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QUEEN *v.* FERNANDO *et al.*

D. C., Kegalla, 1,006.

Criminal Procedure Code, s. 440 (1)—Summary punishment for false evidence in open Court—Irregularity—Evidence.

Where a witness stated in the Police Court that the third accused pulled the complainant out of the house, and in the District Court that the fourth accused did so, and the District Judge found him guilty of contempt of Court under section 440 (1) of the Criminal Procedure Code,—

Held, that if the evidence given in the Police Court was false, the District Judge had no jurisdiction to punish the witness for it.

The mere fact that a statement made before the District Judge does not accord with, and is even altogether inconsistent with, a statement made by him in a Police Court, is no evidence that the witness has committed perjury in the District Court.

In proceeding under section 440 (1), it is the duty of the District Judge to find which of the statements made by the witness in the two Courts is false.

And the District Judge has no right to re-model the evidence given by a witness in a Police Court in order to convict him of perjury.

IN this case of robbery and voluntarily causing hurt the District Judge, after hearing the witnesses for the prosecution, recorded his opinion as follows:—

"I will not call upon the accused for their defence, as the "evidence for the prosecution appears to be unreliable. The wit- "nesses give a different version to the version given by them in "the Police Court. I therefore acquit and discharge the accused."

The District Judge then called upon three of these witnesses to show cause why they should not be convicted of contempt of Court (under section 440 (1) of the Criminal Procedure Code) for deliberately giving false evidence within the meaning of section 188 of the Penal Code. He read out to each of them the contradictory statements made by them before him and the committing Magistrate.

They had no cause to show.

He found them guilty of contempt of Court and sentenced each of them to a fine of Rs. 25, in default whereof to one month's rigorous imprisonment.

Two of these witnesses appealed.

E. Jayawardena, for appellants.

BONSER, C.J., quashed the conviction and acquitted the appellants by the following judgments:—

In this case the appellant Appuhamy gave evidence for the prosecution at a criminal trial in the District Court of Kegalla.

At the conclusion of the trial the District Judge records this:—

" I invite Appuhamy's attention to the statement made to-day: ' ' The fourth accused Agonis pulled out the complainant,' and he " stated that the ' third accused dragged the complainant out,' in " the Police Court.

" I believe this witness Appuhamy gave false evidence within " the meaning of section 188 of the Code.

" I call upon him to show cause why he should not be convicted " of contempt of Court. He states: ' I have no cause to show.' I " convict him of contempt of Court under section 440 (1), Crimi- " nal Procedure Code, and sentence him to pay a fine of Rs. 25, in " default to one month's rigorous imprisonment."

The defendant has appealed on the ground that there was nothing recorded that justified the judge in making that order and I agree with him. I gather that the alleged perjury was that whereas he stated in the Police Court that the third accused pulled the complainant out of the house, he said in the District Court that the fourth accused pulled him out. Now, both of these statements might have been true. The District Judge has not found that one of them was untrue, nor which of them was untrue. It may very well be that Appuhamy told an untruth in the Police Court and told the truth in the District Court. If that be so, the District Judge had no jurisdiction to punish him for having committed perjury in the Police Court. The only case in which he can make the order is if he is satisfied that the witness has committed perjury before him; and the mere fact that a statement made before the District Judge does not accord and is even altogether inconsistent with a statement made by him in a Police Court is no evidence that the witness has committed perjury in the District Court. I think the Judge must have had some vague and incorrect recollection of section 439 of the Criminal Procedure Code, which provides—

" If in the course of a trial by jury before the Supreme Court " any witness shall on any material point contradict either ex- " pressly 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."

Here the witness may be convicted on the mere proof that he has made inconsistent statements in two Courts, but that provision does not apply to a trial in the District Court.

The appeal must be allowed.

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BONSER, C.J.

As regards the appeal of witness Podi Naide, his Lordship said,—

At the conclusion of the trial the Judge records thus:—

"I invite Podi Naide's attention to the statement made before "me to-day, viz.:—'The first accused struck Thegis with the right "hand and he put the sword in his left hand to assault him;' and "'whereas he stated in the Police Court,' Thegis was beaten, and "'that man is not here.' I am of opinion that Podi Naide gave "false evidence within the meaning of section 188, Criminal "Procedure Code.

"I call upon him to show cause why he should not be con- "victed of contempt of Court. He states he has no cause to "show.

"I convict Podi Naide of contempt of Court under section 440 "(1), Criminal Procedure Code, and I fine him Rs. 25 in default to "one month's rigorous imprisonment."

In this case there was even less ground for making the order than in the last case, because I can see no ground whatever for coming to the conclusion that the witness made an untrue statement in either Court. Before the Police Court he said: "Tegis was beaten, and that man is not here." "That man" must mean "Tegis," the only man referred to. Apparently the Police Magistrate has remodelled the evidence given by the appellant in the Police Court and makes it to read thus:—"Tegis was beaten by a man, and the man who beat Tegis is not here." The District Judge had no right to remodel the evidence given by a witness in a Police Court in order to convict him of perjury. But even if he made the statement in the form in which the District Judge understood it, the District Judge had nothing before him to show that the evidence the witness gave in the District Court was untrue.

The observations I made in the last appeal will apply in this case.

The appeal will be allowed.