1940 *Present :* **Keuneman and Nihill JJ.**

THE KING *v.* WIJEYESEKERE.

7—D. C. (Crim.) Colombo, 87.

Giving false evidence in judicial proceeding—Evidence of accused taken down in shorthand—Record of statement put in—Non-compliance with Civil Procedure Code, s. 169—No presumption under Evidence Ordinance, s. 80.

Where evidence is taken down in a civil proceeding by a shorthand writer under the direction of the Judge it does not amount to a sufficient compliance with the requirements of section 169 of the Civil Procedure Code.

Such a record of the evidence given by a witness is not legally admissible evidence against that witness in a prosecution for intentionally giving false evidence in a judicial proceeding.

AN appeal from a conviction by the District Judge of Colombo.

The appellant was convicted of intentionally giving false evidence in a judicial proceeding under section 190 of the Penal Code.

The alleged false statement which formed the basis of the charge was given by the appellant in evidence in a matrimonial action brought by

[1] *42 L. J. Q. B. 126.*

him against his wife for divorce on the ground of malicious desertion. The evidence in the case was recorded by a shorthand writer. At the trial before the District Court the prosecution relied on the record of the matrimonial action in order to prove that the accused made the false statement attributed to him. It was contended on behalf of the accused that the statement was not recorded in accordance with the requirements of section 169 of the Civil Procedure Code and was therefore inadmissible against him.

H. V. Perera, K.C. (with him *C. E. S. Perera, P. H. K. Goonetilleke, Dodwell Goonewardene,* and *T. D. L. Aponso*), for accused, appellant.—The appellant had no intention to deceive the Court. His intention right through the divorce proceedings was to say that his wife was guilty of malicious desertion. The words complained of are "about 1937 she left me altogether". There is evidence that the appellant had as his hobby the study of law. He made the layman's mistake of not properly understanding the difference between "left" and "deserted". Further, he says that the shorthand writer had wrongly taken down "altogether" in place of "in September".

There is no legal proof that the accused actually stated what he is alleged to have stated. The deposition which is the foundation of the case was not taken down in accordance with the provisions of section 169 of the Civil Procedure Code. Section 80 of the Evidence Ordinance cannot help the prosecution if the deposition is proved to have been irregularly recorded. Section 169, Civil Procedure Code, requires the evidence of a witness to be taken down in writing in the English language by the Judge. There is no provision in our Code for a shorthand writer. Although the failure of the Judge to have taken down the evidence himself might not vitiate a decree, yet when a person is to be charged in a criminal proceeding on a document, that document should have been made in compliance with the requirements of the Code. Any deposition which is not taken down in accordance with law is inadmissible to support an indictment and, under section 91 of the Evidence Ordinance, no other evidence of such deposition is admissible. The conviction cannot be upheld—Gour's *Penal Law of British India (1936 ed.); para 2059; Nalluri Chenchiah et al. v. King Emperor*[1]; *The Empress v. Mayadeb Gossami*[2]; *Emperor v. Nabab Ali Sarkar*[3]; *Kamatchinathan Chetty v. Emperor*[4]; *Emperor v. Jogendra Nath Ghose*[5]; *Taj Mohammad v. Emperor*[6]; *Choyeruddin Pramanik et al. v. Emperor*[7]; *Nath Sinha Roy v. Harishee Bagdhi*[8].

Nihal Goonesekera, C.C., for Crown, respondent.—The appellant made a deliberate attempt to deceive the Court in the divorce proceedings. The subsequent theory of constructive malicious desertion was simply a red herring drawn across the trial.

Section 91 of the Evidence Ordinance does not contemplate a record of evidence. It is applicable only to a matter which is reduced to the form of an instrument by, and at the instance of a party against whom section 92 would later operate.

[1] *(1919) I. L. R. 42 Mad. 561*
[2] *(1881) I. L. R. 6 Cal. 762.*
[3] *A. I. R. (1924) Cal. 705.*
[4] *(1904) I. L. R. 28 Mad. 308.*
[5] *A. I. R. (1914) Cal. 789.*
[6] *A. I. R. (1928) Lahore 125.*
[7] *A. I. R. (1928) Cal. 271.*
[8] *A. I. R.. (1929) Cal. 79.*

In regard to section 169, Civil Procedure Code, the words "should be taken down by the Judge" should be read so as to mean that the Judge "may cause to be taken down". That section should be read in conjunction with sections 167 and 170. To construe a section the bearing on it of other sections in the statute may be considered—*Nuth v. Tamplin.*[1]

The shorthand writer has given evidence as to how he took down the evidence, and the transcript has been authenticated by the Judge. The provisions of section 169 are only directory and a non-compliance would not make the depositions inadmissible—*Bolton v. Bolton*[2]; *Elahi Baksh Kazi v. Emperor*[3]; *Ramesh Chandra Das v. Emperor*[4]; *Meango v. Baviah.*[5]

Shorthand is a recognized means of committing the English language to writing—*Riel v. The Queen*[6]; *Attygalle v. Shemsudeen*[7].

H. V. Perera, K.C., in reply.—Section 169, Civil Procedure Code, controls section 170; the latter section contains a relaxation only with regards to the particulars mentioned therein. Evidence, therefore, when recorded in the narrative form, has to be taken down by the Judge personally and in the common script of the English language. Shorthand symbols are only signs for phonetic sounds. A shorthand note of evidence, although it may be a record of something said in English, does not constitute a record in the English language.

Cur. adv. vult.

June 20, 1940. NIHILL J.—

The appellant who is an Inspector of Police was convicted in the District Court of Colombo for intentionally giving false evidence in a judicial proceeding contrary to section 190 of the Penal Code. The alleged false statement which formed the basis of the indictment was given by the appellant in evidence in a matrimonial suit brought by him against his wife for divorce on the grounds of malicious desertion. His petition for divorce was heard *ex parte* and in the course of his evidence he is recorded as having said that "about 1937 she (his wife) left me altogether". His evidence was taken down at the time by a shorthand writer who subsequently transcribed it into English.

At the trial the prosecution called evidence which clearly demonstrated that the statement taken in its ordinary meaning was not true. Indeed it was proved that up to the time of the hearing of the petition the parties had been living together, outwardly at least, as man and wife; that on the very morning of the hearing he had driven her in a car to a hair dresser in the Colombo Fort and that he had rejoined her in a restaurant when the hearing was over.

The appellant in his defence denied that he used the words complained of but agreed that he might have said that "about 1937 she left me in September". He explained that on September 10, 1937 when he was in Kandy he received a letter (not produced) from his wife who was then

[1] *L. R. (1881-2) 8 Q. B. D. 247.*
[2] *L. R. (1875-6) 2 Ch. D. 217.*
[3] *(1918) I. L. R. 45 Cal. 825.*
[4] *(1919) I. L. R. 46 Cal. 895.*
[5] *(1917) 19 Crim. L. J. 603.*
[6] *(1884-5) 10 A. C. 675 at 679.*
[7] *(1905) 4 Tamb. 138.*

in Moratuwa indicating that she wished to return to her parents in England and that it was useless for them to continue to live together under false pretences. In November his wife did return to his house but they occupied separate rooms and thereafter there was never any true *consortium.*

The appellant it appears, as a keen Police Officer, is a student of law and he stated that he had formed the idea in his mind that he was entitled to a divorce on account of the constructive desertion of his wife, so that when he used the word "left" in his evidence he used it in the sense of constructive desertion and not with the intention to convey the false idea of physical desertion.

His proctor who was called by the prosecution to some extent bore out this contention but it becomes difficult to attach much importance to it when one looks at the plaint filed in the matrimonial suit and at the document P 1 c which contains the appellant's evidence given at the hearing of the petition.

In the plaint not a word was said about constructive desertion and the parties were given different addresses, nor in his evidence in the matrimonial suit did the appellant give any indication that he was attaching some special legal meaning to the ordinary meaning of common English words.

I feel constrained to say that did this appeal rest on questions of fact alone I would have no hesitation in dismissing it and affirming the conviction.

A point of law however of some difficulty does arise on this appeal which merits close consideration. It is contended for the accused that his conviction cannot stand because there was at his trial no legal proof that the accused did in fact state what he was charged with stating.

What happened at the trial was this. The assistant recordkeeper of the Colombo District Court put in the record of the matrimonial suit, P 1, and the shorthand writer who had taken down the accused's evidence spoke to having done so. He had no independent recollection of what the accused had said and no other evidence was called, so that the prosecution in order to prove the statement relied on the record and on the presumptions set out in section 80 of the Evidence Ordinance.

The question that arises is, was this statement of the accused "taken in accordance with law" so that the presumptions can apply? The matter is governed by section 169 of the Civil Procedure Code which runs as follows:—"The evidence of each witness shall be taken down in writing in the English language by the Judge, not ordinarily in the form of question and answer, but in that of a narrative".

On the face of it there was non-compliance with section 169. The evidence of the accused was not taken down in the English language by the Judge but by someone else who by the use of certain symbols was able to record what he heard on to paper so that later he could transcribe those symbols into the English language. Later again this transcript was signed by the Judge. The learned District Judge before whom this point was also argued felt able to hold that there had been a sufficient compliance with the section.

I should be happy if I could reach the same conclusion but I confess I find great difficulty in doing so. The introduction into our Courts of the shorthand writer has been a considerable aid to the speedy and efficient administration of justice. Given skill and integrity on the part of the shorthand writer this method of recording evidence has obvious advantages and I should regret if any judgment of mine should retard its development.

Nevertheless our duty is to look at the law as it is and in the interpretation of a statute we cannot add to the ordinary meaning of words something which is not there.

No local case was cited to us which is directly in point but we have been given extensive references to Indian and English cases. The corresponding rule in Indian Civil Procedure is Order XVIII., rules 5, 8, and 14, but this Order is more flexible than section 169 since it allows evidence to be taken down in writing "in the language of the Court by or in the presence and under the personal direction and superintendence of the Judge"—but if not taken down by the Judge himself, rule 8, requires the Judge to make a memorandum of the substance of what each witness deposes.

If our section 169 was in similar terms some of the difficulties in the present case would disappear although there would still remain the question whether a taking down in shorthand was a taking down in the language of the Court. Gour in paragraph 2059 of the 1936 edition of his *Penal Law of British India* in discussing proof of perjury writes as follows:—"The deposition if reduced to writing must have been taken in accordance with law. That is to say, it must comply with the requirements of the law under which it was taken. If, for instance, it was taken under the Code of Civil Procedure it must comply with the provisions of that Code relating to the reading over and signing of it by the Judge, in the absence of which there can be no prosecution for perjury."

It may be also noted that under the Indian Civil Procedure Code, a number of safeguards are provided to ensure the accuracy of the record. For instance, it must be taken under the personal direction and superintendence of the Judge, and where the Judge does not himself take down the evidence, he has to make a memorandum of the substance of what each witness deposes. Further, the record has to be read over in the presence of the Judge and the witness, and if necessary corrected. Under the Ceylon Civil Procedure Code the only safeguard is the taking down by the Judge, and where the record has to be proved in a charge of perjury, special emphasis must therefore be placed on that requirement of the law.

A study of the Indian cases fully bears out the principle stated above. Thus in *Emperor v. Nabab Ali Sarkar*[1], two Judges held that where the provisions of O. XVIII, R. 5 had not been fully complied with it was not permissible to prosecute the witness on his statement informally recorded. In that case the deposition had not been read over to the witness. In *Nath Sinha Roy and others v. Harishee Bagdhi*[2], the evidence was not taken down by the Judge himself nor did he make a memorandum under rule 8. He dictated the evidence to a typist. It was held by Page J.

[1] *A. I. R. (1924) Cal. p. 705.*

[2] *A. I. R. (1929) Cal. p. 79.*

that this was not sufficient compliance with Order XVIII, but that it was a curable irregularity. It should be noted that in this case no question of a prosecution arose. The appellant there sought to set aside a decree on the grounds that no legal evidence had been taken. The matter was heard in revision and the Court refused to treat the whole proceedings as a nullity on the grounds that it would not promote the ends of justice but would work hardship and injustice to the opposite parties.

I think the foliowing passage from the judgment of Page J. is worth quoting because it may have some application to the present case :— "The fallacy, I think, that underlies the construction which the opposite parties urge upon the Courts is that the shorthand writer or the typist who takes down the evidence at the dictation of the Judge is not a mere instrument like the pen or the typing machine, that needs must re-act to the touch of the Judge, but a human being with a will and intelligence of his own, and fallible as all men are."

With that I agree, and it is for this reason that I find it difficult to agree with the learned District Judge in this case who seems to have regarded the shorthand writer as the Judge's "*alter ego*". How can he be ? The evidence in the matter before us was taken down in narrative form ; that was the first intellectual process to which the shorthand writer had to address himself, he then had to write down the appropriate symbols and later transcribe those symbols into English words. There are three stages here in which error might occur, and at no stage in the process can the Judge have exercised any effective control.

Mr. Goonesekere, for the Crown respondent, has cited to us an English case in which their Lordships of the Privy Council as early as 1885 dealt with the question of the taking of evidence in shorthand. This is the case of *Riel v. The Queen*[1]. Not much help however can be got from this case because there the corresponding section in Canadian Procedure required the Magistrate to take or *cause to be taken* in writing full notes of the evidence, and their Lordships held that the taking of full notes of the evidence in shorthand was a *causing* to be taken in writing of full notes of the evidence and therefore a literal compliance with the statute.

I would say at once that on the authority of that decision I would be prepared to hold in the present instance that there had been compliance with section 169 if the Judge himself had taken down the evidence in shorthand. It is the absence of the words "cause to be taken" in section 169 which creates the difficulty.

These words do occur in section 170. Mr. Goonesekere attempted to argue and did argue with skill that the words "cause to be taken" act as an expansion of section 169 and show the intention of the draftsman who drafted sections 169-172. I wish I could agree but I cannot. The clear meaning of section 170 coming after section 169 is that for a particular purpose, that is, for the recording of a particular question and answer the Judge can stop his own taking down of evidence which will ordinarily be in narrative form and direct someone else to take the question and answer down. That is what the two sections say and I can read nothing further into them.

[1] *(1884–5) 10 Appeal Cases 675 at 679.*

Again under section 172 where on objection the Judge refuses to allow a question to be put, on the request of the questioner, the burden is placed on the Judge himself to take down the question, the objection, and the decision of the Court.

In my opinion therefore there has not been a compliance with section 169 and I would hold therefore that the evidence of the accused in the matrimonial suit was not taken in accordance with law. I would concede that section 169 is directory in the sense that an irregularity in its application would not necessarily vitiate the entire proceedings. It would not in my view in the present instance have entitled the respondent to vacate the *decree nisi* on the grounds that no evidence had been tendered at all. But when it comes to the application of section 80 of the Evidence Ordinance I think the matter is different. That section lightens the burden of proof on the party producing the document but the document itself must be free from all taint, for then and then only can the party producing the document obtain the benefit of the presumptions.

Even apart from section 80, we are here dealing with the proof of the record. The law requires that the evidence should be taken down by the Judge. It is not possible to say here that, in any real sense, there was any taking down by the Judge. The record which should have supported the charge of perjury is not available and another record taken down by the shorthand writer is offered as proof. This cannot be allowed.

The application of section 91 of the Evidence Ordinance was also argued before us. For the accused it was urged that this section prevented the Crown from adding parol evidence in support of the document or giving any proof except the document itself containing the record of evidence.

Mr. Goonesekere on the other hand has contended that the section is not intended to cover records of evidence at all, that read with section 92 it seems that the section is contemplating only documents *inter partes* such as contracts, partnership agreements and wills. I found this argument attractive but it is against the trend of the Indian decisions and it is difficult to reconcile it with words used in the section—"and in all cases in which any matter is required by law to be reduced to the form of a document".

However for the purposes of this appeal it is not necessary to decide this point for if the record of what the accused is alleged to have said is put aside as I consider it must be, the prosecution did not prove by parol evidence that the accused did make the statement set out in the indictment.

For the above reasons I have reached the conclusion, with reluctance, that there was no legal evidence before the District Judge on which he could have convicted and accordingly the appeal should succeed and the accused be acquitted.

KEUNEMAN J.—I agree.

Accused acquitted.