IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

T. A. Mahinda Jayarathne
Uda Thammita, Ganemulla
Kirindigalla
Ibbagamuwa.

Accused-Petitioner

C.A.[PHC] APN No.49/2014
HC.KURUNEGALA
CASE NO.151/2009
M.C.KURUNEGALA
CASE NO.NS.14/077

Vs

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant-Respondent

BEFORE	:	**K.T.CHITRASIRI, J.** **W.M.M.MALINIE GUNARATNE, J.**
COUNSEL	:	D.Kurruppu with Nimali Chandrasekera for the Accused-Petitioner Dilan Ratnayake SSC for the Complainant-Respondent
ARGUED ON	:	21.11.2014
WRITTEN	:	15.12.2014 by the Accused-Petitioner
SUBMISSIONS	:	16.12.2014 by the Complainant-Respondent
DECIDED ON	:	26.02.2015

CHITRASIRI, J.

Accused-petitioner (hereinafter referred to as the accused) was indicted in the High Court of Kurunegala under Section 296 of the Penal Code for committing murder of Y.M.Ramani Dissanayake and under Section 300 of that Code for attempting to commit murder on E.M.Loku Menike. When the matter was proceeding before the learned High Judge of Kurunegala, prosecution moved to mark the statement (P4) given by Loku Menike at the non-summary inquiry. Said application had been made in terms of Section 33 of the Evidence Ordinance since Lokumenike has passed away by then. (vide at page 97 in the appeal brief) Learned Counsel for the accused objected to have the aforesaid statement of Loku Menike admitted in evidence since no questions were put to her by the accused in cross examination. Learned High Court Judge of Kurunegala having overruled the objection by the accused made order permitting the prosecution to mark the said statement of Loku Menike for the reason that the accused had the opportunity to cross-examine Loku Menike at the non-summary inquiry though he has not made use of it.

Being aggrieved by the aforesaid decision of the learned High Court Judge, the accused filed this revision application and sought a direction on the learned High Court Judge preventing the statement of Lokumenike being produced in evidence under Section 33 of the Evidence Ordinance and accordingly to have the impugned order set aside.

Aforesaid Section 33 of the Evidence Ordinance reads thus:

> *"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable: Provided -*
>
> *(a) that the proceeding was between the same parties or their representatives in interest;*
>
> *(b) that the adverse party in the first proceedings had the right and opportunity to cross-examine;*
>
> *(c) that the questions in issue were substantially the same in the first as in the second proceeding."*

The above provision of law allows to admit evidence given in judicial proceedings as admissible for the purpose of proving the truth of the facts when that witness is dead, provided the said evidence had been between the same parties; and the accused had the right and the opportunity to cross-examine the witness whose statement is to be admitted in evidence; and that the issue was substantially the same in both the proceedings. Admittedly, both proceedings in this matter had been between the same parties and the questions/issues in those proceedings were substantially the same. Then the question arises whether the accused had **both the right and the opportunity to cross-examine** the deceased

witness whose statement recorded in the earlier proceedings is to be marked in evidence.

I will first look at the issue, as to the **availability of the right of the accused to cross-examine** the witness. Therefore, it is necessary to consider whether the accused in this case had the right in law to cross examine Loku Menike at the non-summary inquiry held before the learned Magistrate. At the commencement of the non-summary inquiry, learned Magistrate has stated that he commenced the said inquiry under Section 146 of the Code of Criminal Procedure Act No.15 of 1979. (vide at page 42 in the appeal brief) Such a conclusion as to the applicable law implies that the learned Magistrate may not have been aware of the significant change, namely taking away the right to cross examine the witnesses at the non-summery inquiry that came into existence with the enactment of the of Code of Criminal Procedure (Special Provisions) Act No.15 of 2005. Otherwise he would have stated that he is resorting to the Code of Criminal Procedure Act because the period of validity of the aforesaid Act No. 15 of 2005 has lapsed by then.

Section 6(3)(b) and 6(5)(b) of the aforesaid Act No.15 of 2005 have clearly taken away the right to cross-examine the witnesses by the accused or by his pleader at a non-summary inquiry.

Section 6(3) (b) of Act No.15 of 2005 reads thus:

> ***"The Magistrate shall not permit any cross-examination of the witness by the accused or his pleader****, but the Magistrate may put to the witness, any clarification required by the accused or*

his pleader of any matter arising from the statement made by the witness in the course of the investigation, or any additions or alterations to his original statement if any, and may put to the witness any clarification which the Magistrate himself may require of any such matter. Every clarification so made shall be recorded."

(emphasis added)

Section 5 (b) of Act No.15 of 2005 reads thus:

> ***"The Magistrate shall not permit any cross-examination of the witness by the accused or his pleader*** *but the Magistrate may put to the witness, any clarification required by the accused or his pleader of any matter arising from the account given, or additions or alterations made, by the witness or may put to the witness any clarification that the Magistrate himself may require of any such matter.*
>
> *(emphasis added)*

However, the aforesaid Act No.15 of 2005 was in existence only for a period of two years from the date of its coming into operation namely from 31st May 2005. Therefore, at the time Loku Menike gave evidence before the learned Magistrate, the right to cross examine witnesses at a non-summery inquiry ensured in the Code of Criminal Procedure Code No.15 of 1979 was not in existence. Therefore, one may come up with a strong argument that the learned Magistrate is correct when he decided to commence the non-summery proceedings under Section 146 of the Code of Criminal Procedure Act No.15 of 1979.

Indeed, it is the contention of the learned Senior State Counsel at the argument stage of this appeal. He further submitted that the learned Magistrate has also given the opportunity for the accused to cross-examine Loku Menike since those proceedings had been conducted under the Code of Criminal Procedure Act.

However, it is necessary to note that another Act was subsequently enacted namely; The Code of Criminal Procedure (Special Provisions) Act No.42 of 2007 whereby a provision similar to Section 6(3) (b) and 6(5) (b) of the Act No. 15 of 2005 have come into place with having retrospective effect. Accordingly, the provisions contained in the Act No. 42 Of 2007 was effective from 31st may 2005 for a period of two years. Hence, it is clear that the **Parliament by introducing specific provision had clearly intended to take away the right to cross examine the witnesses at a non-summery inquiry** that included the matters which came up within a period of two years commencing from 31st may 2007. The law referred to above is clearly seen in Section 7(1) of the Act No. 42 of 2007 and it stipulates thus:

> *"The provisions of this Act shall be in operation for a period of two years commencing from the thirty-first day of May, 2007."*

The aforesaid Section 7(1) of the Act No.42 of 2007 clearly shows that the other provisions of the Act are applicable to the proceedings held before the learned Magistrate in this case as well. It is so, since the recording of the evidence

of Lokumenike has taken place on 29.06.2007 which fell within two years from 31.05.2007.

In the circumstances, I will now turn to look at the law that should prevail when express provision is found to have retrospective effect of a particular enactment. Maxwell on The Interpretation of Statutes [Twelfth Edition] explains how it should be implemented.

Pending Actions –

> *In general, when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights" [At pages 220 and 221]*

Procedural Acts –

> *The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and* ***if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode.*** *"Alterations in the form of procedure are always retrospective, unless there is some good reasons or other why they should not be". [At page 222] [emphasis added]*

Statute plainly retrospective –

> *The rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express*

words in the Act but also by circumstances sufficiently strong to displace it". And this, like the presumption itself, is in accord with the theoretical intention of Parliament for "allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong". [At page 225]

When the law referred to above is implemented to the case at hand, it is clear that the **right of the adverse party to have an opportunity to cross-examine** as required by the proviso (b) in Section 33 of the Evidence Ordinance has ceased, at the time, the statement of Loku Menike was recorded since the said right to cross-examine was not in existence due to the express provisions found in the Act No. 42 of 2007.

Therefore, the Law referred to in Section 7(1) of the Act No. 42 of 2007 cannot be disregarded even though the certification of the Act has been on a date subsequent to the date on which the statement was recorded. Accordingly, it is my view that Sections 6(3) (b) and 6(5) (b) read with Section 7(1) of the Act No.42 of 2007 show that the right of the accused to cross-examine the witness Loku Menike at the non-summery proceedings had ceased at the time she gave evidence before the learned Magistrate.

Hence, the statement of Loku Menike recorded on 29.06.2007 at the non-summary inquiry cannot be made admissible in evidence under Section 33 of the Evidence Ordinance since the right to cross-examine the witness Loku Menike had been taken away with the enactment of the Act No.42 of 2007 with retrospective effect.

For the aforesaid reasons, this application is allowed. Accordingly, the order dated 13.12.2013 of the learned High Court Judge is set aside. The Learned High Court Judge is directed, not to allow the prosecution to produce the statement of the witness Loku Menike in the proceedings against the accused-petitioner.

Appeal Allowed

JUDGE OF THE COURT OF APPEA

MALINIE GUNARATNE, J.

I agree

JUDGE OF THE COURT OF APPEAL