LEELAWATHIE MENIKE AND ANOTHER

v

ATTORNEY-GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 178/1999
HC RATNAPURA 101/94
FEBRUARY 14, 2006
JULY 30, 2007
SEPTEMBER 3, 2007
DECEMBER 13, 2007

Penal Code – Sections 102, 113(b) and 296 – Murder – Conspiracy to commit murder – Code of Criminal Procedure – Act. No. 15 of 1979, Sections 279, 280, 283(1), 283(5), 334(2), 335(2) and 436 – Non-compliance – Evidence Ordinance Sections 33, 35 and 114 – Best evidence rule – Applicability – Constitution Article 138(1) – Is there substantial miscarriage of justice – Evidence given in a former judicial proceeding – When relevant? When could it be used ?– Exception to hearsay rule?

The 3 accused-appellants were charged on three counts under Section 296 read with Section 113(b) and Section 102 of the Penal Code with conspiracy to commit the murder of one E. In the 2nd count the 2nd and 3rd accused were charged with murder of E. In the 3rd count the 1st accused was indicted with the abetment of the 2nd and 3rd accused to commit the murder of E. Accused were sentenced to death – 2nd accused had died.

In appeal it was contended that the trial judge erred in law by failing to comply with Sections 279 -283 in that the judgment had not been pronounced in open Court immediately after the verdict in the presence of the accused and dated by the Judge and that the judgment has not been explained to the accused and a copy given. It was contended that the handwritten judgment had been written very much later and annexed to the case record without a date. It was further contended that the trial judge had erred in placing a probative value and relying upon evidence in breach of Section 33 of the Evidence Ordinance – the Best Evidence Rule – by relying upon the evidence of witness R who could not be procured to give evidence but whose evidence at the non-summary inquiry was led in evidence under Section 33.

Held:

(1) In determining whether the grounds of appeal raised in this case are sufficient to vitiate the conviction, the following *criteria* have to be carefully considered.

(a) Whether such ground has prejudiced the substantial rights of the appellants or occasioned a failure of justice.

(b) Whether on the available evidence the appellants might reasonably have been convicted.

(2) Judgment consists of the verdict, reasons and sentence. The verdict and the sentence had been delivered on 2.12.99 forthwith immediately after trial was concluded. Section 203 envisages a situation where the verdict and reasons could be pronounced within 10 days of the conclusion of the trial. The above provision is merely directory and not mandatory. If the verdict and sentence is delivered forthwith and the reasons for the judgment recorded later within a reasonable time, the failure to date and pronounce the judgment in Open Court and explain same to the accused must be considered in the context whether such defect and, or irregularity has prejudiced the substantial rights of the appellants or occasioned a failure of justice or whether such defect or irregularity could be cured under Section 436 of the Code.

(3) The appellants have not even attempted to satisfy Court that as a result of the defect or irregularity whether the substantial rights of the appellants were prejudiced and therefore it has occasioned a failure of justice. A perusal of the evidence reveals cogent evidence on which the appellants must reasonably have been convicted.

In the interest of justice even though there is some merit in the 1st ground of appeal, as the appellants have failed to show that a substantial miscarriage of justice has actually occurred resulting from same, in the face of clear and cogent evidence that justify the conviction, the 1st ground of appeal by itself would not be sufficient to vitiate the conviction and sentence.

Held further

(4) Court has no discretion as to admitting a deposition when the witness is dead, cannot be found, is incapable or is kept out of the way, deposition of such witness is declared to be relevant and must therefore be admitted.

(5) When the requirements in Section 33 of the Evidence Ordinance are satisfied Section 33 governs the reception as substantive evidence of the testimony given in a former judicial proceeding. The reception of narrated testimony permitted by Section 33, is tantamount to an exception to the hearsay rule the basis is that the evidence was originally given on oath and was subject to cross-examination. These characteristics invest the evidence so introduced with a degree of reliability comparable to a greater extent with pure *viva voce* evidence – the trial judge had not erred in relying on the evidence of witness R under Section 33.

Per Sarath de Abrew, J. -

"When the only eye-witness cannot be found where his evidence in a former judicial proceeding is introduced under Section 33 where thoroughly filtered through cross-examination, where the veracity of such evidence is sustained through other independent corroborative testimony, such evidence may be relied on to sustain a conviction".

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to:

1. *Sinha Ratnatunga* v *State* 2001 2 Sri LR 172 at 211.
2. *Sheela Sinharage* v *A.G.* 1985 1 Sri LR 1.
3. *Moses* v *State* 1999 3 Sri LR 401.
4. *Punchibanda* v *Seelawathie* 1986 2 Sri LR 44.
5. *Ekanayake* v *A.G.* 1987 1 Sri LR 107.
6. *Mutusamy* v *David* 50 NLR 423.
7. *King* v *Fernando* 51 NLR 224 at 225.

Dr. Ranjit Fernando for 1st and 3rd accused-appellants.

Kapila Waidyaratne D.S.G. for the respondent.

Cur.adv.vult.

June 13, 2008

SARATH DE ABREW, J.

The 1st, 2nd and 3rd accused-appellants were indicted before the High Court of Ratnapura on three counts as follows:- In count one, all three accused were charged under Section 296 read with Sections 113(b) and 102 of the Penal Code with conspiracy to commit the murder of one Dr. Elvitigala between 1st January 1986 and 31st March 1986 at Kaluaggala in the Kosgama police area in the Avissawella Magistrate Court Jurisdiction. In the second count, the 2nd accused (deceased at the time of the second trial) and the 3rd accused-appellant were charged with the murder of deceased Dr. Elvitigala under Section 296 of the Penal Code. In the 3rd count, the 1st accused-appellant was indicted with the abetment of the 2nd accused and 3rd accused-appellant to commit the murder of Dr. Elvitigala under section 296 read with section 102 of the Penal Code.

The three accused were originally indicted before the High Court of Ratnapura Case No. 65/92 (the first trial), where after trial before

a jury, the 1st accused was convicted on counts 1 and 3, the 2nd accused was convicted on counts 1 and 2, while the 3rd accused was acquitted on count 1 but convicted on count 2, and all three accused were sentenced to death accordingly. However, on appeal (CA 41-43/93) the aforesaid conviction and sentence was set aside as against all three accused and a retrial was ordered.

Before the second trial without a jury in High Court Ratnapura Case No. 101/94, the 2nd accused had died and the indictment was amended accordingly. At the conclusion of the second trial on 02.12.1999 the learned trial Judge convicted the 1st and 3rd accused-appellants (hereinafter sometimes referred to as 1st and 3rd appellants respectively) of all charges and sentenced them to death. Being aggrieved of the aforesaid conviction and sentence, the 1st and 3rd appellants have tendered this appeal to this Court.

The facts pertaining to this case are briefly as follows:- The deceased Dr. Elvitigala had left his first wife and of mutual consent lived with the 1st appellant Leelawathie Menike by whom he had four children. Dr. Elvitigala used to practice medicine at his clinic at Embilipitiya during week days and return to his family residing at Kaluaggala, Kosgama during the weekend. The 2nd accused and 3rd appellant were also from Kaluaggala and used to visit the 1st appellant's house frequently and according to the evidence, the 2nd accused (now deceased) had developed an illicit intimacy with the wife of the deceased, the 1st appellant.

At the dispensary in Embilipitiya the deceased had employed 03 nurses and a person by the name of Jayaratne to assist him. Apparently there was displeasure between the 1st appellant and the deceased doctor over the alleged involvement of the deceased with one of his nurses (Ramanayake) to whom he had gifted Rs. 25,000/= to set up a house. The deceased used to spend the week at Embilipitiya, have his meals from the house of his assistant Jayaratne, and was in the habit of returning to Kaluaggala for the weekend while returning to his dispensary at Embilipitiya on Sunday evening or Monday morning.

On 24.03.1986 evening the deceased had accordingly left Embilipitiya to come to Kaluaggala and thereafter had not returned to Embilipitiya after the weekend. Jayaratne had come to

Kaluaggala in search of the deceased and met the wife of the deceased, the 1st appellant, who had maintained that the deceased had left their house in Kaluaggala on 25.03.1986 to go to Embilipitiya. Having made further inquiries from the sisters of the deceased and on being satisfied as to the disappearance of the doctor, witness Jayaratne had made a complaint to the Embilipitiya police on 30.03.1986.

The evidence also disclose that the 1st appellant had maintained that she received a letter by post demanding a ransom of Rupees Five Lakhs to release the deceased and therefore she suspects the JVP for the disappearance of the deceased. Witness Kaithan had also stated that the 1st appellant had attempted to induce him to falsely state that he saw the deceased get into a vehicle at Kaluaggala on the day the deceased allegedly left to return to Embilipitiya but never returned.

Against this backdrop, the main prosecution witness Jayantha Rupasinghe, a female domestic servant in the Kaluaggala house, told a different story and directly implicated the 1st, 2nd and 3rd accused in the murder of Dr. Elvitigala. This witness Jayantha had given evidence at the non-summary inquiry and also at the first trial before the High Court of Ratnapura. However at the second trial, as her whereabouts were not known and the prosecution was unable to procure her attendance, the learned trial Judge had granted permission for the prosecution to lead in evidence the testimony of Jayantha given at the non-summary inquiry under Section 33 of the Evidence Ordinance.

According to witness Jayantha, she had been a domestic servant in the Kaluaggala household at the time of the incident. According to her evidence, the deceased had come home from Embilipitiya around 8.00 p.m. on 24.03.1986 and had his dinner. The 1st appellant had given the deceased a cup of tea to which she had administered two pills or tablets before the deceased went to sleep. Around 10.30 p.m. the 1st appellant had woken Jayantha stating that she wanted to go to the toilet and had sent the domestic help to the kitchen to boil water. Then witness Jayantha had heard a noise of assault inside the house and had seen the 1st appellant seated on a chair in the hall. Thereafter Jayantha had gone near

the room where the deceased slept and had seen the 2nd accused squeezing the male organ of the deceased and the 3rd appellant strangling the neck of the deceased. The deceased thereafter had been tied with a rope in a reclining position and thrust into two gunny bags which were firmly tied with a rope given by the 1st appellant. The body inside the gunny bags had been carried out of the house by the 2nd accused and the 3rd appellant. An iron rod and a sword too was seen near the bed of the deceased. The 2nd accused had returned in the morning to remove the bag and shoes used by the deceased. The 1st appellant had cautioned witness Jayantha to state that the deceased had left the house to go to Embilipitiya if anyone questioned her. On a subsequent date Jayantha had divulged the entire gruesome episode to witness Wijesiri Fernando at the Bellanvila temple after obtaining an oath from the latter before a deity that he would not divulge this to anyone. When the 1st appellant found this out, the 1st appellant had threatened Jayantha who had left the house thereafter.

The evidence of Jayantha had been corroborated by witness Wijesiri Fernando who had struck up a friendship with the 1st appellant while travelling in a bus from Embilipitiya to Ratnapura. Subsequently Wijesiri Fernando, who had given his name to the 1st appellant as Dharshana Mayadunne, had visited the 1st appellant's house at Kaluaggala two or three times on the pretext of getting foreign employment to 1st appellant's son, and had developed sexual intimacy with the 1st appellant. On the request of domestic help Jayantha, Wijesiri Fernando had met her at Maharagama and gone to the Bellanvila temple, when after an oath before a deity that he would not divulge the secret, witness Jayantha had poured out to witness Wijesiri Fernando an eyewitness account of the gruesome details of what she saw on the night of 24.03.1986 as to the murder and disappearance of the deceased Dr. Elvitigala. Wijesiri Fernando had finally informed the police which led to the arrests of the 1st, 2nd and 3rd accused. On a statement made by the 2nd accused, the body of the deceased was found buried in an abandoned gem pit some distance away from the house. The police have also recovered a sword, an iron rod and a mammoty based on the statements of the accused.

The medical testimony was that the deceased sustained contusions in the scrotum and the root of the penis, on the left side of the neck, on the upper region of the neck, on the right side of the back of the chest, and left side of the chest with a fracture of the 12th rib, which injuries were consistent with the eyewitness account of domestic help Jayantha.

Witness Upatissa had testified that he was aware that the 1st appellant and the 2nd accused were having an illicit affair as he had seen them bathing together and even feeding each other. Further, Upatissa had testified that on a day in March 1986 he had met the 2nd accused, and having partaken in some illicit liquor, the 2nd accused had taken Upatissa to a close by field where a foul smell emanated from a gunny bag. The 2nd accused had confessed to Upatissa that Dr. Elvitigala was inside the gunny bag. Under threat the 2nd accused had forced Upatissa to assist him to carry the gunny bag to a nearby abandoned gem pit at Salawe estate, Moonamale, where the 2nd accused had finally buried the body.

Witness Kaithen had also testified that he lived in the neighbourhood of the 1st appellant who had informed him that the deceased was abducted by the insurgents. However, according to Kaithen, the 1st appellant had also requested him to state that he saw the deceased get into a vehicle on 25th March, the day that the deceased disappeared.

The 1st appellant had made a dock statement on 03.11.1999 denying the charges against her but had admitted that the 2nd accused was known to her and that he assisted her in the household chores. She had taken up the position that the deceased had many enemies who may have committed the murder. According to her, she was not aware of what happened to the deceased until the body was found in September 1986. The 3rd appellant had not given evidence but had remained silent.

After the addresses of the State Counsel and the two Defence Counsel on 02.12.1999, the learned trial Judge had proceeded to convict the 1st and 3rd appellants of all charges levelled against them and after compliance with section 280 of the Code of Criminal Procedure (*Allocutus*), had sentenced them to death.

At the hearing of this appeal, the learned Counsel for the 1st and 3rd appellants propounded two grounds of appeal on which he was relying on.

Ground I

The learned trial Judge had erred in law by failing to comply with Section 279 and Section 283(1) and (5) of the Code of Criminal Procedure Act No. 15 of 1979 which are mandatory statutory provisions relating to the mode of delivering Judgments in respect of Judgments of the Superior Courts.

Ground II

The learned trial Judge had erred in placing a probative value and relying upon evidence in breach of Section 33 of the Evidence Ordinance and acceptable principles and criteria laid down with regard to the best evidence principle.

Having perused the entirety of the proceedings and the written submissions submitted by both parties, I now proceed to deal with the 1st ground of appeal adduced on behalf of the appellants.

The learned Counsel for the 1st and 3rd appellants submitted that the documentary record, the record of proceedings and the journal entries on the appeal brief do not in any way confirm that the judgment in the case had in fact been pronounced in open Court before the accused and/or their attorneys-at-law and argued further that consequently the points for determination, the decisions thereon and the reasons for the decision could not have been pronounced in open Court and explained to the accused affected thereby as mandatorily required under Section 279 and 283(1) and (5) of the Code of Criminal Procedure, Act No. 15 of 1979, for the following reasons:-

(a) It would have been humanly impracticable and impossible to have delivered and pronounced a 52 page Judgment in open Court on 2.12.1999 immediately after the lengthy and exhaustive submissions of both Counsel lasting over 03 hours after days of trial and an unusual 21 page dock statement.

(b) The fact that the journal entries or proceedings do not confirm any where that a judgment was pronounced in open Court.

(c) That no Petition of Appeal had been filed by the Attorney-at-Law although a motion had been filed to obtain a certified copy, the supplying of which has not been recorded on any date.

(d) That the prisoners themselves had filed Petitions of Appeal through the Prison Authorities.

(e) That the purported judgment runs into 52 hand written pages, undated, with the case number interpolated in different hand-writing.

(f) That the Registrar of the High Court places on record that the High Court Judge had taken away the case record from the Registry and consequently there was a delay of over 3 years to prepare the Brief in Appeal due to the non-availability of the case record.

On the strength of the above circumstances, the learned Counsel for the appellants disputed the validity of the handwritten undated judgment found in the case record on the basis that the learned trial Judge failed to comply with the mandatory provisions embodied in sections 279 and 283(1) and (5) of the Code of Criminal Procedure Act, as stated below.

Section 279: *The Judgment in every trial under the Code shall be pronounced in open court immediately after the verdict is recorded or save as provided in Section 203 at some subsequent time of which due notice shall be given to parties or their pleaders, and the accused shall if in custody be brought up or if not in custody shall be required to attend to hear judgment delivered except when his personal attendance during the trial has been dispensed with and the sentence is one of fine only or when he has been absent at the trial.*

Section 283: The following provisions shall apply to judgments of Courts other than the Supreme Court or Court of Appeal:-

(1) *The Judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall*

contain point or points for determination, the decision thereon, and reasons for the decision.

(5) The Judgment shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it.

Section 203: When the case for the prosecution and defence are concluded the Judge shall forthwith or within 10 days of the conclusion of the trial record a verdict of a acquittal or conviction giving his reasons therefore and if the verdict is one of conviction pass sentence on the accused according to law.

However, in *Sinha Ratnatunga* v *State*(1) at 211 it has been held that requirement to record the verdict and pronounce reasons forthwith or within 10 days after the conclusion of the case is merely directory and not mandatory.

The question that would arise for determination is whether whatever irregularity in the judgment or the mode of passing of judgment would necessarily vitiate the conviction, or whether such irregularity could be cured under Section 436 of the Code of Criminal Procedure Act, if there is no failure of justice.

Section 436: Subject to the provisions hereinbefore contained any Judgment passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account:-

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, Judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this code; or

(b) of the want of any sanction required by section 135, unless such error, omission, irregularity or want has occasioned a failure of Justice.

In determining whether a failure of Justice has been occasioned, the above provision should be interpreted in the light of other relevant statutory provisions which have a direct bearing on the Jurisdiction and powers of the Court of Appeal in the exercise of its appellate powers.

While dealing with the jurisdiction of the Court of Appeal, the proviso to Article 138(1) of the Constitution also stipulates:-

No judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity; which has not prejudiced the substantial rights of the parties or occasioned a failure of Justice.

Similarly, in determination of appeals in cases where High Court trials were held without a Jury, Section 335(1) of the Code of Criminal Procedure Act, No.15 of 1979 provides that in an appeal from a verdict of a Judge of the High Court at a trial without a Jury the Court of Appeal may if it considers that there is no sufficient ground for interfering dismiss the appeal.

In Section 334(1) of the Code, pertaining to determination of appeals in cases where trial was before a jury, the following *proviso* is enacted which is not found in Section 335.

"Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

In *Sheila Sinharage* v *AG*[2] the Supreme Court has decided that the principle in the above *proviso* will apply only to cases of trial before a jury. However, the Court of Appeal in a much later decision. Hector Yapa, J. held in *Moses* v *State*[3] "Though Section 334(2) refers to cases of trial by Jury, it is reasonable and proper to assume that the intention of the legislature must necessarily be the same, whether it is a trial before a Jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted.

After careful consideration of the aforesaid provisions and case law authorities, I am strongly inclined to conclude that, in determining whether the grounds of appeal raised in this case are sufficient to vitiate the conviction, the following *criteria* have to be carefully considered.

(1) Whether such ground has prejudiced the substantial rights of the appellants or occasioned a failure of Justice.

(2) Whether on the available evidence in this case the appellants might reasonably have been convicted.

In the light of the above conclusion, I now return to consider the first ground of appeal propounded by the appellants, in respect of which the following features may be noted.

(1) The appellants have not disputed or challenged the authenticity and contents of the hand written reasons for the Judgment filed of record. There is also no dispute that the Judgment contains the points for determination, the decisions thereon and the reasons for the decision.

Further there is no dispute that the Judge who heard the case had written the judgement and signed it.

(2) The accused appellants have disputed that the Judgment or reasons for the Judgment had not been pronounced in open court immediately after the verdict in the presence of the accused and dated by the learned trial Judge. The appellants have further disputed that the Judgment or reasons for the Judgment had not been explained to the accused and a copy thereof had not been given to them in spite of applying for same. The implied allegation was that the hand-written reasons for the judgment has been written very much later and annexed to the case record without a date.

(3) Even though the appellants have taken up the position that on 02.12.1999, as the 1st appellant made a dock statement comprising of 21 pages and as the State Counsel and the two Defence Counsel had also addressed Court for about 03 hours, it was not practicable on the very same day for the learned trial Judge to write and record a 52 page Judgment, this position is not factually correct.

A perusal of the case record reveals that after the 1st accused had made her dock statement on 03.11.1999, the case had been postponed to 11.11.99 for correction of proceedings and again postponed to 18.11.99 on which date the trial Judge was on leave and finally postponed to 02.12.99 when the verdict was recorded after submissions of Counsel. Therefore the learned trial Judge had sufficient time from 3.11.99 to 2.12.99 to prepare his Judgment if he so endeavoured.

(4) It must also be noted that the submission that a copy of the Judgment requested by the appellants had not been received

is not substantiated and had not been stated in the Petition of Appeal.

(5) The learned Deputy Solicitor-General had further submitted that the endorsement made by the Registrar as to the delay in preparing the brief for appeal does not specifically substantiate that the reasons for the judgment was not already filed of record.

(6) The learned D.S.G. had also submitted that the very fact that the learned trial Judge had made order on 06.12.99 to issue a copy of the judgment and on 17.12.99 and 13.01.2000 had made further orders to accept the Petitions of Appeal and forward the case record to the Court of Appeal is further indicative that the reasons for the Judgment had been filed of record.

(7) In the absence of proof to the contrary, the presumption under Section 114(d) of the Evidence Ordinance that the disputed judicial act had in fact been regularly performed would operate to the disadvantage of the appellants.

The Judgment comprises of the verdict, reasons and sentence. There is no dispute that the verdict and sentence had been delivered on 02.12.99 forthwith, immediately after the trial was concluded. The dispute remains as to when the reasons were annexed to the case record and the fact that the reasons were not dated and pronounced in open court and explained to the 1st and 3rd accused . Section 203 of the Code of Criminal Procedure Act No. 15 of 1979 envisages a situation where the verdict and reasons for Judgment could be pronounced within 10 days of the conclusion of the trial. As stated earlier, the above provision is merely directory and not mandatory. (eg. Singha *Ratnatunga* v *State (supra)*. Therefore if the verdict and sentence is delivered forthwith and the reasons for the Judgment recorded later within a reasonable time, the failure to date and pronounce the reasons in open Court and explain same to the accused must be considered in the context whether such defect or irregularity has prejudiced the substantial rights of the appellants or occasioned a failure of justice, or whether such defect or irregularity could be cured under section 436 of the Code of Criminal Procedure Act. Equally, the sequence is first the verdict, then the reasons and finally the sentence if any. Although the general consensus is that

reasons should precede the sentence, in practice it often happens that the reasons follow the sentence, as in this case, which would be an irregularity. The *cursus curiae* is that such an irregularity in the judgment is not necessarily fatal to vitiate a conviction but can be cured under Section 436 of the code unless it can be shown that such a defect or irregularity had occasioned a failure of Justice.

In *Punchibanda* v *Seelawathie*[4] it had been held that the mere fact that the Judgment or order has not been dated does not constitute a fatal irregularity.

In *Ekanayake* v *A.G.*[5] the argument was raised that the trial Judge had failed to comply with Section 203 of the Code and that he did not give reasons for the conviction nor deliver judgment in open court. A judgment dated 23.8.83 signed by the Judge was filed of record. It was held that the circumstance that the appellant appealed against the Judgment and finding shows that the Judge did deliver Judgment. It was also held that the presumption that an official act had been done correctly would apply and hence there was sufficient compliance of Section 203 and 279 of the Code. In *Muthusamy* v *David*[6] it was held that failure to comply in every particular with section 306 (Section 283 of the new code) of the Criminal Procedure Code does not by itself vitiate a conviction.

The journal entries and the trial proceedings however do not indicate that the learned trial judge had pronounced the Judgment or given reasons for the Judgment in open Court and explained same to the accused as required under Section 279 and 283 of the Code. If the situation is such, this Court strongly disapproves the irresponsible conduct of the learned trial Judge who had a paramount duty to do so. Nevertheless, in the interests of justice, this Court has a duty to examine whether the aforesaid defect or irregularity should necessarily be construed as a fatal irregularity especially so where there is overwhelming evidence to justify the conviction. In such a situation the Court is entitled to examine whether a failure of justice has occurred detrimental to the appellants as a result of the aforesaid defect or irregularity.

In this case the appellants have not even attempted to satisfy Court that as a result of the aforesaid defect or irregularity whether the substantial rights of the appellants were prejudiced and therefore it has occasioned a failure of justice. The defect has not

precluded the appellants from submitting their appeals on time. The hand-written reasons for Judgment contain the points for determination, the decisions thereon and the reasons for such decisions to base their argument at the hearing of the appeal. A perusal of the evidence reveals cogent evidence on which the appellants might reasonably have been convicted. Therefore, in the interests of justice, even though there is some merit in the 1st ground of appeal, as the appellants have failed to show that a substantial miscarriage of justice has actually occurred resulting from same, in the face of clear and cogent evidence that justify the conviction, I hold that the first ground of appeal by itself would not be sufficient to vitiate the conviction and sentence imposed on the 1st and 3rd appellants.

The second ground of appeal is that the learned trial Judge had erred in placing a probative value and relying upon the evidence of domestic servant Jayantha Rupasinghe who could not be procured to give evidence at the second trial but whose evidence at the non-summary inquiry was led in evidence under Section 33 of the Evidence Ordinance which the appellants alleged was in breach of the best evidence principle.

Section 33 of the Evidence Ordinance stipulates as follows:

Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable.

Provided:-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceedings had the right and opportunity to cross-examine.

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation: A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

The submission raised on behalf of the appellants was that even though the defence had vehemently objected to the application by the State to lead the evidence of the domestic help Jayantha Rupasinghe relating to the non-summary Magistrate Court proceedings which had not been subject to cross-examination when in fact her evidence and testimony in the High Court at the previous trial which had been under Oath and tested by cross-examination was readily available, was in breach of the best evidence principle.

Contrary to the aforesaid submission raised on behalf of the appellants a careful perusal of the original case record reveals the following vital information.

(1) At the time of the second trial, the prosecution could not procure the presence of this vital witness Jayantha as she could not be found and her whereabouts were not known. P.C. Heenbanda of the CID had given evidence to this effect (page 327-345) and had produced written reports XI to X5. Therefore there was adequate material for the learned trial Judge to conclude that the above witness cannot be found.

In the case of *King* v *G.W. Fernando*[7] at 225 Jayatilleke SPJ expressed the view that "the court has no discretion as to admitting a deposition when the witness (1) is dead (2) cannot be found (3) is incapable or (4) is kept out of the way; the deposition of such witness is declared to be relevant and must therefore be admitted."

In view of the above, the decision taken by the learned trial Judge to admit the evidence of Jayantha Rupasinghe (P4) cannot be assailed.

(2) The submission of the learned Counsel for the appellants that the non-summary evidence of witness Jayantha which was admitted at the second trial as P4 was not subject to cross-examination is indeed a fallacy and may be construed as an attempt to mislead Court. Witness Pinidiya Senadheera Perera, interpreter-mudaliyar of Ratnapura High Court, had given evidence and had read in evidence the entirety of the testimony

of witness Jayantha given at the non-summary Inquiry marked P4 as follows:

Original record pages 370-385 – Evidence in chief
pages 385-386 – Questions by the learned trial Judge.
pages 387-397 – cross-examination on behalf of 1st accused
pages 398-404 – cross-examination on behalf of 2nd accused.
pages 404-407 – cross-examination on behalf of 3rd accused
pages 407-408 – Re-examination.

Therefore the evidence of eye-witness Jayantha contains 20 pages of thorough cross-examination. Her credibility has not been challenged by the appellants. As her evidence has been corroborated in material particulars by the medical evidence and other direct and circumstantial evidence, the learned trial Judge had correctly relied on her evidence.

(3) The non-summary evidence of the deceased witness No. 18, Kaithan too similarly had been admitted under Section 33 of the Evidence Ordinance. (Page 410 of the Record). Therefore it cannot be sustained that the prosecution discriminately and selectively relied on Jayantha's evidence at the non-summary as against her evidence at the 1st High Court trial in order to derive an undue advantage and thereby violating the best evidence principle, as witness Jayantha's non-summary evidence too had been under oath and thoroughly tested by cross-examination.

(4) Pages 353-357 of the original record clearly disclose that as one of the Defence Counsel had objected to leading Jayantha's evidence given at the 1st trial under Section 33 of the Evidence Ordinance on the mistaken premise that there was no such provision in Section 33, the State Counsel had resorted to lead Jayantha's evidence led at the non-summary. Page 357 and 369 of the record clearly indicate that the defence had not objected to this move at this stage.

(5) Where the requirements contained in Section 33 of the Evidence Ordinance are satisfied, section 33 governs the reception, as substantive evidence, of the testimony given in a former judicial proceeding. The reception of narrated testimony, permitted by Section 33, is tantamount to an exception to the heresay rule. The basis of the exception is that the evidence was originally given on oath and was subject to cross-examination. These characteristics invest the evidence so introduced with a degree of reliability comparable to a great extent with pure *viva voce* evidence. Therefore when the only eye-witness cannot be found, where his or her evidence in a former judicial proceeding is introduced under Section 33, where thoroughly filtered through cross-examination, and where the veracity of such evidence is sustained through other independent corroborative testimony, such evidence may be relied on to sustain a conviction. Accordingly the learned trial Judge had not erred in relying on witness Jayantha Rupasinghe's evidence introduced under Section 33 of the Evidence Ordinance.

(6) The appellants had further submitted that part of witness Wijesiri Fernando's evidence would tantamount to heresay evidence on the failure of the prosecution to call witness Jayantha to give viva voce evidence. I am inclined to reject this contention as witness Jayantha's non-summary evidence (P4) introduced under Section 33 of the Evidence Ordinance too forms part of the substantive evidence led at the trial.

On the basis of the above material gleaned from the original record, there is no substance in the defence submission that the best evidence principle had been observed in the breach. Neither have the appellants succeeded in sustaining a failure of justice. Therefore I do not see any merit in the 2nd ground of appeal propounded by the appellants and therefore I reject same.

Due to the aforesaid reasons I am unable to conclude that a failure of justice had occurred with regard to the 1st and 3rd appellants in respect of the grounds of appeal adduced on their behalf. Therefore, I do not perceive any sufficient ground to interfere with the conviction and sentence.

In view of the above conclusion I dismiss the appeal and affirm the conviction and sentence imposed by the learned High Court Judge of Ratnapura dated 02.12.1999 on both the 1st and 3rd appellants.

Accordingly appeal is dismissed.

IMAM, J. - I agree.

Appeal dismissed.