[COURT OF CRIMINAL APPEAL.]

1944 *Present:* **Howard C.J., Keuneman and de Kretser JJ.**

THE KING *v.* H. D. AMARAKOON.

17—M. C. Tangalla, 18,245.

Evidence—Absence of witness from trial—Illness in hospital—Admissibility of deposition—Evidence Ordinance, s. 33.

In a charge of murder a material witness whose name appeared on the back of the indictment was present at the opening day of the trial but was taken ill and removed to hospital suffering from pneumonia and was unable to give evidence at the trial.

There was no evidence on record as to how long a delay woud be occasioned if the trial was postponed in order to enable the witness to give evidence in person or whether his presence to give evidence would necessitate a trial *de novo with* another Jury.

***Held*, that his evidence could not be admitted under section 33 of the Evidence Ordinance.**

***Held, further*, that temporary illness did not come within the category " incapable of giving evidence ", contemplated by the section.**

APPLICATION for leave to appeal against a conviction by a Judge and Jury before the 1st Southern Circuit, 1944.

H. Wanigatunge, for the applicant.

H. W. R. Weerasooriya, C.C., for the Crown.

Cur. adv. vult.

July 28, 1944. HOWARD C.J.—

The applicant applies for leave to appeal from his conviction on a charge of murder. The main ground of appeal is based on the admission in evidence of the deposition of one N. A. Pedris. Crown Counsel stated that Pedris whose name appeared on the back of the indictment was present on the opening day of the trial but had been taken ill and removed to hospital suffering from pneumonia. In these circumstances he asked that the deposition of Pedris should be put in evidence. Counsel for the defence raised no objection to the deposition being read. Subsequently, Mrs. N. R. Walpola, Admitting Officer at the Galle Hospital, testified to the fact that Pedris was admitted to the hospital suffering from

pneumonia, that she did not think he was capable of attending Court and giving evidence, and that he would not be able to give evidence for some days. Before Crown Counsel closed his case he moved to read the deposition of Pedris. It was then read in evidence.

The deposition of Pedris was admitted in evidence under the provisions of section 33 of the Evidence Ordinance. This section is worded as follows:—

> " Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:
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> Provided—
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> (*a*) that the proceeding was between the same parties or their representatives in interest,
> (*b*) that the adverse party in the first proceeding had the right and opportunity to cross-examine,
> (*c*) that the questions in issue were substantially the same in the first as in the second proceeding.
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> (Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section)."

Presumably his deposition was admitted because Pedris was considered by the learned Judge to be either " incapable of giving evidence " or because " his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable." We are of opinion that temporary illness would not come within the category " incapable of giving evidence ". There is no evidence on record as to how long a delay would be occasioned if the trial was postponed in order to enable Pedris to give his evidence in person, or if his presence to give evidence would necessitate a trial *de novo* with another Jury. There is nothing to indicate what " delay or expense " would be involved or if the Court considered such delay or expense " unreasonable ". In this connection I would refer to the case of *The King v. Kandappu*[1] where Shaw J. held that it is only in extreme cases of delay or expense that the provisions of section 33 should be brought into operation. The learned Judge also stated that it was an important safeguard of the accused that the witnesses who speak to material facts against him should be present in Court and should be seen by the Judge or Jury who has to decide on the evidence. In the Eighth Edition of *Phipson on Evidence* at p. 432, it is stated that " if the indisposition be merely temporary, the proper course is not to admit the evidence, but to postpone the trial ".

[1] *20 N. L. R. 18.*

In his deposition before the Magistrate, Pedris gave evidence with regard to an alleged threat against the deceased uttered six weeks previously. Pedris was, therefore, a witness who spoke to material facts and in our opinion the deposition should not have been admitted in evidence but the trial should have been postponed. Having regard to the fact that both Counsel consented to its admission, the learned Judge was no doubt in a peculiar position. The attitude of Counsel for the defence is inexplicable.

It is impossible to say what effect the evidence of Pedris had on the minds of the Jury. In these circumstances the conviction cannot be allowed to stand. Nor do we consider, having regard to the flimsiness of the remainder of the evidence, that this is a case in which a new trial should be granted. The conviction is therefore quashed and the accused discharged.

Conviction quashed.