CHARLES DE SILVA

v.

ARIYAWATHIE DE SILVA AND ANOTHER

COURT OF APPEAL.
JAMEEL, J. AND ABEYWIRA, J.
C.A. No. 114/76.
(D.C. No. not available).
OCTOBER 29, 30 AND DECEMBER 2, 3 AND 4, 1986.

Last Will – Dispute re execution of will – Report of EQD – Comparison material–Assessment of expert evidence of handwriting–Judgment delivered after long delay–Evidence Ordinance, s. 45.

Where in holding that an impugned Last Will sought to be propounded was not proved, the court acted on the opinion of an expert witness based on comparison material that had not been proved and long intervals in the recording of evidence and the delayed delivery of judgment made judicial evaluation difficult.

Held–

(1) The Court was wrong in acting on the evidence of the handwriting expert as–

(*a*) the genuineness of the comparison material on which he based his opinion was in dispute and such material had not been duly proved.

(*b*) the photographs used by the handwriting expert had not been proved in Court.

(*c*) comparison specimens both adequate in number and of a suitable kind are essential as the human hand will not reproduce the characters like a typewriter–the most suitable material being that which has been written at about the same time as the contested document on similar paper, in similar circumstances and with similar pen and ink, pencil or type-writing.

(2) The Court could not reasonably have in mind the credibility and demeanour of the witnesses.

(3) There was sufficient direct and oral evidence to hold that the impugned will had been in fact signed by the deceased testator. Where there is no doubt of the mental capacity of the testator and no element of suspicion arises a Will will be held to be proved if the witnesses who speak to the due execution and attestation are believed by Court. If there are circumstances which excite the suspicion of the Court the propounder must remove it and satisfy the Court that the testator knew and approved of the contents of the Last Will.

Cases referred to:

(1) *Selvaguru v. Thalalpagar–(1952) 54 NLR 361 (P.C.).*
(2) *Ratnayake v. Ratnayake–(1947) 48 NLR 134.*
(3) *Bandappuhamy v. Ekanayake–(1957) 61 NLR 187.*
(4) *The Queen v. Kularatne–(1968) 71 NLR 529.*
(5) *The Queen v. Wijehamy–(1958) 62 NLR 425.*
(6) *Meenadchipillai v. Karthigesu–(1957) 61 NLR 320.*
(7) *Sangarakkita Thero v. Buddharakkita Thero–(1962) 63 NLR 433.*
(8) *Samarakone v. The Public Trustee–(1960) 65 NLR 100.*
(9) *Soysa v. Sanmugam–(1907) 10 NLR 355.*
(10) *Mohotihamy v. Alninona–(1949) 50 NLR 317.*

APPEAL from the judgment of the District Judge of Gampaha.

Dr. H. W. Jayewardene, Q.C. with *B. Rajapakse* and *Miss T. Keenawinna* for petitioner-appellant.

J. W. Subasinghe, P.C. with *D. Nilanduwa* and *Miss S. Seneviratne* for 3rd respondent.

P. A. D. Samarasekera, P.C. with *K. Abeyapala* for 4th and 5th respondents.

Cur. adv. vult.

January 30, 1987.

ABEYAWIRA, J.

Dissatisfied with the decision of the Learned District Judge of Gampaha delivered on the 7th of June 1976 wherein he has held that the due and proper execution of the Last Will No. 774 of 01.02.1972 has not been satisfactorily proved as it has not been shown in evidence to have been signed by its author, the late Dadallage Don Seeman Appu, who had died on the 3rd of June 1972, and as the learned Judge had accordingly dismissed the application made to Court on the 7th of July 1972 whereby the petitioner as the appointed Executor by the said Will had sought for probate and other authority to have the said Will implemented, the petitioner has filed papers in appeal on the 17th of June 1976 to have the decision of the Learned District Judge set aside and that he be appointed the Executor as mentioned in the said Last Will since he maintains that on the evidence led in the District Court the due and proper execution of this Will had been proved satisfactorily.

The petitioner had filed his papers in the District Court of Gampaha on the 7th of July 1972 together with the Last Will No. 774 of 01.02.1972 (P1) seeking the authority of that Court to have him appointed the Executor as stated therein and for probate. He had named his daughter and wife as the 1st and 2nd respondents respectively to his petition for according to him they are the only other devisees mentioned in the said Last Will. It will be noted that the 3rd, 4th and 5th respondents have been added as parties to this case on their own applications made to Court on the 9th of October 1972 (vide Journal Entry No. 5).

The 3rd respondent has on the 12th of December 1972 filed his objections to the petitioner being appointed the Executor, and against the issue of probate as claimed by the petitioner-appellant: According to this party the deceased had left no Last Will but had died intestate and therefore his estate will have to devolve on the intestate heirs of the deceased, who among himself are very many others than those mentioned in paragraph 8 of the petition of the appellant. He has accordingly prayed that he be appointed the administrator of the deceased's estate by Court and that the application of the appellant be dismissed. This case had thereafter come up for hearing before the

learned judge on the 26th of July 1973 when the following issues were raised by the attorneys appearing for the petitioner and the 3rd respondent, viz:

(1) Is the Last Will No.774 attested by the Notary Mr.B. R. L. Tillekaratne and referred to in paragraph 3 of the petition of the petitioner, the Last Will of the deceased Dadallage Seemon Appu?

(2) Did the said Dadallage Seemon Appu die without signing the said Last Will?

(3) Did the said Dadallge Seemon Appu die without leaving a Last Will?

(4) If the deceased died without leaving any Last Will would his estate devolve on the parties mentioned in paragraph 8 of the petition?

The first witness called on behalf of the petitioner-appellant was the Notary Tillekaratne who is said to have attested the Last Will No. 774 of 01.02.1972 (P1). The said Notary is also an attorney-at-law who has given evidence to the effect that he has been carrying on his professional work for about 11 years and had by then executed over 1200 notarial deeds and about 10 last wills. He has also stated that he had known the deceased for about 20 years prior to his death and that he had been his Attorney in other matters calling for legal advice before he did draw up and attest the disputed Last Will. It was his evidence that about 2 months prior to the execution of the aforesaid Last Will, the deceased had discussed with him about the drawing up of a last will, and that on the 1st of February 1972 while he was in his office that morning before going to Court, the deceased had come there on his way to the deceased's estate in Kurunegala and had given him instructions and the other details required for the drawing up of a last will and had requested him to have it ready when he returned in the afternoon that day from the estate for signature. The Notary has told Court that he had drawn up the Last Will as required by the deceased in the English language and that while he was in his office that day at about 1 or 2 p.m. the deceased had returned by himself to have the Last Will signed. He has told Court that he did explain to the deceased the contents of the said Last Will in the inner room of his office, after which the deceased had signed it before the two

witnesses named Don Ariyawansa Gunaratne and Don Percival Jayasinghe: This witness has formally produced the said Last Will No. 774 of 01.02.1972 (P1) in Court and identified it as the one signed by the deceased and the two witnesses which he had attested; and had also recognised the signatures in it. The witness stated in evidence that both at the time of signing the said document and also when giving instructions to him in the morning of that day the deceased appeared quite normal and signed the same as any other normal person. He stated to Court that the deceased appeared to be in good health both physically and mentally and in no way showed him that he was executing this document under compulsion, haste or such like, but that it was a willing and voluntary act of his. According to this witness after the due execution and attestation of this Last Will was over he had put the same into an envelope sealed it and kept it in his safe. The sealed envelope has been produced marked P2 and identified by the said witness: He also told Court that the petitioner had come to his office a few days after the death of this person and informed him of his death whereupon he had requested the petitioner to produce proof of the said death to him by bringing the death certificate and also a report from the Grama Sevaka of the area to that effect before he could give the document (P1) which was with him. This had been complied with by the petitioner and the witness did state in evidence that he handed over the sealed envelope without opening it to the petitioner. Under cross-examination the witness stated that the deceased had helped him to transport his paddy from a field which was about 1 1/2 miles away from Halpe, by getting him the transport for the same on several occasions, and that he did also occasionally visit him in the office when on his way to the estate. The witness also stated that the deceased may be a person from the Southern Province since the deceased had occasion to get his advice regarding the transfer of a Bank of Ceylon account which he had in Galle to the branch bank at Kurunegala. He was however not sure as to when the deceased had taken up residence at Mirigama.

It will be seen that this witness was in no wise cross-examined on the basis that he was giving false evidence as regards the execution and attestation of P1 and that the said Last Will did not contain the signature of the deceased himself, but was in fact a forgery of it.

Gongala Vitanage Don Ariyawansa Gunaratne a resident of Kurunegala and the 1st witness to the said Last Will P1 has stated that he did know the deceased for about 6 years prior to his death having

met him at various places in the town, and that he had spoken with the deceased also. He has given evidence to the effect that he did sign the said Last Will P1. He has further said that he did know the notary Mr. Tillekaratne and the other attesting witness to this Last Will called Don Percival Jayasinghe. According to him the deceased Seemon, the said notary, a clerk of this notary and the other witness Jayasinghe were all present in the notary's office when he had come there to sign the Last Will. He has also referred to the fact that he was personally present when Seemon, the deceased, and the other witness Jayasinghe did place their signatures to the document P1.

This witness has stated under cross-examination that close to the said notary's office, there was a shop, into which he had gone at some time in the morning of the day in question and that while he was there the said notary had called him to sign as a witness to this document P1. He has told Court that when he did come to the said office it would have been about 1 p.m.-2 p.m. that day, and that the Last Will had been drawn up and ready for the signing of it. It has been his evidence in Court that the said Last Will had been written out in the English language and that its contents were explained by the notary to the deceased in the Sinhalese language. He has stated in evidence that the deceased Seemon Appu did thereafter first place his signature to this document, after which he did sign the same as the first witness and Jayasinghe too signed it thereafter as another witness. He has stated in evidence that an affidavit had also been signed at this time. He was however not sure, if in fact more than one copy of the Last Will was signed on that occasion. He did identify his own signature in the Last Will P1, and has denied the suggestion made to him under cross-examination that this document had been signed on a subsequent date. He has also made out by his evidence, that the deceased may have met the Notary earlier and given him the necessary instructions regarding the preparation of the said Last Will, for when he did arrive at the notary's office it had been drawn up and ready for the respective signatures to be placed thereon.

This Court does see that even in the case of this witness it has not been suggested to him under cross-examination that this Last Will does not bear the signature of the deceased and that he was himself not a witness to it.

The original petitioner, viz. Charles de Silva was an old man at the time he gave evidence in Court for he has said that he was 73 years old then. He has stated that he is a resident of Halpe in the Mirigama District, and that the deceased Seemon who is an uncle of his wife, was himself residing with this petitioner and his family for many years prior to his death in June 1972 and was in fact generally looked after by them. This witness has told Court in evidence that he was given the said Last Will P1 by the notary Tillekaratne in the manner and circumstances as stated to Court by the notary himself thus corroborating the evidence of the notary on this point. He has also given evidence in Court to the effect that having obtained a sealed and unopened envelope from this notary he did take this document to his own lawyer who having opened it and read its contents, had informed him of the fact that it contained the Last Will of Seemon Appu the deceased and the contents of it. The witness had then requested his lawyer Mr. Senaratne to take the appropriate legal steps to have the said Last Will enforced through Court by obtaining probate. On being shown the Last Will P1 this witness has said that he could identify the signature of the deceased therein as the same is familiar to him though he was not personally present when the same was signed.

Under cross-examination he stated that the deceased is an uncle of his own wife, being a brother of her father. He has said that to his knowledge the deceased died unmarried and leaving no brothers or sisters who survived him. According to the petitioner-appellant the heirs of the said deceased would be those mentioned by him in paragraph 8 of his petition. He has accepted the fact that an estate called Kirindigalawatta in the District of Kurunegala which is about 21 acres in extent has been given by this last will P1 to the 1st respondent, but subject to the life interest of both, this petitioner and his wife the 2nd respondent. It will be noted that all the other assets of the deceased have also been given to the petitioner by the said Last Will P1. This witness did tell Court in evidence that he had not been personally aware of the execution of this Last Will until notary Tillekaratne had given him the sealed and unopened envelope containing the same which he took to his own lawyer Mr. Senaratne who after reading the document had informed him that it was the Last Will of the deceased Seemon and the contents stated therein. On being questioned under cross-examination he has told Court that the deceased had at some period prior to his death told him that everything which has to be done regarding his property and estate had

been fulfilled or attended to whereupon the petitioner had thought that what the deceased meant was that he had disposed of his estate by Last Will or otherwise but had not sought to question him in respect of what was told.

This witness stated that the 1st respondent is his own daughter through another woman and that although he had not been happy with her, for some time after she had got married on her own accord without his consent, he had subsequently pardoned her and taken her and her husband back into his family unit whereupon they too lived with him and the said deceased Seemon Appu in the same house. In fact the witness has gone on to state that the 1st respondent had been legally adopted as their own child by his wife and himself without any discrimination, whereupon the deceased had also treated the 1st respondent as a child of the petitioner and his wife the 2nd respondent. This witness has stated in evidence that the 1st respondent herself did always refer to the deceased as her "Mutha" (grandfather) through affection. It was also his evidence that the 1st respondent had been very helpful to the deceased who in the later years of his life had been often unwell due to the condition of his blood pressure, whereupon the 1st respondent had generally looked after him.

The witness admitted that the deceased and he had a joint bank account in the Bank of Ceylon at Kurunegala bearing the account No. 4512. The witness has stated in evidence that the deceased did always invite him to accompany him on the journeys of the deceased whenever he was feeling not too well and that this witness did always comply with the said requests. According to the evidence of this witness the deceased would not even go to his estate named Kirindigalawatta when he felt unwell but would ask him to accompany the deceased on such occasions which he did not refuse.

It will be relevant at this stage to note that while the petitioner-appellant was giving evidence under cross-examination a motion had been tendered to Court by the attorney for the 3rd respondent on the 31st of August 1973 (vide Journal Entry 20) with notice to the Attorney for the petitioner that the Secretary of the Bank of Ceylon at Kurunegala be ordered to submit to Court all the documents in that Bank which contained the signature of the deceased, so that the same could be compared by the Examiner of Questioned Documents with the signature of the deceased found in

the impugned last will P1 by the 3rd respondent. Thereafter the Journal Entry in the Court Record dated the 17th of September 1973 (vide Journal Entry 23) shows that a document which is a Savings Account Form of the Bank (3D3), a signature card of the Bank (3D5) and a photograph with a name "D. Seemon Appu" written on its reverse (3D6) had been received by the District Court. These documents along with the letter dated the 1st of November 1971 (3D4) received by the said Bank and having the name "D. Seemon Appu" written at the appropriate place therein, had been sent for examination and report to the Examiner of Questioned Documents along with the Last Will P1 to examine and report as to whether these so called specimen signatures of the deceased so obtained by Court did tally and was the same as the signature of the deceased Seemon Appu as shown in the Last Will P1. It is significant to note that when the Attorney for the appellant had wanted two notarial deeds, No.6631 of 8.6.1968 and No.9401 of 18.11.71 (marked P5 and P6) wherein the signature of the said deceased is also said to be found, be sent for this examination with the other documents, the same had been objected to by the Attorney for the 3rd respondent which objection had been upheld by the District Judge, so that only the documents received from the Bank of Ceylon, Kurunegala had been available for comparison with the signature found in the Last Will when the commission was sent to the Examiner of Questioned Documents. Also there has been no evidence led in Court at this time through any responsible bank officer as to how, when and why these documents were obtained by the Bank and also that the signatures therein were the true signature of the said deceased.

According to the evidence of the appellant there were no close relations of the deceased who were alive, with whom he even formally associated during the many years that he had lived with this petitioner and his family. It is his contention that the 3rd respondent has for the first time tried to show in this case that he also is an intestate heir of the said deceased though in actual fact the deceased did have no association with this party when living and to the good knowledge of the appellant. It is hence maintained by the appellant that it is no surprise to him to have seen that the deceased had executed a Last Will leaving his entire estate to those who had been of help and benefit to him whereby the 1st–2nd respondents along with himself have been benefited.

Don Percival Jayasinghe the 2nd witness to the Last Will P1 has told court in evidence that he did know the Notary cum Attorney Mr. Tillekeratne for over 15 years and that he, the witness, did run a shop about 4 fathoms away from this Notary's office for quite a period of time prior to his signing the said Last Will. He has also stated that he did personally know the deceased since he was a customer who purchased goods from his shop for a period of about 8 years prior to his death. He has stated in evidence that he did sign the said Last Will as its 2nd witness with Don Ariyawansa Gooneratne who is also known to him signing the same as the 1st witness. He has also mentioned that both of them as witnesses did place their respective signatures after the deceased Seemon Appu had signed the same. It has been his evidence that after signing this document he did immediately return to his shop to attend to the work there, and thus could not say when and where the Notary had signed the Last Will.

Under cross-examination he accepted the fact that this Last Will P1 was drawn in the English Language but contradicted the evidence given by the other witness Gooneratne to the effect that both of them were present when the notary is said to have explained the contents therein to the deceased. He did also say under cross-examination that he had met the deceased earlier on this day and that the latter had requested him to be available to sign a document before the notary as a witness if so required. He has also testified to the fact that at about 1.30 p.m. and 2 p.m. the Notary did call him to attest the document and that when going to the Notary's office the other attesting witness Gooneratne and the deceased were also present in the office. According to this witness it was incorrect for Gooneratne to have stated in evidence that both attesting witnesses were present when the notary did explain the contents of the Last Will to the deceased; though it may have been so explained just before he had been called.

The Examiner of Questioned Documents, Mr. A. D. H. Samaranayake to whom a Commission had been issued by court at the instance of the 3rd defendant has given evidence in this case wherein he has first given his academic and other relevant qualifications which permit him to give a report in the nature of his own report of 25.01.1974 (3D2) and to give oral evidence as an expert under section 45 of the Evidence Ordinance. He gave evidence to the effect that he did compare the signatures of Seemon Appu found in the documents marked 3D3 to 3D6 together with the signature of the

executant of the said Last Will P1 and that it is his opinion that the person who did sign the documents 3D2 to 3D6 did not sign the Last Will P1. It will be seen that the document marked 3D3 is a letter stated to have been received by the Bank on the 27th of August 1970 from its signatory D. Seemon Appu asking the permission of the Bank of Ceylon, Kurunegala to open a Savings Deposit Account with it. This document had been objected to by the attorney for the petitioner when formally produced in evidence and the same had been allowed subject to the proof of it. This together with the other documents sent to Court by the Bank and forwarded to this witness Mr. Samaranayake had been all objected to when produced at the trial but allowed subject to proof, which onus has not been discharged legally by the 3rd respondent as would be seen later from this judgment.

The report of the Examiner of Questioned Documents marked 3D2 and dated the 25th of January 1974 has gone on the presumption that the genuine signatures of the deceased are to be found in the documents 3D3 to 3D6 and thereafter accepting them as specimen signatures of the deceased has after comparison of these with the signature found in the Last Will P1 come to the conclusion that the said Last Will P1 has not been signed by the same person who has signed the documents 3D3 to 3D6. He has also stated in his report and evidence the reasons for the conclusion he has thus arrived at: One important fact which has to be considered by Court is whether these other specimen signatures which had been sent to the Examiner of Questioned Documents were legally proved to bear the actual signatures of the deceased Seemon Appu since they had been allowed in evidence by Court only subject to being correctly proved: This important fact the 3rd respondent has failed to prove as would have been normally required in a Court of law. It will be noted that the only witness called by the 3rd respondent is an officer of the Bank of Ceylon at Gampaha who is a clerk there by vocation, but who failed to say whether the documents 3D3 to 3D6 were in fact signed by the deceased Seemon Appu. Thus it will be seen that the very foundation and data on which the Examiner of Questioned Documents has been called upon to give an opinion as to whether the Last Will P1 has been signed by the deceased being of no legal value as the correctness of the signatures found in 3D3 to 3D6 has not been proved, the report of his marked 3D2 will be of no assistance to Court and so also would be his oral evidence given at the trial. On the point the Privy Council case of *Selvaguru v. Thalalpagar* (1) is relevant for there it was held that the

handwriting expert should compare with the admittedly proved signatures the one which is disputed. The said case also went on to state that the advantage had by a trial Judge of seeing the witnesses, their demeanour and also hearing them when giving evidence is not so great when the evidence is heard on dates widely separated from each other and when the judgment is thereafter written a long time after the last hearing. Again the case of *Ratnayake v. Ratnayake* (2) is an authority for the proposition that a long delay in giving judgment after the evidence had been heard would no doubt affect the recollections of the said judge as regards the veracity of the evidence given by the respective witnesses. In the present case it has been brought to the notice of this court that not only were the said specimen signatures not legally produced and proved to be those of the deceased Seemon Appu, but also that the judgment of the learned District Judge delivered on the 7th of June 1976 was too long a period after the hearing of the evidence in this case which was on the 7th of July 1975 for him to have been reasonably enabled to have in mind the credibility and demeanour of the witnesses (see also *Bandappuhamy v. Ekanayake* (3), *The Queen v. Kularatne* (4) and *The Queen v. Wijehamy* (5)).

Under cross-examination the Examiner of Questioned Documents stated Court that he was unable to say as to how the said specimen signatures of the deceased had been obtained by court in the documents marked 3D3 to 3D6 which had been sent to him for investigation and report with the disputed signature in the Last Will P1 according to the terms of the Court Commission. He has in evidence accepted the fact that no two signatures written by the same signatory would be exactly accurate with each other but even so that an expert should be able to state whether the two have been signed by one person or not. He also accepted as correct that with the passage of time one's own signature would change and also that the time, place and circmstances under which any signature is placed and the mental and physical state of the person signing would also have some effect on the signature he has placed at that time.

The Examiner of Questioned Documents also stated that the signature of anyone written with a ball-point pen will have different features to that person's signature written by him with a fountain pen. On this point the reply sent to court by a former Examiner of Questioned Documents on the 18th October 1974 is relevant. This arose as the appellant not being satisfied with the so called specimen

signature sent to Mr. Samaranayake, without the two notarial deeds marked P5 and P6 which he did also want to send therewith, and the report sent by Examiner to Court thereafter had wanted another Commission sent to Mr. Nagendran a retired Examiner of Questioned Documents who was then accepting private commissions for his reports. On the application made to the District Court by the appellant it permitted him to have the relevant documents sent to this person for his examination and report. However in consequence of this there has been the aforestated letter sent by Mr. Nagendran to Court to the effect that as only the Last Will P1 has been signed with a ball-point pen, while the other specimen documents sent for comparison were not so signed by a ball-point pen but by a fountain pen it would be of no valid purpose to compare them for there were bound to be significant and different features in the two sets of signatures due to the different types of pens used for the writing of the respective signatures. The witness Mr. Samaranayake has also in his evidence accepted the fact that the signature in the last will P1 made by the deceased is with a ball-point pen, while the relevant signatures stated to be of the deceased found in the documents 3D3 and 3D4 have not been made with such a pen. He has also stated in evidence that his evidence to Court is being given with the aid of the enlarged photographs of the relevant signatures that are with him. Here too we would say that the said photograph should have been duly proved in evidence before any reliance on evidence given with their aid could be accepted the fact that the signature in the Last Will P1 made by the photographer who did the said enlargement on the orders of Mr. Samaranayake. This also has not been done by the 3rd respondent and this error or defect also adds to the inability of Court to act on the report and evidence of Mr. Samaranayake.

Under cross-examination Mr. Samaranayake has accepted the fact that even among the specimen signatures sent to him as being the signatures of the deceased there are differences. He accepts the fact that no two signatures of the same person would be similar to one another so as to be called all correct in both. He further stated that the type of paper used when placing the signature, the manner in which the writer was when so signing whether he was seated or standing, his normal health then, his age and the mental condition in which he was when placing his signature would also affect the writing made. He has told Court in evidence that within a period of two years one's own handwriting could change to a significant extent and that a person

who has signed any document after taking liquor or when for any reason not in his normal condition would make a different signature to one made by him under normal circumstances.

Having considered the evidence given by the Examiner of Questioned Documents we are of the view that the so called specimen signatures of the deceased found in the documents marked 3D3 to 3D6 have not been legally proved to contain the true signatures of the deceased. Accordingly the foundation of the examination based on the presumption that the said signatures on 3D3 to 3D6 are the real signatures of the deceased is without legal proof or any substance for the learned District Judge to act on the evidence given by this officer.

The witness Tillekeratne a clerk in the Bank of Ceylon at Gampaha had been summoned to give evidence in a weak attempt made by the attorney for the 3rd respondent to prove the document marked 3D3 to 3D6 as containing the real signatures of the deceased Seemon Appu. However he has admitted under cross-examination that he was not personally present when any of these documents were signed and could therefore not say whether they had been signed by the deceased himself or not. He has also told Court that he has not worked in the Bank of Ceylon at Kurunegala where the deceased had his account with the Bank. Under these circumstances this court is satisfied that the 3rd respondent has failed to prove that these documents had been signed by the deceased especially as they were permitted to be submitted in evidence on the undertaking given that they would be proved before court.

In a dispute of this nature the one question for Court to decide is whether the signature of the executant of the Last Will No.774 of 1.2.1972 is that of the deceased Seemon Appu. It will be noted that this Last Will is a notarial document attested before a notary and two witnesses all of whom have given evidence at the trial before the District Court while the 3rd respondent has rested his case on the evidence of the Examiner of Questioned Documents and the Bank clerk.

As stated earlier in this judgment the Notary and his two attesting witnesses to this Last Will have not been cross-examined on the basis that they are supporting a forgery of the deceased's signature placed

therein. In fact when considering their evidence this Court sees no proper or sufficient cause to reject this evidence as being not possible to be believed by normal standards. Under normal circumstances this Last Will as a notarial document could have been accepted by court unless it had been challenged. The 3rd respondent had filed his objections stating inter alia that the said Last Will did not bear the signature of the deceased whereupon the District Court was put on guard in respect of the grant of probate and the proving of this Last Will. Otherwise as stated in the case of *Ratnayake v. Ratnayake (supra)* (2) where there is no doubt of the mental competency of the testator and no element of suspicion arises a will would be held to be proved if the witnesses who speaks to the due execution and attestation are believed by Court. The Supreme Court in the case of *Meenadchipillai v. Karthigesu* (6) stated that where the grant of probate is resisted and circumstances do exist which excite the suspicion of the Court, it is for those who propound the will to remove that suspicion and satisfy court that the testator knew and approved of the contents of the Last Will.

It is evident to this Court that the learned judge has relied largely on the evidence and report of the Examiner of Questioned Documents in preference to that of the Notary and the two attesting witnesses to the Last Will P1. This expert evidence has been given on the proposition that the signature of the deceased found in the Last Will is not the same as the signatures found in the documents 3D3 to 3D6, though in fact the signatures found in the document 3D3 to 2D6 have not been proved to contain the true and correct signature of the deceased Seemon Appu. In *Bandappuhamy v. Ekanayake (supra)* (3) it was held that where the prosecution relies on the evidence of the prints of the accused as incriminating him, evidence should be expressly given to show that the specimen slips said to have been taken in Court were in fact the prints of the accused. Again the case of *The Queen v. Kularatne (supra)* (4) held that in a criminal case the identity of production must be accurately proved by the direct evidence which is available and not by way of inference. Here the analyst had produced the plate on which he found a trace of arsenic, but neither the police constable who brought the plate nor the person who had identified the said plate were called as witnesses and this non-summoning of the

said persons as witnesses was stated to be bad. These cases are relevant in respect of the evidence in the present matter for there has been no proof of the identity of the person who signed the documents 3D3 to 3D6 and also of the photographer who had made enlargements of the signatures at the instance of and for the benefit of the Examiner of Questioned Documents. Also the case of *The Queen v. Wijehamy (supra)* (5) held that there should be direct evidence of the photographer who prepared the enlarged photographs and that the evidence should not be got from the expert as to the opinion he did form after making use of these photographs if the said photographer was himself not called as a witness; while the case of *Sangarakkita Thero v. Buddharakkita Thero* (7) held that a deed which on its face appears to be in order is presumed to have been duly executed and the mere framing of an issue as to its due execution and followed only by a perfunctory question or two on general matters of execution without stating the omissions or irregularities or other illegalities which are relied upon, is not sufficient to rebut that first presumption had with reference to a notarially executed document.

It is further relevant to note that the evidence of a handwriting expert is to be considered only as a relevant fact and not conclusive of the genuineness or otherwise of the handwriting in dispute and that it is only relevant to enable the judge to form his own opinion. (vide section 45 of the Evidence Ordinance). Also in the case of *Samarakone v. The Public Trustee* (8) it has been held inter alia that on an issue of forgery the Court may accept a handwriting expert's testimony provided that there is some other evidence direct or circumstantial which tends to show that the conclusion reached by the expert is correct (*see also* 61, New Law Reports – page 522). Again in the case of *Soysa v. Sanmugam* (9) the then Chief Justice Hutchinson has stated thus:

> "I have known too many instances in which expert opinions as to the identity of handwriting have been proved to be mistaken, to accept them as anything more than a slight corroboration of a conclusion arrived at independently, never so strong enough as to turn the scale against the person charged with forgery, if the other evidence is not conclusive."

The learned Judge in the course of his judgment has also referred to certain contradictions in the evidence of the two attesting witnesses and for that reason has considered their evidence not acceptable to him. On this point there is the case of *Mohotihamy v. Alninona* (10) which held that where there is a conflict of direct testimony as to the genuineness of a document it would be dangerous to base a decision on a mere comparison of the said document with admitted signatures and that in such an instance the judge should come to a conclusion on the other oral evidence led. Such evidence which in the opinion of this Court is quite adequate or sufficient can be found in the quantum of evidence led by the appellant before the trial judge.

Also the text book writer Phipson on the "Law of Evidence" in his 10th Edition at page 146, paragraph 316 has said that when a party's handwriting is in question in any proceedings the comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses. In this case it cannot be said that the signatures in the documents marked 3D3 to 3D6 have been legally proved to the satisfaction of Court for they were produced subject to proof of the same which the 3rd respondent has failed to supply through the evidence of the Bank clerk (vide section 73 of the Evidence Ordinance also).

The text book writer A. S. Osborn in his 2nd edition on "Questioned Documents" at page 25 has stated:

> "that one of the first steps in the investigation of a suspected or disputed writing should be the seeking out of suitable genuine writings with which it is to be compared."

Again at page 27 in the same Edition the author has stated:

> "that several signatures should always be obtained, if possible, before any final decision is rendered, five signatures always constituting a more satisfactory basis for an opinion than one, and ten being better than five".

Again at page 364 it has been said:

> "that no final and definite opinion should be given regarding a disputed document without finally comparing it with the proved genuine document".

Also at page 368 the same author says thus:

> "One of the evidences of forgery in a tracing is its identity with a model or the damaging identity of several traced forgeries when compared with each other, or of several simulated signatures copied from one model or written from one mental design. As is easily demonstrated by experiment when even two short signatures or any of two words are written, there is possibility of slight divergence at any point in the line making up the words or signatures, and this is the genuine divergence which should appear in genuine signatures or of any continued genuine writing."

The next author Wilson R. Harrison in his book entitled "Suspect Documents" states at page 13 therein, the difference when using a carbon pen than an ordinary fountain pen with ink. At page 288 onwards this author has referred to the two main characteristics in one's handwriting under the term "style characteristics" and personal characteristics. He also has at page 376 in this book referred to the differences in the ball-point movement and the ordinary fountain pen movement with the different pen lifts, halts and hesitations of the signatory due to various reasons. He too has at page 400 in the said book referred to the correct magnification that has to be made for the proper answers to be given to questions which will be asked.

It is thus evident to this Court that the said authors have also considered it essential that the signatures said to be genuine will have to be proved to be so, before the same are compared with the one in dispute. It is also seen how the enlarged photographs are essential to the Examiner of Questioned Documents when giving his report or answer to questions and thus making it clear that these photographs too will have to be proved before Court through the photographer who made the said enlargements of the signature which have to be considered by the expert in respect of any evidence that has to be given by him.

Again the treatise on "Contested Documents and Forgeries" by Brewester at pages 2-3 goes on to show that there will be a certain amount of natural variation in all genuine handwriting as the human

hand will not reproduce the characters like a typewriter. However it is said that two different writing habits do not normally exist at the same time in any one writer. At Chapter 19 in the said book its author goes on to show:

> "That comparison specimens both adequate in number and of a suitable kind are essential when an opinion is sought of any contested document. He has stated that the most suitable material is that which has been written at about the same time as the contested document on similar paper, in similar circumstances and with similar pen and ink, pencil or typewriting."

Further at page 437 the author states:

> "That if a signature is in dispute the number of authentic specimens required for comparison will depend upon the questions to be answered. If the signature in contest is a crude forgery it may proclaim its guilt from the house tops and no specimen at all may be necessary to prove the fact. Sometimes one specimen may suffice but at other times as many as forty may be necessary. As a rule however, at least 6, but if possible 12 should be obtained."

Here too we find that the identity of the specimen signatures which are sent for comparison with the contested signature must be proved to be genuine. The aforequoted passage also shows that the Examiner of Questioned Documents should have been sent the two notarial deeds submitted by the appellant's lawyer (marked P5 and P6) for a better and proper study of the contested signature.

For the said reasons given by us in this judgment we are unable to agree with the Learned District Judge when he held that the signature found on the Last Will P1 is not the genuine signature of its maker the late D. Seemon Appu inasmuch as this decision is largely based on the evidence of the Examiner of Questioned Documents who has said that the signature in the Last Will P1 is not identical with the specimen signatures 3D3 to 3D6 sent to him for comparison. As stated before inasmuch as these specimen signatures have not been duly proved to be the true signatures of the deceased, the foundation on which the examiner has based his decision crumples away and is therefore unable to sustain the conclusion he has thereupon arrived at.

It is also our view that there has been sufficient direct and oral evidence given by the Notary who attested the said Last Will and the two witnesses to the said document to enable the Judge to reasonably conclude that this Last Will has been signed by the deceased himself despite some not very important contradictions made in the course of their evidence which are referred to in the judgment of the learned judge.

We would therefore set aside the answers of the learned judge given to the issues raised at the trial together with his judgment and hold that the Last Will No. 774 of 1.2.1972 (P1) has been signed by its maker the late D. Seemon Appu, wherein he has appointed the appellant as the executor. The said Will is duly admitted to probate and the petitioner appointed Executor under the said Last Will. We accordingly order that this case be remitted to the District Court of Gampaha for appropriate further action on the basis that the Last Will P1 has been duly proved to be the Last Will of the deceased Seemon Appu and for the taking of all the other necessary subsequent steps in testamentary cases through Court.

We further hold that the petitioner-appellant will be entitled to costs as against the 3rd respondent.

JAMEEL, J. – I agree.

Appeal allowed.
Will declared proved.
Case remitted to be continued.

Note by Editor. – The Supreme Court refused an application (No. 23/87) for special leave to appeal from this judgment on 19.05.1987.