[COURT OF CRIMINAL APPEAL]

1967 *Present :* **T. S. Fernando, A.C.J. (President), Abeyesundere, J., and Alles, J.**

M. K. FRANCIS ALWIS, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL 109 OF 1967, WITH APPLICATION 143

S. C. 198 of 1966—M. C. Gampaha, 5799/A.

Criminal procedure—Calling of fresh evidence by Court after case for defence is closed—Scope of s. 429 of Criminal Procedure Code—Misdirection—Court of Criminal Appeal Ordinance, proviso to s. 5 (2).

Where, after the cases for the prosecution and the defence have been closed, the Court, purporting to act under section 429 of the Criminal Procedure Code, calls a fresh witness whose name appears on the list of witnesses contained in the indictment, it would be wrong to direct the jurors that the fresh evidence may be relied upon, either by itself or as corroboration of the evidence of the principal witness for the prosecution, to convict the accused.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *E. St. N. D. Tillekeratne*, *G. Seneviratne* and *L. F. Ekanayake* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

November 17, 1967. T. S. FERNANDO, A.C.J.—

The appellant (the 1st accused) and his son (the 2nd accused) stood their trial before a judge and jury on a charge of attempt to commit the offence of murder by cutting a man named Marshal with a sword. The jury returned a unanimous verdict of guilty of voluntarily causing grievous hurt as against the appellant, but by a similar verdict found his son not guilty of any offence. The son was accordingly acquitted, and the appellant was sentenced to 10 years' rigorous imprisonment.

Learned Counsel for the appellant has contended before us that, by a violation of the rules governing the calling of fresh evidence after the cases for the prosecution and the defence had been closed, the appellant has been deprived of a fair trial.

The names of two witnesses who could have testified as to the identity of the person or persons who made an attempt upon the injured man Marshal appeared on the list of witnesses contained in the indictment. These two witnesses were Marshal himself and another man bearing the name of Dharmadasa. Counsel for the Crown who must ordinarily be presumed to be aware of the strength and the weakness of the Crown case decided, as he was undoubtedly entitled to do, to call only one of these two witnesses, viz., Marshal. That witness stated that the appellant and his son both cut him shortly after midnight on the evening in question. At the close of the case for the Crown both the appellant and his son gave evidence on their own behalf denying their presence anywhere near the place where Marshal was alleged to have been attacked. At the end of the day there was no other evidence which the defence wished to call, and although there is no record made that the defence case had then been closed, the nature of the recorded proceedings thereafter makes it fairly clear that the defence had indeed closed its case. What remained for the next day was for counsel to address and for the judge to charge the jurors summing up the evidence and laying down the law by which they were to be guided.

The next day's proceedings commenced with the learned judge addressing Crown Counsel and informing him that he wished to call Dharmadasa " as my witness ". Crown Counsel stated " Very well, my Lord ". I make mention of this proceeding in Court because the record does not indicate that the learned judge addressed defence counsel on the matter at all. Although it was an assigned junior counsel who was conducting the defence of both accused, there was no inquiry made from him as to whether he had any objection to the course of action proposed. Dharmadasa was then called, and his entire examination-in-chief (which ran into four typed pages) was conducted by the learned judge. Crown Counsel was asked whether he wished to cross-examine Dharmadasa, and, on his replying to the judge that he did not, Dharmadasa was cross-examined at some length by defence counsel. During that cross-examination, counsel marked two passages from Dharmadasa's evidence

as recorded in the Magistrate's Court, probably with the object of discrediting his evidence on certain matters which do not appear to have been of any real importance. Defence counsel was next allowed to prove these two contradictions by calling the Clerk of Assize to produce the record of the Magistrate's Court proceedings. When that had been done, defence counsel made an application that the police officer who prepared the sketch be called by the Court. The Crown, it may be mentioned, had not called this police officer, but his name was on the list of witnesses and, it may be assumed, he was present and available to be called. Defence Counsel's object was to prove that the place of attack as shown to the police officer was some distance away from the place of attack as deposed to by Marshal and Dharmadasa. That part of the record of the trial as relates to the unsuccessful attempt of the defence counsel to have this evidence placed before the jury in order at least to discredit Dharmadasa in respect of the place which he said was the place of attack is reproduced below :—

Defence Counsel : My Lord, I would like to make an application that Your Lordship be pleased to call the officer who made the sketch.

Court : I refuse that.

Defence Counsel : May I make my submissions why I want that evidence ?

Court : Why should I call ? You had your opportunity of calling any witnesses you wanted, and if you did not want them why should I call them ?

Defence Counsel : In the light of this witness's evidence whom we did not anticipate would be called.....

Court : What is your complaint ? Is it your complaint that I have no right to call witnesses ? How does that arise ?

Defence Counsel : No, my Lord, with respect I submit that it would be in the interests of justice to have the officer who made the sketch called because the injured person pointed out to him a place where he said he was cut by the 1st accused which is entirely different from the place where it had happened.

Court : You have no right to make such a submission in the presence of the jury—that anything incorrect was pointed out. If you wanted to make any such submission you should have first asked the jury to retire. You must not lead inadmissible evidence in that fashion.

Defence Counsel : I am sorry, my Lord. May I make that application ?

Court : I refuse the application to call the sketch officer.

The scope of a court's power under section 429 of the Criminal Procedure Code to call a witness at any stage of a trial has been examined in many cases by this Court. In *The King v. Aiyadurai* [1], it was observed that the power is not incompatible with the relevant English rule, and this Court formulated the principle accepted in the English Court of Criminal Appeal to be 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 Crown in the instant case decided to rest its proof with the evidence of the single witness Marshal. The learned Commissioner who presided at the trial, having called Dharmadasa as a witness in pursuance of the power vested in a court by section 429, expressed himself thus in the course of his charge to the jury :—

> " Now, the reason why I called Dharmadasa today was because I wanted you to know that Dharmadasa who was there and who claims to have come there straightaway and seen the assault did not see the 2nd accused there. That, gentlemen, would be of some importance to you, because, while it is just possible that witness Marshal is possibly true in the story that he says, it is curious that Ruban and this 2nd accused have disappeared not to be seen at the time Dharmadasa comes to see Puran (the 1st accused) still cutting the man. So that, in those circumstances, in view of the fact that the injured man himself in the first instance to the Police is recorded as having said " Puran cut ", coupled with the fact that Dharmadasa did not see the other accused, I think, in my opinion, would make you doubt, apart from anything else, as to whether it is safe to find the 2nd accused guilty in a case like this."

If the sole effect of Dharmadasa being called by the Court after the close of the evidence for the defence was to assist the jury to decide whether the 2nd accused was a participant in the attack, the course adopted by the learned Commissioner could not be the subject of legitimate criticism. As was pointed out by this Court in *The Queen v. Don Wilbert* [2], the rule in regard to the calling of fresh evidence is strictly observed only when such evidence is intended to support the prosecution case, but where the defence is concerned a certain degree of latitude is permitted.

The actual shape the charge to the jury took thereafter was, however, unfortunate. Said the learned Commissioner in respect of the evidence against the appellant :—

> " In regard to the first accused there is the evidence of Dharmadasa who says I saw the 1st accused cut Marshal as he lay fallen..... So that it is for you to decide whether you can act on the evidence of

[1] *(1942) 43 N. L. R. 289.* [2] *(1962) 64 N. L. R. at 89.*

Marshal as against both accused. If you doubt his evidence, first of all, in regard to the 2nd accused, then there is no evidence against the 2nd accused and he must be acquitted. Then, can you act on his evidence against the 1st accused ? For the moment consider that he had not given evidence, and that the only witness was Dharmadasa who gave evidence and said " I saw this 1st accused cutting Marshal ". Would you act on the evidence of Dharmadasa ? Because, if you feel that it is safe to act on the evidence of Dharmadasa, then Dharmadasa corroborates Marshal in regard to the cutting. Then, even if you do not believe Marshal by himself, it is open to you to say " Well, we believe him because he is corroborated by Dharmadasa " or " We act on the evidence of Dharmadasa alone ". These are entirely matters for you."

The jury's verdict clearly shows that they relied either only on Dharmadasa's evidence or on that part of Marshal's evidence as was corroborated by Dharmadasa. It is therefore relevant to remind ourselves of what was stated in *John Owen's case*[1] that

> " The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that where it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex v. Browne*[2], the calling of a fresh witness."

The prosecution had an opportunity of calling Dharmadasa, but deliberately refrained from doing so. Probably the prosecutor correctly felt that the calling of Dharmadasa would weaken his case against the 2nd accused. Each of the accused then gave evidence in support of his respective alibi. Thereafter any application by the Crown to call Dharmadasa, which could only have been done by way of evidence in rebuttal, could not possibly have been entertained, and Crown Counsel did not attempt to make any such application. Was it, then, open to the Court to call Dharmadasa ? It is sufficient if I were to quote from the decision of *John Owen* (*supra*).

> " Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed, where it becomes necessary to rebut matters which have been raised for the first time by the defence."

The Crown not having attempted to rebut any evidence called by the defence, the action of the Court in calling the evidence of Dharmadasa, although it may not of course have been so intended, had the unfortunate effect of imperilling the defence of the appellant and placing him at an unfair disadvantage. This Court, in *The Queen v. Mendis Appu*[3], stated

[1] *(1952) 2 Q. B. 362.*
[2] *(1943) 29 Cr. A. R. 106.*
[3] *(1960) 60 C. L. W. 11.*

that " the powers conferred by section 429 should be used with caution. In a trial by jury the functions of the prosecution, the defence and the judge are laid down in the Code, and the Court should take care not to leave room for any impression that it is using its powers under section 429 to help the prosecution to discharge the burden that rests on it ". The ground of appeal advanced is, in our opinion, sound.

For the reasons indicated above, we quashed the conviction and sentence of the appellant ; but, being of opinion that this is a case in which we should act under the power conferred by the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, we ordered a new trial of the appellant on a charge of voluntarily causing grievous hurt with an instrument of cutting, an offence punishable under section 317 of the Penal Code.

Sent back for re-trial.