1968 *Present :* **T. S. Fernando, J., and Alles, J.**

THE SOLICITOR-GENERAL, Appellant, *and*
AHAMADULEBBE AVA UMMA and 4 others, Respondents

S. C. 36 of 1966—D. C. (Crim.) Batticaloa, 1287

Evidence—Charge of committing forgery of a deed of transfer of a land—Vendee and the two attesting witnesses made co-accused—Competency of the owner of the land and the attesting notary to give evidence—Evidence Ordinance, ss. 68, 69, 71—Notaries Ordinance (Cap. 107), s. 31, Clauses (8), (9), (10) and (12)—Prevention of Frauds Ordinance, s. 2.

In a criminal case involving the offence of forgery of a deed of transfer of immovable property, the two attesting witnesses of the execution of the deed were the 3rd and 4th accused. The prosecution, as its contention was that it was not competent for it to call the two attesting witnesses, sought to call, as witnesses, an owner of the land and the notary who attested the deed. Counsel for the defence objected to the production of the deed on the ground of a lack of compliance with section 68 of the Evidence Ordinance. The trial Judge upheld the objection and acquitted the accused.

Held, that section 68 of the Evidence Ordinance had no application to a criminal case where the prosecution had made the attesting witnesses also accused in the case and, far from seeking to use the deed as evidence, was impugning it as a forgery committed as a result of the abetment of the said offence on the part of the witnesses and the vendee. In such a case, the elements of the charges which have to be established by the prosecution may be established in any of the ways permitted by law.

APPEAL from a judgment of the District Court, Batticaloa.

V. S. A. Pullenayegum, Crown Counsel, with *R. Gunatilleke*, Crown Counsel, for the appellant.

G. E. Chitty, Q.C., with *A. M. Coomaraswamy*, for the accused-respondents.

Cur. adv. vult.

May 15, 1968. T. S. FERNANDO, J.—

This is an appeal by the Solicitor-General against an order acquitting in somewhat unusual circumstances the five accused-respondents who had been indicted on a number of charges, the principal one relating to a conspiracy to commit forgery of a valuable security, viz., a deed of transfer of immovable property, in consequence of which conspiracy it was alleged the said forgery was indeed committed.

The 5th accused-respondent is alleged to be the vendee upon the deed in question, the 3rd and 4th accused-respondents are alleged to have attested as witnesses at its execution, while the 1st and 2nd accused-respondents are alleged to have been two of its eleven executants.

As soon as the deed was shown to the first witness called for the prosecution (a woman who claimed to be one of those in truth entitled to the land which the alleged forged deed is said to have purported to convey to the 5th accused), when that witness was being examined in chief, counsel for the defence objected to its production on the ground of a lack of compliance with section 68 of the Evidence Ordinance. After some argument, the learned District Judge upheld the objection. Thereupon the proctor who was conducting the prosecution on behalf of the Attorney-General applied for a postponement to enable him to consult the latter and obtain certain instructions which he submitted were necessitated by the order upholding the objection to the production of the deed. The trial judge refused this application and made an order " acquitting and discharging the accused ".

A preliminary objection to the appeal to this Court was made by counsel for the accused-respondents on the ground that what took place after the order upholding the objection to the reception of the document was in reality a refusal on the part of the Crown to lead evidence. We have considered this objection but, considering the novelty and difficulty of the point of evidence that arose so early at the trial, we think the learned trial judge should have acceded to the application for a postponement for the purpose indicated by the proctor for the prosecution. If he thought such a step expedient, he could even have made an order directing the Crown to pay to the defence a specified sum as the day's costs. The objection that was upheld had not been foreshadowed at the non-summary inquiry, and the proctor was obviously taken by surprise and was not prepared to reply to it adequately or to shape the conduct of his case when the order made turned out to be adverse to the prosecution. In overruling the preliminary objection, we bear in mind also the provisions of section 338 (2) of the Criminal Procedure Code whereby the legislature, in addition to the right of appeal against an acquittal, conferred on the Attorney-General a right to appeal against any judgment or final order pronounced by a Magistrate's Court or a District Court in any criminal case or matter.

We can now turn to the important question that is raised by this appeal. The deed referred to above bears No. 3915 and purports to have been executed on the 6th January, 1961 in the presence of one Mr. Samithamby Kandappan who attested its execution as the notary. In the attestation clause of the said deed, Mr. Kandappan (whose name, I observe, appears on the list of witnesses in the indictment) has certified that the eleven executants were not known to him, but that the two subscribing witnesses were known to him and that they declared that the executants were known to them, and the executants and the witnesses all signed in his presence and in the presence of one another, all being present together at the same time. Clause (12) of section 31 of the Notaries Ordinance (Cap. 107) appears therefore to have been complied with, and, although the executants were not known to the notary, clause (9) of the same section permitted attestation of the deed in these circumstances by the notary. I assume that the prosecution intended to call Mr. Kandappan as its witness. Indeed, a statement to that effect was made by the proctor who appeared for the prosecution in the course of his reply to the objection raised against the reception of the deed at the trial. As the prosecution's contention was that it was not competent for it to call the two attesting witnesses, the proper course it should have adopted would appear to have been to call the notary as a witness even before the alleged owner or owners of the land.

The learned trial judge has held that the prosecution has failed to satisfy section 68 of the Evidence Ordinance. That section prohibits the use *as evidence* of any document required by law to be attested until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. I think it is implicit in this finding of the trial judge that he did not consider the notary to be an attesting witness within the meaning of section 68. Crown Counsel before us himself contended that the notary is not such an attesting witness. The previous cases of this Court which have considered this question have not taken a uniform view thereon, and Mr. Chitty invited us towards the end of his argument to consider whether this was not a question which deserved a reference to a bench of five judges. After giving thought to the matter of such a reference, we do not think that such a reference is called for here, as we are in any event upholding the argument of learned Crown Counsel on another question which, in our opinion, suffices for the decision of the present appeal. We would, however, draw attention to the state of the authorities in regard to the question whether the notary is himself an attesting witness. It may be mentioned that section 2 of the Prevention of Frauds Ordinance which is, after all, the statute that makes validity of a deed depend on notarial attestation, requires the deed to be signed in the presence of *a licensed notary public and two or more witnesses*. This same differentiation between the notary and the witnesses is contained in clauses (8), (9), (10) and (12) of section 31 of the Notaries Ordinance. The Evidence

Ordinance is however silent on the question of any such differentiation and contemplates only the calling of an attesting witness. In *Velupillai v. Sivakamipillai* [1], Middleton J. referred to the Judicial Dictionary meaning of " to attest " which is " to bear witness to a fact ", a meaning which Sinnetamby J. adopted in *Marian v. Jesuthasan* [2]. But Crown Counsel referred us to an interpretation of the expression " attesting witness " itself, rendered by the Lord Chancellor in *Burdett v. Spilsbury* [3], in the following language : " The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness."

In the earlier case we have examined, *Kiribanda v. Ukkuwa* [4], decided, however, before the enactment of the Evidence Ordinance, Burnside C.J. (with Withers J. agreeing) held that, in an instrument falling within section 2 of the Prevention of Frauds Ordinance, a notary is an attesting witness in precisely the same sense as are the two witnesses who with him are required to attest the execution thereof. Seven years later, in 1899, in *Somanader v. Sinnatamby* [5] Lawrie J. stated that " the later decisions of this Court regard a notary as an attesting witness and (though I am not sure that I quite agree) I am willing to hold that, by proving the signature of the notary, the requirements of the 69th section (of the Evidence Ordinance) have been fulfilled." In *Ramen Chetty v. Assen Naina* [6] the Court held that, even on the assumption that the notary is an attesting witness within the meaning of section 68, the document cannot be proved without proof of the signature of the executant. This case was referred to by Schneider A.J. in his *obiter dictum* in *Seneviratne v. Mendis* [7] which I reproduce below in full : " The language of section 2 of Ordinance No. 7 of 1840, and in particular the words " the execution of such writing, deed, or instrument be duly attested by such notary and witnesses " to my mind leave no room for doubt or contention that the notary is an attesting witness in precisely the same sense as the other two witnesses mentioned in that section. This was the view taken in *Kiribanda v. Ukkuwa* (*supra*) and in *Somanader v. Sinnatamby* (*supra*). It was argued that when it is enacted in section 68 of the Ceylon Evidence Ordinance 1895 that a document required by law to be attested is not to be used as evidence until one attesting witness at least has been called " for the purpose of proving its execution " the witness meant was not the notary but one of the other attesting witnesses. I do not quite agree with this contention. It would be correct if qualified. The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and

[1] *(1907) 1 A. C. R. 181.*

[2] *(1956) 59 N. L. R. 349.*

[3] *(1843) 10 Cl. & Fin. 340 (8 Eng. Rep. at 800–1).*

[4] *(1892) 1 S. C. R. 216.*

[5] *(1899) 1 Tambyah's Rep. 38 (or 1 Koch's Rep. 16)*

[6] *(1909) 1 Curr. L. R. 257.*

[7] *(1919) 6 C. W. R. 212 (or 1 Law Rec. 47).*

proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution. If the notary knew the person signing as maker he is competent equally with either of the attesting witnesses to prove all that the law requires in section 68—if he did not know that person then he is not capable of proving the identity as pointed out in *Ramen Chetty v. Assen Naina* (*supra*), and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person. It seems to me that it is for this reason that it is required in section 69 that there must be proof not only that "the attestation of one attesting witness at least is in his handwriting" but also "that the signature of the person executing the document is in the handwriting of that person." If the notary knew the person making the instrument he is quite competent to prove both facts—if he did not know the person then there should be other evidence. When the instrument is signed with a mark it is evident that the language of section 69 must be read to mean that there must be proof that the mark was placed by the person whose mark it purports to be". Fairly recently, in *Wijegoonetilleke v. Wijegoonetilleke* [1] it was held that a notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance. A fortnight later, in *Marian v. Jesuthasan* (*supra*), this Court held that where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant. If this last mentioned case is to be followed by us, then the notary in the case now before us cannot be regarded as an attesting witness. In all the cases which were brought to our notice or which we have ourselves examined the party seeking to produce the deed desired to use it as evidence of its contents. In the case before us the prosecution does not seek to use deed No. 3915 as evidence; indeed, its contention is that it is not a genuine deed and is, in truth and in fact, a forged instrument. As we have stated already, it does not become necessary for us on this appeal either (*a*) to choose which of the somewhat varying views on the question where the notary is an attesting witness within the meaning of section 68 we should adopt or (*b*) express our own view thereon, for the reason that we think that section 68 has no application to a case where the deed is not claimed to be a true document and the claim is that it has indeed been forged.

The principal point made by the trial judge in his order upholding the objection to the showing of the deed to one of the true owners probably with the object of getting her to say that she did not set her thumb mark thereon is that the prosecution has not given an opportunity to the witnesses to the deed (whom the prosecution seeks to identify as the 3rd and 4th accused) to deny the execution of the document or to say that

[1] *(1956) 60 N. L. R. 560.*

they cannot recollect its execution. It seems to us that the learned judge has here misdirected himself completely when he held that the execution of the deed could be proved in view of section 71 of the Evidence Ordinance only where the attesting witnesses deny or do not recollect the execution of the document. He has, inadvertently perhaps, overlooked the important circumstance that this was a criminal trial and that the 3rd and 4th accused were not competent witnesses for the prosecution. The question of complying with section 71 cannot arise in such a case. Nor can it be the law that in order to prove the complicity of the attesting witnesses in the forgery of a deed it is inevitable that at least one such witness must be made a Crown witness after granting him a conditional pardon. Crown Counsel attempted to derive some support for the contention that an attesting witness who is not legally competent to give evidence is embraced in the expression "if no such attesting witness can be found" occurring in section 69 of the Evidence Ordinance by relying on a decision of the Allahabad High Court in *Bam Jassa Kunwar v. Sabu Narain Das*[1], itself a case where a deed was sought to be used as evidence. Malik J. (with Bennet J. agreeing) there stated:— "If I may, with great diffidence, say so, the words "can be found" are not very appropriate and, to my mind, they must be interpreted to include not only cases where the witness cannot be produced because he cannot be traced but cases where the witness for reasons of physical or mental disability or for other reasons, which the Court considers sufficient, is no longer a competent witness for the purpose as is provided in section 68, Evidence Act. The law requires one more formality that a document required by law to be attested shall not be admitted as evidence until one attesting witness at least has been called for proving its execution, provided there be such a witness alive and subject to the process of the court and capable of giving evidence". Learned Counsel for the accused-respondents argued that "capable of giving evidence" here means physical or mental capacity to testify but does not include legal capacity or competency. We do not think there is justification for limiting the meaning of the expression in the manner so suggested. Therefore, even on an assumption that section 68 would ordinarily have been applicable, we think that the legal incompetency of the 4th and 5th accused to testify for the prosecution brings this case with the class of cases contemplated in section 69 of the Evidence Ordinance. As we understand the position, the prosecution's case is that the notary is available to be called; he is able to say that the 3rd and 4th witnesses signed in his presence as witnesses; there is the evidence of a hand-writing expert to corroborate his testimony that the signatures of the persons who have signed as witnesses are in the hand-writing of the 3rd and 4th accused respectively; finger-print evidence can demonstrate that the thumb prints of two of the executants tally with the thumb prints of the 1st and 2nd accused. Thus, it is claimed, if section 69 is applicable the prosecution's case is capable of being proved provided the trial court accepts the evidence proposed to be led.

[1] *(1946) A. I. R. All. at 183.*

Although we have set out at some length the nature of some of the arguments addressed to us and our own views thereon, we desire to emphasize that we base our order allowing this appeal on the opinion we hold that section 68 of the Evidence Ordinance has no application to a criminal case where the prosecution has made the attesting witnesses also accused in the case and, far from seeking to use the deed as evidence, is impugning it as a forgery committed as a result of the abetment of the said offence on the part of the witnesses and the vendee. In such a case the elements of the charges which have to be established by the prosecution may, of course, be established in any of the ways permitted by law.

We reverse the order of acquittal and direct that the accused be retried on the indictment dated 8th April, 1965, the retrial to take place before a District Judge other than the Judge who made the order of acquittal.

ALLES, J.—I agree.

Acquittal set aside.