

KUMARASINGHE

v.

THE STATE

COURT OF APPEAL

YAPA, J. (P/CA)

KULATILAKE, J.

C.A. 210/96

HC COLOMBO 5483/93

Penal Code - S.188, S.400, S.459 - Forged permit to obtain spirits - Prosecution witness giving false evidence in court - Code of Criminal Procedure Act 15 of 1979, S.195(e), S.448(1) S.449, S.449(1) - Conviction - Procedure to be followed opportunity to be given to defend - Constitution Article 13(3).

The Appellant - was a witness for the prosecution in the High Court of Colombo, at the trial of one "R" who was indicted under S.459 and S.400 of the Penal Code.

In the course of the trial an application was made by the State to deal with the Appellant in terms of S.449 of the Code of Criminal Procedure Act for giving false evidence in Court. There upon the Trial Judge proceeded to act in terms of S.449 and convicted him for contempt of Court.

It was contended that

- (1) there was no proper charge
- (2) that trial Judge failed to follow the correct procedure
- (3) the Appellant was not given an opportunity to retain Counsel or sufficient time to prepare his evidence.

Held :

- (i) It is a basic requirement of the Criminal law that the accused should be made aware of the charge levelled against him.
- (ii) In a case where the allegation against a witness was that he gave false evidence, the proper time at which such witness should be dealt with in terms of S.449(1) is upon the conclusion of the main trial.
- (iii) When a witness in a High Court trial is dealt with in terms of S.449 he should be afforded the facility of availing himself of the services of an Attorney at law, and further sufficient time should be given to him to prepare his defence.

Appeal from an order of the High Court of Colombo.

Cases referred to:

1. *Gunapala vs. Attorney-General* - 2000 2 SLR 130.
2. *Queen vs. Piyadasa* - 67 NLR 481.
3. *Subramaniam vs. The Queen* - 60 NLR 25.
4. *Daniel Appuhamy vs. The Queen* - 64 NLR 481.
5. *Chang Hang Klu vs. Piggot* - 1909 AC 312(S.C)
6. *Sameen vs. The Bribery Commissioner* - 1991 1 SLR 76.
7. *Godage and Others vs. OIC Police Station, Kahawatte* - 1992 1 SLR 54.
8. *Coorey vs. Ceylon Para Rubber Co., Ltd.*, 23 NLR 321 at 326.

K.S. Tilakaratne for Accused-Appellant.

Priyantha Nawana S.C. for the Attorney-General.

cur adv vult.

January 29, 2001

KULATILAKA, J.

The appellant in this case Mervyn C. Kumarasinghe was a witness for the prosecution in the High Court of Colombo case No. 5483/93 at the trial of Madduma Hewage Ratnatilaka who was indicted firstly, for using as genuine a forged document to wit, a forged permit to obtain rectified spirits from the Excise Department, an offence punishable under Section 459 of the Penal Code and secondly, for cheating by personation an offence punishable under Section 400 of the Penal Code.

In the course of the appellant's evidence the prosecuting State Counsel made an application requesting the Court to deal with the appellant in terms of Section 449 of the Code of Criminal Procedure Act No. 15 of 1979 for giving false evidence in open Court. Thereupon the learned trial Judge proceeded to act in terms of Section 449 of the Code of Criminal Procedure Act and

by his order dated 05. 07. 96 convicted the appellant for Contempt of Court and sentenced him to a term of two years rigorous imprisonment. This appeal is against that conviction and sentence. Apparently in the main case the accused was acquitted on both counts for the reason that there was reasonable doubt as to the identity of the accused.

The learned counsel for the appellant in his endeavour to impugn the order of the learned trial Judge urged the following grounds: namely,

- (1) that there was no proper charge against the appellant.
- (2) that the learned trial Judge failed to follow the correct procedure as laid down in a series of cases when he purported to act in terms of Section 449 of the Code of Criminal Procedure Act.
- (3) that the appellant was not given an opportunity to retain counsel or sufficient time to prepare his defence.

The learned counsel relied upon the judgment of this Court in *Gunapala vs. The Attorney-General*⁽¹⁾. The learned State Counsel in his submissions cited *Queen vs. Piyadasa*⁽²⁾, *Subramaniam vs. The Queen*⁽³⁾, *Daniel Appuhamy vs. The Queen*⁽⁴⁾, *Chang Hang Kiu vs. Piggot*⁽⁵⁾.

The appellant was an Excise Inspector attached to the Excise Department. Adducing evidence in respect of the document P2 at the examination-in-chief, the appellant's position was that the accused Madduma Hewage Ratnatilake personally handed over the document marked P2 to him. Albeit, whilst being cross-examined when he was confronted with his own document marked V3 by the defence he changed his original stand and testified that it was one B.S. Perera who handed over the document to him and the accused Ratnatilaka was present in the vicinity. It was at that stage the learned State Counsel invited Court to deal with the appellant under Section 449 of the Code of Criminal Procedure Act No. 15 of 1979.

Thereupon the learned trial Judge having examined the appellant again, merely asked the appellant to show cause why he should not be dealt with for Contempt of Court for giving false evidence. In *Daniel Appuhamy vs. The Queen*(supra) at 483 and 484 the Lord Chancellor delivering his judgment was highly critical of such procedure adopted by the Court in that case.

It must be borne in mind that Section 448 of the Code of Criminal Procedure Act deals with a case where a witness contradicts either expressly or by necessary implication the evidence previously given by him at the inquiry before the Magistrate, in which case the witness will be arraigned and tried on an indictment. This does not mean that since there is no such provision laid down in Section 449(1) a formal charge should not be framed and read out to a witness who is to be charged in terms of Section 449 of the said Act which entails penal consequences. It is a basic requirement of the criminal law that an accused should be made aware of the charge levelled against him. In this regard vide *Sameen vs. The Bribery Commissioner*⁽⁶⁾, and *Godage and Others vs. OIC Police Station Kahawatte*⁽⁷⁾. At the argument the learned State Counsel quite rightly conceded that there was no proper charge framed against the appellant.

It is to be observed that Section 449 of the said Act is silent as regards the time at which a witness should be dealt with for giving false evidence in open Court. The expression "summarily to sentence such a witness" refers not to the time but to the nature of the proceedings. Vide *De Sampayo, J. in Cooray vs. Ceylon Para Rubber Co., Ltd.*,⁽⁸⁾ at 326.

In *Gunapala vs. The Attorney-General*(supra) this Court having considered the judgment in *Cooray vs. Ceylon Para Rubber Co., Ltd.*,(supra) and the provisions of Section 448(1) of the Code of Criminal Procedure Act has expressed the view that in a case where the allegation against a witness was that he gave false evidence at the High Court trial within the meaning

of Section 188 of the Penal Code the proper time at which such witness should be dealt with in terms of Section 449(1) is upon the conclusion of the main trial and that such a procedure would not in any way prejudice the case against the prosecution or the defence on the main case. Further it is likely to render more apparent the falsehood of any statement.

Further it appears from the proceedings that the appellant was not given sufficient time to avail himself of the services of an Attorney-at-Law. Learned counsel referred us to Article 13(3) of the Constitution as well as the provisions of section 195(g) of the Code of Criminal Procedure Act. This Court has considered this issue in *Gunapala vs. Attorney-General(supra)* at page 135 and has expressed the view that when a witness in a High Court trial is dealt with in terms of Section 449 of the Code of Criminal Procedure Act he should be afforded the facility of availing himself of the services of an Attorney-at-Law. In addition we also hold the view that sufficient time should be given to him to prepare his defence.

For the aforesaid reasons we are of the considered view that the impugned proceedings are invalid. Hence we set aside the conviction and sentence and proceed to acquit the appellant.

HECTOR YAPA, J.(P/CA) - I agree.

Appeal allowed.