GAMINI DOLAWATTA

v.

ATTORNEY-GENERAL

SUPREME COURT.
RANASINGHE, C.J., WANASUNDERA, J. AND H. A. G. DE SILVA, J.
S.C. APPEAL No. 16/86.
H.C. AVISSAWELLA 19/81.
FEBRUARY 01 AND 03, 1988.

Criminal Law–Attempted murder, s. 300 Penal Code–Medical reports–Case history recorded in medical reports–Informant who gave case history not called as a witness–Admissibility of such case history–Hearsay evidence–Section 32(2) of the Evidence Ord.–Section 414(1) of the Code of Criminal Procedure Act.

Acid was thrown on one Buddhadasa by one of three persons (who also attacked him with hands) when he was on his way home accompanied by a 12-year old boy called Udaya Kumara. Buddhadasa was blinded in both eyes and rendered unconscious and in his statement first recorded by the Police 8 days after the incident he mentioned the 1st accused Gamini Dolawatta as the person who threw the acid. Dr. (Mrs.) Coomaraswamy examined Buddhadasa and in her Medico-legal report P2 while mentioning that there was permanent loss of vision stated that the victim had been admitted with a history of acid having been thrown on him and assault with hands. Buddhadasa being unconscious at the time could not have given this information. On the next morning Buddhadasa was examined by Dr. P. R. Fernando, lecturer in Forensic Medicine of the Colombo University and in his Medico-Legal report P1 the history was given as 'Acid was thrown by Gamani at 6.30 p.m. on 20.03.78 at Ihala Bomiriya'. Dr. Fernando too said that Buddhadasa had acid burns over his entire face caused by corrosive acid and permanent loss of vision of both eyes.

Both Dr. (Mrs.) Coomaraswamy and Dr. P. R. Fernando had left the island and were not available as witnesses but their medico-legal reports were admitted under s. 414(4) of the Code of Criminal Procedure Act.

The 3 accused persons where indicted in the High Court for committing the offence of attempted murder under s. 300 of the Penal Code. The 1st accused Gamini Dolawatta was unanimously found guilty under s. 317 of the Penal Code and sentenced to 5 years R.I. and a fine of Rs. 250. The 2nd accused was acquitted by a 5 to 2 verdict and the 3rd accused by a unanimous verdict.

The Judge in his summing up told the Jury that Dr. Fernando had recorded the history that one Gamini threw acid at the injured but there was no evidence as to who told this to the Doctor.

Held–

(1) The summing up was grossly inadequate and amounts to a misdirection.

(2) While a medico-legal report is admissible in evidence under s. 414(1) of the *Code of Criminal Procedure Act, hearsay evidence by way of case history embodied in* such a report is not admissible as such history is information not ascertained by the Doctor from his own examination of the injured.

(3) The expression 'Government Officer' includes any officer of the Department of Forensic Medicine of the Faculty of Medicine of the Universities.

(4) (Ranasinghe, C.J. dissenting):
Case histories in such reports treated as statements recorded by doctors in the ordinary course of business and in particular as entries or memoranda made in books kept in the ordinary course of business or in the discharge of professional duty under s. 32(2) of the Evidence Ordinance are not admissible.

(5) Even if such a statement (case history) is technically admissible it should have been ruled out by the Judge and not left to the jury as its probative value is far outweighed by the prejudice it will cause the accused.

Cases referred to:

(1) *Korossa Rubber Co. v. Silva, 20 NLR 65, 72, 79.*
(2) *R. v. Hanmanta, 1 ILR Bom. 610, 617.*

APPEAL from judgment of the Court of Appeal.

Dr. Colvin R. de Silva with *Mrs. Manouri Muttetuwegama* and *Mrs. Chamantha Weerakoon* for the 1st accused-appellant.

Asoka de Silva, SSC for the Attorney-General.

Cur. adv. vult.

March 30, 1988.

H. A. G. DE SILVA, J.

The 1st accused-appellant with two others were indicted with the attempted murder of one Gamage Buddhadasa, by attacking and injuring him with some corrosive liquid, an offence punishable under Section 300 of the Penal Code. While the 2nd accused was acquitted of the charge by a 5 to 2 verdict of the Jury, the 3rd accused's acquittal was unanimous, on a direction given by the learned trial judge that there was no evidence against him. The 1st accused-appellant alone was convicted following an unanimous verdict of guilt of causing grievous hurt with a corrosive substance, under Section 317 of the Penal Code and sentenced to 5 years R.I. and a fine of Rs. 250. The Court of Appeal confirmed the conviction and hence this appeal with leave of that Court.

The prosecution case was briefly as follows: on 20th March 1978 there had been a funeral close to Buddhadasa's house at Ihala Bomiriya and he had supplied a pot of tea, to the funeral house. At about 6.15 p.m. accompanied by one Udaya Kumara, a 12 year old

boy, Buddhadasa had gone to the funeral house to bring back the pot and thereafter he had gone a little further to a boutique and bought some sprats. On his way back he observed 3 persons on the road, one of whom was the 1st accused Gamini Dolawatte whom he knew, but was not aware of the identities of the other two who were with the 1st accused. As Buddhadasa passed the house of one Liyanage, and when he was about 5 feet from the 1st accused, the latter flung some liquid at his face, some of which fell on his eyes and he immediately started losing his eye-sight. He was also physically attacked after the liquid was thrown. He was definite in his evidence in Court that he had identified the 1st accused well. He shouted out that acid had been thrown at him but to none of the persons who came there to his help on hearing his shouts, did he disclose the identity of his assailant.

He was taken to the eye hospital and on admission to the ward he was examined by Dr. (Mrs.) Coomaraswamy. Her medico-legal report has been produced marked P2. From it one finds that there is permanent loss of vision and according to it, Buddhadasa has been admitted with a history of acid having been thrown on him and assaulted with hands at about 6.30 p.m. It is obvious that this information could not have been given by Buddhadasa himself as he had lost consciousness by that time. Next morning he was examined by one Dr. P. R. Fernando, the lecturer in Forensic Medicine of the Colombo University and according to the latter's Medico-legal report P1 the history is given as "Acid was thrown by Gamini at 6.30 p.m. on 20.3.78 at Ihala Bomiriya." He reports that there were acid burns over the entire face caused by corrosive acid and the patient has suffered permanent loss of vision of both eyes.

Udaya Kumara who was the other eye-witness to this incident and had run away from the scene had been unable to identify any of the assailants as the time was about 6.30 p.m. and there was no sufficient light for him to do so. The other two witnesses who were called by the prosecution, other than the official witnesses were Missi Nona and her daughter Sirimawathie, two inhabitants of that village, who stated that shortly prior to the incident, the 1st accused had come to their house with two others and asked for some water. He had been given the water in a glass, and Missi Nona had gone off to the funeral house. Sirimawathie said that she saw the 1st accused going away from their house with two others and the 1st accused was carrying a parcel in the shape of a bottle. She had inquired from the

1st accused whether it contained arrack or medicine. The motive alleged by the prosecution was a dispute between the 1st accused's father who owned a field at Ihala Bomiriya, and Buddhadasa who was the ande cultivator of that field.

The Police evidence was that I. P. Tillekeratne had recorded the statement of Buddhadasa eight days later and it was in this statement that Buddhadasa had disclosed the name of the 1st accused as his assailant. It appears that this was the first occasion he had done so. It was also the evidence of Inspector Tillekeratne, who conducted the investigations into this case, that when he was on his way to another inquiry, seeing a crowd chasing after the 3rd accused he apprehended him and took him into custody and went to the place of the incident which was about a quarter of a mile away. There he found a glass and a bottle and a parcel of sprats on the road. Both the glass and the bottle smelt of acid and the parcel of sprats was identified at the trial as the one that was being carried by Buddhadasa at the time of the incident. The glass and the bottle were sent to the Registrar of Finger Prints and the latter detected one finger print on the glass and two on the bottle. The two finger prints found on the bottle were found to be identical with those of the acquitted 2nd accused while the finger print found on the glass did not match the finger prints of any of the three accused in the case. As a result there was no finger print evidence against the 1st accused.

Neither Dr. (Mrs.) Coomaraswamy nor Dr. P. R. Fernando both of whom had left the country were available to give evidence at the trial. Their Medico-legal reports P1 and P2 were produced under Section 414(1) of the Code of Criminal Procedure and Prof. H. V. J. Fernando was called by the prosecution to give expert evidence based on the findings of Drs. Coomaraswamy and Fernando as stated in their Medico-legal reports P1 and P2.

The main contention of Dr. Colvin R. de Silva was that even though the Medico-legal reports P1 and P2 were admissible under the said section 414(1), the case histories as found in them were not admissible inasmuch as, the identity of the persons who gave that information to the doctors, especially to Dr. Fernando was not known and that the informant was not called as a witness. Regarding the statement in the Medico-legal report that "Acid was thrown by Gamini" it was his contention that other than the fact that the name

Gamini being disclosed, which did not necessarily refer to Gamini Dolawatte the 1st accused, in that there may have been many more Gaminis in Ihala Bomiriya, without adequate direction by the trial judge to the jury, that Gamini could refer to some person other than the 1st accused, it was not made clear to the jury that no credence could be given to this statement as the identity of the person who gave that information was not known and hence he was not called to give evidence, thus making it hearsay evidence and of no value at all, and should be ignored by them. All that the learned trial judge has stated about this in his summing up is that Dr. P. R. Fernando has recorded the history that one Gamini threw acid at the injured at Ihala Bomiriya on 20.3.78 at 6.30 in the evening but there is no evidence before us as to who told this fact to the doctor. In my view this direction is grossly inadequate and amounts to a misdirection. The learned trial judge should have been more specific and directed the jury in no uncertain terms on the true import of these words.

Learned Senior State Counsel sought to justify the admission of the evidence provided by the case histories found in P1 and P2 under Section 32(2) of the Evidence Ordinance in that they were statements recorded by the doctors in the ordinary course of business and in particular as it consists of an entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty.

There is also another provision which also has a specific bearing on this matter, namely Section 414(1) of the Code of Criminal Procedure Act. It deals with the question of admissibility of the statements in the Medico-legal reports, made by the doctors, on the ground that they cannot be called without undue expense and delay, and as they have been recorded by them in the ordinary course of business or in the discharge of their professional duty. It was Dr. Colvin R. de Silva's contention that what is made admissible by Section 414(1) of the Code of Criminal Procedure Act is the report of the doctor regarding the medical examination conducted by him and the admissibility does not extend to matters such as case history in that such information is not ascertained by him from his own examination of the injured.

Section 414(1) of the Criminal Procedure Code Act states–

"Any document purporting to be a report under the hand of the ... Government Medical Officer upon any person, matter or thing duly

submitted to him for examination... and report .... may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness."

Under the definition "Government Officer" includes any officer of the Department of Forensic Medicine of the Faculty of Medicine of the Universities.

The relevant phrase in that Section is,

"any document purporting to be a report under the hand of the ..... Government Medical Officer upon any person, matter or thing duly submitted to him for examination...."

Though finding out the manner in which the person came by his injuries would help him in the examination of the injured, it cannot surely be said that the identity of the assailant is necessary. I hold that Dr. De Silva's contention must succeed and the case history contained in the report of a Government Medical Officer who has examined the injured cannot be led in evidence under Section 414(1) of the Code of Criminal Procedure Act. A doctor is not expected to conduct an investigation into the commission of an offence. That is a matter for the Police and the fact that a statement of that nature is volunteered by a person shall not make it any more admissible. Probably the same considerations may apply to its admissibility under Section 32(2) of the Evidence Ordinance. In any event, even if such a statement is technically admissible it should have been ruled out by the Judge and not left to the jury as its probative value is far outweighed by the prejudice it will cause to the accused.

Taking into consideration the fact that out of the two witnesses who saw the incident viz, Buddhadasa and Udaya Kumara, that it was only Buddhadasa who purported to identify his assailant and not his two companions, the other two accused, while Udaya Kumara was unable to do so due to the state of the light and the absence of any finger prints of the 1st accused on any of the articles found at the scene, one cannot be certain to what extent the case history as given in Dr. Fernando's Medico-legal report would have induced the jury to believe and act on the evidence of Buddhadasa. Since there has not been adequate direction given by the trial judge on how this evidence provided by the purported case history should be considered and analysed by them, it would in my opinion be unsafe to allow the conviction of the 1st accused to stand. I accordingly quash the conviction and the sentence of the 1st accused-appellant.

Learned Senior State Counsel has submitted that the jury could have acted solely on the evidence of Buddhadasa and convicted him on this charge. I agree, that had the adequate directions been given regarding the manner in which, and the weight to be given to, the evidence of the case-histories in P1 and P2, a conviction of the 1st accused may have been upheld. It is therefore my view that a re-trial of the 1st accused on a charge under Section 317 of the Penal Code viz: for causing grievous hurt to Buddhadasa with a corrosive substance should be ordered. I accordingly do so.

WANASUNDERA, J. – I agree.

RANASINGHE, C.J.

I have had the advantage of perusing, in draft, the judgment of H. A. G de Silva, J., I agree with the Order proposed by him – that the appeal be allowed, and that the case be sent back for the 1st accused-appellant to be tried de novo upon a charge, under section 317 Penal Code, of causing grievous hurt to the said Buddhadasa. The grounds upon which I take the view that the appeal be allowed are, however, slightly different. I, therefore, now proceed to set out my reasons.

The facts and circumstances relevant for a consideration of the arguments adduced at the hearing of the appeal by learned Counsel are all set out in the judgment of (H.A.G.) de Silva, J.; and I do not, therefore, propose to set them out in detail.

I agree that, in view of the provisions of section 414(1) Criminal Procedure Code of 1979, only such part of either P1 or P2 as refers to the results of the examination of the injured person, G. Buddhadasa, by each of the doctors would be admissible, as neither of the two doctors, who examined the said Buddhadasa and issued the reports P1 and P2 respectively, has been called to testify at the trial. Any other matter contained in P1 and/or P2 could be led in evidence only if it is relevant and admissible under any other provision of law.

The statement contained in P1 that "Acid was thrown by Gamini at 6.30 p.m. on 20.3.78 at Ihala Bomiriya" is not, therefore, admissible under the provisions of section 414(1) Criminal Procedure Code of 1979. It would, however, be, in my opinion, admissible under the provisions of section 32(2) Evidence Ordinance, even though it was not

a matter within the personal knowledge of the doctor himself, and the source of such information is not specifically stated therein; but, being "double hearsay", the weight to be attached to it, as an item of evidence to be considered, is entirely a matter for the jury, where the trial is held before a Judge and Jury—vide: *Korossa Rubber Co., v. Silva et al, (1) Monir, Law of Evidence (4th Ed) Vol. I, p. 230; Woodrofe and Amir Ali, Law of Evidence (14th Ed) pg. 988; R. v. Hanmanta, (2).*

A consideration of the learned trial Judge's charge to the Jury reveals that, although this item of evidence was placed before the Jury, yet far from giving adequate directions to the Jury as to its evidentiary value and how it should be assessed, the Jury was in fact misdirected by the learned trial Judge; for, in directing the Jury on this matter, the Jury was told that the name referred to in the report P1 was "Gamini Dolawatta". The name "Gamini Dolawatta" could be a reference to the accused–appellant; but the name contained in P1, in truth and in fact, is only "Gamini." This was indeed a serious misdirection. How far this misdirection weighed with the jury in considering the identity of the offender is extremely difficult to assess. To what extent the knowledge that the doctor had been informed, by a person other than the accused, the day after this incident, that the person responsible for the attack on the injured man, was a person by the name of "Gamini Dolawatta", persuaded the majority of the gentlemen of the Jury to conclude that the offender was the accused–appellant himself, is a matter for conjecture. This is indeed such a misdirection as would, in my opinion, operate to vitiate the verdict of the Jury.

Quite apart from the said item of evidence contained in P1, there was also the direct evidence of the injured person, G. Buddhadasa, that it was the accused-appellant himself who flung the acid at him. Although the said Buddhadasa had made his statements to the Police for the first time only several days after the said incident, yet, it is open to a Jury, properly directed, to accept the said item of evidence given by the said Buddhadasa at the trial.

For these reasons, I agree with the Order proposed by (H.A.G.) de Silva, J.

Appeal allowed. Conviction quashed. Case sent back for re-trial on a charge under s. 317 of the Penal Code.