" to trump up a charge against him. More it is not necessary to " add. There are some aspects of the case which might call for " observation, but it is enough to say that we have come to the " conclusion that this verdict was an unsatisfactory one."

I have come to a similar conclusion in this case. There is in substance no corroboration and there is some ground for suspicion that this is a trumped up charge. The appeal accordingly is allowed and the conviction quashed.

CHANG WAH BEU *ats.* POLICE.

[Appellate Jurisdiction (Corrie, C.J.) January, 6, 1940.]

Liquor Ordinance 1932—*s.* 44[1]—*evidence disproving licence called by Court after close of case for prosecution—whether an irregularity.*

At the close of the case for the prosecution in a summary trial for an offence under the liquor Ordinance 1932 counsel for the defence submitted that there was no case to answer as the prosecution had failed to prove that the defendant had no licence to sell liquor. The District Commissioner decided to call evidence himself and his clerk gave the necessary evidence.

HELD.—The course taken by the District Commissioner was not irregular.

[**EDITORIAL NOTE.**—*Vide Ah Ben ats. Police* [1940] 3 Fiji L.R. as to onus of proof.]

Cases referred to :—

(1) *R. v. Harris* [1927] 2 K.B. 587 ; 96 L.J.K.B. 1069 ; 137 L.T. 535 ; 43 T.L.R. 774 ; 28 Cox. C.C. 432 ; 2 Cr. Ap. 86.

(2) *R. v. Crippen* [1911] 1 K.B. 149 ; 80 L.J.K.B. 290 ; 103 L.T. 704 ; 27 T.L.R. 69 ; 22 Cox. C.C. 289 ; 5 Cr. Ap. 255 ; 14 Dig. 291.

(3) *Hargreaves v. Hilliam* [1894] 58 J.P. 655 ; 33 Dig. 344.

APPEAL against conviction. The facts appear from the judgment.

R. Townsend, for the appellant.

The Attorney-General, *E. E. Jenkins,* for the respondent.

CORRIE, C.J.—This is an appeal against a conviction of the appellant by the Commissioner's Court Lautoka for having on the 6th March, 1940 at Lautoka, sold liquor without a licence, contrary to s. 44 of Ordinance 25 of 1932.

The first ground of appeal is that the conviction was against the weight of evidence, the appellant alleging that while there was evidence of an attempted delivery, there was no reliable evidence of a sale.

As to this I am satisfied that there was evidence before the Commissioner which, if believed by him, was sufficient to prove an actual sale of liquor by the appellant.

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[1] *Rep. Vide now Liquor Ordinance,* 1946, s. 46.

The second ground of appeal is that the conviction was erroneous in law in that after the prosecution had closed their case the Court wrongly permitted further evidence to be called.

The material facts are that when the case for the prosecution was closed, Mr. Patel for the defence submitted there was no proof that the appellant had no licence authorising him to sell liquor. Thereupon the Commissioner, after hearing the arguments of the parties, decided himself to call evidence on this point, and the District Commissioner's clerk gave evidence that no permit had been issued to the appellant. Mr. Patel then said that he did not propose to call any evidence for the defence, and the appellant was found guilty and sentenced.

In support of the appeal it is argued that this case is governed by the judgment in *R. v. Harris* [1927] 2 K.B. 587. The headnote to that case reads as follows :—

> " A judge at a criminal trial has the right to call a witness not " called by either the prosecution or the defence, without the con- " sent of either the prosecution or the defence, if in his opinion that " course is necessary in the interests of justice, but in order that " injustice should not be done to an accused person, a judge should " not call a witness in a criminal trial after the case for the defence " is closed, except in a case where a matter arises *ex improviso*, " which no human ingenuity can foresee, on the part of the " prisoner ".

Delivering the judgment of the Court of Criminal Appeal, Avory J. said (at page 594) :

> " The cases of *Reg. v. Chapman*, 8 C. & P. 558 and *Reg. v. Holden*, 8 C. & P. 606, " establish the proposition that the presiding judge at a criminal trial has the right to call a " witness not called by either the prosecution or the defence, and without the consent of either " the prosecution or the defence, if in his opinion this course is necessary in the interests of " justice. It is true that in none of the cases has any rule been laid down limiting the point " in the proceedings at which the judge may exercise that right. But it is obvious that " injustice may be done to an accused person unless some limitation is put upon the " exercise of that right, and for the purpose of this case we adopt the rule laid down by " Tindal C.J. in *Reg. v. Frost* where the Chief Justice said : 'There is no doubt that the " 'general rule is that where the Crown begins its case like a plaintiff in a civil, they cannot " 'afterwards support their case by calling fresh witnesses, because they are met by certain " 'evidence that contradicts it. They stand or fall by the evidence they have given. They " 'must close their case before the defence begins ; but if any matter arises *ex improviso*, " 'which no human inguenuity can foresee, on the part of the defendant in a civil suit, or a " 'prisoner in a criminal case, there seems to me no reason why that matter which so arose " '*ex improviso* may not be answered by contrary evidence on the part of the Crown'. That " rule applies only to a witness called by the Crown and on behalf of the Crown, but we " think that the rule should also apply to a case where a witness is called in a criminal trial " by the judge after the case for the defence is closed, and that the practice should be limited " to a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on " the part of a prisoner, otherwise injustice would ensue ".

It is somewhat curious that in the hearing of the appeal in Harris' case no mention was made of the judgment of the Court of Criminal Appeal in *R. v. Crippen* [1911] 1 K.B. 149. In that case one ground of appeal was that Lord Alverstone C.J. improperly allowed the prosecution, after the close of the case for the defence, to give, in rebuttal of evidence for the defence, evidence which, it was admitted by the prosecution, could have been given in chief. As to this, Darling J., delivering judgment of the Court, said :—

> " We do not feel inclined to lay down the rule as strictly as Tindal C.J. in *Reg. v. Frost*. " We do not propose to adopt the language of Tindal C.J. The rule laid down in those terms " may we think place an unfair burden on counsel for the prosecution in some cases ".

It may be therefore that the judgment in Harris' case is to be taken as a judgment on the particular facts, a view to which some weight is lent by the observation in the judgment (at page 596) :—

" In the circumstances, without laying down that in a case can additional evidence be " called by the judge at the close of the trial after the case for the defence has been closed, " we are of opinion that in this particular case the course that was adopted was irregular and " was calculated to do injustice to the appellant Harris ".

If such be the true view, then the headnote to the report of Harris' case in the law reports requires modification.

I have not, however, for the purpose of this appeal to decide that question, as the facts in the present appeal are clearly distinguishable from those in *R. v. Harris*. In that case the evidence called by the Court was called after the defence had been closed. In the case now under appeal the evidence was called immediately after the close of the case for the prosecution, and it was thus open to the appellant to call evidence in rebuttal, if he were in a position to do so.

Clearly therefore, there was no injustice to the appellant in evidence being called by the Court at that stage. A situation similar to that in the case under appeal arose in the case of *Hargreaves v. Hilliam*. No report of this case is contained in any of the series of reports that are available here, but a sufficient note of the decision is given in *Stone's Justice's Manual*, 72nd edition, 1940, at pages 688 and 689. From the note it appears that an information laid by an Inland Revenue officer was dismissed by Justices upon objection made at the close of the case for the prosecution that there was no evidence of the written order of the Inland Revenue Commissioners authorising the prosecution. The prosecuting officer then offered to put in a letter, which was objected to. The Queen's Bench Division held that the Justices ought to have re-opened the case.

I am satisfied that the course taken by the Commissioner in the case now under appeal was not irregular and the appeal is dismissed.

R. v. SALAUNEUNE.

[Criminal Jurisdiction (Corrie, C.J.) March 13, 1940.]

District Commissioners Ordinance, 1876—s. 26[1]—language of the Court—evidence at preliminary inquiry not interpreted aloud—objection to validity of proceedings.

A District Commissioner conducting preliminary enquiry without the assistance of an interpreter recorded the evidence of Fijian speaking witnesses in English and " read back " to the witness the District Commissioner's translation of the record in Fijian. No English translation was made aloud in open Court.

HELD.—On objection prior to trial, that the procedure was not in conformity with s. 26 of the District Commisioner's Ordinance, 1876 but was not void.

[**EDITORIAL NOTE.**—As to the language of the Court at preliminary enquiries *vide* Criminal Procedure Code (Cap. 4) s. 189, 190. Revised edition Vol. I p. 117.]

[1] *Repealed. Vide Criminal Procedure Code, Cap. 4, ss. 189, 190.*