MOSES
v.
STATE

COURT OF APPEAL.
YAPA, J.,
KULATILEKA, J.
CA NO. 58-59/98.
HC GALLE NO. 1581.
NOVEMBER 1, 1999.

Murder – Code of Criminal Procedure Act, ss. 203, 283 (1), 334 (2), 449 – Absence of a judgment – Deprivation of the right of appeal of an accused by failing to give reasons in judgment – Criteria to be applied when sending a case back – Adverse witness – Evidence Ordinance, s. 154 – Probative value.

Held:

(1) S. 203, s. 283 (1) – Make provision that the judgment shall be written by the Judge who heard the case and shall be dated and signed by him. It is a mandatory requirement – A duty is cast on the Judges to give reasons for their decisions, as their decisions are subject to review by superior courts.

(2) Though s. 334 (2) refers to cases of trial by jury, it is reasonable and proper to assume that the intention of the legislation must necessarily be the same, whether it is a trial before Jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted.

(3) Once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness, and hence his version cannot be treated as the version of the prosecution itself.

APPEAL from judgment of the High Court, Galle.

Cases referred to:

1. *Ibrahim v. Inspector of Police, Ratnapura* – 59 NLR 235 at 236.
2. *King v. Fernando* – 46 NLR 254.

3. *Dahanayake v. Kannangara* – 72 CLW 62.
4. *Q. v. Abilinu Fernando* – 70 NLR 73.
5. *Keshoram Bora v. State of Assam* – 1978 AIR 65 – SC 1096 para 6.

Dr. Ranjith Fernando with *Sandamali Munasinghe* for accused-appellant.

Yasantha Kodagoda, Senior State Counsel for Attorney-General.

Cur. adv. vult.

November 01, 1999.

HECTOR YAPA, J.

The accused-appellant M. Rose Moses was indicted in the High Court of Galle, for committing murder by causing the death of Lokunarangodage Wimalasena on 18.07.1986, an offence punishable under section 296 of the Penal Code. The case was heard before the High Court Judge, without a jury. After trial the accused-appellant was found guilty of murder and was sentenced to death.

The prosecution led the evidence of witnesses Tiranagamage Gunapala, Ukwatta Jalage Ariyawathie, Withanachchige Panditha, the medical evidence and the Police evidence. At the trial witness Gunapala was treated adverse by the prosecution under section 154 of the Evidence Ordinance, and thereafter he was convicted for perjury in terms of section 449 of the Code of Criminal Procedure Act, No. 15 of 1979, and sentenced to a term of two years' rigorous imprisonment. The second witness Ariyawathie was also treated adverse by the prosecution. The evidence given by witness Panditha was that, after the incident he admitted the deceased to Mahamodara hospital and also testified that the deceased was taken to the General Hospital, Colombo, for an operation and later transferred to Galle hospital where he had died. According to the doctor the deceased had two cut injuries, one on the left side of the head and the other injury was on the neck and expressed the view that these injuries could have been caused with a knife. The cause of death was due to an injury caused to the

brain by stabbing with a pointed knife. After the formal evidence of the police and the registrar of the Court, the prosecution case was concluded. When the defence was called, the accused-appellant did not lead any evidence and opted to remain silent.

At the hearing of the appeal the learned senior counsel for the accused-appellant submitted that, in this case there was no judgment delivered by the learned High Court Judge in terms of section 203 of the Code of Criminal Procedure Act. Learned counsel contended that this was a grave error on the part by the learned High Court Judge and therefore the conviction and the sentence should be set aside. The section 203 of the Code of Criminal Procedure Act provides as follows:

> "When the cases for the prosecution and defence are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor and if the verdict is one of conviction pass sentence on the accused according to law."

In addition learned counsel referred us to section 283 (1) of the Code of Criminal Procedure Act which makes provision that the judgment shall be written by the Judge who heard the case and shall be dated and signed by him. Therefore, having regard to these provisions it is very clear that there must be a judgment where reasons should be given by the Judge. It is a mandatory requirement, where a duty is cast on the Judges of the trial Courts to give reasons for their decisions, for their decisions are subject to review by superior Courts. If their decisions are to be challenged, then, obviously reasons are essential. Therefore, the failure to give reasons in this case would deprive the accused-appellant of his right to canvass the conviction and the sentence in this Court. Furnishing of reasons not only assist the Court of Appeal in scrutinizing the legality and the correctness of the order made by the lower Court, but also the existence of reasons will tend to support the idea of justice and would enhance the public confidence in the judicial process. Failure to give reasons may even lead to the inference that the trial Judge had no good reasons for his decision. Learned counsel cited the case of *Ibrahim v. Inspector*

of Police, Ratnapura[1] at 236 where L. W. de Silva, AJ. stated as follows: "The learned Magistrate's omission to state the reasons for his decision has deprived the appellant of his fundamental right to have his conviction reviewed by this Court and has thus occasioned a failure of justice. Without such reasons, it is impossible for this Court to judge whether the finding is right or wrong. I, therefore, set aside the conviction and sentences and order a new trial".

In view of this grave error on the part of the learned High Court Judge in not giving reasons for his decision, we are of the considered view that the conviction and the sentence passed on the accused-appellant cannot be allowed to stand and therefore it should be set aside.

The next question to be considered in this appeal, is whether there is sufficient evidence to send this case for a fresh trial. With regard to this matter the proviso to section 334 (2) of the Code of Criminal Procedure Act provides as follows:

> . . . "Provided that the Court of Appeal may order a new trial if it is of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed.". . .

Even though this proviso refers to cases of trial by jury, it was submitted by learned counsel that the same principle would apply to cases before a Judge without a jury as well. It should be mentioned here that, even though the proviso refers to the jury and not the Judge, it is reasonable and proper to assume that the intention of the legislature must necessarily be the same, whether it be a trial before a jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted. This reasoning finds support, when one examines the proviso to section 350 (2) of the Administration of Justice Law, No. 44 of 1973, which is similar to section 334 (2) of the Code of Criminal Procedure Act, where reference is made to the jury and the Judge. The said proviso of the Administration of Justice Law provides as follows:

". . . Provided that the Court may order a new trial if it is of opinion that there was evidence before the jury or the Judges, as the case may be, upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed." . . .

In this case, therefore, learned counsel contended that, for the Court to order a new trial, there must be evidence before the trial Court upon which the accused-appellant might reasonably have been convicted, but for the irregularity upon which the appeal was allowed. Counsel argued that in the present case there was no such evidence. It is to be observed that the two alleged eye-witnesses have been treated adverse. The third witness Panditha, did not give evidence relating to the incident where the deceased came by his death, but spoke to matters after the death of the deceased. In the circumstances, there was no evidence before the trial Court, on the question as to whether it was the accused-appellant who caused the death of the deceased, if the evidence given by the witnesses Gunapala and Ariyawathie is disregarded. In regard to this matter learned counsel cited authorities to support the proposition that, when a witness is treated adverse, there is no value in the evidence given by such a witness, and therefore the prosecution could not make use of such evidence to support the conviction. In the case of the *King v. Fernando*[2] it was observed that the fact that a witness is treated as adverse and is cross-examined as to credit does not warrant a direction to the jury that they are bound in law to place no reliance on his evidence. It is for the jury to examine the whole of the evidence of such a witness so far as it affects both parties favourably or unfavourably for what, in their opinion, it is worth. However, more recently the view has been expressed that such evidence has no value and cannot be relied upon by either party. This principle was followed in the case of *Dahanayake v. Kannangara*[3]; *Queen v. Abilinu Fernando*[4]. In the Indian Supreme Court case of *Keshoram Bora v. The State of Assam*[5] it was observed that "While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well-settled that when once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness and, hence his version cannot be treated as the version of the prosecution. itself".

Therefore, since witnesses Gunapala and Ariyawathie were treated adverse, there is not even an iota of evidence to support the conviction against the accused-appellant. In our view the learned High Court Judge should have acquitted the accused-appellant without even calling for a defence, for want of evidence to establish the charge against him. In addition as observed earlier the learned High Court Judge had failed to comply with section 203 of the Code of Criminal Procedure Act, by not giving his reasons for the conviction. The failure of the trial Judge to give reasons for the conviction may have been due to the fact that the learned Judge had none to give in order to justify the conviction of the accused-appellant. If the learned High Court Judge was mindful of section 203 of the Code of Criminal Procedure Act and complied with it, he could not have come to any other conclusion other than to acquit the accused-appellant. It is highly regrettable that the learned High Court Judge failed to take cognizance of this vital provision of law, and thereby caused the accused-appellant to languish in jail.

Learned senior State counsel very fairly and correctly conceded that he was not supporting the conviction in this case. He further submitted that there is no justification to order a new trial due to the lack of evidence against the accused-appellant.

In these circumstances, we set aside the conviction and the sentence of death passed on the accused-appellant and acquit him. Appeal is allowed.

KULATILEKA, J. – I agree.

Appeal allowed.