[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Moseley S.P.J., and Cannon J.**

THE KING *v.* MOHOTTIHAMY.

1—M. C. Ratnapura, 32,040.

Deposition of witness—Proof that accused was absconding essential—Use of deposition at trial—Refresh the memory of witness—Evidence Ordinance s. 159—Criminal Procedure Code, ss. 407 and 297—Court of Criminal Appeal Ordinance, s. 5 (2).

A deposition taken under section 407 of the Criminal Procedure Code cannot be read in evidence at the trial unless proper proof was forthcoming that the accused was absconding at the time.

Where evidence is taken under section 153 of the Criminal Procedure Code in a charge of culpable homicide instituted under section 148 of the Criminal Procedure Code, evidence taken in the absence of the accused may be read to him under the provisions of section 297 of the Criminal Procedure Code.

Quaere whether section 159 of the Evidence Ordinance has reproduced the English law so far as to allow a witness to refresh his memory by referring to the deposition made by him in the lower Court.

Even if a witness may refresh his memory by referring to his deposition, the deposition cannot be read out to him nor can it be made evidence at the trial.

Where an appeal has been allowed, but, where there was evidence before the jury upon which the appellant might reasonably have been convicted but for the irregularity upon which the appeal was allowed, the Court of Criminal Appeal will order a new trial.

APPEAL from a conviction by a Judge and Jury before the Fourth Western Circuit. The facts are stated in the judgment.

C. Suntharalingam, for accused, appellant.—Before evidence can be recorded under section 407 of the Criminal Procedure Code it must be proved that the accused had absconded. This has not been done. See *Rustom v. Emperor*[1]; *Fazal Rahim v. Emperor*[2]; *R. v. Appusinno*[3]; *Bhika v. Emperor*[4]. In this latter case the Judges opined that the depositions recorded without proof of absconding might be used for refreshing memory but that was only an obiter. The instructions of the Attorney-General to the committing Magistrate raised doubts as to the regularity of the proceedings. The waiver by the proctor on behalf of the accused is bad in law. See the Privy Council decision, *The Attorney-General for New South Wales v. Bertrand*[5], *and The Deputy Legal Remembrancer of Bengal v. Upendra Kumari Ghose*[6]. Section 297 of the Criminal Procedure Code lays down the mode of taking and recording evidence in relation to the presence or absence of the accused. That section has not been complied with as the absence of the accused "*had not been dispensed with*".

The use of depositions in refreshing memory is not justified under our law. The law of evidence in Ceylon is statutory but the law in England

[1] *A. I. R. (1915) All. 411.*
[2] *A. I. R. (1934) Pesh. 70.*
[3] *22 N. L. R. 353.*
[4] *A. I. R. (1924) Lah. 605.*
[5] *16 L. T. 752.*
[6] *12 C. W. N. 140.*

is mainly common. Our Code is silent as to the actual manner of refreshing memory. Under the *casus ommissus* section English practice will apply. Witness can have in his hand the copy of the writing from which his memory is to be refreshed. He can read it to himself and from recollection of the facts give his evidence, R. *v. Beardmore*[1]. The evidence cannot be read out to him in open Court, R. *v. Quin*[2]. There was a further difficulty in this case. Section 159 (2) requires that if the writing is made by any other person it must be read *by* the witness. Under section 299 of the Criminal Procedure Code depositions are *read over* to witnesses. In this case the deposition of a chief witness was recorded in English but he was ignorant of the English language. The writing could not therefore be held to have read *by* him. The leading questions were improperly put and the marking in evidence of the depositions of two witnesses was irregular.

Nihal Gunasekera, C.C., for the Crown.—Although the evidence of certain witnesses is recorded as having been taken under section 407 of the Criminal Procedure Code it can be regarded as having been recorded under section 153, the Magistrate having gone to the spot in a case of culpable homicide and examined the available evidence in the absence of the accused. This evidence was later read over to the accused under section 297 of the Criminal Procedure Code. The deposition of a witness may be used by him to refresh his memory under section 159 (2) of the Evidence Ordinance. The requirement of the sub-section that the writing must be read by the witness at the time it is made is fulfilled by the deposition having been read over to him and admitted by him to be correct. (See *Bhika v. Emperor*[3].) Under the English law the deposition of a witness can be produced if the witness admits its correctness but has no independent recollection of the facts.

Cur. adv. vult.

January 13, 1941. HOWARD C.J.—

In this case Counsel for the appellant has put forward several grounds why the appeal should be allowed. The first three grounds may be considered together. They relate to the manner in which the depositions were taken. It is desirable that the procedure followed in taking the depositions should be set out in detail.

The offence was committed on April 11, 1926. At 7.30 A.M. on April 14, 1926, the Police Magistrate of Ratnapura proceeded to the *locus in quo* and held an inquiry. At that stage in the proceedings the only person accused was the appellant. In the record of the proceedings there is a note by the Magistrate that the appellant was absconding and that he is recording evidence under section 407 of the Criminal Procedure Code. The Magistrate on that day then proceeded to record the evidence of Punchihamy, Podiappuhamy, Collette, Paulis Appu, Diashamy, the widow of the deceased and P. M. Rammalhamy the associated wife of Bandulahamy who was afterwards charged with complicity in this murder. On April 26, 1926, the inquiry was resumed at Ratnapura. On this occasion Bandulahamy was also said to be an accused person. Both accused are stated in the record to be absconding. On this day the

[1] *173 E. R. 486.* [2] *176 E. R. 374.*
[3] *A. I. R. (1924), Lah. 605.*

evidence of Dr. G. F. Bartholomeusz, acting District Medical Officer, Ratnapura, was recorded. On April 28, 1926, the inquiry was resumed. The accused are still stated to be absconding and the evidence of the Gan-Arachchi and a man called Malhamy was recorded. On May 24, 1926, with the accused still absconding the evidence of Sub-Inspector Rajapakse was recorded. On July 12, 1926, the accused Bandulahamy was produced before the Magistrate and after being addressed in terms of what was then section 155 of the Criminal Procedure Code made a statement. The inquiry was resumed on August 6, 1926, and Bandulahamy was discharged on the ground that there was not sufficient evidence to warrant his committal for trial. At the same time he made a statement which was recorded by the Magistrate. The inquiry was resumed before a different Magistrate on December 20, 1939, when the appellant was present. Collette, Punchihamy, Podiappuhamy, Paulis Appu, Rammalhamy and the Gan-Arachchi gave evidence. Further evidence was taken on subsequent dates in the presence of the appellant who on February 19, 1940, was committed by the Magistrate for trial to the Supreme Court. In consequence of instructions received from the Attorney-General, the inquiry was re-opened on September 27, 1940, when Mr. Jansz, Settlement Officer, the Magistrate who held the inquiry in 1926, gave evidence and stated as follows :—

"At the time of this offence I was Police Magistrate, Ratnapura. I visited the scene of offence on 14th April, 1926. As a result of questioning the Police, headman and the villagers I got the impression that the person who was accused of the crime was absconding, and there was no immediate prospect of arresting him in the near future. I accordingly made the entry that the accused was absconding and I was recording evidence under section 407, Cr. P. C. I visited the scene on 13.4.26 with the acting D. M. O.".

On October 17, 1940, in consequence of further instructions received from the Attorney-General all the witnesses were recalled and the following was recorded by the Magistrate :—

"Accd. R. A. Mohottihamy pt : on remand.

Mr. O. M. L. Pinto for accused.

Mr. Pinto submits that he does not want the evidence of the witnesses who had given evidence in the absence of the accused to be re-recorded and he waives on behalf of the accused the right to object to the evidence as recorded.

In view of the accused's proctor waiving his right to object to the evidence recorded in the absence of the accused I do not proceed to re-record the evidence of the witnesses whose evidence was taken when accused was absconding.

Remand accused. Forward record to S. C. and brief to A.-G.".

Counsel for the appellant contends that the depositions recorded on April 14, 1926, were taken in pursuance of the provisions of section 407 of the Criminal Procedure Code. Before use could be made of such depositions in subsequent proceedings strict compliance should have been made with this section. He maintains that strict compliance has not been so made inasmuch as it was not proved that the appellant had absconded

and there was no immediate prospect of arresting him, and, moreover, there was no finding by the Magistrate to this effect. In these circumstances it was not open to the Magistrate to make use of the depositions in the way he did. In support of this proposition the case of ***Rustom v. King Emperor*** [1] was cited. In this case a murder was committed in 1897. The accused ran away at that time and was not heard of till he was arrested in 1915. The witnesses were examined in 1897 on behalf of the prosecution to prove the commission of the offence by the accused. The Magistrate, however, did not record any finding that in his opinion the accused had absconded and that there was no immediate prospect of his arrest. The accused was convicted on the evidence recorded in 1897. On an interpretation of section 512 of the Indian Criminal Procedure Code, which is worded similarly to section 407 of our Code, it was held that the evidence given in 1897 was inadmissible to prove the guilt of the accused and that the conviction was bad. *Fazal Rahim v. King Emperor* [2] was also cited as an authority for the proposition that before the provisions of section 512 of the Indian Criminal Procedure Code can become operative, proper proof of the absconding of the accused must be forthcoming. In *R. v. Appu Singho* [3] a witness gave evidence before the Magistrate when the accused was not present. The magistrate issued a warrant but the accused was not arrested for some months. The witness had by this time disappeared and consequently he was not recalled for cross-examination by the accused. The deposition of the witness was read at the trial before the jury without objection. It was held that the evidence was inadmissible and should not have been read to the jury. The principle laid down by these cases is that, without proof of absconding the consequences resulting on the taking of a deposition under section 407 as formulated in the second half of this provision do not follow. A deposition taken in such circumstances can be put in evidence at the trial.

In the present case, however, the deposition of witnesses whose evidence was recorded in the absence of the appellant were not put in evidence at the trial. Recourse for such a purpose was not had to the second part of section 407. Moreover it has been contended that although the Magistrate had recorded that the evidence taken on April 14, 1926, was recorded under section 407 it was in fact, recorded under section 153. We think there is substance in this argument. The proceeding was instituted under section 148, the case was one of culpable homicide, the Magistrate had gone to the spot where the offence appeared to have been committed, and in the absence of the accused held an examination of such persons as seemed to him to be able to give material evidence. In these circumstances the evidence tendered on this day was recorded in lawful and regular manner and in accordance with section 297 of the Criminal Procedure Code which formulates the general proposition that evidence shall be taken in the presence of the accused. We think that section 153 expressly provides that in the circumstances mentioned therein evidence can be recorded in the absence of the accused. In this case the presence of the accused had not been " dispensed with ", but the taking of evidence without his being present was " otherwise expressly provided ". The evidence so taken was according to the record read

[1] *(1915) A. I. R. All. 431.* [2] *(1934) A. I. R. Pesh. 70.* [3] *22 N. L. R. 353.*

over to the various witnesses on December 20, 1939, in the presence of the appellant. Hence compliance has been made with the proviso to section 297. The case of *Herath v. Jabbar*[1], contains nothing contrary to this proposition inasmuch as the evidence held in that case to have been improperly recorded was not taken in the absence of the accused by virtue of any of the exceptions to the general rule that " all evidence taken at inquiries and trials shall be taken in the presence of the accused ". In *Mudiyanse v. Appuhamy*[2], when two accused were charged in the same plaint, one accused surrendered to Court after the other was convicted and the Magistrate recalled the witnesses and read over to the accused the evidence already recorded and put further questions to the witnesses and submitted them for cross-examination it was held that the procedure followed was sanctioned by section 297 of the Criminal Procedure Code and it was necessary to hold an entirely independent trial.

Although the procedure prescribed by the Criminal Procedure Code has been followed with regard to the recording of the deposition taken on April 14, 1926, the same cannot be said of those recorded at Ratnapura on April 26 and 28, and May 24, 1926. We are of opinion, however, that the evidence tendered on April 14, 1926, and subsequently read over to the witnesses supplemented by further evidence recorded in the presence of the appellant constituted a prima facie case of murder warranting the committal of the appellant to take his trial before the Supreme Court. This committal was, therefore, in accordance with the law and in these circumstances the effect in law of the waiver on October 17, 1940, by the proctor for the appellant of his right to have the evidence of the witnesses recorded does not require consideration.

Grounds IV. and VI. which it is also convenient to consider together relate to the use made of the depositions of the witnesses Podiappuhamy and T. F. Collette during the course of the trial. It appears from the record of the trial that during the examination-in-chief of the witness Podiappuhamy, Crown Counsel asked the learned Judge if he was entitled to remind the witness of what he had said. The learned Judge replied as follows :—" You can refresh his memory. The value of the evidence is a different matter, it is admissible ". Parts of the evidence given by this witness in the lower Court were then put to him in the form of questions and he stated what he remembered. A similar procedure was adopted in the case of the witness Collette who was a surveyor. Later on in the course of the trial the learned Judge made the following order :—

" On resuming after the adjournment Crown Counsel brings to my notice the fact that Mr. Collette refreshed his memory in the course of giving his evidence in this Court by having the evidence of his given in the Court below read to him. He himself did not read the evidence given by him in the Court below, nor did he verify his signature at the foot of that evidence in the record of the proceedings taken down by the Magistrate. Crown Counsel thinks that by way of abundant caution it would be advisable to apply strictly the section of the Evidence Act and to let the witness refresh his memory by referring to

[1] *16 C. L.W. 125.* [2] *22 N. L. R 169.*

the statement made by him at a time when his recollection of that statement was fresh in his memory or by referring to the record of a statement made by him and taken down by another person; in this case the Magistrate. He moves to call Mr. Collette for this purpose. I allow the application ".

Collette was then re-sworn, the record of his evidence in the lower Court was handed to him and he stated it was what he had said to the Magistrate. Podiappuhamy was re-affirmed and stated he gave evidence before the Magistrate which evidence was read out to him and he acknowledged it was correct. Crown Counsel then called the clerk of assize who formally produced the record of proceedings in the lower Court and referred in particular to the evidence of these two witnesses. Reference was made to the depositions of these two witnesses for the purpose of refreshing their memory. The point at issue is whether there was any irregularity in the procedure that was adopted. There is no doubt that English law permits a witness to refresh his memory by referring to his deposition, *vide R. v. Quin*[1]; and *R. v. Beardmore*[2] It is clear, however, on the authority of these cases that the witness can only look at the deposition to revise or assist his memory and to bring to his mind a recollection of the facts. The deposition cannot be read to him nor can it be made evidence. There seems, however, to be some doubt as to whether section 159 of the Evidence Ordinance has reproduced the English law so far as to allow a witness to refresh his memory by referring to the deposition made by him in the lower Court. It is clearly not a " witness made by himself " and hence not within the ambit of sub-section (1). Nor does it seem to come within sub-section (2) as " a writing made by any other person and read by the witness ". Depositions are read " to " and not " by " witnesses. At the same time the commentary by Ameer Ali on the corresponding section of the *Indian Evidence Act* seems to record such use being made of a deposition. At page 1033 of the 9th edition the following passage occurs:—

> " So it has been said that a witness at sessions might be shown his former deposition before the committing Magistrate in order to refresh his memory a couple of months after, if such first deposition were taken after the occurrence. "

We have some difficulty in reconciling this observation with the phraseology of section 159 (2).

There is no doubt that section 159, 160 and 161 of the Evidence Ordinance substantially reproduce the English law. Even if the deposition can under section 159 be used to refresh his memory, it can only be used in the manner contemplated by the cases of *R. v. Quin* and *R. v. Beardmore*. Section 160 of the Evidence Ordinance provides that a witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves if he is sure that the facts were correctly recorded in the document. In the present case Collette states that he recollects that

[1] *176 E. R. 374.*

[2] *173 E. R. 486.*

his deposition is a correct statement of the evidence given by him before the Magistrate and that he signed it because he acknowledged it as a correct statement of his evidence. Podiappuhamy merely states that he gave evidence which was read out and acknowledged as correct when the facts were fresh in his memory. Neither witness states that he is sure the facts were correctly recorded in his deposition. In these circumstances the witnesses should not have had put to them a series of questions framed with the idea of bringing to the notice of the jury what they had said soon after the offence was committed. Nor were these depositions themselves admissible in evidence. In this particular case the depositions were read to the witnesses and made evidence. Such use went beyond what is sanctioned by English law or sections 159 and 160 of the Evidence Ordinance. It is also necessary to add that, if the use of these depositions was not warranted by these sections for the purpose of refreshing memory, their use is not permissible under any other provision of the law. They cannot be said to have been used under section 157 to corroborate the testimony of a witness.

Mr. Nihal Gunasekera for the Crown has asked us to say that even if there has been an irregular admission of evidence there has been no substantial injustice and therefore the case should be treated as coming within the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance. We are unable to take this point of view for the following reason. The point on which Collette's memory failed was as to his recollection of the mention by the principal witness Punchihamy of the name of the deceased's assailant. The gap in this evidence was completed by the passage in his deposition in the lower Court in which he stated that the appellant was named as the assailant. This piece of evidence was before the jury. Collette was a surveyor and therefore a man of superior education and also unbiassed. The jury was invited by the learned Judge to accept his evidence. What he said in the lower Court corroborated the evidence of the principal witness Punchihamy. In this connection it must be remembered that at the time of the commission of the offence the latter was a young girl. She was at the trial testifying to events that happened fourteen years previously. The additional testimony supplied by Collette's evidence in the lower Court might have influenced the jury to return a verdict of guilty. It cannot be said that the verdict must have been the same if this evidence had not been admitted. In these circumstances the proviso to section 5 (1) cannot be applied.

In the circumstances mentioned it is not necessary to consider grounds V., VII. and VIII.

For the reasons I have given the conviction is quashed. We are, however, of opinion that there was evidence before the jury upon which the appellant might reasonably have been convicted but for the irregularity upon which the appeal has been allowed. Under the proviso to section 5 (2) we therefore order a new trial.

Conviction quashed.

New trial ordered.