Bandaranaike

v.

Premadasa

COURT OF APPEAL
SOZA, J., AND RODRIGO, J.
C.A. (S.C.) 15/78 (INTY)
APPLICATION No. LA 52/78
D.C. COLOMBO 1/672 M
OCTOBER 4, 5, 6, 11, 13, 17, 18, 19 AND 20, 1978.

Evidence – Witnesses – Order of calling them in civil cases – If defendant is calling witnesses and himself giving evidence should defendant give evidence first ? – Corroboration in advance – Prejudice – Evidence Ordinance S. 135, 136(2) and 157 – Hearsay – Practice – Adversary system.
Principles of Natural Justice –

Principles of Natural Justice – Audi Alteram partem.

The appellant complained of five orders of the District Judge directing that the defendant, if he was giving evidence, should give evidence before he calls the evidence of the witnesses whom his counsel moved to call at different stages and with reference to whom the five impugned orders were made.

Held :

1. When the Judge in his first order held that the normal procedure that is followed in courts should be observed in this case too and the defendant should give evidence prior to his witness being called, he was not purporting to exercise any discretion but was rather following what he stated

(though wrongly) was the practice of the court. The other four orders though non-speaking orders, speak the language of the first order.

2. Section 135 of the Evidence Ordinance in effect lays down that in civil proceedings the order in which the witness should be called shall be regulated

(a) by the law relating to civil procedure and
(b) by the practice relating to civil procedure
(c) in the absence of any such law, by the discretion of the court.

The court can exercise its discretion only where there is no law regulating the order of calling witnesses but where there is only a practice the court is not prohibited from departing from it and exercising its discretion.

Sections 136(2) and 157 of the Evidence Ordinance govern the order in which witnesses may be called on the basis of admissibility of evidence. Under 136(2) if proof of a fact is admissible only upon proof of another fact the latter fact must be proved first unless an undertaking is given to prove the latter fact later. Under S. 157 evidence of a former statement of a witness cannot be adduced in anticipation of the evidence of the maker of the statement. In the instant case however none of the witnesses proposed to be called were to give evidence of a former statement of the defendant-appellant.

In Sri Lankan courts where sections 136(2) and 157 do not apply, the practice is that the right to determine the order of calling witnesses is given to Counsel subject to the overriding discretion given to the Court by Section 135 to direct the order in the interests of justice. This practice giving the Counsel the right to decide what witnesses he will call and in what order, is linked at one end with the adversary system and at the other end with the audi alteram partem rule of natural justice: with the adversary system because the judge is cast in the role of an impartial umpire ruling on the case as presented by the counsel and not descending into the area of combat; with the audi alteram partem rule of natural justice because the judge has to give the counsel an opportunity of being heard and presenting his case to the best possible advantage of which the corollary is that the Counsel is entitled to call his witnesses in the order he chooses. The Court will interfere with the practice in the exercise of its discretion only in an exceptional case to avert a miscarriage of justice.

Cases referred to

1. *Wilson v. Gotfrey (1972) 26 L.T. (N.S.) 481*
2. *King v. Majid [1914] 17 NLR 254*
3. *King v. Silva (1928) 30 NLR 193, 195*
4. *Dassee v. Bose [1900] 3 Cal. Weekly Notes XVI*
5. *Shwe Kin v. Emperor (1907) 5 C.L.J. 411*

6. *Muthu Coundan v. Chinniah Coundan AIR 1937 Madras 861*
7. *Goonesekera v. Inspector of Police, Kiriella (1947) 49 NLR 119*
8. *Subramaniam v. Public Prosecutor [1956] 1 WLR 965, 970*
9. *Nawaz Khan v. Regina [1967] 1 All ER 80, 82*
10. *R. v. Smith (Joan) [1968] 2 All ER 115*
11. *The Queen v. Tennakone Mudiyanselage Appuhamy [1959] 60 NLR 313, 328*
12. *Edwards v. Martyn L. J. Rep. [1852] 30 (N.S.) 21 Q.B.D. 87*
13. *Scales v. Cheese [1844] 12 M & W 685, 687*
14. *Jacobs v. Layborn [1843] 11 M & W 685, 690*
15. *Poyser v. Minors [1881] 7 QBD 329, 333, 334*
16. *Lever Brothers, Limited v. Kneale and Bagnall [1937] 2 KB 87*
17. *In re Shoesmith [1938] 2 KBD 637*
18. *State of Saraikella v. Union of India (1951) SCR 474, 513*
19. *Yonge v. Toynbee [1910] 1 KB 215, 220*
20. *Hanifa v. de Mel [1952] 46 CLW 97, 100*
21. *Attorney-General v. Rawther (1924) 25 NLR 385*
22. *The King v. Chandrasekera (1942) 44 NLR 97*
23. *Kedar Nadar Ghose v. Surendra Nath Boss and another (1900) 5 Cal Weekly notes XV*
24. *Lakshmi Chand v. Mukta Parshad and Others (1926) 92 IC 1006, 1007*
25. *Jarat Kumari Dassi v. Bissessur Dutt (1912) 39 Cal. 245, 263*
26. *Briscoe v. Briscoe [1966] 1 ALL ER 465, 466*
27. *Barnes v. BPC (Business Forms) Ltd [1976] 1 All ER 237, 239*
28. *Evans v. Bartlam [1973] AC 473*
29. *Sundaram v. Gonsalves (1948) 51 NLR 15*
30. *Yapa Anthony v. Don Davith (1937) 10 CLW 25*
31. *Wijewardena v. Lenora (1958) 60 NLR 457, 463, 364*

INTERLOCUTORY APPEAL from five orders of the District Judges of Colombo.

C. Thiagalingam Q.C. with *Anil Obeysekera, Nawaz Dawood, S.C.B. Walgampaya* and *P. Dayasri* for defendant – appellant.

C. Ranganathan Q.C. with *P. Navaratnarajah,* Q.C. *K. N. Choksy, S. Sunderalingam, K. Sivananthan, C. Ranadheera* and *Ikram Mohamed* for plaintiff –respondent.

Cur. adv. vult.

November 22, 1978.

SOZA, J. read the following judgment of the Court.

This is an interlocutory appeal from five orders made by the learned District Judge of Colombo on the question of the order in which the defen-

dant-appellant should call his witnesses. The orders complained of were made on 4th August 1978 at the commencement of the defence in this suit where the defendant-appellant is defending himself against a claim for damages in a sum of Rs. 150,000/- for making certain statements defamatory of the plaintiff-respondent at two public meetings held on the 3rd and 4th April 1976 in connection with the by-election for the Ja-ela seat then due to be held on 23rd April 1976. The defendant-appellant (hereafter referred to as the appellant) was the Chief Organiser of the Sri Lanka Freedom Party Youth League and the meetings referred to were held in support of the Party candidate. The plaintiff-respondent (hereafter referred to as the respondent) was the Chief Organiser of the United National Party.

The appellant in the answer admitted uttering the defamatory words complained of but pleaded qualified privilege as a defence and also put damages in issue. Twelve issues were raised at the trial which began on the 4th August 1978 but, in view of the admissions, the Court had before it only two important questions to resolve:

(1) Were the words complained of uttered by the appellant on an occasion of qualified privilege on information honestly believed to be true and made as fair comment and in the exercise of his right as the Chief Organiser of the S.L.F.P. and in the discharge of his duty to his audience?

(2) What damages was the respondent entitled to?

After the issues were accepted, learned counsel for the respondent closed his case without leading any evidence.

Opening his case learned Counsel for the appellant submitted he would establish that the words were uttered by the appellant in the honest belief that they were correct, on information he had the truth of which he believed. He then moved to call P.C. 3608 Jayamaha as his first witness. Learned Counsel for the respondent objected and submitted that the appellant should give evidence first. He assumed that the appellant will be called as a witness from the averments in paragraph 4 of the answer. There were two grounds of objection advanced:

1. This was an attempt to corroborate the appellant's evidence in advance.

2. No prejudice would be caused to the appellant if he gave evidence first.

Learned counsel for the defendant replied that he was not calling P.C. Jayamaha to corroborate anything the appellant was going to say. He was only

calling him to lay the foundation for the defence that the appellant honestly believed the truth of the information he received. Further he claimed that the respondent's Counsel had no right to dictate to him in what order he should call his witnesses. During the argument before us it has been pointed out that P.C. Jayamaha was merely going to say that the respondent had called the appellant a "pakis buruwa" and compared him to a frog between two lotuses in a pond, at a meeting held in support of the U.N.P. candidate on the afternoon of 4th April 1976 a few hours before the S.L.F.P. had their meeting of that day at which the appellant spoke. The respondent's counsel had a copy of the notes of P.C. Jayamaha. It was not the appellant's case that P.C. Jayamaha communicated any information to the appellant. The Court however refused the application to call P. C. Jayamaha and made the first of the orders complained of. The full text of this order is as follows:

> "I understand from Mr. Thiagalingam that he intends to call P. C. Jayamaha in order to show that the plaintiff had abused the defendant and that the defendant was possessed of that information that he had been abused before he uttered the words complained of in this case. My view is that the normal procedure that is followed in courts should be observed in this case too and the defendant should give evidence prior to this witness being called".

Following this order an application was made to call another constable P.C. 8943 Jayatilleke to show, as learned counsel for the appellant put it, the filthy language which respondent used and how he abused the appellant and his mother in foul language. This too was objected to on the same ground as before. The Court thereupon made the second order appealed against. It reads as follows:

> "I am still of the opinion that the defendant should give his evidence prior to P.C. Jayatilleke".

The next defence move was an application to call P.C. 6061 Hemachandra, P.C. Fernando and P.C. Kumaradasa on the question of damages only, to say that the respondent is "not held in esteem". On this occasion learned counsel for the appellant even stated he may not call the appellant as a witness. Here it must be observed that to prove that a defendant spoke words defamatory of a plaintiff, honestly believing in the truth of the information he had, it is not always essential that such defendant should give evidence. If the informant is creditworthy and the content of the information supports the necessary reference, the evidence of the informant alone may suffice to establish the defence. Further the question of damages is an independent issue and a party may content himself with getting damages reduced to a nominal amount. The objection was however taken that the purpose of calling these witnesses was to corroborate the evidence of the appellant. Here followed the third order of the Court:

"Mr. Thiagalingam states that witnesses Hemachandra, Fernando and Kumaradasa will testify in regard to damages. I direct that these witnesses be called after the defendant if the defendant desires to give evidence in this case".

Learned Counsel for the appellant then moved to call the Clerk to the House of Representatives to say that even in Parliament the respondent used to "talk without repsect". The objection again was that the witness was being called to corroborate the appellant. On this objection the Court ruled as follows:

"I indicate to Mr. Thiagalingam that he should call the defendant prior to the Clerk to the House of Representatives".

Finally learned Counsel applied to call a string of witnesses, Peter Mendis, P. B. G. Kalugalla, D. H. S. Jayawardena, S. A. Robert, Kalu Banda, Robert Perera, Ariyaratne and David Perera, all informants of the appellant.

The objection was on the same ground as before, and on this the Court made the last of the orders we are called upon to review:

"Witnesses D. H. S. Jayawardena, S. A. Robert, Kalu Banda, Robert Perera, Mr. P. B. G. Kalugalla, Ariyaratne, and David Perera are to give evidence in regard to the information that the defendant received and/or in regard to the character of the plaintiff. As indicated by me earlier in regard to the other witnesses, if Mr. Thiagalingam proposes to call these witnesses, my view is that all these witnesses should give their evidence after the defendant if the defendant proposes to give evidence in this case".

Thereafter there were some proceedings regarding the marking of some documents which need not detain us. Learned Counsel for the defendant then moved Court to stay further proceedings as he wished to canvass the orders made on the calling of witnesses. Argument on the question was deferred for the next day of hearing namely 7th August 1978. The proceedings of the 4th August ended with learned Counsel for the appellant assuring learned Counsel for the respondent that the case would be "conducted" and the appellant would get into the witness box.

On resumption of the trial on 7th August 1978 the Court after hearing counsel on both sides made order refusing the application to stay proceedings. Thereupon the appellant was called into the witness box under protest. The evidence so far elicited from him consists of introductory matter and, we may add, presents no obstacle to the order we propose to make in this case.

The question we have to decide concerns the order in which witnesses should be called at the trial of a civil case. The order in which witnesses in

both civil and criminal trials may be called is provided for in section 135 of our Evidence Ordinance. This section reads as follows:

> "The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively and, in the absence of any such law, by the discretion of the court".

Section 135 in effect lays down that in civil proceedings the order in which witnesses should be called and examined shall be regulated –

(a) by the law for the time being relating to civil procedure, and

(b) by the practice for the time being relating to civil procedure, and

(c) in the absence of a law applicable to civil procedure, by the discretion of the court.

Thus the court can exercise its discretion only in areas where there is no law regulating the order in which the witnesses should be called. Where the question is governed only by practice it is obvious that the court may, if the circumstances demand it, depart from the practice and control the order of calling the witnesses in the exercise of its discretion.

The law relating to civil procedure in civil courts is contained principally in the Civil Procedure Code and in the Evidence Ordinance.

The Civil Procedure Code contains no direct provisions regulating the order in which witnesses should be called. Such provisions as there are, like section 178 relating to the recording of evidence de bene esse of a witness because he is about to leave the jurisdiction or for other special reason, or section 179 relating to the taking of evidence on a commission, may by inference be understood as limitedly controlling the order in which the evidence of particular witnesses may be led. It was submitted for the appellant that section 151 of the Civil Procedure Code prescribes that witnesses should be so presented as to ensure that they speak to events in their chronological order. What section 151 and the explanation appended to it state is that the party having the right to begin shall produce his evidence by calling his witnesses and by questioning them elicit, as nearly as may be in the chronological order, a narrative of all the facts relevant to the matter in issue between the parties, which he has witnessed. The same direction applies to the opposing party when it comes to his turn to present evidence – see section 163 of the Civil Procedure Code. These provisions apply to the content of each witness's evidence and not to the order in which the witnesses should be called. Hence we do not agree with learned Counsel for the appellant in regard to his interpretation of section 151.

We will now turn to the Evidence Ordinance. Here apart from the general provisions in section 135 the only provisions which may be interpreted as stipulating the order in which witnesses should be called are found in sections 136 and 157 but these two sections too are limited in scope. Subsection (2) of section 136 states that if the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact the latter fact must be proved first unless an undertaking is given to the satisfaction of the Court to prove the latter fact later. If the two facts involved are being spoken to by different witnesses then we would have an occasion where the law regulates the order in which the witnesses should be called.

Before we come to section 157 we may mention that section 156 of the Evidence Ordinance deals with the question of how a witness whom it is intended to corroborate may be questioned. The section provides for the admission of evidence given not to prove a relevant fact but to test a witness's truthfulness. For the purpose of corroborating the testimony of a witness as to any relevant fact he may be asked about other surrounding circumstances or events observed by him at or near to the time or place at which such relevant fact occurred. The principle of section 156 is consistent with the principle laid down in the English case of **Wilcox v. Gotfrey**[1] where Martin B. held that corroboration of a fact may be established not only by proof of what has taken place afterwards but equally by what has taken place before.

Section 157 of the Evidence Ordinance deals with corroboration. This section permits the proof of a former statement of a witness, if made relating to the same fact at or about the time when the fact took place or to any authority legally competent to investigate the fact, to corroborate the testimony of such witness. The section has been repeatedly interpreted to imply that evidence of a former statement cannot be adduced in anticipation of the evidence of the maker of the statement.The maker of the statement must give evidence first and thereafter he can be corroborated by the witness to whom the former statement was made. To do otherwise would result in the admission of hearsay inadmissible at the stage at which it is led – see the case of **The King v. Majid**[2]. Fisher C. J. in enunciating the same principle in the case of **King v. Silva**[3] stated "a witness cannot be corroborated in advance. . . .". The expression "corroboration in advance" appears thereafter to have gained a wholly unwarranted currency in our legal parlance. The fact that the expression was first used in the interpretation of section 157 and the reason given, namely inadmissibility because of the hearsay rule, tend to be overlooked. Reasoning similar to that applied in the case of **The King v. Majid** (supra) and **King v. Silva** (supra) was applied in several Indian cases – see for instance **Dassee v. Bose**[4], **Shwe Kin v. Emperor**[5] and **Muthu Goundan v. Chinniah Goundan** [6]. On the other hand in the case of **Goonesekere v. Inspector of Police, Kiriella**[7] Windham J. held that corroborative evidence under section 157 even though called in advance of the evidence to be corroborated, will not vitiate the trial unless prejudice be caused to the accused.

Sections 136(2) and 157 therefore govern the order in which witnesses should be called on the basis of admissibility of evidence. It should be observed that in the instant case none of the witnesses were to give evidence of any former statement of the appellant. The witnesses proposed to be called fell into four classes:

1. Witnesses with whom the appellant had no communication who would speak to what they themselves saw and heard e.g. P.C. Jayamaha.

2. Witnesses who communicated to the defendant what they themselves saw and heard e.g. Ariyaratne.

3. Witnesses who informed the appellant of what they came to know from others e.g. P. B. G. Kalugalla.

4. Witnesses regarding the character of the respondent – relevant on the question of damages – e.g. P.C. Jayatilleke.

Some witnesses fall into more than one category. Of the witnesses proposed to be called only those in the third category were to give hearsay evidence but even so, such evidence would have been admissible hearsay because what was being sought to be proved was not the truth of the information but the fact that it was given. The object of leading this evidence was to establish before the Court that the appellant received information and acted honestly believing the truth of this information. As has already been pointed out he could stake his case on his informants' testimony and not give evidence himself. It is not necessary that the appellant should establish the truth of his information. It is adequate if he proves that he received information and honestly believed it to be true. As is stated in the last paragraph of the explanation to section 151 of the Civil Procedure Code a witness is not barred from stating hearsay if it is relevant to the case. **Wigmore** in his work on **Evidence (3rd ed.) Vol. 6 p. 178** explains the rule that applies thus:

> "The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realised, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted".

The rule has been explained thus in the case of **Subramaniam v. Public Prosecutor:**[8]

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of

what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made".

The above principles were adopted by the Privy Council in the case of **Mawaz Khan v. Regina.**[9] Lord Hodson delivering the judgment of the Board said:

"Their Lordships agree with Hogan C.J. and Rigby A.J. in accepting the generality of the proportion maintained by the text writers and to be found in **Subramaniam's** case that a statement is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made".

Therefore the evidence of the informants will, to put it in the language of Wigmore, "legally pass the gauntlet of the Hearsay rule because it does not apply to them".

It will be seen that none of the witnesses in the four groups were being called (so far as could be judged at that stage) to give evidence repugnant to any provisions of law. This fact remains unaltered even if we bear in mind the distinction between cumulative evidence and corroborative evidence.

By way of final comment on this matter we would like to add as a general observation that all witnesses whom a party calls would give evidence in one way or another corroborative of the case of the party who calls them. This does not mean that such party would invariably have to give evidence first. The whole question would depend on the nature and content of the evidence being called; for ordinarily corroborative evidence simply means fortifying evidence whether it is evidence of different or similar facts or additional evidence of the same fact. Accordingly it would be fallacious to adopt corroboration as a test in every case.

It is remarkable that although on every occasion the objections of learned counsel for the respondent were based in a very large way on the contention that corroborative evidence was being attempted to be led in advance, the learned District Judge did not refer to it even once in a single of the five orders he made.

On the other hand the first order the learned District Judge made was that in his view the normal procedure that is followed in courts should be observed on that occasion too and therefore the appellant should give evidence before the witness proposed to be called. It was strenuously contended that what the Judge did here was to make an order in the exercise of his discretion as is permissible under section 135 of the Evidence

Ordinance. We cannot agree that the use of the words "my view" in the order implies the exercise of discretion. What the learned Judge did was to declare his opinion that the case was one in which the practice of the courts should be followed. There is, in section 135 every justification for such a step. But is the practice of the courts what the Judge declared it to be? There is no judicial pronouncement in our law reports on this matter and learned counsel for the respondent submitted that it is not open to this court to declare what the practice is in the absence of the question being put in issue in appropriate proceedings and proved as a custom would be proved.

A perusal of the decided cases shows however that time and again, when the occasion required it, Judges have declared the practice of the courts without the formalities which learned counsel for the respondent says should be observed.

In criminal cases the practice of the courts in England was stated on the basis of the experience of the Judges of the Court of Appeal (Criminal Division) in **R. v. Smith (Joan)**[10] where the Court said as follows:

> "It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before the other witnesses who may be called on his behalf".

In the local case of **The Queen v. Tennakone Mudiyanselage Appuhamy**[11] His Lordship Basnayake, C.J. expressed the view that the practice in criminal cases both in Sri Lanka and in England was to call the accused first. This practice no doubt owed its origin to the fact that in a criminal trial, unlike in civil proceedings, it was essential that the accused should be present in court when the evidence was being led unless of course the law expressly excused his absence. In this situation if the accused gave evidence after his witnesses he would be tempted to trim his own evidence.

Similarly in civil cases there are instances where Judges have made pronouncements on what the practice was when the need for it arose. In the case of **Edwards v. Martyn**[12] Lord Campbell C.J., Patteson J. and Coleridge J. stated that the practice which prevailed of discharging from custody under an execution, a married woman who had no separate property out of which the judgment-debt could be satisfied, prevails equally whether the husband be or be not taken in execution with her. In **Scales v. Cheese**[13] Trindal C.J. observed that—

> "Every court is the guardian of its own records and master of its own practice".

In **Jacobs v. Layborn**[14] Lord Abinger C.B. ruled that the practice was to allow objection to be taken to the competency of a witness if the incompetence became manifest during the examination-in-chief and not

necessarily on the voir dire. His Lordship based his pronouncement on the authority of cases and of Judges of repute and on the "testimony" of his "own experience".

It is therefore open to us, and indeed it is our duty in this case, to state what the practice is drawing on our own knowledge and experience.

The word "practice" as used in our courts carries three shades of meaning:

1. "Practice in the larger sense. . . . denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product.

   'Practice' and 'procedure', . . . I take to be convertible terms – per Lush L. J. in **Poyer v. Minors.**[15] This definition was approved by Slesser L. J. in **Lever Brothers, Limited v. Kneale and Bagnall**[16] and **In re Shoesmith.**[17] A similar definition was given by Mahajan J. in **State of Saraikella v. Union of India.**[18]

2. "The 'practice' of a court, when that word is used in its ordinary and common sense, denotes the rules that make or guide the cursus curiae, and regulate procedure within the walls or limits of the court itself, and does not involve or imply anything relating to the extent or nature of its jurisdiction" – see Stroud's Judicial Dictionary 4th ed. 1975 p. 2077. The maxim cursus curiae est lex curiae emphasises this aspect of the meaning of the term.

3. "The expression 'practice and procedure' is not confined to steps in the action itself, but covers also matters in connection with the action" – per Buckley L.J. in **Yonge v. Toynbee**[19]. This definition was approved by Slesser L.J. in the case of **In re Shoesmith** (supra).

With these variants of the meaning of the term 'practice' before us, we will now address ourselves to determining the practice of our courts. In doing so could we look to the practice of other jurisdictions? Learned counsel for the respondent submitted that the practice of England cannot be regarded as the practice in Sri Lanka. For a correct appreciation of the question some notice of the historical background of our Evidence Ordinance would be apposite. Despite the Proclamation of 23rd September 1799 retaining Roman-Dutch Law, English rules of evidence had infiltrated into our courts although not expressly through positive enactments. This was no doubt because our judges were all men trained in the English tradition. Then came a series of Ordinances – Nos. 6 of 1834, 3 of 1846 and 9 of 1852 – whereby a great many English principles of evidence became firmly entrenched in Sri Lanka. Finally on the recommendation of Chief Justice Budd Phear the Indian

Evidence Act No. 1 of 1872, with slight adaptations, was adopted and passed as our Evidence Ordinance No. 14 of 1895. The Indian Evidence Act itself is a codification with modifications of the principles of the law of evidence developed by the English courts. Our Evidence Ordinance closely follows the Indian Act but the two statutes are not identical. Section 100 of our Ordinance, for instance, which provides for recourse to English law in the event of a casus omissus is not found in the Indian Act. Further, our section 2 is not found in the Indian Act. By subsection (2) of this section all rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of the Ordinance, were repealed – see Nadaraja: **The Legal System of Ceylon in its Historical Setting** (1972) pp. 259, 260 and **Hanifa v. De Mel.**[20]

After the Evidence Ordinance came into force its provisions along with any other statutory provisions enacted relating to evidence, constitute our law of Evidence and take precedence over all other sources. On matters provided for by the Evidence Ordinance the language of its sections becomes the primary source of our law and should be supplied. No doubt English judicial decisions may legitimately be referred to in the interpretation of such of our sections as are based on English law; yet they are at most of persuasive authority. English decisons however will be absolutely binding if resorted to under section 100 of the Evidence Ordinance – see **Attorney-General v. Rawther.**[21] **The King v. Chandrasekera.**[22] and **Dr. Mark Cooray's** article in the **Colombo Law Review 1969 p. 105.**

The order in which witnesses may be called being provided for by section 135 of our Evidence Ordinance, the decisions of English and Indian Courts on this subject can be no more than of persuasive value in Sri Lanka. Yet reference can be made to them with profit.

Monir in his **Principles and Digest of the Law of Evidence** 4th ed. 1958 Vol. 11 p. 854 has this observation to make on the Indian Section 135 which is identical with ours:

> " . . . there is no definite rule of law or definite rule of practice as to the order in which the witnesses of a party are to be produced and examined; and, therefore, it is generally left to the discretion of the party or his counsel to lead his evidence in the order he considers proper, and the Court is very slow to interfere with this discretion . . . . . Under the present section however, the Court has the power to interfere and to direct the order in which the witnesses of a party shall be examined".

Similar views have been expressed by several other commentators on the Indian Evidence Act. In the Indian case of **Kedar Nadar Ghose v. Burendra Nath Bose and another**[23] counsel for the defendant at the close of the examination-in-chief of the plaintiff's first witness moved that the cross-examination be deferred until after the examination-in-chief of the plaintiff.

He submitted that the order of examination, in the absence of any law relating to civil procedure, should be regulated by the discretion of the Court. The plaintiff should have been called first to give his account of the transaction. Stanley, J. held as follows:

> "The Court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined. I think in the present case the ordinary practice should regulate the order of examination and that the witnesses should be cross-examined at the conclusion of the examination-in-chief."

In the case of **Lakshmi Chand v. Mukta Parshad and others**[24] the defendants had examined the plaintiff before putting one of themselves into the witness-box and, on an objection taken by the plaintiff, the District Judge had disallowed the statement of the defendant on the ground that the defendants should, if they wished to take a statement of the defendant, have taken it before the statement of the plaintiff was recorded. The District Judge seemed, as was said when the matter was being reviewed, to have been influenced by an announcement of the defendant that he would be giving evidence. In appeal the Court said:

> "I do not see that it was the duty of the Court to direct the party as to the order in which he was to lead his witnesses".

On the other hand there have been occasions when the Court has in its discretion interposed its own directions in regard to the order in which witnesses should be called. In this connection reference should be made to what Woodroffe, J. stated in **Jerat Kumari Dassi v. Bissessur Dutt**[25]:

> "As regards Bissessur, the learned Judge points out that he abstained from going to the witness-box until all his witnesses other than the experts and formal witnesses had given evidence. The Court might, and I venture to say under the circumstances of the case, should have directed that the caveator be examined earlier, if not (as would have been proper) in the first place. The Court has always the power to do this under Section 135 of the Evidence Act".

This was a case where a last will was being challenged by the caveator as not being the act and deed of the deceased testator.

Turning to the English cases we have **Briscoe v. Bricoe.**[26] Here the Magistrate had in a civil matrimonial proceeding directed that the husband who was the party in the case should be called first before any other witness. Karminski J. held in this case that the discretion lay with the Counsel to call what witnesses he chose, in what sequence he chose whatever the practice was in criminal cases. He said:

> "What we are concerned with here in a matrimonial suit is the duty of the court and the duty of counsel respectively to decide what evidence is called and in what order it is called. Speaking for the moment entirely for myself I have always thought, that the duty of deciding what witnesses should be called and in what order they could be called is solely a matter for Counsel. It is a grave responsibility and, it rests on him and on him alone, and I think, that point of view was also accepted by counsel who appears for the wife in this appeal. There is nothing so far as I can see in the Magistrate's Courts Act, 1952, or in any rules made under it, which seeks to dictate the order in which witnesses shall be called".

The Judge added:

> "The discretion which must lie with counsel to call his witnesses as he pleases, and in the order he pleases, was overborne by the Court".

In the same case Lane J. stated her opinion as follows:

> "It seems to me to be a matter of quite fundamental importance that counsel should retain the right, which I have always understood them to have, to choose what witnesses to call and in what order".

In another English case **Barnes and another v. BPC (Business Forms) Ltd**[27] Phillips, J. quoted Counsel as saying that the appellants had been deprived of a fundamental right which belonged to their legal representative, that is to say, the right to call witnesses in the order that he thought best and that there had been a breach of natural jusitice. Phillips, J. referred to **Briscoe v. Briscoe** (supra) and added:

> "So one can see at once that there was a substantial practical impairment of his (counsel's) right to conduct the case as he thought fit".

In England in civil proceedings the discretion of counsel to decide on the selection of witnesses and the sequence in which they should be called is recognised, as a fundamental right. Learned Counsel for the appellant submitted that though in the English judgments the statement of the principle is so phrased, still it is necessarily subject to the residual right of a Court to interfere where necessary.

The decided cases establish that both in England and in India the practice is that counsel enjoys the right to decide in what order he will call his witnesses. In England possibly, and in India certainly the Court has the power in its discretion to interfere with this right if the interests of justice demand it.

Our own experience and knowledge of the practice in our Courts (where section 136(2) and 157 do not apply) is that the right to determine the order of calling witnesses is given to Counsel. It is true that this practice is subject to an overriding discretion given to the Court by section 135 of our Evidence Ordinance just as much as it is given to the Courts in India under the corresponding section of their Act. But it does not make it the less a practice or make it non-existent. It exists and takes its course until the Court inrerferes. When Counsel calls his witnesses in the order determined by him, we do not agree that it must be inferred that he does so because the Court in its discretion has impliedly given him permission. The Court no doubt is in control of all proceedings before it but its power to interfere cannot always be equated with the concept of implied permission. Till the court interferes the practice takes its course on its own momentum so to speak. In fact the very word "interfere" as the commentators say, connotes meddling in somebody else's business, and in this context, the business of Counsel. Except where the law prescribes otherwise and subject to the overriding discretion of the Judge, the practice of our Courts in Sri Lanka is to give the right to counsel to decide what witnesses he will call and in what order. This practice is linked at one end with the adversary system of trial in civil cases and at the other end with the audi alteram partem rule of natural justice.

When we speak of the adversary or accusatorial system as distinguished from the continental inquisitorial system, we refer to a particular philosophy of adjudication whereby the function of the counsel is kept distinct from that of the Judge. It is the function of counsel to fight out his case while the Judge keeps aloof from the thrust and parry of the conflict. He acts merely as an impartial umpire to pass upon objections, hold counsel to the rules of the game and finally to select the victor. This common law contentious procedure has its defects and has been criticised by jurists like Roscoe Pound (see Landmarks of Law ed. Hensen – Beacon series pp. 186, 187) but it is the Anglo-American system and prevails in India and Sri Lanka too. In fact the **Foster Advisory Committee** in its **Report on the English Civil Procedure** (1974) recommends the retention of the adversary system of procedure – see the **Stevens** publication of the report – chapter 5 paragraph 102 pp. 28, 29. This system is built on the English notion of fairplay and justice where the Judge does not descend into the arena and so jeopardise his impartiality. Under this system it is counsel's duty to prove the facts essential to his case with the other party striving to disprove these facts or to establish an affirmative defence. It is logical therefore, subject to the strict rules of evidence, to leave the choice of witnesses and the order of calling them to counsel as it is his business so to present his case as would best advance his client's cause. The Court will interfere in the exercise of its discretion only in an exceptional case to avert a miscarriage of justice.

The practice we have mentioned is also linked to the audi alterm partem rule of natural justice which is one of the fundamental tenets of our law. This rule enjoins on the adjudicator the duty of giving every party to a lawsuit an

opportunity of being heard and therefore of presenting his case, so far as the law permits, to the best possible advantage. Such a right carries the corollary that his counsel is entitled to call his witnesses in the order he chooses.

In the instant case we do not agree with what the learned District Judge stated in his first order that the normal procedure in our Courts is to call the defendant first. This view of the learned District Judge, it is reasonable to infer, influenced him in every one of the remaining four orders he made on the question of the order of calling witnesses, although he did not expressly say so in every one of them. This inference is supported by the learned District Judge's reference to his earlier orders in the fifth order he made. It was submitted by learned Counsel for the respondent that some of the orders are non-speaking orders. True enough; but we think that in the circumstances and the context they speak the language of the first order. Everything points to the fact that the learned District Judge applied what he thought to be the practice in every one of his five orders. He obviously did not consider that he should depart from the 'normal procedure' or practice and elect to issue directions in the exercise of his discretion. The learned District Judge in our view was in error on every occasion when he insisted that the appellant should be called first if at all and before any of his witnesses. The five orders complained of therefore cannot stand.

Learned Counsel for the respondent submitted that in any event it is our duty by way of review to exercise the discretion vested in the Court by section 135 even where the trial Judge has failed to exercise it. We were referred to several cases and the dicta of Lord Atkin and Lord Wright in the House of Lords decision in **Evans v. Bartlam.**[28] Lord Atkin in his speech in this case said as follows at pages 480, 481:

> " . . . . while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the Judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it".

Lord Wright voiced a similar opinion at page 486:

> "It is clear that the Court of Appeal should not interfere with the discretion of a Judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the Judge had the discretion and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine all the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the Judge might be regarded as independent of supervision".

In the case of **Sundaram v. Gonsalves**[29] Basnayake C. J. approving the decision of Hearne, J. in **Yapa Appuhamy v. Don Davith**[30] held that where the Court of trial has exercised no discretion at all in a matter where it should have acted in its discretion and had instead acted arbitrarily, the appellate court will interfere. The same Judge said as follows in the case of **Wijewardene v. Lenora**[31]:

> "The mode of approach of an appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the Judge composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principle of law or allowed extraneous or irrelevant considerations to guide or affect him, or that he has mistaken the facts, or not taken into account some material considertion. Then only can his determination be reviewed by the appallate Court.
>
> Now where such a wide discretion has been given to a sub-ordinate Court the appellate Court should be careful not to restrict it by laying down rules which the Legislature has not prescribed".

We are in respectful agreement with the principle enunciated in these cases on the question of the exercise of discretion. But in the instant case we are not reviewing the exercise by the learned District Judge of his discretion nor an arbitrary order made by him where he should have acted in the exercise of his discretion. This is not a case where he was bound to exercise his discretion. He has chosen to follow what he declared was the practice of our courts and that is what we are here reviewing. In any event we do not see adequate reason to warrant the court departing from the practice and acting in the exercise of the discretion vested in it. Therefore we are unable to accede to the invitation to us to exercise our discretion under section 135 of the Evidence Ordinance.

Learned Counsel for the respondent argued that great prejudice would be caused to his client if the appellant is not called first while no prejudice would be caused to the appellant. He submitted that if the appellant's witnesses give evidence first it would merely have the effect of "slinging mud" on the character of the respondent. The causing of prejudice however is inevitable in our adversary system and we do not see that that alone will defeat the ends of justice. Further if the evidence of the appellant's witnesses will amount only to "mud-slinging" we cannot see how this can be avoided by calling them into the witness-box at the end rather than at the beginning. The Court on the other hand has the power and the duty to forbid questioning which is intended to insult or annoy or which is needlessly offensive and to prevent the witness-box from being used merely to indulge in scurrility and scandal.

Our attention was drawn to Article 138 of the Constitution. This Article carries a proviso that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. In our view the orders made in the District Court which are before us for review are in contravention of the right of the appellant's Counsel which the practice of the courts has given him to decide what witnesses he will call and in what order so long as there is no infringment of any rule of law and so long as the circumstances do not justify the interposing of the discretion vested in the Judge.

For the reasons as have given we allow this appeal and set aside the five orders which are the subject of the appeal. The proceedings from the stage of Counsel opening his case for the appellant including the incomplete evidence of the appellant are all set aside. We direct the trial to be continued from the stage at which respondent's case was closed. The trial may be continued by the same District Judge who made the orders we have set aside or by any other Judge of the District Court of Colombo. We may add that no prejudice will be caused by a different Judge continuing the trial as no evidence has been led on behalf of the respondent. During the argument before us, we were informed that this appeal was filed mainly to vindicate the rights of Counsel in the conduct of civil trials. This we believe has been achieved. Hence so far as the costs of this appeal are concerned let the parties bear their own costs.

Appeal allowed and case sent for trial to be continued.