APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

KRISHNAYYA NAIDU AND ANOTHER (ACCUSED), PETITIONERS.* 1930, January 31.

Criminal trials—Case and counter-case—Defence witnesses in a case already examined as prosecution witnesses in counter-case—Depositions—Whether may be filed as part of their evidence as defence witnesses in former case.

Where the defence witnesses in a case have already been examined as prosecution witnesses in a counter-case, their depositions in the latter case may be filed, to save time, as part of their evidence as defence witnesses in the former case, *in favour* of the prisoner, and with the consent of both sides.

Umar Hajee v. *King-Emperor*, (1922) I.L.R., 46 Mad., 117, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tiruppattur in Criminal Appeal No. 74 of 1928 (Calendar Case No. 273 of 1928 on the file of the Court of the Second-class Magistrate of Gudiyattam).

This Criminal Revision Case came on for hearing in the first instance before JACKSON, J., who made the following

ORDER :—

This petition raises a point of some importance.

It will be seen on page 23 that the depositions given by D.W. 2 in a previous trial were read out to him and exhibited as evidence in the present case. This is precisely what I myself did in the case which was subject of appeal in *Umar Hajee* v. *King-Emperor*(1) when it was ruled that my action was fatally irregular.

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* Criminal Revision Case No. 672 of 1929.

(1) (1922) I.L.R., 46 Mad., 117.

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Of course there is no objection to a witness being led, if both sides consent, and the alternative and correct procedure according to that ruling would be for the judge to copy out the previous depositions in his own hand.

You were examined at the previous trial?

Yes.

You deposed that, etc., etc.?

Yes.

and then the Judge is set busily to work for a few hours committing to paper what is already on paper. With the greatest respect, I can see no necessity for this deplorable waste of time. The accused is in no way prejudiced. He can ask any supplementary questions he likes. He is present when the depositions are exhibited, so the rule in 2 Hawkins Pleas, Chapter 46, is not violated. As regards the implied consent discussed on page 120, I may say perhaps that the depositions were exhibited at the express request of the defence vakil, as in the present case. I have never been able to understand this ruling and think it should be examined by a Bench.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioners.

Public Prosecutor (*L. H. Bewes*) for the Crown.

JUDGMENT.

This case arises out of a judgment in a Criminal Appeal, in which the Appellate Magistrate refused to reverse the conviction of the petitioners, on the ground urged before him that the conviction was illegal, because the trial Court had allowed certified copies of evidence given by the petitioners as defence witnesses in a counter-case to be filed as evidence for the defence in this case. It is contended that the refusal of the Appellate Magistrate is directly opposed to the ruling of a Bench of this Court in *Umar Hajee* v. *King-Emperor*(1).

On another ground raised, it appears to us that the Appellate Magistrate's judgment cannot be supported.

(1) (1922) I.L.R., 46 Mad., 117.

He considered that section 167 of the Evidence Act did not compel him to order a retrial merely because these copies of depositions had been put in, since, to use his words "without the evidence thus admitted there is sufficient evidence to prove the charges." He seems to have entirely overlooked the fact that the evidence thus admitted was for the defence and not for the prosecution. He has thus decided the case against the accused by the simple process of ruling out and refusing to consider the evidence for the defence. But it would not suffice for us merely to order him to rehear the appeal, if under the law as it stands stated in 46 Madras 117, he would still have to reject these depositions and order retrial. We therefore had the question argued before us, whether the 46 Madras case applies here, and if it does, whether it does not lay down too strict a procedure, and whether we should not have the case posted before a Full Bench to consider whether the 46 Madras case has been rightly decided.

We have perused the printed papers in the two cases which gave rise to the 46 Madras judgment. A criminal trial had proceeded for some time against two persons in part before one Special Sessions Judge. It was then split up into two. That Judge was succeeded by another, who decided on a *de novo* trial. At the *de novo* trial the second Judge permitted the depositions of the prosecution witnesses taken at the original trial to be filed as evidence for the prosecution. Whether this was done at the request or with the consent of the defence is not material. The evidence of the defence witnesses was taken entirely by the second Judge. Now, the judgment in 46 Madras 117 proceeds on the general proposition that "in cases of life, no evidence is to be given *against* a prisoner, but in his presence", subject to the exceptions permitted by some express provisions

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of law. It is clear from the facts as set out above that the Bench was dealing only with a case where previous depositions not taken in the presence of the accused were used as evidence against him. We think that the decision does not go further than to decide that such a procedure is contrary to law, and, if we may say so with respect, it embodies a very salutary principle, the principle upon which *Reg* v. *Bertrand*(1), on which 46 Madras relies, proceeded. In the latter case, there was the additional infirmity that what was read over to the witnesses was not their actual depositions but only notes of those taken by the trying Judge. We do not think that 46 Madras can be taken to have decided that evidence taken *in favour of* a prisoner in a counter-case, in which he was a witness but was not himself the prisoner, cannot be put in by him on his own behalf.

In the case before us, the depositions given by defence witnesses 2 and 3 when examined as prosecution witnesses in the counter-case were filed with the consent of both sides. We do not think that 46 Madras prohibits such a procedure, which obviously saves a great deal of time which would otherwise be occupied in merely copying down previous depositions. No one is prejudiced. Obviously the prisoner is not, and if the Crown had thought its case would be prejudiced, it would not have consented to the procedure.

Our attention has been drawn to a ruling of a Bench of the Lahore High Court in *Thakar Singh* v. *Emperor* (2), but so far as we can gather the facts of the case, it appears that the defence witnesses were not summoned and examined in Court, but their previous depositions were put on the record without the witnesses coming to swear to their truth. The same procedure

(1) (1867) L.R., 1 P.C., 520. (2) (1927) 28 Cr. L.J., 771.

appears to have been adopted in the case reported in *Allu* v. *Crown*(1). In the present case, however, the defence witnesses were called and examined in the presence of the accused and they swore to the truth of their previous statements, which were then filed with their consent to save time. In another case, *Emperor* v. *Harjivan Valji*(2), a High Court Bench held that to file for the Crown depositions taken in one case as substituted evidence in another case against the same prisoner was merely an irregularity. But it may be noted that in that case all the depositions had been taken in the presence of the prisoner.

We do not therefore think it necessary to refer this case to a Full Bench on the question of reconsidering the decision in 46 Madras. We hold on the facts here that there was nothing illegal or irregular in the procedure at the trial Court. However as we have already remarked the Appellate Magistrate has erred in refusing to consider that evidence recorded for the defence. We must therefore set aside his order and direct him to rehear the appeal, and decide it after giving due weight to the evidence recorded in the previous depositions filed as Exhibits VI, VI (*a*), VII and VII (*a*). We order accordingly.

B.C.S.

(1) (1923) I.L.R., 4 Lah., 376. (2) (1925) I.L.R., 50 Bom., 174 at 178.