the words of the Lord Chancellor in delivering the judgment of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (1) "These trials were prohibited in the mode in which they were conducted," and were, therefore, illegal.

For the reasons given above I am of opinion that these appeals must be accepted and that the convictions and sentences of the Court below should be set aside, and new trials ordered.

BROADWAY J.—I concur in the proposed order. The appeals are accepted, the convictions and sentences are set aside and the cases are returned to the Court of Sessions to be retried in accordance with law.

C. H. O.

Appeals accepted.

APPELLATE CRIMINAL.

Before Mr. Justice Fforde.

1923

June 19.

LYME—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 417 of 1923.

Criminal Procedure Code, Act V of 1898, *sections* 304, 537—*Evidence of witnesses previously recorded by the Court subsequently read out and not recorded again in trial by a jury—Illegality or irregularity—Verdict of jury once given is final—second verdict, after hearing further evidence,* ultra vires.

The appellant was tried before the District Magistrate of Bannu for certain offences under the Indian Penal Code. On the 12th March 1923, 7 witnesses for the prosecution were examined and the Public Prosecutor then closed the case for the Crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th, when the accused claimed as an European British subject, to be tried by a jury. The proceedings were accordingly stayed and a jury appointed, and on the 22nd two witnesses were duly examined by the prosecution and cross-examined by counsel for the defence. As

(1) (1901) I. L. R. 25 Mad. 61, 98 (P. C.)

1923

LYME
v.
THE CROWN.

regards the remaining witnesses for the Crown the course adopted was as follows :—When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination.

Again, after a certain number of witnesses for the defence had been examined the foreman of the jury asked if the defence could not cut down the number of witnesses they had summoned. The defence, thereupon, agreed to dispense with all further witnesses save one. The learned Magistrate, taking the foreman's intervention as an indication that the jury had decided to acquit, proceeded then to charge the jury upon the case as it stood. The jury, however, found the prisoner guilty on the second charge, but not guilty on the first. The Magistrate then ordered the evidence of the remaining witnesses for the defence to be taken on the following day. This was done, and a further address to the jury was then delivered by the Court and they were asked to reconsider their verdict in the light of this additional evidence. The jury then brought in the same verdict as before and upon this verdict sentence was subsequently passed.

Held, that the method of presenting the evidence for the prosecution was irregular, and not only irregular but entirely illegal, and was not covered by the provisions of section 537 of the Code of Criminal Procedure.

Allu v. *Crown* (1), and *Attorney-General of New South Wales* v. *Henry Louis Bertrand* (2), per Sir John Coleridge, referred to.

Held further, that the manner in which the case was presented to the jury was in direct contravention of the express provisions of the Code of Criminal Procedure. All the evidence on both sides must be concluded before the case can be submitted to the jury and once a verdict has been delivered there is no power in the trial Court or in the jury to re-consider that verdict except under the provisions of section 304 of the Code. The second verdict is therefore a nullity and the judgment based upon it is without jurisdiction and void.

Appeal from the order of Major W. A. Garstin, District Magistrate, Bannu, dated the 26th March 1923, convicting the appellant.

SHAMAIR CHAND and SAGAR CHAND, for Appellant.

DALIP SINGH, Assistant Legal Remembrancer, for Respondent.

(1) (1923) I. L. R. 4 Lah. 376, *vide supra.*

(2) (1867) 36 L. J. P. C. 51, 57, cited in 12 W. R. (Cr.) 3.

1923

LYME
v.
THE CROWN.

FFORDE J.—The appellant has been tried by the District Magistrate of Bannu, sitting with a jury of three persons, on a charge of rape. He has been found guilty of an attempt to commit the offence and has been sentenced to a term of six months' rigorous imprisonment.

A number of grounds of appeal have been put forward but the principal ground relied upon by Mr. Shamair Chand, counsel for the appellant, is that the manner in which the trial was conducted was illegal in certain material particulars.

The facts relevant to the determination of the questions which have been raised on this contention are as follows :—

On the 12th March, 1923, the prisoner was brought before the District Magistrate upon a charge under section 376, Indian Penal Code. After seven witnesses for the prosecution had been examined the Public Prosecutor closed the case for the Crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th, when the prisoner claimed as an European British subject to be tried by a jury under the provisions of section 451 of the Code of Criminal Procedure, and the proceedings were accordingly stayed to enable the necessary steps to be taken in compliance with the section.

On the 17th of March the prisoner was again brought before the Magistrate, when he was formally charged and the trial fixed for the 22nd. On the 22nd the jury were duly ballotted for and the names of three persons, one Indian and two Europeans, were returned. These names were read out to the prisoner at the bar who was asked to challenge them. He, however, accepted them without challenge and the trial commenced.

Two witnesses were then duly examined by the prosecution and cross-examined by counsel for the defence, namely, *Mussammat* Mir Gulla, the person against whom the offence in question was alleged to have been committed, and Bishen Das, Sub-Inspector of Police. So far as these two witnesses were concerned it is not suggested that there was anything illegal or irregular in the mode in which their evidence

was presented. As regards the remaining witnesses for the Crown, however, the course adopted was as follows :—

1923

LYME
v.
THE CROWN.

When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination. In the case of *Khan Sahib* Akbar Ali Khan, prosecution witness No. 3, the following note appears on the record :—"This witness is called and the above statement made by him in this Court on 12th March 1923 is read out to the jury and the statement transferred to the file." It does not appear from the record that this particular witness was even sworn.

With regard to the next witness Shai Mast (P. W. 4) the note on the record is as follows :—"22nd March 1923. Shai Mast Khan" recalled :—"I have heard the above statement made at the first hearing on the 12th March 1923 read over to me. It is correct and I adhere to it." Again it does not appear from the record that this witness was sworn though I will assume that this formality at least was observed in every case. The evidence of the next witness (P. W. 5) is recorded as being on solemn affirmation. He also says that he has heard his statement made in the Court on the 12th March 1923 read out and that it is correct and he adheres to it. The remaining three witnesses for the prosecution are dealt with in similar fashion.

Now, it is quite obvious that this method of presenting the evidence for the prosecution is irregular, and not only irregular but entirely illegal. It is a wholly unauthorized variation from the ordinary and proper procedure. It is argued by counsel for the Crown that this departure from the ordinary procedure is an irregularity covered by section 537 of the Code of Criminal Procedure which enacts that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account, *inter alia*, of any error, omission or irregularity in the proceedings before or during trial, unless such error .... has in fact occasioned a failure of justice. I entirely disagree with this view as to the scope of that section. I have already expressed

1923

LYME v. THE CROWN.

my views on this section in the case of *Allu and others* and *Hasta* v. *The Crown* (1) and I need not repeat them here. The procedure being illegal it is not material to determine whether or not it has occasioned a failure of justice. In many cases where the authorised mode of trying a criminal offence has been departed from it is impossible to say whether it has or has not occasioned a failure of justice. It is otherwise when the irregularity is one of form and not of substance. A mere slip or oversight in the manner in which evidence is recorded, for instance, can rarely prejudice the person who is being tried. But a substantial departure from authorised procedure in the mode in which the evidence of witnesses is presented to a jury may very seriously affect the prisoner's chances. Had the proper course been adopted in presenting the evidence for the prosecution the jury would have had an opportunity of gauging the value of the testimony of each individual witness by his general demeanour. A witness may show a suspicious hesitancy in answering certain questions put by counsel for the prosecution, or he may show an equally suspicious excess of zeal. Both Judge and jury are undoubtedly influenced to a considerable extent by the manner in which a witness gives his evidence-in-chief; and, moreover, the demeanour of a witness during the examination-in-chief may be of the greatest help to counsel for the defence in his cross-examination.

In this context I cannot do better than quote the words of Sir John Coleridge in delivering the judgment of the Privy Council in *Attorney-General of New South Wales* v. *Henry Louis Bertrand* (2) where one of the matters to be determined was the propriety or otherwise of the very procedure now under discussion.

"Those of their Lordships who have been used, on motions for new trials to hear the Judge's notes of the evidence read, probably know well by experience how difficult it is to sustain the attention, or collect the value of particular parts when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary rank, intelligence and experience of common jury men. But this is far from all. The most careful note must often fail to convey the evidence fully in some of its most important elements, those for

(1) (1923) I. L. R. 4 Lah. 376. *vide supra*

(2) (1867) 36 L. J. P. C. 51, 57 referred to in 12 W. R. (Cr.) 3.

which the open oral examination of the witness in presence of prisoner, Judge and jury is so justly prised. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the judge properly take on him to supply any of these defects, who indeed will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence without its spirit which is supplied when given openly and orally, by the ear and eye of those who receive it."

In that case there had been two trials and at the second trial the Chief Justice, who was trying the case, at the request of the prisoner and also of his counsel and with the consent of the counsel for the Crown, read over to certain of the witnesses the evidence which they had given at the first trial, and then permitted counsel for the prosecution and counsel for the defence to put such further questions to the witnesses as they might think fit; the witnesses of course being sworn in the usual manner. This procedure, which was much the same as was adopted in the present case, was strongly disapproved of by their Lordships of the Privy Council. It is true that the prisoner's application for a new trial was not granted, but that was on the ground that there could be no new trial in a case of felony. That case was decided in 1867 when there was no appeal in such cases, the decision, therefore, is only of value for the general principles enunciated in the judgment.

A further illegality in the mode of trying the present case, which is relied upon by counsel for the appellant as vitiating the trial, is the manner in which the case was presented to the jury.

After a certain number of witnesses for the defence had been examined, the foreman of the jury asked if the defence could not cut down the number of witnesses they had summoned. The defence, therefore, agreed to dispense with all further witnesses save one.

The learned Magistrate, thereupon apparently with the desire to conclude the trial that day, proceeded to charge the jury upon the case as it stood. He explains in his judgment that he took the foreman's intervention as an indication that the jury had decided to acquit,

1923

LYME
v.
THE CROWN

and he further states that he warned them that it might be necessary to summon the remaining witnesses for the defence. By this, he explains, he meant that if they had the intention of convicting the accused they must first hear the remaining witnesses, but if on the other hand they had made up their minds to acquit they need not bother about the further defence evidence. These mental reservations of the learned Magistrate were however, not understood by the jury who apparently did not possess sufficient telepathic powers to read what was in his mind. It may be remarked that in the official report of the charge to the jury there is no indication of any reservation. After counsel on both sides had addressed the jury the learned Magistrate proceeded to charge them, commencing his address in these terms :—

> "On the facts before you I am going to ask you to determine two issues."

The proper issues are then set out and towards the end of the charge appears the statement.

> "Now gentlemen, you have heard the evidence on both sides * * * * * * I will not now detain you longer. The evidence has been well dealt with by counsel on both sides. I need only remind you in conclusion of your oath as jurors to deal fairly and impartially between the Crown and the prisoner at the bar."

Nowhere on the record, save in the judgment itself and in a subsequent note of the Magistrate does it appear that the case for both sides was not concluded when the jury were asked to return their verdict. The jury having then considered their verdict found the prisoner not guilty on the first issue and guilty on the second.

On being faced with this verdict the Magistrate ordered that the evidence of the remaining witness be taken on the following day. On the following day, however, not only was the evidence of this witness taken but two more witnesses for the defence were examined. A further address to the jury was then delivered by the Court and they were asked to reconsider their verdict in the light of this additional evidence. The jury then brought in the same verdict as before. Upon this verdict sentence was subsequently passed.

1923

LYME
v.
THE CROWN.

Now it is obvious that the course here adopted was in direct contravention of the express provisions of the Code of Criminal Procedure. All the evidence on both sides must be concluded before the case can be submitted to the jury. There is no power in a Judge to present a case to a jury subject to conditions, and once a verdict is delivered there is no power in the trial Court or in the jury to reconsider that verdict except under the provisions of section 304 of the Code of Criminal Procedure, which provides that where a wrong verdict is delivered by accident or mistake, the jury may amend it before or immediately after it is recorded. With this exception the jury is *functus officio* as soon as its verdict is announced to the Court. What has been done in this case is that after a trial has been concluded and verdict given, a new trial has been held on further evidence and a fresh verdict given. It is immaterial that the second verdict happened to be to the same effect as the first. The second verdict upon which judgment has been given and sentence pronounced is a nullity and the judgment based upon it is, therefore, made without jurisdiction and is void. For this reason alone the finding and sentence must be set aside.

In view of the conclusions I have come to it is unnecessary to examine the remaining grounds upon which this trial is sought to be impeached.

For the reasons I have given I accept the appeal, and setting aside the conviction and sentence of the Court below I direct that a new trial be held.

C. H. O.

Appeal accepted