1921.

Present: Bertram C.J.

THE KING *v.* JORONIS *et al.*

4—P. C. Avissawella, 32,503.

Accused only witness for defence—Time for summing up by Crown Counsel —One of several accused calling other witnesses—Time for summing up—Criminal Procedure Code, ss. 234 and 235.

Where the only witness called for the defence is the accused himself, the appropriate time for summing up of his case by counsel for the Crown is after the accused has given evidence and before the reply of his own counsel.

If there is another person accused on the same indictment and that person calls evidence (other than himself), the summing up of counsel for the Crown may be postponed till the conclusion of the case for that other person, so that counsel for the Crown may sum up as regards one accused person and reply as regards the other in the same speech. In such a case the counsel who called no evidence but his own client has the last word.

THE facts appear from the judgment.

Barber, C.C., for the Crown.

C. S. Rajaratnam (with him *Senaratne*), for first accused.

Georgesz, for second accused.

September 12, 1921. BERTRAM C.J.—

The question has arisen as to the point in a criminal trial at which Crown Counsel should sum up his case to the jury, where the only witness called for the defence is the accused himself. The matter came up at the Kandy Assizes last year, and there it was provisionally agreed that the summing up in such cases should take place before the prisoner had given his evidence, but it is said that the previous practice had been otherwise. Some inconvenience results from the course indicated, as, if Crown Counsel sums up before the accused has disclosed his defence in his evidence, he is not in a position adequately to address the jury. The practice works out with special inconvenience in certain cases. I have, therefore, submitted the relative section of the Criminal Procedure Code to a fuller examination.

The position appears to be as follows. Our Code was originally modelled upon the Indian Criminal Procedure Code at a time when, according to the Indian system, the accused was not a competent witness in his own defence. It dealt with two cases: Firstly, that

of a trial by the District Court (sections 208–212); and secondly, that of a trial by the Supreme Court (sections 232–237). In the first case the prosecuting counsel was not entitled to sum up the result of the evidence on the conclusion of his case. He was only entitled to a reply in the event of the accused calling witnesses. At a trial before the Supreme Court, on the other hand, prosecuting counsel, if the accused called no witnesses, was entitled to "address the jury a second time in support of his case for the purpose of summing up the evidence against the accused." To this system there is now added the new principle, now embodied in the English Criminal Evidence Act, 1898, that the accused is a competent witness in his own defence. This in Ceylon was the result of section 120 (4) of the Evidence Ordinance (No. 14 of 1895).

Thus, from 1895 to 1898, the prisoner was a competent witness on his own behalf under the old Criminal Procedure Code, and in the provisions of that Code his electing to give evidence did not affect the Crown's right of reply. Now the Criminal Evidence Act, 1898, contained two special provisions, which are in the following terms:—

Section 2.—"Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution."

Section 3.—"In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."

The second of these provisions was embodied in our new Criminal Procedure Code passed in the same year (section 296 (2)). The first provision (section 2), however, was not so embodied.

These provisions were the subject of judicial interpretation in *Reg. v. Gardiner*.[1] It was contended that section 2 (which admittedly deprived counsel for the defence of his right to open his case) also deprived counsel for the Crown of his right to sum up his case to the jury, and, alternatively, that even if this was not the effect of the section, counsel for the Crown in summing up was not entitled to comment on the evidence of the accused. Both these contentions were disallowed, and as the result of this decision, it is now the settled practice in England that the prisoner, if the only witness called by the defence, gives his evidence immediately after the evidence for the prosecution; that counsel for the Crown then sums up; that in so doing is entitled to comment on the prisoner's evidence; and that counsel for the defence then replies.

It will be observed that this decision turned wholly upon the effect of section 2. But we have nothing to correspond with this section in our own Code. What is the effect of this circumstance on our own procedure in a Supreme Court trial? To answer this

[1] *(1898) 1 Q. B. 150.*

1921.

BERTRAM C.J.

The King v. Joronis

question we must examine the terms of the Code. If we confine ourselves to the express provisions of the Code, the result is somewhat unexpected. It is only in the event of the accused or his pleader announcing his intention not to adduce evidence that counsel for the Crown is entitled to sum up at all (section 234 (3)). This is in accordance with the English procedure as settled by Denman's Act of 1865 (28 and 29 Vict., c. 18). If, therefore, the accused or his pleader announces that the accused himself will give evidence, but that no other witnesses will be called, counsel for the Crown has no right to sum up. Similarly, the combined effect of section 237 (2) and section 296 (2) deprives him of his right of reply. The result is that if we confine ourselves to the express terms of the Code, where the accused is the only witness, counsel for the Crown cannot speak at all. After his opening speech his mouth is closed.

This, however, has never been the practice. Moreover, it seems difficult to believe that it was the intention of the Code that the mere fact of the accused electing to give evidence should put counsel for the Crown in this position. It seems more reasonable to hold that this is a *casus omissus*, that is to say, that the draftsman by an oversight omitted to make any special provision for the right of counsel for the Crown to address the jury in cases where by the operation of section 296 (2) he loses his right of reply, and that this is a matter to which under section 4 we are entitled to have recourse to " the law relating to Criminal Procedure for the time being in force in England . . . . so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto." It is no doubt by virtue of this section that according to the present practice counsel for the Crown is allowed to sum up where the prisoner is the only witness called for the defence.

This is, indeed, not the only omission in our Code. There is a similar omission as regards counsel for the defence. The only places in which his rights are defined are section 211 as regards District Court trials and section 235 as regards Supreme Court trials. If these sections were carefully examined, it will be seen that they only provide for cases in which the accused calls witnesses. The expression " open his case " is hardly appropriate to cases other than these. Where he calls no witnesses, no provision is made for his addressing the Court or the jury at all. Yet in practice he always does so, presumably in accordance with English procedure. The explanation of these omissions is that this part of the Code (both in India and Ceylon) was based upon Denman's Act above referred to, and that the object of Denman's Act was not to codify the law, but to supplement it. It is, therefore, a treacherous model.

But, if we may have recourse to the English practice for the purpose of allowing counsel for the Crown to sum up at all, we may equally have recourse to it for the purpose of determining the point

at which his summing up should take place. This, according to the English practice, where the accused is the only witness, is immediately after the accused has given his evidence. I do not think that this implies that counsel for the defence in such cases loses his right to open his case to the jury before his client is called. He is expressly given that right by section 235, and there is nothing in the Code to take it away. The English practice is only to be introduced so far as it is not inconsistent with the Code and can be made auxiliary thereto. The English practice can be introduced, therefore, to the extent of allowing counsel for the Crown his right to sum up, counsel for the defence still retaining his right of opening. The right is not likely to be often exercised.

It would appear then that the appropriate place for counsel for the Crown's summing up is after the accused has given evidence and before the reply of his own counsel. If there is another person accused in the same indictment, and that person calls evidence (other than himself), I see no reason why the summing up of counsel for the Crown should not be postponed till the conclusion of the case for that other person, so as to allow counsel for the Crown to sum up as regards one accused person and reply as regards the other in the same speech. In such a case the counsel who called no evidence but his own client, of course, has the last word.

The basis of the suggestion, on which the provisional decision above referred to was given, was the presence of the word " then " in section 235. " The accused or his pleader may *then* open his case." It was submitted that this implies that the summing up referred to in the preceding section must take place in all cases before the case for the accused is presented at all. But this, I think, proves to be a misapprehension. There is some confusion in our Code here owing to faulty adaptation from the Indian model. Section 235 does not follow logically on sub-section (3) of section 234. The word " then " is an inexactitude. The case contemplated in the final sub-section of section 234 is that where " the accused or his pleader announces his intention *not* to adduce evidence." The case contemplated in section 235 is that where he proposes to adduce evidence. There is no sequence in the events contemplated by these two provisions. They are alternatives, and the word " then " is thus out of place. How it comes to be there may be understood by reference to the Indian model. Section 235 corresponds to section 290 of the Indian Code, but after the word " witnesses " the Indian section has the words " if any," and the final sub-section of section 289 contemplates the two cases in the alternative, that is to say, the case where the accused declares his intention to adduce evidence and the case where he does not. The word " then " in section 290 is thus logical. In our own Code it is not. Under the circumstances, I do not think that any argument can justly be based upon it. I think it is best to consider that the

1921.

BERTRAM C.J.

The King v. Joronis

case of an accused person being the only witness called for the defence is a special case which has not been expressly provided for, and for which accordingly we must have recourse to the English practice.

In the case under consideration, by consent counsel for the Crown addressed the jury on the case of the first accused after he had given evidence. Any other procedure would, in the circumstances of the case, have been obviously inconvenient, and I promised to look further into the matter and to deliver a considered judgment.

I have consulted my colleagues, and they all agree with the view above expressed.