WANNAKU ARACHCHILAGE GUNAPALA
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
C.A. 70/2004
H.C. NEGOMBO 115/2000
July 10, 2007

Penal Code – Section 296 – Convicted – Weapon used not produced – Is it fatal to a conviction? Evidence Ordinance Section 60(1)(2) – Section 91, Section 165 – Statement of facts made by witness not challenged – What is the conclusion?

Held:

(i) Non-production of a material object is not fatal to a conviction.

(ii) Provisions of the Evidence Ordinance itself have made a clear distinction with regard to the documentary evidence on the one hand and real evidence on the other.

(iii) Absence of cross-examination of a prosecution witness of certain facts leads to the inference of admission of that fact.

APPEAL from the Judgment of the High Court of Negombo.

Cases referred to:

(1) *Hichin* v *Ahquirt Brothers* – 1943 All ER 722
(2) *Lucus* v *William and Sons* – 1892 2 QB 113
(3) *Rex* v *Francis* – 1874 Law Reports 2 CCR 128 at 132
(4) *Sarwan Singh* v *State of Punjab* – 2002 – AIC SC (iii) 3652 at 3655, 3656,
(5) *Boby Mathew* v *State of Karnataka* – 2004 3 Cri LJ 3003
(6) *Himachal Pradesh* v *Thakuar Dass* – 1993 2 Cri 1694 at 1983
(7) *Motilal* v *State of Madya Pradesh* – 1990 Cri LJ No. C 125 MP
(8) *Edrick de Silva* v *Chandradasa de Silva* – 70 NLR 169 at 170

Jagath Abeynayake for accused-appellant.

Shavindra Fernando, DSG for Attorney-General.

Cur. adv. vult

July 2, 2007
RANJITH SILVA, J.

The accused-appellant was charged in the High Court of Negombo for having committed the offence of murder an offence punishable under section 296 of the Penal Code. After trial the accused was found guilty of the charge and was sentenced to death. Aggrieved by the said judgment and the sentence the accused-appellant has preferred this appeal to this Court. At this stage of the argument learned Counsel for the appellant confines himself to only one ground of appeal namely that the High Court Judge erred in convicting the accused, in the absence of any evidence to prove that the accused stabbed the deceased with the weapon that was mentioned in the charge. Further he contends that the weapon used was never produced in Court and was not identified by the Doctor to be the murder weapon or a like weapon that could have caused the injuries. A production in a case is only one of the circumstantial evidence against an accused in a case. When there is cogent evidence given by eye-witnesses sufficient to warrant a conviction it would not always be necessary to produce the weapons used in the crime.

I hold that non production of a material object is not fatal to a conviction. The provisions of the Evidence Ordinance itself have made a clear distinction with regard to documentary evidence on the one hand and real evidence on the other. Section 91 of the Evidence Ordinance excludes parole evidence whereas section 60(1) and (2) of the Evidence Ordinance enacts that if the oral evidence refers to a fact which could be seen or perceived by any other sense or in any other way, it must be the evidence of the witness who says that he saw or perceived that fact by that sense or in that manner, that should be led to prove that fact, although the Court **may, if it thinks fit, require the production of such material thing for its inspection**. (Section 165 of the Evidence Ordinance) Thus the prosecution was entitled to lead oral evidence of a witness without producing the material object.

Although the English law is different on this point in several English cases it was held that the production of a material object is not necessarily fatal to a conviction. Vide the following case *Hichin* v *Ahquirt Brothers*[1], *Lucus* v *William & Sons*[2], *Rex* v *Francis*[3] at 132.

In the circumstances the contention that as the knife was listed as a production in the indictment, its non production at the trial is fatal to the conviction, is an untenable proposition.

We have heard both Counsel in support of their cases. We have perused the evidence in this case and we find that the accused-appellant had not taken up any objection as to the non-production of the weapon in the course of the trial and also we find that the accused had not thought it fit to question the doctor with regard to the nature of the weapon. Eye-witness Roshantha has stated in his evidence that he saw the accused-appellant stabbing the deceased with a pointed weapon. No questions were asked from him in cross examination as to the nature or the type of the weapon used. It appears that the nature or the type of the weapon was not put in issue instead the Counsel for the defense had challenged this witness only on the basis that the witness did not see the incident or the weapon that was used in the commission of the crime. Therefore we find that it is not in the mouth of the accused now, to take up all these objections that were not raised at the trial. In *Sarwan Singh* v *State of Punjab*[4] at 3655, 3656. " It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted." This case was cited with approval in the case of *Boby Mathew* v *State of Karnataka*[5].

In *Himachal Pradesh* v *Thakuar Dass*[6] at 1983 V.D. Misra, CJ held: Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.

"Absence of cross examination of prosecution witness of certain facts leads to the inference of admission of that fact." *Motilal* v *State of Madya Pradesh*[7].

In *Edrick de Silva* v *Chandradasa de Silva*[8] at 170 Justice H.N.G. Fernando observed I quote "Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the word "prove" in section 3 of the Evidence Ordinance, and as trial

Judge or Court must necessarily take that fact into consideration in adjudicating the issue before it".

The witnesses including the medical officer was not questioned or challenged with regard to the nature of the weapon alleged to have been used in the Commission of the Crime.

Therefore the learned trial Judge could not be faulted for convicting the accused on the charge of murder and it cannot be said that the prosecution has failed to prove the identity of the weapon used in the crime beyond reasonable doubt. 80

For these reasons we find that there is no merit in this appeal. We affirm the conviction and the sentence. Accordingly the appeal is dismissed.

SISRA DE ABREW, J. - I agree.

Appeal dismissed.