[ASSIZE COURT]

1951 *Present:* **Dias S.P.J.**

REX *v.* GUNAWARDENE *et al.*

S. C. 2—M. C. Ratnapura, 16,250

Criminal Procedure Code (Cap 16), s. 406 (3)—Government Analyst's report on a question unconnected with chemical analysis—Admissibility—Proper direction to be given to Jury—Government Analyst's name not on the list of witnesses in case committed for trial—Right of prosecution under s. 406 (4) to ask for summons on Government Analyst without amending indictment.

The provisions of section 406 (3) of the Criminal Procedure Code, which makes admissible in evidence the report of the Government Analyst upon any matter or thing duly submitted to him for examination or analysis, are not confined to matters or things submitted to him for " chemical analysis ". Therefore, his report on a question of ballistics is admissible in evidence without calling him, subject to the provisos contained in sub-sections (4) and (5) of section 406.

It is the duty of the trial Judge in such cases to tell the jury that they should appreciate that in considering *the weight* to be attached to the report, it had been admitted without being tested by cross-examination. It is also the duty of the Judge to draw attention to any surrounding facts or circumstances which may tend to support or negative the correctness of the facts or inferences stated in the report.

Where the Attorney-General has committed a case for trial before a higher Court, merely placing the report of the Government Analyst as an exhibit in the list of productions, without adding the name of the Government Analyst to the list of witnesses, it is open to question whether *the prosecution* under the *proviso* to s. 406 (4) can request the Court to summon the Government Analyst as a witness for the prosecution. The right of *the defence* to request the Court under s. 406 (4) to summon that officer as a witness for the defence cannot be questioned. *Perera v. Dharmaratne* (1946) 47 N. L. R. 38 distinguished.

ORDER made in the course of a trial before the Supreme Court.

S. P. M. Rajendram, with *R. Nagalingam*, for the 1st accused.

R. Nagalingam, for the 2nd accused.

A. B. Perera, with *L. H. R. Peiris*, for the 3rd accused.

S. P. M. Rajendram, with *L. H. R. Peiris*, for the 4th accused.

L. H. de Alwis, for the 5th accused.

T. S. Fernando, Crown Council with *A. C. M. Ameer*, Crown Counsel, for the Crown.

March 5, 1951. DIAS S.P.J.—

Can the report of the " Government Analyst " upon matters such as questions of ballistics *which may not need chemical analysis* be admitted in evidence against an accused person without calling the Government Analyst into the witness box under section 406 (3) of the Criminal Procedure Code, as amended by Ordinance No. 23 of 1945, section 2 ?

Originally, no doubt, the functions of the Government Analyst were confined to matters of chemical analysis. It is a well known fact that today that officer has attracted to himself a great many other functions which cannot be described as " chemical analysis ". Amongst such other functions he is called upon to examine firearms, bullets, cartridge cases, &c., in order to assist the Courts in the administration of justice. His competency to do this work is not in question. The point is whether when he expresses his opinion, he should appear as a witness in the Court and give evidence and face cross-examination, or whether his report alone can legitimately be admitted without his being called under s. 406 (3) of the Criminal Procedure Code ?

This problem arose directly in the present case. The Government Analysts Report P17 shows that he was asked to report whether certain distorted slugs P6 and P7, and two card wads P9 and P9A found at the scene of an alleged murder by shooting were parts of cartridges. He was also requested to express an opinion as to the kind of gun from which they were fired, and whether the gun P3 was or was not the firearm from which they were fired.

The report P17 states that it was not possible from a measurement of or from the weight and size of the distorted slugs P6 and P7 to state the size of the complete slugs. A spectro-chemical examination of them, however, revealed that they were similar in composition to " S. G. slugs " from the brand of cartridges known as "Eley Kynoch Cartridges ". The Government Analyst also expressed the view that the two card wads are of the type found in such cartridges, the larger wad corresponding in size to a wad from a " 20 bore cartridge ". He also gave it as his view that the smaller wad corresponded in size and type to the inside wad of a " felt-substitute crimped card wad " used in Eley Kynoch cartridges, and could have been part of a 20 bore wad of this type. With regard to the gun P3, the Government Analyst stated that " spent

smokeless powder residues " were identified in the right barrel of the gun P3. No spent residues were detected in the left barrel of P3. He summed up his opinion in the following words, " I am of opinion that P6, P7, P9, and P9A could have come from a 20 bore cartridge used in the gun P3 ".

So far as I can judge, except for the spectro-chemical examination of the distorted slugs, and the detection of spent smokeless powder residues in the right barrel of the gun, the rest of the inferences of the Government Analyst have nothing to do with " chemical analysis ". They are opinions expressed by a ballistics' expert. There is no question as to the relevancy or admissibility of such opinions. The question is whether the ballistics' expert should not be called to give evidence and to face cross-examination ?

I have had the advantage of a full argument from learned Crown Counsel. The learned Counsel for the defence have made no contribution to the argument, because they do not object to the admission of the exhibit P17 without calling the expert.

Crown Counsel submits that where "any matter or thing " has been " duly " submitted to the officer designated " the Government Analyst " for " *examination or analysis* ", any document " purporting to be his report " thereon may be used as " evidence " in any inquiry, trial or other proceeding under the Criminal Procedure Code. He stresses the use of the disjunctive " or " in the words " examination or analysis ". It is submitted that the expression " Government Analyst ", although defined by section 2 of the Code, does not specify or place any limit to his functions. The name is a mere label and any other designation would serve equally well. Crown Counsel argues that the report of the officer designated the " Government Analyst " on any matter or thing duly submitted to him for examination or analysis, can be used as evidence in a criminal trial, subject to the provisos indicated in section 406 namely (*a*) the right of the Court in its discretion to call the officer to testify [406 (5)], or (*b*) the right of either party to the case to request that the expert should be summoned to give evidence as a witness.

I am satisfied that the contention of the Crown is correct. " To examine " a thing means to look over or inspect a thing carefully, to scrutinize, or test a thing. " To analyse " means to separate a thing into the part of which it is made and so to examine it thoroughly. Therefore, when the Government Analyst has been " duly " called upon to make a report, he is entitled not only to analyse, but also to examine the thing submitted to him. He can examine the thing without subjecting it to analysis. In either case, the law makes his report admissible as evidence without his being called, subject to the qualifications I have already indicated. I, therefore, decided to admit the exhibit P17.

It is a broad principle of justice that a person, who is charged with a criminal offence, is entitled to be confronted with those who accuse him—*Parupatham v. Kandiah* [1], *R. v. Don William* [2]. Section 406 (3) furnishes one exception to that general principle. In such cases, it would be the duty of the trial Judge to sound a note of warning to the Jury that in considering the *weight* to be attached to the statement or report lawfully admitted as evidence, it should be appreciated that it has been admitted

[1] *(1928) 30 N. L. R. at p. 141.* [2] *(1920) 2 Cey. L. Rec. 192.*

without being tested under cross-examination. It would also be the duty of the Judge to draw attention to other surrounding facts or circumstances which may tend to support or negative the correctness of the facts or inferences contained in the statement or report—*Cf. R. v. Asirvadan Nadar* [1].

At an earlier stage of these proceedings, Crown Counsel moved under the proviso to section 406 (4) to call the Government Analyst. Each of the defending counsel objected, and I upheld their objections. The defence appears to be satisfied with the inferences contained in the report and do not wish to cross-examine the Government Analyst. I have subsequently discovered the case of *Perera v. Dharmaratne* [2] where on an appeal in a summary case from a Magistrate's Court, de Silva (M. W. H.) J. held that it is the duty of the Court under section 406 (4) to summon the Government Analyst if either party makes application that he should be summoned to give evidence regarding his report. With respect, it seems to me that the proposition as stated in that case is too wide. Undoubtedly, in the Magistrate's Court, whether in summary or non-summary proceedings, if either party requests that the Government Analyst should be summoned, it would be the duty of the Court to issue summons on that officer. When, however, a criminal case has been committed for trial to a higher Court, and the Attorney-General has merely placed the Government Analyst's report as an exhibit in the list of productions without adding that officer's name to the list of witnesses, it is open to question whether the prosecution, without amending the indictment, can request under section 406 (4) that the Government Analyst should be called as a *witness for the prosecution*. It is of course beyond doubt or question, that the accused in the higher Court has the right to demand that the Government Analyst should be summoned as *a witness for the defence*. See also *R. v. Bandirala* [3] *and Bandaranayaka v. Ismail* [4].