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THE KING *v.* DIAS.

D. C., Colombo, 75,706.

False evidence—Penal Code, s. 190—Contradictory statements—Alternative count in indictment—Criminal Procedure Code, 1883, s. 509, and form of indictment at p. 368—Criminal Procedure Code, 1898, s. 439 (2).

The Criminal Procedure Code of 1898 nowhere provides that, in a prosecution for intentionally giving false evidence under section 190 of the Penal Code the Attorney-General may present to the Court an indictment setting forth two irreconcilable statements made by an accused person, and averring in such indictment that one of such statements the prisoner either knew or believed to be false, or did not believe to be true.

An indictment for breach of that section must aver that the accused intentionally gave false evidence by knowingly and falsely stating something which he knew or believed to be false, or did not believe to be true, and that he thereby committed an offence punishable under section 190 of the Penal Code.

THE accused was convicted for an offence punishable under section 190 of the Penal Code, in that on the 24th March, 1902, in the course of an inquiry into case No. 74,945 in the Police Court of Colombo, he stated to the Magistrate in evidence, "The first accused Anthony came back with an open knife in hand, and without a word he stabbed the complainant. I saw him draw the knife from his waist and open it;" and that on the 7th August, 1902, in the course of the trial of case No. 441 of the District Court of Colombo he stated to the District Judge in evidence, "I did not see an open knife in the first accused's (Anthony's) hand as I told the Magistrate. I did not see him come with an open knife, nor did I see him stab."

The District Judge (Mr. N. E. Cooke) found the accused guilty and sentenced him to six months' rigorous imprisonment, holding that the two statements set out in the indictment were so contradictory and irreconcilable that one of them must be false and intentionally spoken.

The accused appealed.

Dornhorst, K.C. (with him *Van Langenberg*), for appellant, and *Rámanáthan, S.-G.*, for the Crown, were heard on 24th July, 1902.

In view of the doubt entertained by the presiding Judge as to the soundness of the judgment of the Supreme Court, pronounced in *Reg. v. Jasik Appu* (*4 N. L. R. 18*), in which Browne, A.J. held that, where two statements were so irreconcilable that one or

the other must be necessarily false, it was needless to offer any evidence to negative either statement, the case was ordered to be put on for argument before the Collective Court.

On 18th May, 1903, the case was taken up before Layard, C.J., Middleton, J., and Grenier, A.J.

Dornhorst, K.C., and *Van Langenberg*, for appellant.—The form of the indictment adopted in the present case is taken from page 368 of the Criminal Procedure Code of 1883. Such a form was sanctioned by section 509 of that Code, but that Code has been repealed by the present Code of 1898, and this form of indictment does not appear in it. It has been repealed. Nevertheless Browne, A.J., in *Reg. v. Jasik Appu* (*4 N. L. R. 18*), saw no objection to its use at present His reason was that it had been approved in India and followed by Lawrie, J. But all Indian decisions are founded on the form sanctioned by schedule V. of the Indian Code. *Starling's Indian Criminal Law, chap. XI. p. 234 (Sixth Edition)*. As that form copied into our Code of 1883 has been repealed by the Code of 1898, the decision of Browne, A.J., is not according to law, and should not guide the decision of this case. In section 439 (2) of the Code it is specially provided that in the case of the Supreme Court only it shall not be necessary to prove which of the contradictory statements alleged is false. That section does not apply to District Courts. *Queen v. Podinaide* (*1 Browne, 99*). If the Supreme Court accepts this contention, it will not be necessary to go into the second question raised in the Court below, viz., whether the District Judge was right in allowing a witness to refresh his memory by the notes of the evidence, interpreted by him to the Court and recorded by it.

LAYARD, C.J., called upon the Solicitor-General for the respondent.

Rámanáthan, S.-G.—The form of the indictment containing alternative statements is no doubt omitted in the Code of 1898, but it was not expressly repealed, nor is its use prohibited. There were forty-six forms in the Code of 1883, but the Code of 1898 has only fourteen forms. Nevertheless many of the old forms are still in use, because they are necessary forms. Section 439 of the present Code merely re-enacts the provision contained in section 19 of the Ordinance No. 1 of 1888. The power of the Supreme Court to try a witness who has contradicted the evidence previously given by him at an inquiry before the Magistrate, upon an indictment in the form (4) contained in schedule III. of the Code of 1883, was something additional to the power given by the Code to the Supreme Court and the District Court to try such cases upon

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commitment in regular form. When the Code of 1898 re-enacted this procedure, it stated that "at such trial it shall be sufficient to prove that the accused made the contradictory statements alleged," &c. These words do not mean that a special form of proof has been introduced in the Supreme Court. The Law of Evidence is the same for all Courts which have power to try cases of false evidence. Section 190 defines false evidence to be making any statement on oath or affirmation which one knows or believes to be false or does not believe to be true. Proof of such knowledge or belief is possible by direct or circumstantial evidence. If a person says now " I saw A stab B, " and afterwards " I did not see A stab B, " these statements are irreconcilably contradictory, and of themselves show that the person who made them knew, or believed, that one of them was false. The requirements of the definition of false evidence are fully answered by such evidence. [LAYARD, C.J.—If so, why did the Code of 1898 enact in section 439, " it shall be sufficient to prove that the accused made the contradictory statements," &c.?] Those words are unnecessary; they are words of supererogation. There is nothing in the Law of Procedure to prevent the Attorney-General from presenting an indictment for giving false evidence; nothing to prevent him from setting forth in the indictment the special manner in which the false evidence was given; and nothing in the Law of Evidence to prevent him from proving the offence of false evidence by direct or circumstantial evidence, such as the particular case admits of.

18th May, 1903. LAYARD, C.J.—

The indictment in this prosecution is for an offence against section 190 of the Ceylon Penal Code. It is drawn in the alternative form which was originally prescribed by section 509 of the Criminal Procedure Code of 1883 and the schedule attached to that Code. It has been held by this Court, that in view of section 509 of the old Procedure Code and section 4 of that Code, such an indictment was good. I have grave doubts as to whether those decisions were correct. They were decisions of single Judges only, and not of a Full Court; and had it been necessary in this appeal to review those decisions, I would have felt myself bound to hold that those judgments were not correct, even though it is alleged that they are supported by judgments of the Indian Courts. However, for purposes of my judgment, it is not necessary to take into consideration the judgments that were given by this Court prior to the passing of the Criminal Procedure Code now in force, for these decisions were based on the provisions of the Criminal Procedure Code of 1883, which were repealed by the

Ordinance No. 15 of 1898. The Ordinance No. 15 of 1898 nowhere provides that in a prosecution for intentionally giving false evidence under section 190 of the Penal Code, the Attorney-General may present to the Court an indictment setting forth two irreconcilable statements made by an accused person, and averring in such indictment that one of such statements the prisoner either knew or believed to be false, or did not believe to be true. An indictment for breach of that section must aver that the accused intentionally gave false evidence by knowingly and falsely stating something which he knew or believed to be false, or did not believe to be true, and that he thereby committed an offence punishable under section 190 of the Penal Code.

There is no provision in the present Criminal Procedure Code for an indictment under section 190 of the Penal Code in the alternative, except that section 439 of that Code provides that " If in the course of a trial by jury before the Supreme Court any witness shall on any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the Police Magistrate, it shall be lawful for the presiding Judge, upon the conclusion of such trial, to have such witness arraigned and tried by the same jury on an indictment for intentionally giving false evidence in a stage of a judicial proceeding, which indictment shall be prepared and signed by a Registrar," and that section further enacts that when such indictment has been presented and the prisoner has pleaded thereto, " it shall be sufficient to prove that the accused made the contradictory statements alleged in the indictment, and it shall not be necessary to prove which of such statements is false." I cannot remember, and the Solicitor-General has not referred me to any provisions of our Statute Law in which it is laid down that a person can be charged by the Attorney-General in the alternative as has been done in this case, or that being so charged simple proof that he made the contradictory statements laid in the indictment would be sufficient to enable the Court before which he was tried to convict him of an offence under section 190 of our Penal Code.

My attention has been drawn to a judgment of Mr. Browne, when acting as a Judge of this Court, in which he held that an indictment in the form of the one now before the Court was good. Mr. Browne, in the case of the *Reg. v. Jasik Appu* (*4 N. L. R. 19*), merely states that he relies on this form because it had been approved in India; but this form was approved in India under certain provisions of the law which are not in existence at the present time in this Colony. But even if Indian Courts

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had expressly adjudicated on the law as it exists at this time in Ceylon, I would not consider myself bound to follow those decisions unless they appeared to me to be manifestly sound.

In my opinion the indictment in this case must be quashed and the prisoner discharged.

MIDDLETON, J.—

I agree with my lord that this indictment is not a good one. False evidence by way of contradictory statements is to my mind a form of offence which is not contemplated by the Penal Code. It is a specific form of offence that the Legislature first provided for in section 9 of Ordinance No. 1 of 1888.

It has been held by learned Judges in this Court that by virtue of section 4 of the Criminal Procedure Code of 1883, as read with section 509 of the same Code, there was power to try offences under section 19 of the Ordinance No. 1 of 1888 before a District Court. In my opinion, Ordinance No. 1 of 1888 creates a specific form of offence coming before a special Court and under special circumstances, and to be tried only under and according to the provisions of the section constituting it. In my opinion, it creates no offence under the meaning of the words in section 4 of the Code of 1883, which could be tried according to the form in the schedule of the Ordinance of 1883. Now, all this legislation in Ordinances Nos. 1 of 1888 and 3 of 1883 has been entirely repealed. The only thing remaining is the Criminal Procedure Code of 1898. Under section 439 of that Code the form of offence of perjury or false evidence by contradictory statements is provided for, and the power of dealing with it is given under certain restrictions to the Supreme Court. That section enacts: "If in the course of a trial by jury before the Supreme Court any witness shall on any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the Police Magistrate, it shall be lawful for the presiding Judge, upon the conclusion of such trial, to have such witness arraigned and tried by the same jury on an indictment for intentionally giving false evidence in a stage of a judicial proceeding, which indictment shall be prepared and signed by the Registrar."

The sub-section (2) goes on to give power to dispense with the ordinary proof of false evidence, and section 3 gives a power of adjournment before another jury.

As regards the Solicitor-General's argument as to inferential perjury by making contradictory statements, it has been urged repeatedly in numerous cases. It is an argument, however, which is not sustainable. If it were, there would have been no necessity

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for the legislation which has occurred in India, Ceylon, Straits Settlements, Cyprus, and other places.

In my opinion an indictment which alleges contradictory statements before two Magistrates is not triable by a District Court; it is not the offence contemplated either in section 439 or in the old Code. The offence which is triable by the Supreme Court under section 439 is false evidence constituted by statements made before the Supreme Court, which are contradictory in any material point either expressly or by necessary implication to the evidence previously given before the Magistrate; but here the conflicting statements alleged to be made were made before two Magistrates, and I take it we must in all cases construe the Criminal Law strictly.

This is a form of indictment which is not warranted, and should be quashed.

GRENIER, A.J.—

I am of the same opinion. There is scarcely anything I can add to what has fallen from my lord and my brother Middleton.