1947 *Present :* **Dias J.**

WIJERATNE, Appellant, *and* EKANAYAKE, Respondent.

S. C. 1,770—M. C. Kandy, 20,580.

Evidence—Summary trial—Denial by accused of previous statement to police—Evidence Ordinance, s. 155 (c).—No evidence in rebuttal—Effect of such failure.

In a summary trial in the Magistrate's Court, the prosecuting officer in order to discredit the accused cross-examined him in regard to a statement by him recorded in the information Book which was inconsistent with his defence. The accused denied the statement which was not thereafter proved in rebuttal.

Held, that no prejudice was cause to the accused if the Magistrate addressed his mind to the warning that such statement should be disregarded in assessing the credit to be attached to the evidence of the accused.

Quaere, whether evidence in rebuttal can in no circumstances be led in a summary trial.

Welipenna Police v. Pinessa (1944) 45 *N. L. R.* 155 referred to.

APPEAL against a conviction from the Magistrate's Court, Kandy.

R. L. Pereira, K.C. (with him *Mackenzie Pereira*), for the accused, appellant.

Boyd Jayasuriya, C.C., for the Attorney-General.

Cur. Adv. vult.

July 1, 1947. DIAS J.—

The accused-appellant when under cross-examination stated—"I made a statement to the Police Inspector. Ukkubanda did not run after me and strike me with a mamotty. I cannot say if he threw a stone. I did not say that Ranbanda struck me with a mamotty and the blow accidentally struck Heenbanda and that I was assaulted with mamotties by Heenbanda and others. I deny I said my clothes were covered with mud". It is obvious that these were answers to leading questions put by the prosecuting officer in terms of section 155 (c) the the Evidence Ordinance in order to discredit the evidence of the accused based on alleged statements recorded in the Information Book. After the close of the case for the defence, the prosecution did not call the officer who recorded the statement of the appellant to prove such statements.

It is argued that the failure of the prosecution to do this is an irregularity which vitiates the conviction. This contention is based on the following passage in the judgment of Dalton J. in the Divisional Bench case of *R. v. Graniel Appuhamy* [1]—"In our opinion, the questions based upon this statement should not have been put to the accused at all, unless the prosecution was prepared to go further in the event of the accused denying he had made the statement. At the close of the defence no request was made by the prosecution to call any evidence in rebuttal, although the sub-inspector in question was one of the Crown witnesses and had given evidence earlier". The law on this subject is summarised by the Court of Criminal Appeal in *R. v. Harmanissa.*[2]—"(3) The written

[1] *(1935) 37 N. L. R. at p. 284.*

[2] *(1944) 45 N. L. R. at p. 540.*

record of such a statement is admissible by virtue of section 122 (3) of Chapter 16 to contradict a witness after such witness has given evidence. (4) The written record of the statement of a witness used as formulated in (3) is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance".

I am unable to agree that the failure of the prosecution to prove the statements from the Information Book which were put to the appellant under cross-examination and denied by him necessarily vitiates the conviction. The case of *R. v. Graniel Appuhamy (supra)* shows that the learned trial Judge in that case failed to tell the jury that if the alleged previous inconsistent statement was not legally proved, the jury should disregard the unproved statement in assessing the credit of the witness. Dalton J. said: "The jury were not directed that there was no evidence at all on this point, except his (accused's) denial. This omission, on a most material point, was a misdirection". The rule of evidence is that the cross-examiner can ask the witness "Did you on a previous occasion either to the Magistrate or to the investigating police officer or to some other person say so and so?" If the witness denies such statement, the cross-examiner must elect whether he is going to discredit the witness by proving that previous statement, and in that event he will at once mark the inconsistent statement if it is in writing, and duly prove it at the proper time either by calling the person who recorded the statement to produce it, or if the statement was not recorded, by calling the person who heard the inconsistent statement made. If he fails to do so, all that happens is that the evidence of the witness stands uncontradicted, and the judge of facts will assess his credibility in the usual way. In the case of an accused witness in particular, it is the duty of the judge of facts to have addressed to his mind the warning that the alleged unproved statement should be disregarded in assessing the credit to be attached to the evidence of the witness. If that is done, the failure to prove such statement is of no significance. I have no reason to believe that the experienced Magistrate who tried this case failed to address his mind to these principles. I am, therefore, unable to say that any prejudice has been caused to the appellant.

Crown Counsel, however, has drawn attention to another aspect of this matter. He has referred to the case of *Welipenna Police v. Pinessa*[1] where Moseley J. held that evidence in rebuttal cannot be led in a summary trial before a Magistrate. He points out that that is the reason why evidence in rebuttal was not led. He submits that if the view expressed in *Welipenna Police v. Pinessa (supra)* is correct, then it will *never* be possible to discredit an accused witness by proving a previous statement against him in order to discredit the evidence he gives at the trial. The prosecution being debarred from leading evidence in rebuttal, the accused can never be contradicted. Sections 212 and 237 (1) of the Criminal Procedure Code provide that in trials before the District Court and the Supreme Court rebutting evidence can be led. The Code is silent, however, as to the calling of such evidence in a summary trial before a

[1] *(1943) 45 N. L. R. 115.*

Magistrate. Does that mean that in the following cases, evidence by way of rebuttal cannot be led by the prosecution in the interests of justice—(1) Where the prosecution is taken by surprise by the evidence called for the defence, *e.g.*, an *alibi* which can be disproved ; (2) Where under section 15 of the Evidence Ordinance proof is available to rebut a defence raised by the defence for the first time when the accused gives evidence[1] or (3) Where a previous statement inconsistent with the present testimony of the accused is available to show that the evidence of the accused is untrue ? I doubt if that is the law. Why should there be one standard of proof in the District Court and the Supreme Court and another in a Magistrate's Court ? Under certain sections of the Criminal Procedure Code it is open to the Magistrate himself to cause evidence to be called at a summary trial, *e.g.*, sections 189 (2), 190 and 429 ; but a Magistrate is a judge, and will not use his powers in order to fill up gaps in the prosecutor's evidence. In view of the finding I have reached that the failure to call rebutting evidence in this case has caused no prejudice to the appellant, this question does not strictly arise. It is, therefore, unnecessary to decide this question which merits consideration by a bench of two Judges or a Divisional Court.

I have carefully considered the facts of this case ; but can see no reason to interfere with the findings of fact of the Magistrate. I have been asked to consider the sentence passed on the appellant. The offence is a serious one. In the course of a quarrel about a land the appellant took a katty from another and cut the injured man on his face causing a permanent disfigurement. Having regard to the fact that the appellant has no previous conviction, I consider the sentence excessive. I reduce the sentence from three months' rigorous imprisonment to one months' rigorous imprisonment. In all other respects the conviction and sentence will stand affirmed.

Sentence varied.