

1953

Present : Nagalingam A.C.J.

D. FERNANDO, Appellant, and S. I. POLICE, WELIKADE,
Respondent

S. C. 567—M. C. Colombo, 24,457

Criminal Procedure Code—Sections 297 and 407—Accused absconding—Evidence of witnesses recorded in his absence—Procedure for reading it over at the trial.

Where an accused person absconds and evidence is recorded in his absence under section 407 of the Criminal Procedure Code, the evidence so recorded may be read over to the deponents at the trial of the accused. Section 407 must be read in conjunction with section 297.

Jane Sinno v. Ratnapura Police (1949) 39 C. L. W. 79, not followed.

APPPEAL from a judgment of the Magistrate's Court, Colombo.

G. E. Chitty, with *V. Wijetunge*, for the accused appellant.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

Civ. adv. vult.

September 28, 1953. NAGALINGAM A.C.J.—

The point taken on this appeal is that the conviction is vitiated by reason of the fact that the learned Magistrate took into consideration evidence which cannot be said to have been legally before him. The contention advanced arises in this wise: The accused was absconding and the Magistrate examined witnesses and recorded their depositions as provided by section 407 of the Criminal Procedure Code. At the trial the evidence so recorded was read over to the witnesses, they were further examined in chief and tendered for cross-examination and were in fact cross-examined by counsel for the accused.

Mr. Chitty argues that the reading over of the evidence of the witnesses recorded under section 407 is a fatal error as those depositions could only have been placed before Court if it were shown that "the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable", in terms of the second part of section 407. It has been urged that none of these conditions precedent to the reception of such evidence has been shown to exist and that in fact the contrary is established by reason of the presence of everyone of the witnesses at the trial.

In support of this contention Mr. Chitty relied upon the judgment of Basnayake J. in *Jane Sinno v. Ratnapura Police*¹. That case, no doubt, supports the contention of Counsel but I do not think that that judgment concludes the matter. In that case another relevant provision of the Criminal Procedure Code does not appear to have been brought to the notice of the learned Judge either by Counsel for the appellant or by Crown Counsel who appeared for the respondent. Section 407 cannot be divorced from the other provisions of the Code. Section 297 of the Code has a very material bearing on the question. The proviso to section 297 enacts that where "the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereof" and embodies a rule laying down a general principle of legal admissibility of evidence recorded in the absence of an accused person. In this case it is clear that the attendance of the accused person had not been dispensed with at the time the evidence was recorded under section 407, so that if the proviso is applicable it would be perfectly regular for the evidence of those witnesses whose evidence had been taken in the absence of the accused to be read over to the accused in the presence of such witnesses and the accused afforded an opportunity of cross-examining them.

Mr. Chitty, however, contends that the proviso to section 297 can have application only where it is shown that the conditions prescribed by section 407 do exist. I think this is wholly erroneous and untenable; for if the deponent were dead, to take only one of the conditions, then under the proviso to section 297 you cannot read out the deposition in the presence of the witness nor give the accused person an opportunity of cross-examining the witness; so that Mr. Chitty's argument must logically mean that section 297 can have no application where evidence has been recorded under section 407. To my mind it is clear that when section 407 says in the second part of it that the deposition recorded during the absence of the accused person may be given in evidence against him if the deponent is dead, it merely means that that deposition may be read in evidence without the observance of the ordinary rule that evidence should be given in the presence of the accused person and that the accused person should be provided an opportunity of cross-examining the witnesses. This provision enunciates a rule analogous to that underlying section 32 of the Evidence Ordinance.

In my view section 297 cannot be excluded from operation in cases where evidence has been recorded under section 407. The procedure adopted by the learned Magistrate is therefore unexceptionable, and the conviction is therefore founded on evidence which was properly before the Court.

The appeal is dismissed.

Appeal dismissed.

¹ (1949) 39 C. L. W. 79.