1961 *Present* : Tambiah, J.

THE ATTORNEY-GENERAL, Appellant, *and* N. SUPPIAH and another, Respondents

S. C. 125/61—M. C. Gampola, 6388

Criminal procedure—Accused brought before Magistrate otherwise than by summons or warrant—Witnesses who make depositions at pre-trial stage—Should prosecution call all of them at the trial ?—Criminal Procedure Code, ss. 148 (1) (b), 151 (2), 187 (1), 189 (1)—Evidence Ordinance, s. 138.

A witness who is examined at the pre-trial stage when an accused person is brought before a Magistrate otherwise than on summons or warrant and who knows nothing about the facts of the case but states only tha the produces the accused on a charge preferred against him need not be called to give evidence at the trial.

APPEAL from an order of the Magistrate's Court, Gampola.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General, appellant.

No appearance for the Accused-Respondents.

Cur. adv. vult.

May 24, 1961. TAMBIAH, J.—

The point which arises for consideration in this case is whether a witness, who was examined at the pre-trial stage when the accused were brought before the Magistrate otherwise than on summons or warrant and who knew nothing about the facts of the case but stated that he produced the accused before the Magistrate on a charge preferred against the accused, should either be called or be tendered for cross-examination at the trial of the accused.

In this case, the 1st and 2nd accused were charged with having voluntarily caused hurt to one Murugiah with a battle-axe and a knife respectively, under Section 315 of the Penal Code. They were convicted at the first trial. On appeal, the Supreme Court set aside the order of the Magistrate for failing to observe the provisions of section 187 (1) of the Criminal Procedure Code and the case was sent back for retrial. At the retrial, the evidence of Murugiah, the injured person, and the evidence of Senaratne, Police Constable 5333, were led before the charges were framed against the accused. Murugiah stated in his evidence that the accused had stabbed him, but Constable Senaratne said that he knew nothing about the facts of the case and that he was producing the accused since a charge of having caused hurt to Murugiah was preferred against the accused. After the evidence of these two witnesses, the accused were charged and evidence was led both for the prosecution

as well as for the defence. The prosecution called the injured person Murugiah, but Senaratne, who had given evidence at the pre-trial stage was neither called to give evidence nor was he tendered for cross-examination. At the conclusion of the trial, the counsel for the accused purporting to rely on the ruling in *Perera v. Ja-ela Police* [1], contended that the trial was illegal, as the witness Senaratne, who had given evidence at the pre-trial stage, was neither called to give evidence nor was he tendered for cross-examination, at the trial of the accused. The Magistrate upheld this point and discharged the accused observing that "another illegality has occurred now". The Attorney-General has appealed from this order.

When an accused person is brought before Court, otherwise than on summons or warrant, Section 187 (1) of the Criminal Procedure Code states that the Magistrate should, after examination as required by section 151 (2) of the Criminal Procedure Code, frame a charge against the accused if he is of opinion that there is sufficient ground for proceeding against the accused. For this purpose, it is incumbent on the Magistrate to forthwith examine, on oath, the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case (vide section 151 (2) of the Criminal Procedure Code). These provisions were enacted to prevent abuse of the process of Court and to safeguard the liberty of the subject. When proceedings are instituted under Section 148 (*a*), (*b*) and (*c*) of the Criminal Procedure Code, the Magistrate acts on the statements of responsible persons and he has other means of satisfying himself whether there is sufficient cause to proceed against an accused person. But where a person is brought to Court, otherwise than on summons or warrant, the Magistrate has to satisfy himself, on the evidence led at the pre-trial stage, whether there is sufficient cause to proceed against the accused.

A careful scrutiny of the relevant sections of the Criminal Procedure Code shows that when an accused person is brought before the Magistrate, otherwise than on summons or warrant, there is no provision of law which compels the prosecution to call all witnesses who had given evidence at the pre-trial stage, at the trial. The procedure to be followed in Magistrates' Courts proceedings is set out in Chapter 18 of the Criminal Procedure Code. Where an accused person pleads not guilty to a charge, the Magistrate has to receive "all such evidence as may be produced by the prosecution or defence respectively". (vide section 189 (1) of the Criminal Procedure Code). Section 189 (1) of the Criminal Procedure Code makes it abundantly clear that the Magistrate is bound to receive so much of the evidence as may be called by the prosecution or the defence and the Magistrate cannot compel the prosecution or the defence to call any witness who has given evidence at the pre-trial stage, and whose evidence the prosecution or the defence was not prepared to lead at the trial. There is no statutory provision requiring a witness, who had given evidence at the pre-trial stage, to testify at the trial. If such a requirement is introduced by statute or otherwise, then it

[1] *(1959) 61 N. L. R. 260.*

would, in some cases, lead to consequences which may result in the denial of justice. Thus, if a witness, who gave evidence at the pre-trial stage is either dead or has become insane, and if there is a requirement of law that such a witness must be called or tendered for cross-examination at the trial, it may well-nigh be impossible to proceed with such a case, although there may be other clear and cogent evidence to establish the charge.

In the instant case, no purpose would have been served by calling the witness Senaratne as he stated at the pre-trial stage that he had no knowledge of the facts of the case and that he merely produced the accused on the 15th of August 1958 before the Magistrate of Gampola. Any evidence which witness Senaratne could have given about the facts of the case would have been hearsay. There are two reasons why hearsay evidence is excluded at trials. Firstly, because such evidence lacks the sanction of oath, and secondly, because no opportunity for cross-examination is given to the opponent. (vide Phipson on Evidence (9th Edition) Sweet and Maxwell at pages 223 & 224). "Lack of oath is never stressed" says Edmund M. Morgan, one of the leading authorities on the Law of Evidence and the Reporter of the American Law Institute's Committee on Evidence, "and unfortunate as it may be, it is now generally recognised that the oath has lost most of its efficacy as a sanction. If lack of opportunity for cross-examination is the real basis for exclusion, as is now almost universally conceded, it must be because cross-examination may eliminate the imperfections in testimony likely to mislead the trier of fact." (vide Modern Code of Evidence (American Law Institute—Foreword by Edmund M. Morgan– at pages 36 and 37). Hence, even if Senaratne was called to give evidence at the trial he could only have given hearsay evidence about the facts of the case and such evidence had to be excluded.

The Crown Counsel, who represented the Attorney-General, referred to the ruling in *Perera v. Ja-ela Police* (supra) and contended that this decision should not be followed. This case, however, could be distinguished from the facts of the instant case. It was held in that case that a person who gave evidence at the pre-trial stage and who spoke to the facts of the case, should have been recalled at the trial, or, at least, he should have been tendered for cross-examination. The learned Judge, who decided this case, based his decision on three grounds which require careful examination. Firstly, he was of the view that the Magistrate would have been necessarily influenced by the evidence led at the pre-trial stage, at the trial. Secondly, he was of the view that in the case of *Isidor Fernando v. Roy Perera*[1] this Court took the view that the evidence recorded under section 187 (1) of the Criminal Procedure Code could not be utilised by the Magistrate by merely recalling the witness and tendering him for cross-examination. Thirdly, the learned judge held that section 138 of the Evidence Ordinance requires every witness who is examined, to be subject to cross-examination, if the adverse party so desires.

[1] *(1947) 48 N. L. R. 303.*

The Crown Counsel contended that the first proposition assumes that a Magistrate, who is usually a trained judge and one whose mind should not be warped by extraneous considerations, would be prejudiced by the information he may have gathered at the pre-trial stage and, therefore, such evidence which has influenced him at the pre-trial stage, must necessarily be tested by cross-examination. The Crown Counsel pointed out that where a Magistrate acts on a report sent under section 148 (*b*) of the Criminal Procedure Code, he has access to the statements in the Information Book, but it has never been held by this Court that a Magistrate who uses the Information Book in this manner and tries the case has acted in a prejudicial manner. Magistrates, unlike jurors, contended the Crown Counsel, are trained and experienced personnel and the maxim *omnia praesumuntur solemniter esse acta* applies to all their acts. Secondly, the Crown Counsel contended that the case of *Isidor Fernando v. Roy Perera* (supra) laid down the proposition that a witness should be called at the trial and his evidence in chief led before he is subjected to cross-examination and the Magistrate, therefore, was not justified in utilising the evidence-in-chief which was led at the pre-trial stage, and the evidence elicited in cross-examination, at the trial when such a witness was tendered for cross-examination. The Crown Counsel further pointed out that section 138 of the Evidence Ordinance states that any witness who is examined should be subject to cross-examination, if the adverse party so desires. He contended that this section only applies to those witnesses who are called at the trial and, consequently, the accused has the right to cross-examine any such witness who was called. This section does not state that a witness who had been called at a pre-trial stage, should be examined at the trial.

I agree with the submissions made by the Crown Counsel in this case. I hold that a witness who was called to give evidence at the pre-trial stage, and who stated that he knows nothing about the facts of the case need not be called to give evidence at the trial.

In the instant case, the learned Magistrate has erred in discharging the accused on the point raised by the counsel for the accused. I set aside the order of discharge and send the case back to the Magistrate in order that he might deliver his order on the evidence led at the trial.

Order set aside.