**GUNAPALA**

**v.**

**ATTORNEY GENERAL**

COURT OF APPEAL.
YAPA, J.
KULATILAKE, J.
CA 58-59/98.
HC Galle 1581.
13TH, 17TH DECEMBER, 1999.

*Evidence Ordinance, S.154 - Treating witness as an adverse witness - Code of Criminal Procedure Act S.195(g), S.449(1) - Contempt of Court - Opportunity of answering the charge - Constitution, Article 13(3) - Reasons for imposing sentence - Mandatory.*

The first prosecution witness appellant was the first witness for the prosecution. In the course of his evidence the prosecution preferred an application under S.154 Evidence Ordinance seeking permission of court to treat the Appellant as an adverse witness. This was allowed. Thereafter Court had purported to act in terms of S.449(1) of the Code of Criminal Procedure and convicted the Appellant for contempt of Court.

**Held :**

(1) The trial Judge had proceeded with a subsidiary criminal investigation against the witness purporting to act under S.449(1) in the same day after the conclusion of his evidence, in the course of the main trial itself.

(ii) The procedure followed deprived the Appellant of the opportunity of explanation and possibility of correcting misapprehensions as to what had been in fact said or meant.

(iii) There is no reason why a witness in the main case in a High Court trial when charged with an offence of contempt of Court for giving false evidence, should be deprived of legal representation.

**APPEAL** from an order of the High Court of Galle.

**Cases referred to :**

1. *Chang Han King vs Piggot* (1909) AC 312 (JC)
2. *Subramaniam vs Queen* (1868) 5 Moore NS 111 16 ER 457

3. *Cooray vs Ceylon Para Rubber Co.* 23 NLR 321 at 326
4. *Muttusamy vs Attorney General* SC Application 81/94
   HCA 302/94 MC Mt. Lavinia 793993 - SCM 6. 10. 1994
5. *Daniel Appuhamy vs Queen* 64 NLR 487
6. *Tillekeratne vs Officer in Charge Pugoda Police Station* [1997] 1 Sri.L.R.

*Nimal Muttukumarana* for 1st Prosecution witness Appellant.

*Yasantha Kodagoda SSC* for Attorney General.

*Cur. adv. vult.*

January 11, 2000.

**KULATILAKA, J.**

The "first prosecution witness appellant" Tiranagamage Gunapala (hereinafter referred to as the appellant) was the first witness for the prosecution in the High Court of Galle case No. 1581 at the trial of accused Amrose Moses who was indicted of having committed the murder of Laku Narangodage Wimalasena, an offence punishable under Section 296 of the Penal Code.

In the course of his evidence the prosecution has preferred an application under Section 154 of the Evidence Ordinance seeking permission of Court to treat the appellant as an adverse witness and that application had been allowed by court. Thereafter the learned trial Judge has purported to act in terms of section 449(1) of the Code of Criminal Procedure Act No. 15 of 1979 and by his order dated 07. 12. 1998 convicted the appellant of Contempt of Court and sentenced him to a term of two years rigorous imprisonment. The appellant has appealed against that order in terms of section 449(3) of the Code of Criminal Procedure Act.

We have considered the submissions made by the learned counsel who appeared for the appellant as well as the learned Senior State Counsel. The relevant section under which the learned trial Judge has acted reads as follows :

449(1) "If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme court or Court of Appeal or High court, summarily to sentence such witness as for a contempt of the court to imprisonment either simple or rigorous for any period not exceeding two years or to fine such witness in any sum not exceeding one thousand rupees; or if such court be an inferior court to order such witness to pay a fine not exceeding five hundred rupees or to undergo rigorous or simple imprisonment for any period not exceeding three months. Whenever the power given by this section is exercised by a court other than the Supreme court or Court of Appeal, the Judge of such court shall record the reasons for imposing such sentence."

It is pertinent to note that the prosecution endeavour was to adduce appellant's evidence as direct evidence of an eye witness. Albeit this was not to be so because he had to be treated as an adverse witness by the prosecution. Having taken this step the learned State Counsel had marked two passages where the appellant had contradicted the evidence previously given by him at the non summary inquiry before the Magistrate. The first contradiction reads as follows:

". . . . . when I was engaged in a conversation with him a person by the name Moses came to my house. Moses is the accused".

This passage had been marked as P1. The second contradiction reads as follows:

"Then Wimalassena having said that it was not necessary to raise a question now, abused in filth. He further said that he was not afraid of anybody".

This passage has been marked as P2.

We observed that the learned trial Judge had confronted the appellant only with P2. In *Chang Han King vs. Piggott*[1] it was held that when it is not suggested that the whole of a witness's evidence is false it is imperative that the witness should not be left in doubt as to which parts of his evidence are alleged to be false. Such a lapse on the part of the trial Judge would leave the accused in doubt as to the matter on which in the opinion of Court the appellant had given false evidence. In this case the learned trial Judge by not confronting the appellant with the contradiction P1 has in our opinion made a grave error of law.

The appellant Tiranagamege Gunapala was the first witness called by the prosecution. His evidence was led on 07. 12. 1992. The learned trial Judge had proceeded with a subsidiary criminal investigation against the witness (appellant) purporting to exercise the power under Section 449(1) on the same day at the conclusion of his evidence in the course of the main trial itself. Such a procedure was frowned upon by Their Lordships in *Subramaniam vs. Queen*[2].

Learned Senior State Counsel cited the judgment of De Sampayo, J. in *Cooray vs. The Ceylon Para Rubber Co., Ltd.*,[3] at 326 which was a *rei vindicatio* action which held that the proper time for dealing with a witness under Section 440 of the Criminal Procedure Code (similar to Section 449 of the Code of Criminal Procedure Act No. 15 of 1979) is after the conclusion of his own evidence and after the close of the case of the party who calls him or of the whole case if the completion of the trial is likely to render more apparent the falsehood of any statement. Nevertheless in the instant case where the allegation against the appellant was that he gave false evidence at the High court trial within the meaning of Section 188 of the Penal Code, we are of the view that the Court should be guided by the provisions of Section 448(1) of the Code of criminal

449(1) "If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme court or Court of Appeal or High court, summarily to sentence such witness as for a contempt of the court to imprisonment either simple or rigorous for any period not exceeding two years or to fine such witness in any sum not exceeding one thousand rupees; or if such court be an inferior court to order such witness to pay a fine not exceeding five hundred rupees or to undergo rigorous or simple imprisonment for any period not exceeding three months. Whenever the power given by this section is exercised by a court other than the Supreme court or Court of Appeal, the Judge of such court shall record the reasons for imposing such sentence."

It is pertinent to note that the prosecution endeavour was to adduce appellant's evidence as direct evidence of an eye witness. Albeit this was not to be so because he had to be treated as an adverse witness by the prosecution. Having taken this step the learned State Counsel had marked two passages where the appellant had contradicted the evidence previously given by him at the non summary inquiry before the Magistrate. The first contradiction reads as follows:

". . . . . when I was engaged in a conversation with him a person by the name Moses came to my house. Moses is the accused".

This passage had been marked as P1. The second contradiction reads as follows:

"Then Wimalassena having said that it was not necessary to raise a question now, abused in filth. He further said that he was not afraid of anybody".

This passage has been marked as P2.

We observed that the learned trial Judge had confronted the appellant only with P2. In *Chang Han King vs. Piggott*[1] it was held that when it is not suggested that the whole of a witness's evidence is false it is imperative that the witness should not be left in doubt as to which parts of his evidence are alleged to be false. Such a lapse on the part of the trial Judge would leave the accused in doubt as to the matter on which in the opinion of Court the appellant had given false evidence. In this case the learned trial Judge by not confronting the appellant with the contradiction P1 has in our opinion made a grave error of law.

The appellant Tiranagamege Gunapala was the first witness called by the prosecution. His evidence was led on 07. 12. 1992. The learned trial Judge had proceeded with a subsidiary criminal investigation against the witness (appellant) purporting to exercise the power under Section 449(1) on the same day at the conclusion of his evidence in the course of the main trial itself. Such a procedure was frowned upon by Their Lordships in *Subramaniam vs. Queen*[2].

Learned Senior State Counsel cited the judgment of De Sampayo, J. in *Cooray vs. The Ceylon Para Rubber Co., Ltd.*,[3] at 326 which was a *rei vindicatio* action which held that the proper time for dealing with a witness under Section 440 of the Criminal Procedure Code (similar to Section 449 of the Code of Criminal Procedure Act No. 15 of 1979) is after the conclusion of his own evidence and after the close of the case of the party who calls him or of the whole case if the completion of the trial is likely to render more apparent the falsehood of any statement. Nevertheless in the instant case where the allegation against the appellant was that he gave false evidence at the High court trial within the meaning of Section 188 of the Penal Code, we are of the view that the Court should be guided by the provisions of Section 448(1) of the Code of criminal

Procedure Act where it is laid down that a summary trial against a witness who had given false evidence in the High Court irrespective of whether the trial was by a jury or by a Judge without a jury should be upon the conclusion of that trial. Such a procedure would not in any way prejudice the case against the prosecution or the defence in the main case.

On a perusal of the proceedings against the appellant we find that the very day he was treated as an adverse witness he was asked whether he had any cause to show as to why he should not be punished in terms of Section 449 of the Code of Criminal Procedure Act. His meek reply was as follows:

"My Lords, It was due to forgetfulness. (ස්වාමීනි කල්පනාව නැති කමට)

He was not asked whether he admitted or denied giving false evidence.

In *Muttusamy vs. Attorney-General*[4] decided on 6th October 1994, Fernando, J observed that the gist or the essence of the accusation should be communicated to the appellant and afford him an opportunity to furnish an explanation.

In *Daniel Appuhamy vs. Queen*[5] at pages 483 and 484, Lord Chancellor referred to the fact that the witness was not asked whether he admitted or denied giving false evidence but only to show cause why he should not be dealt with. At the trial the appellant had begged his Lordships pardon. The Lord Chancellor delivering his judgment was highly critical of this particular procedure adopted by the trial Court.

In the instant case the learned High Court Judge has followed such a procedure and thereby the appellant was deprived of the opportunity of explanation and possibly of correcting misapprehension as to what had been in fact said or meant. In this regard vide the decision of Justice Kulatunge in *Tillekeratne vs. Officer-in-Charge of Pugoda Police Station*[6].

The learned counsel who appeared for the appellant submitted that the appellant was not given an opportunity of answering the charge of Contempt of Court levelled against him. He could not avail himself of the services of an Attorney-at-Law. In this regard the learned counsel referred us to Article 13(3) of the Constitution which reads as follows:

> "Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-Law at a fair trial by a competent Court".

Under Section 195(g) of the Criminal Procedure Code one of the duties of the High Court Judge when serving an indictment on an accused person is to ask the accused whether he requires an Attorney-at-Law to be assigned to him for his defence and if he so requests to assign a counsel. We see no reason why a witness in the main case in a High Court trial when charged with an offence of Contempt of Court for giving false evidence which is a criminal offence should be deprived of such a facility. Hence, we see merit and substance in the submissions tendered to Court by the learned counsel for the appellant.

Further on a careful scrutiny of the order made by the learned trial Judge, we find that he has failed to give reasons for the conviction. In terms of Section 449(1) of the Code of Criminal Procedure Act it is a mandatory requirement that the judge should give reasons for imposing sentence. His failure to do so is a grave error of law.

For the aforesaid reasons we are of the considered view that the impugned proceedings are invalid. In the circumstances we set aside the conviction and the sentence imposed by the learned trial Judge and accordingly we acquit the appellant.

**YAPA, J.** - I agree.

*Appeal allowed.*