[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J., Mosley S.P.J., and Hearne J.**

THE KING *v.* RANHAMY.

59—M. C. Anuradhapura, 2,708.

Court of Criminal Appeal—Power to take evidence in appeal—When the power should be exercised—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 10 (1) (b).

The Court of Criminal Appeal will allow evidence not called at the trial to be taken in appeal where it is satisfied that the failure to produce such evidence was due to ignorance on the part of the prisoner or to the mistaken conduct of the case by the prisoner or his adviser.

APPEAL from a conviction before a judge and jury in the 1st Midland Circuit.

V. Panditha Gunawardene, for the accused, appellant.

Nihal Gunasekera, C.C., for the Crown.

September 9, 1940. HOWARD C.J.—

In this case Counsel for the appellant makes no complaint with regard to the charge of the learned Judge, nor does he complain of the verdict of the jury, having regard to the evidence which was before them. On the other hand, he contends that evidence should be submitted to this Court which was not called before the jury, if justice is to be done. That evidence consists of the testimony of Suddahamy, the father of the appellant, who was accused with the appellant in the lower Court. He was in fact committed to take his trial before the Assize Court, but his case was not taken inasmuch as the Crown considered that the two men could not be tried together. The other evidence which Counsel for the appellant submits should be before this Court is that of a woman called Menikhamy, the mistress of the injured man. Her testimony was before the lower Court, but the Crown did not call her in the Assize Court, nor was her name on the back of the indictment. The appellant also desires to call the evidence of a man called Wilson Singho, who, it is urged, can speak in support of the appellant's *alibi.*

Now, to deal first of all with the evidence of Wilson Singho, we find that no application was made by the appellant to call this witness in the Assize Court, nor did he say at the time of the trial that he desired the evidence of this witness. In these circumstances, we are not prepared to make an order with regard to his evidence being produced before this Court.

The evidence of Menikhamy goes to show that the appellant was not present when the injured man was attacked. The third accused himself in a statement to the Magistrate says that he was the person who attacked the injured man with an axe on the night in question, and that the appellant was not present.

It is possible that if the evidence of these witnesses had been before the jury they might have come to a different decision. On the other hand,

if we allow that evidence to be tendered to this Court we shall in effect be substituting a trial by three Judges for a trial by jury. That is a course which we are not prepared to follow unless justice requires it. The point for consideration, therefore, in this case is whether justice requires it.

The appellant, when he asked for leave to appeal in this case, stated that he did not call these witnesses through ignorance. There may be something in this plea. He might have anticipated that the evidence of Menikhamy having been before the lower Court would also have been before the Judge and jury ; also, that the third accused, his father, being at his side in the dock would also have made the statement which he had previously made before the Magistrate and which he confirmed when he was asked in the lower Court whether he wished to say anything in his defence. In these circumstances, we think that these witnesses may not have been called as the result of the mistaken conduct of the case by the appellant.

Following the decision in *Rex v. Perry and Harvey*', we think that the Court ought not to be bound by any hard and fast rule never to allow further evidence to be called where the fact that it was not called at the trial was due to the mistaken conduct of the case by the prisoner or his adviser.

We think that this is a case where it is plain that justice requires it, and we think that the Court should interfere to protect the appellant from his bad management of his case at the trial. We, therefore, order that the witness Menikhamy and the third accused Suddahamy should be produced before this Court to give their evidence.

We further order that the case should be listed for September 23, and that the evidence should be taken on that day. At the same time we give leave to apply for a further date, if the necessity should arise.