1934 *Present :* **Drieberg J.**

THE KING *v.* KENNEDY

83—P. C. Colombo, 10,713

[THIRD WESTERN CIRCUIT.]

Criminal Procedure—Evidence of witness not relied on by the Crown—Crown Counsel opens the evidence to the Jury—Proposal to limit the examination—Prejudice to accused.

Crown Counsel in opening a case to the Jury referred to certain evidence given by a witness called for the prosecution which he stated he did not accept for reasons given by him. When the witness was called, Crown Counsel proposed to limit his examination to such part of his evidence as was not challenged by him.

Held, Crown Counsel was bound to examine the witness on the evidence he opened to the Jury.

THE accused in this case was charged before the Supreme Court under section 418 of the Penal Code with committing mischief by fire.

J. E. M. Obeyesekere, Acting D. S.-G. (with him *Deraniyagala, C.C.*), for the Crown.

R. L. Pereira, K.C. (with him *Vangeyzel*), for accused.

September 18, 1934. DRIEBERG J.—

In opening the case for the prosecution, Mr. Obeyesekere, Acting Deputy Solicitor-General, stated that there would be proof that the accused bought two tins of petrol some time before the fire. Referring

to the evidence to be given by the witness S. A. Perera, he said that Perera would say that the list P 32, on which the accused supported his claim to Rs. 98,454,03 worth of skins obtained from the tannery of S. A. Perera and which were said to have been in his store and destroyed by the fire on September 29, was written by him but that there were no unsold skins of his with the accused at the time of the fire. He relied on that part of Perera's evidence, but Perera had given other evidence which the Crown did not accept as true. S. A. Perera had stated in the Police Court that some time before the fire the accused gave him to tins of petrol—the accused said he got the petrol for the purpose of removing stains on skins, and when he told the accused that petrol would damage the skins the accused said the petrol would be of no use to him and he made Perera a gift of the two tins.

Mr. Obeyesekere then stated certain reasons why the evidence of Perera on this point could not be believed.

When Perera was called, Mr. Obeyesekere concluded his examination-in-chief without eliciting from him anything regarding the two tins of petrol. Mr. R. L. Pereira, for the accused, contended that, this evidence given by S. A. Perera in the Police Court having been disclosed to the Jury in the opening, Mr. Obeyesekere was obliged to place it before them.

Mr. Obeyesekere contended that the position was in no way different from the Crown electing not to call a witness for the prosecution entered in the indictment and leaving it to the accused, if he so desired, to ask that the witness be tendered for cross-examination.

This is, no doubt, the usual practice, and I was referred to the case of *King v. Perera*[1], where it was recognized. But the present case is different, for the Crown has called Perera, but claims the right not to lead a certain part of his evidence, which was stated in full to the Jury with the reasons why the Crown regarded it as false.

In the *King v. Perera* (*supra*), Wood Renton C.J. said that when the Crown did not elect to call a witness the Crown should state the reasons why it was considered undesirable to do so. I do not understand this to mean that the Crown should go to the extent of stating the evidence fully and demonstrating why it should regarded as false.

In this case, if the Crown does not elicit this evidence and the accused does not do so in cross-examination, the Jury would be left with a statement by the Crown that Perera had attempted in the Police Court to prove that the accused had given him two tins of petrol before the fire and with reasons placed before them for believing that this was not true. This may greatly prejudice the accused, even though I were to impress on the Jury that they were to dismiss from their minds all reference made to this evidence given in the Police Court.

I think the correct course in these circumstances was for the Acting Deputy Solicitor-General in opening the case to have omitted any reference to this part of Perera's evidence, leaving it to counsel for the accused to deal with it in cross-examination, if he so desired.

I informed Mr. Obeyesekere that I thought he should put this evidence before the Jury, and he agreed to do so. As the point is of importance to the Crown, I said I would put in writing the reasons for my order.

[1] *(1915) 18 N. L. R. 215.*