1949 *Present :* **Nagalingam and Windham JJ.**

In re DE SILVA

S. C. 22—D. C. Galle, L 2,324

Oaths Ordinance (Cap. 14)—" Contempt of Court "—Summary punishment for giving false evidence—Conditions precedent—Section 11 (1).

A District Judge or Magistrate should not punish a witness summarily for giving false evidence, under section 11 (1) of the Oaths Ordinance, without first giving the witness an opportunity of reconciling his contradictory statements. Nor should action be taken under that section until the conclusion of the case.

APPEAL from an order of the District Judge, Galle.

E. B. Wikramanayake, K.C., with *H. W. Jayewardene*, for appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 12, 1949. WINDHAM J.—

The appellant, a village headman, was a witness called by the plaintiff in a partition action. He was the last witness called for the plaintiff. At the conclusion of his evidence, and before the defence witnesses testified, the learned magistrate proceeded forthwith to deal with him

[1] *(1866) 5 W. R. 68 (Civil).* [2] *2 C. W. N. 562.*

[3] *(1935) 39 C. W. N. 888.*

" for contempt of court " under section 11 (1) of the Oaths and Affirmations Ordinance (Cap. 14), for giving false evidence. The learned magistrate, after stating that the appellant had been guilty of the most flagrant contempt of court and that in his (the magistrate's) opinion he had been bribed by both parties to the case and given flagrantly false evidence, went on to specify the witness's contradictory statements which led him to this conclusion. In brief, the contradictory statements were that whereas the appellant in examination-in-chief had said that between 1940 and 1945 the first defendant had been in possession of the land in dispute and that he did not know who possessed it before 1940, in cross-examination he changed his evidence and said that he did not know who possessed the land before 1945 and that the second defendant's mother possessed it from 1934 to 1940. The appellant had in fact made contradictory statements to this effect in his evidence. The learned magistrate, thereupon, in order to " set an example " proceeded to convict the appellant under section 11 (1) and sentenced him to a fine of Rs. 50 with 2 months rigorous imprisonment in default, without having said which of the appellant's statements he considered to be false and which true and without having called upon him to explain the discrepancies or contradictions before convicting him. The learned magistrate then proceeded to hear the defence evidence.

In these circumstances I am of opinion that the appeal must be allowed, on the ground that the learned magistrate, in exercising his powers under section 11 (1), did not comply with the procedure which has been judicially laid down for the exercise of those powers, and which in my view is a necessary safeguard to the exercise of the powers of summary punishment there conferred. It has even been suggested that since he purported to deal with the appellant for contempt of court, it was section 792 of the Civil Procedure Code, and not section 11 (1) of the Oaths and Affirmations Ordinance, under which he should have acted. But I do not think that contention can succeed; for clearly the learned magistrate was dealing with a witness who in his opinion had given false evidence before him, and was summarily punishing him " as for a contempt of court "; and in such a case section 11 (1) is the appropriate section. But in resorting to that section, which confers arbitrary powers of imprisonment in default up to a period of two months, a magistrate should be very careful to give a witness the opportunity of first showing cause why he should not be convicted under it. It is true that the only requirement laid down in the section itself is that the magistrate should record his reasons for imposing the fine. But it has been held on a number of occasions by this court that the magistrate should not convict under the section without first giving the witness an opportunity of reconciling his contradictory statements—*Balthazar v. Baba Appu*[1]; *King v. David*[2]. It is true that the learned magistrate did ask the appellant in the box why he had given in cross-examination answers which in fact contradicted his evidence-in-chief; but he did not ask him to reconcile the statements, nor did he at that stage suggest that he had a conviction under section 11 (1) in view. Secondly, I am of the opinion that action should not be taken under the section until the conclusion of the case;

[1] *(1897) 3 N. L. R. 63.* [2] *(1933) 35 N. L. R. 103.*

for only then will the court have heard all the evidence and so be in a position to form a final opinion whether a particular piece of evidence is false or not. In this connection I respectfully agree with the opinion of Drieberg J. in *Dewaya v. Bilinda*[1], that it is not open to the court to convict a witness under section 11 (1) merely because he has made contradictory statements; the court should make up its mind which statement it holds to be false and which it does not hold to be false.

All these things the learned magistrate failed to do before convicting the appellant. It is regrettable that his zeal and impetuosity in what, on the merits, may well have been a proper case for exemplary punishment under section 11 (1), should have defeated their own ends. But that section, though it provides for summary punishment, should not be acted upon with undue haste and without giving the witness every reasonable opportunity, in court, of showing that what the magistrate is disposed to consider as false evidence within the meaning of section 188 of the Penal Code is not false evidence, or to show cause why, although it may be false evidence, he should not be punished under section 11 (1) in respect of it.

For these reasons the appeal is allowed, nd the order of the learned magistrate convicting and sentencing the appellant under section 11 (1) of the Oaths and Affirmations Ordinance is set aside.

NAGALINGAM J.—I agree.

Appeal allowed.