1960 *Present :* **Weerasooriya, J., and Sinnetamby, J.**

A. GRATIAEN PERERA, Appellant, *and* THE QUEEN, Respondent

*S. C. 69—D. C. (Criminal) Colombo N 1930/38752A*

*Evidence—Expert—Weight of his evidence—Handwriting—Duty of expert to give particulars—Duty of Judge to examine the expert's opinion.*

Where a handwriting expert testifies of forgery, his testimony should be accepted only if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct.

A handwriting expert should draw the attention of the Judge to the details which influence him in reaching his decision, and the Judge must not accept the expert's opinion without making an attempt himself to decide whether the grounds on which the expert's opinion is formed are satisfactory. The opinion of the expert is relevant but the decision must, nevertheless, be the Judge's.

APPEAL from a judgment of the District Court, Colombo.

*Nimal Senanayake,* for the 3rd accused-appellant.

*T. A. de S. Wijesundera,* Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

March 7, 1960. SINNETAMBY, J.—

This is an appeal by the third accused on a conviction of forgery in respect of four cheques referred to in counts 3 to 6 of the indictment, and, on count 1, for conspiracy with the 1st accused in order to commit the offence of criminal misappropriation of the proceeds of the said four cheques. He was found guilty by the learned District Judge ; so was the 1st accused who has not appealed. There were, in all, four persons charged. The 2nd and 4th have been acquitted.

It would appear that the four cheques in question were given by customers to The Medapalatha Co-operative Stores Society Limited. The Secretary of the Society had endorsed them on behalf of the Society by writing the word "Credit" and affixing, below, the seal of the Society. They were then on 11.1.57 posted at the Nattandiya Post Office to the Society's Bankers, namely, the Chilaw District Co-operative Bank Limited. When the monthly statement from the Bank P15 was sent to the Society, it was discovered that certain cheques including the four cheques in question, namely, P1 to P4 had not been credited to its account. This started inquiries and eventually it was discovered that the proceeds of these cheques were drawn by the first accused, to whose account they had been credited. The evidence also shows that the words " Credit " appearing above the seal of the Society had been altered to read " Creditz", the initials " A. C. " were written before the word " Creditz ", and the word " Perera " added after the word "Creditz". To the casual reader the cheque would thus appear to have been endorsed

by one "A. C. Creditz Perera". In this way, the cheques were once again brought into circulation. There has been no evidence led to suggest by whom these alterations were made. Thereafter, on the back of each cheque there appears an endorsement purporting to be signed by one H. M. Fernando followed by a direction to the following effect: "Please credit to the a/c of T. M. D. de Silva". There were also pay-in-slips in respect of each of the cheques having the purported signature of "H. M. Fernando". There is no evidence to establish, satisfactorily, the person who wrote the words "Please pay to the credit of T. M. D. de Silva"; but the evidence of the Examiner of Questioned Documents is to the effect that the words "H. M. Fernando" on the reverse of the cheques P1 to P4, and the entirety of the pay-in-slips P1A to P4A had been written by the 3rd accused. If this evidence of identification of the writing of the 3rd accused on the cheques as well as the pay-in-slips is accepted as having been satisfactorily established, there can be no doubt that the 3rd accused is guilty of the offence of forgery. Apart from the evidence of the handwriting expert, there were certain other items of slight circumstantial evidence in support of the charge of forgery. There is for instance, in the 3rd accused's diary P23, acknowledgment of the receipt of a sum of Rs. 3000/- from the 2nd accused at or about the time that the proceeds of the cheques were credited to the 1st accused's bank account. One Martin Singho noticed, at or about this time, a sudden affluence in the household of the 3rd accused. There is, further, the evidence of one Dissanayake of visits by the 4th to the 3rd accused, and the fact that the 3rd accused about this time was purchasing articles of furniture and a machine.

It will be seen from the above that the case against the 3rd accused depends almost entirely on the identity of his handwriting on the back of the cheques. There is no evidence of any person who witnessed these endorsements, or who saw the 3rd accused write the particulars on the pay-in-slips. The only evidence is the evidence of the handwriting expert. The learned Judge accepted the opinion of the handwriting expert, as he was entitled to do, but did not guard himself against the dangers of acting on the unsupported testimony of such an expert. Our Courts have from the earliest times pointed out the dangers of so doing. If I may refer to the comparatively recent case of *King v. Perera*[1] Jayewardene, A.J. therein referred to the case of *Soysa v. Sanmugam*[2] wherein Hutchinson, C.J. observed that "he had known too many instances in which expert's opinion as to the identity has been proved to be mistaken to accept them as nothing more than a slight corroboration of the conclusion arrived at independently, never so strong enough as to turn the scale against the person charged with forgery if the other evidence is not conclusive."

In *Mendis v. Jayasuriya*[3] Akbar, J. took the view that the expert evidence should be used only in corroboration of a conclusion arrived at independently, and not to convict a person on a charge of forgery if the other evidence is not conclusive. It would create some kind of suspicion but would not go beyond it.

[1] *(1930) 31 N. L. R. 450.* [2] *(1907) 10 N. L. R. 355 at p. 359.*
[3] *(1930) 12 C. L. R. 44.*

While I would not go to the extent of saying that an expert's evidence would only afford " some slight corroboration of the conclusion arrived at independently " I would hesitate to act solely upon it. If there is other independent evidence in support of the conclusion reached, recourse need not be had at all to the expert's evidence. I think the modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct; provided, of course, the Court, independently of the expert's opinion, but with his assistance, is able to conclude that the writing is a forgery.

In this case the handwriting expert has not in his report given any details of the grounds on which he came to his conclusions. He has only stated that there is similarity in quality, capability, slope, speed, spacing, size, alignment, etc. and in a series of characteristic features. He does not point to any particular characteristic feature, nor does he say in respect of which letter or letters he found similarities in slope, spacing, size, etc. Enlargements have been produced but a perusal of these does not enable a layman to come to any conclusion. The expert should, therefore, have drawn the attention of Court to the details which influenced him in reaching his decision, so that the Court could, independently but with the expert's assistance, have formed its own opinion.

The expert has expressed the opinion that the impugned documents are in the handwriting of the persons who wrote the admitted documents, namely, the 3rd accused. The Judges of our Courts, as well as of the Indian Courts, have made it clear that it is the function of the Court, with the assistance of an expert, to decide on the similarity of handwriting, and that it is not proper to act solely on the opinion of the expert. A Court cannot, of course, without the assistance of an expert, come to an opinion on so difficult a question; and the Courts have deprecated, indeed condemned, any attempt on the part of a Judge to come to a decision without the help of an expert in handwriting, vide *Cader Saibo v. Ahamadu*[1].

At the same time the decision being the Judge's, he should not delegate his function to the expert. The opinion of the expert is relevant, but the decision must, nevertheless, be the Judge's. To reach his decision his attention must be drawn to the points of similarity and dissimiliarity. This is generally done with the help of photographic enlargements of the impugned as well as the admitted or genuine writings. The expert generally gives his reasons in detail in support of his conclusion, and the Court with the enlargements is able to verify the details referred to and arrive at a decision.

In this case the Judge has accepted the handwriting expert's opinion, and had made no attempt, himself, to decide whether the grounds on which the opinion was formed are satisfactory. Indeed, he would not have been in a position to do so. The expert did not, in his report or in his evidence, point out the similarities in the handwriting upon which the Court could come to a determination. In the result, the Judge merely

[1] *(1948) 50 N. L. R. 304.*

adopted the opinion of the expert and this, it seems to me, he was not entitled to do. A Court is not justified in delegating its function of judging to an expert and acting solely on the latter's opinion. The conviction on the charge of forgery fails and must, therefore, be set aside.

In regard to the charge of conspiracy, in order to commit criminal misappropriation, one has to consider whether the misappropriation was not of the proceeds of the cheques but of the cheques themselves. A cheque, being a valuable security, constituted movable property which was capable of being misappropriated. It is not known how the accused came to be in possession of the cheques but if their original possession was innocent, and that would appear to be so having regard to the fact that the letter containing the cheques instead of being delivered at No. 57, Ferry Street, Chilaw, was delivered at No. 57, Ferry Street, Colombo, it may be that the offence of criminal misappropriation of the cheques would have been established.

To constitute misappropriation the authorities seem to suggest that there must be an initial honest possession followed by a dishonest conversion. In so far as the proceeds of the cheques are concerned, from the very moment that any one of the accused got possession of it they did so dishonestly. Can a charge of criminal misappropriation be maintained in such a case ? vide *Kanavadipillai v. Koswatte*[1] and *Georgesy v. Seyado Saibo*[2].

It is, however, not necessary for the purposes of this case to decide this question. The charge of conspiracy makes it incumbent on the prosecution to prove that the accused agreed to commit or to abet the commission of the offence of criminal misappropriation. The main item of evidence on which this charge was based, in so far as the 3rd accused at least was concerned, is the forgery. If, as we hold, the evidence in respect of the offence of forgery is unsatisfactory and the conviction untenable, then, there is no evidence sufficient to justify the inference that the 3rd accused conspired with the 1st accused: and the conviction in respect of the offence of conspiracy, as set out in count 1 of the indictment, must also be set aside.

I would accordingly set aside the conviction and sentence of the 3rd accused and acquit him.

In view of the acquittal of the 3rd accused the conviction and sentence of the 1st accused on the charge of conspiracy cannot stand, vide *Cooray v. The Queen*[3] and the observations of Lord Porter in *Rex v. Dharmasena*[4]. It is not suggested that the 1st accused conspired with persons other than the 2nd, 3rd and 4th accused and in view of the acquittal of the 2nd, 3rd and 4th accused, acting in revision, I would set aside the conviction and sentence of the 1st accused also on count 1 of this indictment. His conviction and sentence on the other count stands.

WEERASOORIYA, J.—I agree.

*Appeal allowed.*

[1] *(1914) 4 Balasingham's Notes of Cases, Page 74.*
[2] *(1902)3 Brown's Reports, Page 88.*
[3] *(1953) 50 C. L. W. 23.*
[4] *(1950) 51 N. L. R. 481 at page 485.*