1917.

Present: Shaw J.

THE KING *v.* KANDAPPU.

67—D. C. (Crim.) Trincomalee, 103.

Admissibility of evidence given at Police Court inquiry by absent witness—Evidence Ordinance, s. 33.

It is only in extreme cases of delay or expense that the personal attendance of a witness should be dispensed with, and the evidence given by him before the committing Magistrate referred to.

THE facts appear from the judgment.

A. St. V. Jayewardene, for the appellant.

Grenier, C.C., for the Crown.

April 4, 1917. SHAW J.—

In this case the accused, who is a Police Headman, is convicted of an offence against section 194 read with 190 of the Penal Code for having signed a certificate knowing the certificate to be false in a material point. Several objections are taken to the proceedings. The first is, that the conviction is in respect of an offence which is not charged in the indictment. I do not think that objection is a sound one. I think the count in the indictment under which the conviction has gone does charge the offence with which the accused has been convicted. It is true that it goes on to allege some further thing, but the first two lines of the count charging the accused with

signing a certificate knowing the certificate to be false will cover the conviction which has been made. There is another objection which seems to me to be of a more serious nature, that is, that the Judge admitted in evidence the depositions in the Police Court of a witness, Rawter, who was the second witness on the indictment. It appears that this witness was not bound over to appear and give evidence at the trial, as he should have been under the provisions of the law. Accordingly, summons had to be issued for his attendance by the prosecution. He was a very important witness, being the person for whom the accused had signed the certificate. Summons was also issued for his attendance by the defence, showing that the accused was anxious that he should be present in Court. The evidence of this witness was absolutely necessary for the purpose of obtaining a conviction, and the Judge himself in his judgment says that he could not have convicted on the evidence of the documents had not certain facts been provided by the verbal evidence of this witness, Rawter. The deposition before the Magistrate was admitted under section 33 of the Evidence Ordinance, which allows depositions taken at an earlier stage of the judicial proceedings to be read in evidence when the witness is dead, or cannot be found, or is incapable to give evidence, or is got 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, a Court considers unreasonable. The process server was called. It appears that the witness was supposed to be at Tamankaduwa, but that the process server was unable to get there owing to floods. It appears that a river near that place was in a flooded state, and the process server could not get a boat. If he had been able to get a boat, he says he could have got across. Instead of making any efforts to get round the flood by going by the river, or by procuring a boat or canoe, the process server returns without any further attempt to serve the summons. It is quite clear from his evidence that the reason for his non-serving of summons and the non-appearance of the witness was due to the neglect of duty of the Magistrate not binding him over to appear to give evidence in the District Court, and in the neglect of the process server in not taking more energetic measures to serve the summons. At the time of the trial it seems to me that it was impossible to say that the presence of the witness could not be obtained without an amount of delay or expense which was unreasonable. The expenses would have been nothing to procure the attendance of the witness at the subsequent sitting of the District Court, because the floods would have abated by that time. The delay would only have been for some short period of a month or so. I agree with the opinion expressed by Sir Douglas Straight in the case reported in the *Indian Law Reports, 2 Allahabad 646*, that it is only in extreme cases of delay or expense that the provisions of section 33 should be brought into operation. It is

1917.

SHAW J.

The King v. Kandappu

an important safeguard of the accused that the witnesses who speak to material facts against him should be present in Court and should be seen by the Judge or jury who has to decide on the evidence, and it is important, in the interests of the prisoner, that such witnesses should be, if desired by the accused, subjected to cross-examination by counsel defending the prisoner. This is so especially in this country, where accused are very often not represented by counsel in the lower Court, or, at any rate, are not represented by such eminent lawyers as in the later stage of the proceedings. The deposition of this witness being, in my opinion, inadmissible under the circumstances of this case, there was not sufficient evidence on which the accused could have been convicted. I, therefore, set aside the conviction appealed from, and I remit the case to the District Court for re-trial after proper measures have been taken for the purpose of procuring the attendance of the witness Rawter. In the circumstances, as the Judge has expressed a definite opinion in this case on evidence which, in my opinion, was inadmissible, it will be better that the case should be heard before another District Judge.

Sent back.