

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

Perumal Punyamoorthy

ACCUSED-APPELLANT

C.A. 06/2012

H.C. Kegalle 1786/2002

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Jeffry Zenudeen for the Accused-Appellant
H.I. Peiris S.S.C for the Respondent

ARGUED ON: 30.06.2014

DECIDED ON: 10.07.2014

GOONERATNE J.

In this appeal, two Accused were indicted for the murder of one Selvamuththu Poobalan, on or about 7.2.1999 in the High Court of Kegalle. At the outset of the hearing learned counsel for the Accused-Appellant as well as Senior State Counsel indicated to court that the 2nd Accused had expired. This is a case of circumstantial evidence. However during the course of the argument learned counsel for the Appellant and learned Senior State Counsel, both submitted to court that the procedure admitting statements under Section 33 of the Evidence Ordinance as regards witness No. 8 who was reported dead had not been properly admitted in court.

Police Inspector Gunasena who was witness No. 8 in the back of the indictment was reported dead at the trial before the High Court. The proceedings of 16.1.2012 indicates that the State Counsel moved court to lead the deposition made before the Magistrate in the non-summary inquiry of the witness No. 8. At the trial the deposition was marked as P3. The trial Judge refer to Section 33 in the judgment but it appears to court that the evidence of deposition had not been properly admitted and adopted as required by law. The learned Senior State Counsel refer to the case of Stephen and Others Vs.

the Queen 67 CLW 48; followed in 41 NLR 534. The procedure to be adopted is clearly laid down in the above judgment as follows which need to be strictly adhered in the trial court. The said case read thus:

Sansoni J.

Mr. de Silva has brought to our notice an irregularity which has taken place in the course of the trial. A witness, Abeywardena, whose name was on the back of the indictment, had died before the trial began. The Crown Advocate who was prosecuting called evidence to prove the fact of death and then, according to the record, he moved to mark the deposition of the deceased witness, Abeywardena, as P17 and to read it in evidence. He also moved to amend the indictment formally so as to include this deposition P17 as item 23 on the back of the indictment in the list of productions. The trial Judge allowed these applications.

But no witness was called to produce the deposition of the deceased witness made before the inquiring Magistrate. The correct course was for the original record of the non-summary proceedings to have been produced in evidence by the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record – See *The King v. Kadirgamar (1940) 41 N.L.R 534*. A certified copy of the deposition should also have been produced by the witness. As these essential steps were not taken the deposition was not in evidence.

We formally set aside the convictions in the case and send the case back for a re-trial before another Judge.

It is essential to follow the 'dicta' in the above case and have the entire non-summary records of the proceedings produced before the High Court. The record of non-summary proceedings have not been produced. Only

the statement P3 had been produced. Essential steps have to be complied with since the adverse party would be entitled to view the entire proceedings in the court below. This Section 33 draws a distinction between the right to cross-examine and the opportunity to cross-examine. Even if the right and the opportunity were not availed of, Section 33 would be satisfied. King Vs. Appu Singho (1920) 22 NLR 353.

In the above circumstances we formally set aside the conviction and sentence and send the case back for re-trial.

Application for re-trial allowed.



JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.



JUDGE OF THE COURT OF APPEAL