IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

K.K. Anura Alias Marrai

Accused-Appellant

Vs

CA 200/2005
HC Galle HC 1884

The Attorney General.

Respondent

Before : Sisira de Abrew J &
Anil Gooneratne J

Counsel : Anil Silva President's Counsel for the Accused Appellant.
Sarath Jayamanne DSG for the Respondent.

Argued on : 10.09.2012, 11.09.2012 and 12.9.2012
Decided on : 8.11.2012

Sisira de Abrew J.

The indictment alleged that the accused appellant along with HAK Leelarthne alias Harbour who died before the commencement of the trial committed the murder of a man named Jayalath Kalansuriya which is an offence punishable under section 296 of the Penal Code. The learned High Court Judge (the trial judge) convicted the accused appellant for the said offence and sentenced him to death. Being aggrieved by the said conviction and the sentence the accused appellant has appealed to this court.

Facts of this case may be briefly summarized as follows: On 12.1.1995 around 10.30 p.m. the accused appellant and Harbour who were passing the deceased's house scolded the deceased using filthy language. At this time the deceased person who was seated on the door step of his house went and addressed them in the following language. "Are you going to attack or fight?" Thereupon the accused appellant and Harbour attacked the deceased person with their fists, dragged for about 25 feet, put him on the ground and assaulted while he was lying fallen on the ground. Thereafter the deceased got up and tried to chase them but his wife intervened and brought him back. At this stage his wife noticed a bleeding injury below his armpit. On hearing the shouts of the deceased's wife, Mahindalal, a neighbour, came to the scene. Then she told Mahindalal that Marrai (the accused appellant) stabbed him. This was the evidence of the deceased's wife Nanda Gunawardene.

Mahindalal immediately went in search of a vehicle and addressed the accused appellant and Harbour whom he met about 250 feet away from the scene of crime in the following language: "What is the dirty thing that you did." The accused appellant without speaking showed the bleeding injury in his hand.

When Nanda Gunawardene, the wife of the deceased gave evidence learned defence counsel marked three contradictions (V1, V2 and V3) with her evidence given at the Non Summary Inquiry. V1 to V3 are as follows:

V1 – "I did not see Marrai and Harbour assaulting the husband."

V2 - "Were you there when they came"

V3 – " I did not see the incident."

Learned trial judge, when writing the judgment, observed that she had not seen the incident when the said contradictions are considered. But he did not stop at this at this point and considered her evidence given at the Non Summery Inquiry which was not produced at the trial in order to decide whether the contradictions go to the root of the prosecution case. After considering her evidence given at the Non Summary Inquiry he concluded that the witness had given the same evidence at the trial. After doing this he rejected the contradictions on the basis that they do not go to the root of the case. Thus it is seen that he had used the Non Summery evidence which was not produced as evidence at the trial. It has to be stated here that the accused was unaware that the trial judge was using this evidence against him.

In the course of Nanda Gunawardene's evidence she stated that when Mahindalal came to the scene she informed him that Marrai stabbed her husband. It has to be noted here that she, at the trial, did not speak of any dying declaration. But the learned trial judge after going through her statement made to the police in the course of the investigation concluded that her husband (the deceased person) had told her that Marrai stabbed him. According to the learned trial judge this dying declaration had been produced at the Non Summary Inquiry as P10. It is relevant to note that no dying declaration was produced at the trial. Her statement made to the police was not produced at the trial. I must mention here that there is no provision in law to produce her statement as evidence at the trial. It is seen from the above material that the learned trial judge has used witness Nanda Gunawardene's statement made to the police as evidence and decided that the deceased had made a dying declaration to the effect that the accused

appellant had stabbed the deceased. Learned President's Counsel appearing for the accused appellant contended that the procedure adopted by the learned trial judge was highly irregular. He contended that the accused appellant was unaware that the learned trial judge was using as evidence the statement made by witness Nada Gunawardene and her evidence at the non summary inquiry. Two main questions arise for consideration. One is whether the learned trial Judge when writing the judgment can use a statement made by a witness to the investigating police officer in the course of the investigation (not produced at the trial) as evidence. The other one is whether the learned trial judge when writing the judgment can use the evidence given by a witness at the Non Summary inquiry (not produced at the trial) as evidence. I now advert to these questions. Criminal justice system of this country functions on the principle that no accused person charged with criminal offences can be convicted except upon the evidence produced at the trial. When an accused person is tried by a jury, presiding judge in his opening address and in the summing up warns the jury inter alia that they must consider only the evidence given in court. This warning clearly indicates that evidence must be led in open court to be heard by the jury, the judge, the prosecuting State Counsel, defence counsel and the accused. Same principle is applicable when the accused is tried by a judge. What is evidence? Section 3 of the Evidence Ordinance reads as follows:

Evidence means and includes-

(a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statements are called oral evidence;

(b) all documents produced for the inspection of the court; such documents are called documentary evidence.

It clearly says that the evidence must be produced in court. This shows that the evidence must be led in open court. The idea of this procedure is that that accused or his pleader must know the evidence led against him so that he can test the truthfulness of the evidence by way of cross examination, call witnesses to counter and defend him. When court considers material not produced in open court, the accused does not get the above opportunity and he is denied of a fair trial. At this stage it is pertinent to ask the following question. Can the court consider statements of witnesses made to the investigating police officer in the course of the investigation? In this connection I would like to consider the judgment in Keerthi Bandara Vs The Attorney General [2000] 2 SLR 245. Head note of the judgment states: "It is for the Judge to peruse the Information Book in the exercise of its overall control of the said book and to use it to aid the Court at the inquiry or trial." This should not be interpreted to say that the Judge is empowered to use the statement of the witness which was not produced at the trial when writing the judgment. It is pertinent to consider what His Lordship in the above judgment said at page 258. "We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and

decide on that issue." Where does he do it? Is it open Court or Chambers of the Judge? Is it during trial or after conclusion of trial? It is very clear that the Judge has to do the above things in open court during the trial. If it is a trial by a judge, same procedure should apply. When the defence counsel spot lights an omission or seeks to mark a contradiction, the trial judge must peruse the Information Book and decide whether the sentence in the statement which the defence counsel intends to mark as a contradiction is in fact found in the statement or the defence counsel is trying to confront the witness with an incomplete sentence in the statement or decide whether the omission is correct. This is how court uses the Information Book to aid the trial or inquiry. Thus the trial judge will have to peruse the Information Book in order to decide the above matters. This does not mean that he can use statements of witnesses made in the course of investigation to the police officer as evidence. When the defence counsel seeks to mark a contradiction or wants to spotlight an omission the trial judge cannot and should not permit the entire statement to be marked. He can permit the defence counsel to mark only the portion of the statement which contradicts the evidence in court. In this connection I would like to consider the judgment in Rathnam Vs Queen 74 NLR 317. Before I consider the said judgment it is pertinent to state here section 110(3),(4) of the Code of Criminal Procedure Act No. 15 of 1979 (hereinafter referred to as the present CPC) and section 122(3) of the old Criminal Procedure Code (hereinafter referred to as the old CPC). Section 110(3) of the present CPC reads as follows: "A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court;

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code."

Section 110(4) of the present CPC reads as follows: "Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in Sec.444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the Police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance Sec.161 or 145 as the case may be, shall apply:

Provided that where a preliminary inquiry under chapter XV is being held in respect of any offence, such statements of witnesses as have up to then been recorded shall, on the application of the accused, be made available to the accused for his perusal in open court during the inquiry."

Sec.122(3) of the old CPC: "No statement made by any person to a police officer or an inquirer in the course of any investigation under this chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh his memory of the person recording it. But any criminal court may send for the statements recorded in

a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid any such inquiry or trial. Neither the accused or his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, Sec. 161 or Sec.145 as the case may be, shall apply.

Nothing in this section shall be deemed to apply to any statement falling within the provisions of Sec. 32(1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under Sec. 180 of the Penal Code."

It is seen that the first part of the Section 122(3) of the old Criminal Procedure Code is almost identical with the first part of Section 110(3) of the Present Criminal Procedure Code.

In Rathnam Vs Queen 74 NLR 317 Justice Alles held thus:

(i) The accused-appellant was charged with the murder of a person by shooting him from a passing car in which the accused was travelling. When the Police Inspector who conducted the police inquiries immediately after the commission of the alleged offence was giving evidence at the trial, the prosecuting Counsel elicited from him the fact that when he reached the scene of the shooting the chief prosecution witness K made oral statements to him inculpating the accused, which resulted in instructions being given for the arrest of the accused. In the summing-up the Jury were invited indirectly by the trial Judge to accept the evidence of K because it was

corroborated by the statement which K promptly made to the Police inculpating the accused.

Held, that the effect of section 122 (3) of the Criminal Procedure Code is to render the use of an oral statement made to a police officer in the course of a Police investigation just as obnoxious to it as the use of the same statement reduced into writing. Neither Counsel for the defence nor Counsel for the prosecution nor even the Court is entitled to elicit, either directly or indirectly, material which would suggest to a jury that the contents of a statement to the Police made either orally or recorded in writing corroborates the evidence given by a witness in Court. In the present case therefore, there was a serious misdirection to the Jury when they were invited indirectly by the trial Judge to accept the contents of K's oral statements to the Police as corroboration of to K's testimony in Court.

"An analysis of Sec.122(3) of the Criminal Procedure Code would seem to indicate that-

(a) The statement can only be used for the limited purpose of proving that a witness made a different statement at a different time or to refresh the memory of the person recording it:

(b) Any criminal Court may send for the statements recorded in a case under inquiry or trial in such Court and may use such statements or information not as evidence in the case but to aid it in such inquiry or trial:

(c) Neither the accused nor his agents shall be entitled to call for such statements except as provided for in the recent amendment to the

Criminal Procedure Code by Act No. 42 of 1961, nor shall he or they be entitled to see them because they are referred to by the Court:

(d) If the statement is used by the police officer or inquirer to refresh his memory or if the Court uses them for the purpose of contradicting such police officer or inquirer the statement will be entitled to be shown to the adverse party and such party will be entitled to cross-examine the witness thereupon."

It is seen from the above legal literature that statements made by witnesses to the investigating officer in the course of the investigation cannot be used as evidence but the court can peruse them to aid the inquiry or trial. I have earlier stated as to how the information book is used by court to aid the inquiry or trial.

In King Vs Soysa 26 NLR 324 His Lordship Justice Jyawardene held: "A Judge is not entitled to use statements, made to the police and entered in the Information Book, for the purpose of corroborating the evidence of the prosecution."

In PAULIS APPU v. DON DAVIT. 32 NLR 335 "Where at the close of a case, the Police Magistrate reserved judgment, noting that he wished to peruse the information book,- **Held**, that the use of the information book for the purpose of arriving at a decision was irregular."

In WICKREMESINGHE *v.* FERNANDO. 29 NLR 403 "Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement by

him to the Police,-**Held**, that the use of the Police Information Book was irregular."

In INSPECTOR OF POLICE, GAMPAHA v. PERERA 33 NLR 69 "Where, after examining the complainant and his witnesses, the Magistrate cited the Police to produce extracts from the information book for his perusal, before issuing process,- Held; that the use of information book was irregular."

In PEIRIS Vs ELIYATAMBY 44 NLR 207 It was held that entries in a Police Information Book cannot be used as evidence for the purpose of testing the credibility of a witness.

Having considered the above legal literature and observation, I hold that in criminal trials court is not entitled to use statements made by witnesses to the investigating police officer in the course of the investigation as evidence. A statement made by a witness to the investigating police officer can be used for the purpose of contradicting the witnesses but the portion of the statement so produced cannot be used as evidence. Such portion of the statement can be used to decide the credibility of the witness. I further hold that the trial judge, when writing the judgment, is not entitled to use statements made by witnesses to the investigating police officer in the course of the investigation which were not produced at the trial.

The other question that must be decided is whether the trial judge when writing the judgment can use the evidence given by a witness at the non summary inquiry which was not produced at the trial as evidence. I now advert to this question.

According to section 3 of the Evidence Ordinance for an oral statement or written statement or document to become evidence it has to be produced at the trial. Then if it is not produced at the trail it does not become evidence. Then the trial judge cannot use such a document. What is the position when trial judge uses a document which was not produced at the trial? If he uses it, does the accused know it? The answer is no. It is an accepted principle that the evidence must be led in open court to be heard by the accused or his pleader. This view is supported by section 272 of the Crminal Proceduure Code which reads as follows: "Except as otherwise expressly provided all evidence taken at inquires or trials under this Code shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader."

It is an accepted principle in our criminal justice system that no accused can be convicted of the charge with which he is charged except upon evidence produced at the trial. Same rule will apply to acquittals too. Thus if the trial judge uses evidence given at the non summary inquiry or document which is not produced at the trial he violates the above principle. If he does so it would cause severe prejudice to the accused. Thus the trial judge is not entitled to use any evidence or document not produced at the trial. At this stage it is pertinent to consider the judgment of the Court of Criminal Appeal in King Vs Namasivayam 49 NLR 289. The Court of Criminal Appeal in the said case observed the following facts. "The accused were charged with being members of an unlawful assembly, rioting, criminal trespass and causing hurt. The defence did not contest the fact of perpetration of the offence but did contest that the prisoners on the trial were responsible for it and the question of identification became, in consequence,

of extreme importance. Some of the witnesses in the course of examination stated that they could not remember the presence of various accused, whereupon the trial judge proceeded to examine them in the following strain:

Q: You told the Magistrate that four people came and one of them was the first accused. What you said in the lower court, is that true?

A: Yes.

Q: If you told in the lower court that the first accused was one of them is that true?

A: Yes.

Court held: that such examination let in as substantive evidence the depositions made by the witnesses before the Magistrate and that such evidence was illegal and inadmissible."

Howard CJ in the said judgment observed thus: "There is also another aspect of the matter: the deposition of a witness before the Magistrate can properly be used for the purpose of contradicting a witness and not for the purpose of corroborating him."

Considering the above legal literature and observation I hold that in a criminal trial, trial judge cannot use the deposition of a witness at the non summary inquiry which is not produced at that trial as evidence. But this does not mean that he cannot use deposition of a witness at a non summary inquiry produced under section 33 of the Evidence Ordinance as evidence.

In the present case the learned trial judge used the statement of Nanda Gunawardene made to the investigating officer in the course the investigation and her evidence given at the non summary inquiry which were not produced at the trial as evidence. In view of the above conclusion reached by me, the decision of the learned trial judge to use above

documents as evidence is wrong. Therefore the conviction of murder and the death sentence will have to be set aside. The next question is whether to order a retrial or consider less culpability. The accused was sentenced to death on 7.10.2005. If I order a retrial such an order can be considered as another punishment. I therefore intend to consider lesser culpability. The deceased person went and questioned the accused and Harbour when they were scolding him using filthy language. They assaulted the deceased person. He was brought back home with a bleeding injury. When questioned by Mahindalal as to the dirty thing that accused appellant did, he did not deny it and showed a bleeding injury in his hand. The deceased died of a stab injury. All these circumstances establish that there was a fight between the deceased and the accused appellant and Harbour. Therefore the prosecution has established beyond reasonable doubt that the deceased died in the course of a sudden fight between him and the two accused (the accused appellant and Harbour). This is the one and only conclusion that can be reached on the facts of this case and no other conclusion is possible. In these circumstances I convict the accused appellant of the offence of culpable homicide not amounting to murder on the basis of sudden fight which is an offence punishable under section 297 of the Penal Code. Court is entitled to act on evidence of defences such as sudden fight, grave and sudden provocation or exceeding right of private defence although such a defence was not taken up by the accused appellant if such a defence has been established by the prosecution evidence. This view is supported by the judgment in the case of The King Vs Bellana Vithanage Eddin 41 NLR 345 where Court of Criminal Appeal held thus: "In a charge of murder it is the duty of the Judge to put to the jury the alternative of finding the accused guilty of culpable not amounting to murder when there is any basis for such

a finding in the evidence on record, although such defence was not raised nor relied upon by the accused."

I sentence the accused appellant to a term of eight years rigorous imprisonment (RI) and to pay a fine of Rs.2500/- carrying a default sentence of one month imprisonment. I set aside the conviction of murder and the death sentence. I direct the Prison Authorities to implement the sentence of eight years RI from the date of sentencing by the learned trial Judge (7.10.2005). The learned High Court Judge is directed to issue a fresh committal indicating the sentence imposed by this Court.

Judge of the Court of Appeal

Anil Gooneratne J

I agree.

Judge of the Court of Appeal