1944 *Present:* **Wijeyewardene J.**

THE KING *v.* FERDINANDS *et al.*

46—M. C. Matara, 49,741.

Evidence—Several accused charged jointly with conspiracy to commit or abet the offence of giving false evidence—Additional evidence led for defence through Crown witness under cross-examination—Official witness called by defence to produce document—Examined by Counsel for other accused—Crown's right of reply.

Where, in a trial before the Supreme Court, additional evidence is led for the defence through a Crown witness, whilst under cross-examination from a document produced by the witness, the Crown has the right of reply.

Where an official witness, who is called by one of the accused to produce a document, is examined by Counsel for the other accused with regard to other entries in the document, the Crown has a right of reply against the other accused as well.

The fact that one accused whilst giving evidence incriminated other accused does not deprive the Crown of the right of reply.

The order in which Counsel should address the Jury indicated.

***Quaere*, whether the Crown has a right of reply against all the accused, where several persons are charged and some of them only call witnesses.**

IN this case the accused were indicted jointly before Wijeyewardene J. and a Jury with conspiracy to commit or abet the offence of giving false evidence in a judicial proceeding.

Nihal Gunesekera (with him *Vernon Wijetunge*), for the first accused.

G. E. Chitty (with him *H. Wanigatunge*), for the second accused.

H. Sri Nissanka, K.C. (with him *J. Fernandopulle* and *Ananda Pereira*), for the fourth accused.

U. A. Jayasundere (with him *S. E. J. Fernando* and *J. V. T. de Fonseka*), for the fifth and seventh accused.

The third, sixth and eighth accused were undefended.

E. H. T. Gunasekera C.C. (with him *E. L. W. de Zoysa, C.C.*), for the Crown.

August 14, 1944. WIJEYEWARDENE J.—

The questions I have to decide relate to the order in which Counsel should address the Jury.

The accused in this case are indicted jointly for the offence of conspiracy to commit or abet the offence of giving false evidence in a judicial proceeding.

The Crown Counsel called as one of his witnesses Mr. Vitharana, the Recordkeeper of the Magistrate's Court of Matara. In answer to the Crown Counsel, Mr. Vitharana read (*a*) the evidence given by some of the

accused from the record of the proceedings in Inquest No. 50 of the Magistrate's Court, Matara (P 1), and (*b*) the evidence-in-chief of the 1st and 4th accused from the record of the non-summary proceedings in case No. 43,107 of the Magistrate's Court, Matara (P 21). He also referred to the report of Mr. Leembruggen to the Magistrate, the private plaint filed by U. R. Charles, the letter sent by Mr. Wijetunge, the charges framed in M. C. Matara, 43,107, and some other matters.

Mr. Vitharana was cross-examined by Mr. Chitty, Counsel for the 2nd accused, and he read from P 1 at Mr. Chitty's request the evidence of a witness, U. R. Charles, and certain passages in the evidence of the 1st accused. He was also made to disclose the evidence with regard to the relationship between Hinni, the deceased, and certain persons as shown in P 1.

At the request of Mr. Sri Nissanka, Counsel for the 4th accused, Mr. Vitharana read passages from the evidence of a witness Martin as appearing in P 21.

When the Crown Counsel concluded leading his evidence Mr. Nihal Gunesekera called the first accused and a number of witnesses including Mr. Quyn, the Recordkeeper of the Supreme Court. He got Mr. Quyn to read certain passages from the evidence of Ariyadasa and Sahabandu as appearing in the notes of evidence taken at the trial in S. C. No. 51, M. C. Matara, No. 43,107.

At the request of Mr. Sri Nissanka, who cross-examined him, Mr. Quyn read passages from the evidence of two other witnesses, Martin and Andrayas. It should be noted that Mr. Vitharana and Mr. Quyn were not giving evidence on matters within their personal knowledge but were merely reading passages from the records of certain judicial proceedings.

At this stage I wish to refer to the stenographer's note made just before Mr. Sri Nissanka cross-examined the 4th accused. That note does not set out clearly what happened. Mr. Sri Nissanka said he would like to get Mr. Nihal Gunesekera to ask Mr. Quyn to read the passages from the evidence of Martin and Ariyadasa. I told him that I could not allow that to be done. Mr. Sri Nissanka then said that he presumed that he would be allowed to cross-examine the witness and I replied that he would be cross-examining the witness.

After the 1st accused's case was closed, the 2nd, 4th, and 5th accused did not call any evidence, the 3rd accused called two witnesses, while the 6th accused gave evidence and called one witness.

While giving evidence "in his own behalf" the 6th accused made statements inculpating the other accused. The 1st, 2nd, and 3rd accused cross-examined the 6th accused. I gave the accused an opportunity for leading such evidence as they thought necessary to meet the evidence given by the 6th accused, but no such evidence was, in fact, called. After the 6th accused closed his case, the 7th and 8th accused closed their cases without calling any evidence.

The two questions for decision are:—

(1) Can the Crown Counsel claim the right of reply as against the 2nd and 4th accused on the ground that they had led evidence through Mr. Vitharana and Mr. Quyn?

(2) Is the Crown Counsel's right of reply affected by the fact that the 6th accused incriminated the other accused while giving evidence after the close of the case for the prosecution?

It is convenient to discuss question (1), as if there is only one accused, says the 2nd accused. In such a case the Crown Counsel is entitled to reply, if the defence has led evidence other than the evidence of the accused (see sections 237 (2) and 296 (2) of the Criminal Procedure Code). Now " Evidence " as defined in section 3 of the Evidence Ordinance includes " documentary evidence ", that is " all documents produced for the inspection of the Court ". Thus, if documentary evidence is adduced by the defence, the Crown is entitled to the right of reply. Conflicting views have been taken by the various High Courts in India on the question whether the Crown can claim such a right, when such " documentary evidence " is led through a Crown witness while under cross-examination. The Madras and Allahabad High Courts have answered the question in the affirmative and the Bombay High Court too has expressed the same view in a number of cases. (See *Queen-Empress v. G. W. Hayfield and another*[1]; *Queen-Empress v. Venkatapathi and others*[2]; *Emperor v. Bhopatkar*[3]). Sections 234 and 237 of our Code differ, however, from the corresponding sections 289 and 292 of the Indian Code of Criminal Procedure, 1882, and section 292 as enacted in 1882 was modified by the Code of 1898 and was replaced by an entirely new section in 1923. Our courts too have recognized this right in such circumstances, and the course of practice has been to allow Counsel for the Crown to address the Jury summing up the evidence against the accused and commenting on the evidence led for the defence after the address of the Counsel for the defence.

Now when the Crown Counsel examined Mr. Vitharana and proved through him certain facts as recorded in P 1 and P 21, the Crown did not, thereby, produce the entire records P 1 and P 21 for " the inspection of the Court ", as in that case the Jury would have been entitled to read and examine the whole mass of evidence appearing in those records. Mr. Chitty, therefore, adduced fresh documentary evidence when he placed before the Court the evidence of other persons and proved some other facts appearing in P 1. No doubt the " documentary evidence " led by the Crown Counsel and the "documentary evidence" led by Mr. Chitty appear on a number of sheets bound together and referred to as the record of certain proceedings. That fact does not, however, make the evidence led by the Crown Counsel and the evidence led by Mr. Chitty one item of evidence. In this connection I would refer to *Gregory v. Tavernor*[4] decided under section 5 of the Criminal Procedure Act (*28 & 29 Vict. c. 18*) corresponding to section 145 of the Evidence Ordinance. That decision holds that, if a witness refreshes his memory from entries in a book, Counsel may cross-examine on those entries without making them his evidence and the jury may see them if they think fit, but, if Counsel cross-examine as to other entries in the same book, he makes them his evidence.

[1] *(1892) 14 All. 212.*
[2] *(1888) 11 Mad. 339.*
[3] *(1906) 30 Bom. 421.*
[4] *172 E. R. 1241.*

What I have said above applies to the cross-examination of Mr. Vitharana and Mr. Quyn by the Counsel for the 4th accused.

The fact that there are several accused in this case and that Mr. Quyn was called by the 1st accused does not affect this question.

For the reasons given by me I answer question (1) in the affirmative.

It may become necessary to determine in an appropriate case whether the Crown Counsel does not have a right of reply against all the accused where, as in the present trial, several persons are charged and some of them call witnesses. In such a case the decision in *The King v. Joronis*[1] would have to be considered. Section 296 (2) of the Criminal Procedure Code reads:—

> "When at any trial the evidence of the defence consists only of the *evidence of the person or persons charged*, as the case may be, the prosecution shall not have the right of reply."

The words underlined by me, read with section 237 (2), favour the view that the Crown is entitled to a right of reply against all the accused where there are several accused and some accused alone have called witnesses, as in this trial. The authorities cited in Archibald's *Criminal Pleading (31st Edition) at page 181* are to the effect, that under the English Law the Crown has such a right only where the evidence called by one accused is applicable to all.

The second question arises from the fact that the 6th accused's evidence inculpates all or most of the other accused. It is contended that the evidence given by the 6th accused became "tacked, as it were, to the case for the prosecution". (See Judgment of Jervis C.J. in *Regina v. Burditt and others*[2]) and that, therefore, the Crown should be regarded as having led evidence in rebuttal, giving the defence thereby the right to the last word. I find it difficult to follow this reasoning. It is, to say the least, somewhat unsatisfactory to build a legal argument on a phrase occurring in a judgment. I do not think the phrase means anything more than that the Crown could avail itself of the evidence given by one accused against another (see *The King v. Hawden and Ingham*[3]) just as much as it could make use of the evidence given by a defence witness even against the accused calling that witness. If the contention of Mr. Chitty is correct, it would lead to most startling results. Suppose there is only one accused in the case, and that at the close of the case for the prosecution the accused gives evidence and calls five witnesses one of whom proves hostile to the accused. Suppose further that his credit is impeached by the accused himself as set out in section 155 of the Evidence Ordinance. And yet, according to this argument, the accused can claim that the Crown has, in these circumstances, lost the right given to it under section 237 (2) of the Criminal Procedure Code. The cases cited by the defence (*e.g., Regina v. Woods and May*[4]; *Regina v. Burditt and others* (*supra*) show merely that the accused against whom evidence is given by another accused or a witness of that accused would have the right to cross-examine such accused or witness and also the right of addressing the Jury after such accused.

[1] *(1921) 22 N. L. R. 468.*
[2] *(1855) 6 Cox Rep. 458.*
[3] *(1902) 1 K. B. 882 at 887.*
[4] *(1853) 6 Cox Rep. 224.*

I answer the second question in the negative.

The Crown Counsel stated to me that he did not desire to exercise his right of reply as against the third and sixth accused who were undefended. I have, however, to consider the interests of the other accused. As the defence has not communicated to me any agreement among the accused as to the order of speeches, I direct that the Jury should be addressed first by the sixth accused and then by Mr. Nihal Gunesekera, Mr. Chitty, the third accused, Mr. Sri Nissanka, Crown Counsel, Mr. Jayasundere and the eighth accused.