

1943

Present: **Soertsz J.**KING *v.* KITCHILAN *et al.*56—*M. C. Matara*, 43,107.

*Criminal Procedure—Charge against several accused for same offence—Evidence called by one accused—Applicable to all—Crown's right of reply—Criminal Procedure Code, ss. 237 (2) and 296 (2).*

Where several are indicted for the same offence and one of them calls evidence, which is generally applicable to all, the Crown has the right of reply only against the accused on whose behalf evidence is led.

**C**ASE heard before Soertsz J. and a Jury at the 4th Western Circuit.  
1943.

*M. T. de S. Amerasekere, K.C.* (with him *George Samarawickreme*), for first accused.

*C. S. Barr Kumarakulasinghe* (with him *Vernon Wijetunge*), for second accused.

*Sri Nissanka* (with him *J. Fernandopulle*), for third accused.

*Sri Nissanka* (with him *S. N. Rajah*), for fourth accused.

*Siri Perera* (with him *P. S. W. Abeywardene*), for fifth accused.

*E. H. T. Gunasekera, C.C.* (with him *J. A. P. Cherubim, C.C.*), for the Crown.

November 3, 1943. Soertsz J.—

The question has arisen once again in regard to the circumstances in which the Crown is entitled to the right of reply to the case for the defence. There is no difficulty in answering that question in a case in which a single accused is charged on an indictment; but in a case such as his where 5 accused are involved in the indictment the answer is not so easy in view of the phraseology of the sections of our Criminal Procedure Code dealing with this matter. In England the question appears to be well settled now. The latest edition of Archibold's "Pleading Evidence and Practice in Criminal Cases" (1943) puts the matter thus at pages 18 and 182:—

"If two prisoners are indicted generally for the same offence and one calls witnesses it seems that Counsel for the prosecution is entitled to a

general reply. But if the offences are separate and they might have been separately indicated, he can reply only on the case of the party who has called witnesses."

If this principle is applied to the present case the Crown would appear to have a right of reply because all the prisoners here are generally indicted for the same offence. Again Archibold comments on the strength of several cases cited by him as follows:—

"Where on an indictment against several prisoners one of them calls evidence, which is applicable to the cases of all, the prosecution has a general right of reply, although the others called no witnesses."

According to this principle too the Crown would appear to have a right of reply in this instance because it is quite clear that the evidence of Drs. Karunaratne and Sinnadurai to mention only those witnesses called by the second accused, is applicable to the case of all the accused. Indeed in view of the defence set up by the second accused in his statement from the dock that evidence is more applicable to the cases of the other accused than to that of the second accused.

But what is to be decided by me in regard to the true view of the matter in the light of the provisions of our Criminal Procedure Code without resort to the English law has to be decided in the manner provided by section 6 of the Criminal Procedure Code. There are two sections of our Code relating to the question raised here. Section 237 (2) says—

"The prosecuting Counsel shall subject to the provisions of sub-section 2 of section 296, be entitled to reply on any evidence given by or on behalf of the accused" and section 296 (2) enacts that "when at any trial the evidence for the defence consists only of the evidence of the person or persons charged as the case may be, the prosecution shall not have the right of reply."

The effect of these sub-sections read together appears to me to be quite clearly that the only evidence tendered by the defence is the evidence of the accused person or persons concerned and that there is no right of reply. But in a case in which evidence "is given on behalf of the accused" in a case in which several persons are concerned the resulting position is ambiguous. Those sections do not say or enact what is to be understood by the words "on behalf of the accused" in a case where there are more than one accused. They do not say what the position would be if only one accused led evidence and the other refrained from doing so. It would be unfair to give the Crown the right of reply to the defence of the accused in such a case merely because for instance one of the accused called witnesses to prove an *alibi* for himself. Such evidence would not be evidence given on behalf of the other accused. But in my opinion the submission made by Crown Counsel on this occasion is very impressive. He rightly says that the evidence of the witnesses called by the second accused in this case is evidence led on behalf of all the accused inasmuch as it is intended to benefit the case of each and every one of them. I should have accepted that submission and ruled that prosecuting Counsel has a right of reply in the circumstance but for the view put forward by defending Counsel that the prosecution's substantial

right of reply can be impaired or even circumvented by appropriate strategic methods. But in the practice obtaining in our Courts the position has been different and Crown Counsel have as a rule been content with a reply to the case of the accused who actually calls witnesses into the witness box regardless of the question whether their evidence accrues to the benefit of the other accused as well or not leaving the last word to the Counsel who do not put witnesses into the witness box. That practice was upheld by my brother Hearne J. in the case of *King v. Romanis Perera*<sup>1</sup> a case similar to this in regard to the question raised here, and although I do not find myself, if I may say so most respectfully, able to endorse that view wholeheartedly, I think I ought to follow it and content myself with expressing the hope that if in case the question should arise before the Court of Criminal Appeal we will have the benefit of an authoritative ruling on the point. I therefore rule that Counsel for the second accused shall address the Jury first and the Crown Counsel shall reply to him and that the other Counsel shall address the Jury thereafter in due order.