[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Soertsz and de Kretser JJ.**

THE KING *v.* CHARLES

54—M. C. Balangoda, 30,008.

Evidence—Witness called by the Judge after close of defence—Right of Crown or Judge to call such evidence—Irregularity—No prejudice to accused—Criminal Procedure.

The right of the Crown or the Judge to call fresh evidence after the close of the case for the defence is limited to something arising *ex improviso*.

Where a Judge has committed an irregularity in calling a witness after the close of the defence and no prejudice has been caused to the defence the conviction will not be set aside.

THIS was an application for leave to appeal from a conviction before a Judge and Jury.

J. L. M. Fernando, for the applicant.—The proceedings in this case are vitiated by two serious irregularities, viz. : (1) the presiding Judge called a witness for the prosecution after the case for the prosecution and the defence had been closed ; (2) the Judge called another witness for the prosecution in the middle of his summing-up and put certain questions to her.

Any new evidence called by the Court after the case has been closed should not prejudce the accused. This is how section 429 of the Criminal Procedure Code has been construed. The discretion given to the Judge by that section should not be exercised in a manner prejudicial to the accused—*Vandendriesen v. Howwa Umma*[1]. In India, under the corresponding section 540, it was held that the power conferred on the Judge by that section is very wide, but the wider the power, the more cautious should be the exercise of discretion on the part of the Judge. See *Natabar Ghose*[2] ; *Gulzari Lal v. Emperor*[3]. Relevant English cases are *Harold Day*[4] and *Dora Harris*[5].

[COURT.—Is there no case in which new evidence was called on the request of the Jury?]

There is none. Section 429, Criminal Procedure Code, gives no power to the jury to ask for further evidence. In the present case, the additional evidence was not led to meet a situation which had arisen *ex improviso* ; it, in fact, made the jury decide, in favour of the prosecution, a point on which they had previously been doubtful.

E. H. T. Gunasekera, C.C., for the Crown, was not called upon.

July 28, 1941. HOWARD C.J.—

In this application Mr. Fernando has taken three points. The first point is that the learned Judge called a witness after the cases for the prosecution and the defence had been closed. The second point is that

[1] *(1937) 9 C. L. W. 17.*
[2] *(1922) 24 Cr. L. J. 957.*
[3] *(1922) 24 Cr. L. J. 3.*
[4] *27 Cr. App. R. 168.*
[5] *20 Cr. App. R. 86.*

the learned Judge in the middle of his summing-up re-called one of the witnesses called by the prosecution and put certain questions to her. The third point is that the medical evidence does not establish the cause of death.

With regard to the first two points, we think that there was some irregularity and it was a procedure which Judges should avoid. On the other hand it is impossible to say that the applicant was in any way prejudiced by the adoption of such procedure.

With regard to the calling of the new witness, the principles on which a Judge should take such a course were laid down in the judgment of Avory J. in the case of *Dora Harris*[1]. In that case the Recorder of Liverpool *proprio motu* asked a co-defendant, Benton, who had pleaded guilty to the theft and remained throughout the trial in the dock, whether he was willing to give evidence and, on his saying that he was, he called him as a witness and examined him. It is obvious that there is no similarity between these two cases inasmuch as this witness, Benton, had been present in the dock throughout the trial and listened to the evidence. In his judgment Avory J. laid down the following principle with regard to this calling of a witness by the Judge and in doing so adopted the words of Tindal C.J. in *Sullivan v. Frost*, 4 *St. Tr. N. S.*, page 86, in which the following passage occurs :—" Where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso* which no human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner in a criminal case, there seems to me no reason why that matter which arises *ex improviso* may not be answered by contrary evidence on the part of the Crown ". Avory J. then goes on to say that that passage only applies to the Crown but it should also apply to the Judge who calls a witness, that is to say, after the close of the case for the defence fresh evidence is limited to something arising *ex improviso*. Avory J. also says that in these circumstances and without laying it down that in no circumstances may an additional witness be called by the Judge after the close of the defence, that in that case it was irregular and calculated to do an injustice to the appellant. We think, therefore, in this case that it would have been better if the evidence of this witness had not been put before the Jury, even allowing for the fact that the Jury had requested that certain points should be cleared up and the Judge called this witness with this object in view. But we do not think that the applicant was in any way prejudiced or that any injustice was done to him by the evidence of this witness. So also with regard to the re-calling of one of the witnesses for the prosecution in the middle of the summing-up, that is also a practice which should be avoided.

With regard to Mr. Fernando's third point, it is true that the medical evidence does not establish in a clear and precise manner the cause of death. There is nothing surprising in this in view of the fact that the body was examined by the District Medical Officer several days after the

[1] *20 Cr. App. R. 86.*

death had occurred and during which period it had suffered from the attention of maggots. On the other hand, any gaps in the medical evidence were filled in by the applicant himself. We think, therefore, that there is nothing in this point.

For the reasons I have given the application is dismissed.

Application dismissed.