out of Court accused who desires to give evidence—Criminal Procedure Code, s. 297.—Evidence Ordinance, s. 120—Evidence of one accused inadmissible against co-accused.

An accused person who desires to give evidence cannot be ordered out of Court when the other witnesses are giving evidence. The statement of one accused is inadmissible as against a co-accused.

THE facts appear from the judgment.

H. V. Perera, for first accused, appellant.

D. B. Jayetilleke, for second accused, appellant.

Dias, C.C., appeared as *amicus curiae*.

November 9, 1923. BERTRAM C.J.—

This is a very singular case. The conviction cannot stand against either accused, because the learned Magistrate has unfortunately made a fatal mistake in regard to each one of them. The two accused are charged with causing hurt to a Police Vidane by shooting him with a gun. The only evidence against them was that one man saw them going to the place where the Police Vidane was shot, the first accused carrying a gun, and that another man saw them coming away. But the second accused made a statement which implicated the first. The learned Magistrate was obviously much impressed by the statement, because in language which is, perhaps, unnecessarily picturesque he says : " In this statement he had almost made a confession as regards himself, and had implicated most damnably the first accused." After that remark by the Magistrate, it is impossible to say that the statement of the second accused, which he was by law precluded from taking into account (see *R. v. Ukku Banda*[1]) did not decisively influence his mind against the first. The conviction of the first accused must, therefore, be quashed.

With regard to the second accused, the Magistrate's error is equally fatal. At a certain stage in the proceedings it was intimated that the second accused intended to give evidence. The learned Magistrate thereupon ordered him out of Court as a witness in the case. His proctor would appear to have consented to this course, but apparently thought that, when the accused person came back into Court to give evidence, all the evidence previously taken against him in his absence would be read. The Magistrate refused to allow

[1] *(1923) 24 N. L. R. 327.*

this, and thereupon the proctor discontinued his defence. This appears to be a misapprehension on the part of both the learned Magistrate and the proctor. The learned Magistrate justifies his procedure by a reference to section 120 (4) of the Evidence Ordinance, which declares that the accused may give evidence in the same manner and with the like effect and consequences as any other witness. He says that one of the consequences of a man being a witness is that he must go out of Court while the other witnesses are giving their evidence, and he considers that section 297 of the Criminal Procedure Code, which requires that, generally speaking, all evidence should be taken in the presence of the accused, must be read subject to the above-cited requirement. If this proposition were right, every accused would have to decide at the beginning of the trial whether he would give evidence, and if he decided to exercise this privilege conferred upon him by the law, the trial would have to take place in his absence. If there is any apparent conflict between the two enactments, the express provision of the Criminal Procedure Code must prevail. The learned Magistrate seems to have thought that he was acting in accordance with a practice sanctioned by English procedure. But here he is under a misapprehension. There is no authority for the procedure which he adopted. If authority were required in the other direction, it may be found in the case of *Peries v. Perera*,[1] where my predecessor. Sir Alexander Wood Renton, discussed the question with his customary force. The error, therefore, was fatal, and the conviction of the second accused cannot stand also.

The only question now is whether I should direct a new trial with non-summary proceedings. Mr. Jayatilleke, however, has put before me very forcible considerations with regard to the facts, I think it highly unlikely that, if these two persons set out to shoot at the Police Vidane and passed the first witness, who is a Vel-Vidane, on the way, they would have persisted in the attempt. I agree also that it is very unlikely that, if they had carried out this criminal act they would have walked quietly away together. When they were noticed by the second witness, he does not seem to have observed any signs of perturbation. It is also very unlikely that the second accused, who had no grudge against the Police Vidane, would have set out with the first on this positively murderous errand, and would have accompanied him after he had carried out his design. The fact of the case are very tortuous and peculiar. It is involved in a very high degree of doubt, and I question, even if the two witnesses who allege that they saw the two accused are believed, whether the evidence would be sufficient to justify a conviction. I would make no order, therefore, for further trial. and allow the appeal.

Appeal allowed.

[1] *1 Bal. Notes of Cases 3*