
PUNYAMOORTHI**Vs.****ATTORNEY GENERAL**

COURT OF APPEAL
GOONERATNE, J.
FERNANDO, J.
CA/218/2016
HC/KEGALLE/1786/2002
FEBRUARY 21, 2019

Criminal law—Penal Code, section 296— — Evidence Ordinance, section 33— Code of Criminal Procedure Act, No. 15 of 1979, section 151— Admissibility of depositions of witnesses deceased at the time of the trial—Re—trial

The accused and another (deceased at the time of trial) were convicted under section 296 of the Penal Code and sentenced to death by the High Court. The only evidence that the prosecution relied on to prove its case was the deposition of Sellamuttu (PW2), which was given during the non-summary inquiry. PW2 was deceased at the time of the trial and his deposition was led in evidence in terms of section 33 of the Evidence Ordinance.

A main ground of appeal was on the procedure adopted by the High Court in admitting the deposition of PW2, as there was no evidence on record that the relevant facts deposed to by PW2 were led in evidence before the trial judge.

Held:

1. The proper procedure for admitting the deposition of a deceased person is by producing a certified copy of the deposition through a witness having custody of the record of the non-summary proceedings, and the relevant facts deposed to by the deceased person should be led in evidence before the trial judge for his consideration in accordance with the law.

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2. Although the deposition of PW2 was admitted in evidence, the relevant facts deposed to by PW2 were not led in evidence before the trial judge, which is contrary to the applicable law in admitting witness depositions under section 33 of the Evidence Ordinance.
 3. There is no indication in the judgment that the trial judge was mindful of the infirmities in the deposition of PW2 before admitting the same.
 4. It is not appropriate to send the case back for re-trial as the appellant has spent a good part of his life in court in pursuance of justice, and the court should do justice by all the parties.

Cases referred to:

1. Stephen and others v. The Queen 67 CLW 48
2. Sheela Sinharage v. Attorney General [1985] 1 Sri LR 1
3. Regina v. D. M. Arthur Perera et al (1956) 57 NLR 313 at 326

APPEAL from the Judgment of the High Court of Kegalle.

Nayantha Wijesundara for the Accused-Appellant.

Madhawa Tennakoon, S. S. C., for the Respondent.

cur. adv. vult.

March 26, 2019

GOONERATNE, J.

The 1st Accused-Appellant, (hereinafter referred to as the Appellant) was indicted together with the 2nd Accused, Thyagaraja, (deceased at the time of trial) in the High Court of Kegalle, under Section 296 of the Penal Code for causing the death of Selwamuttu Pubalan, (hereinafter referred to as the deceased) and upon conviction the Appellant was sentenced to death.

The case for the prosecution entirely rests on circumstantial evidence.

Sellamuttu, (PW1), the sister of the deceased, states that when she was at the common water tap, close to her house, she heard the 2nd Accused requesting the deceased to come to his house. Moments later Thamil Selvam, the daughter of the 2nd Accused (Thiyagaraja) had cried for help, and when she entered the house of the 2nd Accused, she had seen the deceased lying on the floor. At that point, the Appellant who was inside

the house of the 2nd Accused had thrown aside an axe which was in his hand and had run away. She also stated that, the 2nd Accused told her that the Appellant attacked the deceased. The Appellant and the 2nd Accused Thyagaraja were brothers who lived in adjoining line rooms which were interconnected. However, in cross-examination, PW1 claimed that she did not see the Appellant holding the axe or throwing it away and it was Thiyagaraja who told her about it.

Palaniandi Nadaraja (PW7), in his evidence stated that when he came to the place where the deceased was attacked, Thamil Selvam had told him that the Appellant had attacked the deceased. However, Thamil Selvam was not called to give evidence by the prosecution. It is observed that there were several others who were present at the scene of the crime, who have not been questioned by the police regarding this incident.

The prosecution also relied on the evidence given by Valliamma Sellamuttu (PW2), at the non-summary inquiry which was adopted in terms of Section 33 of the Evidence Ordinance, which is the only evidence the prosecution relied on to prove its case.

When the case was taken up for argument, the counsel for the Appellant raised a preliminary ground of appeal questioning the procedure in admitting statements under Section 33 of the Evidence Ordinance, as regards to witness No. 2, who was reported dead at the time of trial.

It is to be noted that, in the instant case by order dated 10/07/2014, in Application CA 06/2012, this Court sent this case back for re-trial due to a procedural error arising out of an admission of a deposition under Section 33 of the Evidence Ordinance as regards to PW8, who was reported dead at the time of trial, on the basis that the said deposition in the non-summary inquiry was not properly admitted in evidence. At the re-trial, the prosecution did not proceed to admit the said deposition of PW8, however, proceeded to admit in evidence the deposition of PW2, under the said Section.

In CA 06/2012, decided on 10/07/2014 (supra), Anil Gooneratne J. stated;

it is essential to follow the 'dicta' in the above case and have the entire non-summary records of the proceedings produced before the High Court. The record of non-summary proceedings has not been produced. Only the statement P3 had been produced. Essential steps have to be complied with since the adverse party would be entitled to view the entire proceedings in the Court below.

Counsel for the Appellant argues that the following essential steps which go to the root of this case were not complied with when admitting the deposition of PW2 in evidence;

- (a) the deposition of PW2 admitted under Section 33 of the Evidence Ordinance was not given a separate marking and included in the list of productions of the indictment.
- (b) the entire non-summary record of the proceedings was not produced before the High Court.
- (c) the relevant evidence was not adduced by the prosecution from the witness who produced the deposition of PW2, subject to the infirmities in adopting such evidence.

PW13, the Registrar of the High Court of Kegalle, was called by the prosecution to produce the deposition of PW2 under Section 33 of the Evidence Ordinance. The proper custody of the record of the non-summary proceedings is not in question. The death of the deceased has also been admitted. At the conclusion of evidence of PW3, a certified copy of the said deposition was marked as "X". It is noted that the statutory statement made by the Accused under Section 151 of the Code of Criminal Procedure Act (CCPA), has also been given the same marking. The deposition marked "X" is not included in the list of productions in the indictment. The entire proceedings of the non-summary Inquiry were available in Court for perusal by counsel. The evidence given by the High Court registrar is confined only to the marking of the said deposition.

The learned High Court Judge, at page 8 of the judgment has narrated a part of the evidence given in cross-examination of PW13, which has no bearing to the culpability of the Appellant. However, at page 9 and 10 of the judgment the learned trial Judge has narrated the facts contained in the deposition without such content being led in evidence.

Therefore, the question arises,

Firstly, as to whether the trial Judge can act on a deposition of a deceased witness, produced from proper custody, without the relevant facts deposed to, being led in evidence,

Secondly, whether the trial Judge was mindful of the presumptions associated when admitting the said deposition in evidence.

It is observed that the said deposition was produced in evidence by PW13.

In *Stephen and others v. The Queen*¹ (cited with approval by Gooneratne J. in C. A. 06/2012 (supra)), Sansoni J. held that;

where a witness who has given evidence before the inquiring magistrate and whose name is on the back of the indictment dies before the trial, the correct procedure to produce the deposition of such witness is by calling the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record of the non-summary proceedings to produce it. A certified copy of the deposition should also be produced by the witness.

E. R. S. R. Coomaraswamy in his book "the Law of Evidence" at page 500 cites, in assent to the case, 67 CLW 48 (supra) as follows;

where witness who has given evidence before the inquiring magistrate and whose name is on the back of the indictment dies before the trial, the correct procedure to produce the deposition of such witness is not by amending the indictment and moving to mark and read the disposition in evidence, but by calling the Chief Clerk of the Magistrate's Court or another officer of the District Court connected with the custody of the record of the non-summary proceedings to produce it. A certified copy of the deposition should also be produced by the witness. (emphasis is mine)

The above authorities could indicate that, the facts related to a deposition can be admitted by the learned trial Judge under the relevant Section by producing a certified copy of the deposition through a witness having custody of the record of the non-summary proceedings, without adducing the evidence in open Court. as contended by the counsel for the Respondent.

However, in *Sheela Sinharage v. Attorney General*.² Ranasinghe J. (as he was then) approached the said issue in the following manner;

there is, however, express provision in the Evidence Ordinance (Chap. 14), in Section 33, making evidence given by a witness in a judicial proceeding relevant in a later stage of the same Judicial proceeding. Once such evidence becomes relevant at the stage of the trial, then such evidence would have also to be proved before the trial judge in the same way the other items of relevant and admissible evidence are placed before the trial Judge in

accordance with the express provisions of the laws of evidence or of criminal procedure. Facts which are relevant can be considered by the trial judge only if and when they are led in evidence before him at the trial in accordance with the relevant express provisions of Jaw. A deposition made at a non-summary inquiry must, if relevant at the subsequent trial, be adduced in evidence in open court at the trial in the presence of both parties, just as much as the other relevant facts have to be led in evidence and proved at the trial in open court in the presence of the parties. This is what the law requires, and it has a/so been the inveterate practice.

As noted above, there is no evidence on record that the relevant facts in evidence deposited to by PW2, were led In evidence before the trial Judge for his consideration in accordance with the provisions of the laws of evidence or criminal procedure. Therefore, in the instant case, by considering evidence deposited before the inquiring Magistrate, not led before the trial Court, the learned trial Judge has acted contrary to the requirements of the laws of evidence and criminal procedure, applicable in admitting witness depositions under Section 33 of the Evidence Ordinance.

In Regina v. D. M. Arthur Perera et al, 3 (cited with approval in Sheela Sinharage v. Attorney General (supra)), Basnayake A. C. J. observed that;

evidence given by a witness in a previous judicial proceeding, even though it be that of an accused person, cannot be admitted in evidence in a subsequent proceeding except in accordance with the provisions of the evidence Ordinance or the Criminal Procedure Code.

The next issue raised by the Appellant, is whether the trial Judge was mindful of the Infirmities of the deposition of PW2, when adopting such evidence.

When admitting evidence given by a witness who has testified in a prior judicial proceeding in terms of Section 33 of the Evidence Ordinance, the learned trial Judge should be mindful that the witness whose evidence is to be admitted, is not before Court to give evidence or to be cross-examined and he is unable to observe the demeanour and deportment of the witness.

We observe that there is no finding to the effect that the learned High Court Judge was mindful of the said infirmities before admitting the deposition of PW2. Therefore, for all the above reasons, it is unsafe to allow the conviction against the Appellant to stand. Accordingly, we set aside the conviction and the sentence imposed on the Appellant and acquit the Appellant.

In the circumstances of this case the question that must be considered is whether this case should be sent back for re-trial. There is no application by the State, to have this case sent back for re-trial. As noted above, the deposition of PW2 at the non-summary inquiry is the only evidence that the prosecution has placed reliance on against the Appellant. We are mindful that this is an appeal from a re-trial ordered by this Court. The offence is alleged to have been committed in 1999, and since then, the Appellant has spent a good part of his life in Court in pursuance of justice. When sending a case back for re-trial, the Court should not only be mindful of the injustice caused to the aggrieved party but also to the prisoner accused of the offence.

In the above circumstances, we refrain from sending this case back for re-trial.

FERNANDO, J. - I agree.

Appeal allowed.

Judgment by: Anil Gooneratne, J.

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