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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal Case No. 253/2015

Vs,

Gopalan Sampanarayan Jeyaraj alias Raju.

Accused

And Now Between

Gopalan Sampanarayan Jeyaraj alias Raju

Accused-Appellant

High Court of Chilaw Case No. 144-2004

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : Indika Mallawarachchi Attorney-at-Law for the Accused-Appellant
M.Thennakoon SSC for the Complainant- Respondent

Written Submissions : Accused Appellant – 13th November 2017
Respondent – 28th February 2018

Argument on : 30th July 2018 and 9th August 2018

Judgment on : **31st August 2018**

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Judgment

S. Thurairaja, PC. J

Accused appellant (hereinafter sometimes referred to as the appellant) was indicted by the Attorney General for committing double murder of Rajapakse Mudiyanselage Milton Nishantha and Rajapakse Mudiyanselage Sanath Priyantha. After the trial at the High Court of Chilaw the Appellant was found guilty on both counts and sentenced to death.

Being aggrieved with the said conviction and the sentence the Appellant preferred the following grounds of appeal.

I. Deposition of PW/6 has been admitted in total contravention of Section 33 of the Evidence Ordinance and well settled law thereby rendering the deposition inadmissible.
II. Following closely on the heels of ground 1, Learned Trial Judge seriously flawed by relying upon the said deposition to form the basis of the conviction.
III. In the event the deposition is jettisoned, conviction is factually untenable due to paucity of evidence.
IV. Learned Trial Judge failed to address his judicial mind to the items of evidence favourable to the Appellant thereby denying him of a fair trial.

The Counsel for the Appellant emphasized the fact that the ground of appeal namely the evidence given at the non-summary inquiry was adopted by the High Court Judge at the trial which is contradictory to provisions set out by the Evidence Ordinance.

The Senior State Counsel supported the conviction and submits that there is no violation of provisions of the Evidence Ordinance.

The prosecution led the evidence of Siriwardhane Mudiyanselage Bandula Siriwardhane, JMO Serasinghe Jayakodi Arachchige Piyasena, Chief Inspector of Police Ranbandage Anura Kumara Premaratne, Sub Inspector of Police Jayasinghe Mudiyanselage Susantha Jayanath, Sub Inspector of Police Herath Hitihamilage Upali Ranjith, Sergent of Police Wanshapperuma Kulathilaka Arthanayake Mudiyanselage Lionel Kumarasiri.

According to the evidence before the High Court is that all of them belong to one political party. On the day of the incident both deceased were shot by a person who travelled in a motor-bike on the street. There is only one eye-witness to the incident. According to him a motor-bike passed him near the junction. He had observed that the rider and the pillion rider disembarked from the bike, pulled out a pistol from his pocket of the jacket and shot at deceased persons. Before shooting he had lifted the wiser of the helmet, there the witness had identified him as "Raju" who is known to him more than twelve years.

The Appellant was arrested almost two years from after the incident; he had a pistol and a grenade in his possession. The Appellant was indicted separately for possession of hand grenade.

When the present case was taken up before the High Court, the eye-witness died and his evidence was led under Section 33 of the Evidence Ordinance.

Section 33 of the Evidence Ordinance reads as follows.

> *"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 or delay or expense which, under the circumstances of the case, the court considers unreasonable:

(a) That the proceeding was between the same parties or their representatives in interest;

(b) That the adverse party in the first proceeding 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.

In the present case the interpreter of the High Court had got into the box and read the evidence given by the eye-witness at the non-summary inquiry and the document was not marked at the trial before the High Court.

Section 62 of the Evidence Ordinance states as follows;

"Primary evidence means the document itself produced for the inspection of the Court."

It is evidence before the Court; the prosecuting counsel had informed the Court that he will be filing the certified copies at the trial. There is no material before the Court to that fact that the State Counsel had submitted the said documents to the Court. The Police investigation notes, non-summary briefs and other materials including bail were before the Trial Judge but the Trial Judge cannot consider all materials for his judgements. The Judge is expected to consider what is presented before him as evidence, and diminer deportment of the witness. Therefore in technical term the evidence of the alleged eye-witness which was given at the non-summary inquiry was not formally produced to the Trial Judge for consideration.

In **Stephen and three others v. Republic of Queen [66 NLR 264]** held that,

> *"In a trial upon an indictment, the deposition made by a witness at the non-summary inquiry is not admissible in evidence after his death unless the original record of the non-summary proceedings is duly produced in evidence together with a certified copy of the deposition."*

This case was followed by H.N.J. Perera J in ***Rupersinghe Arachchige Upali Rupersinghe v. The Attorney General [CA 204/2012].***

Considering the facts of this case the sole eye-witness, Handunneththi Pathirannaehelage Vipul Priyadharshana is dead. His evidence was led at the non-summary inquiry and submitted to the High Court under Section 33 of the Evidence Ordinance.

The Learned State Counsel submits that the original case record was before the Court and the contention of the statement was read and embedded into the proceedings. Therefore there is no irregularity and hence he is supporting the conviction.

Considering the technical objections taken I'am of the view that contents of a document unless otherwise provided cannot be elicited without marking the said document. I agree with the Sansoni J's findings in Stephens' Case. Therefore I uphold the conviction and find there is no proper adoption of the evidence of Vipul Priyadharshana. In fairness to the prosecution and the Appellant a re-trial should be ordered.

After careful consideration of the objections I vacate the conviction and the sentence and I order a re-trial.

Since the alleged date of offence is 1999, I order the High Court Judge of Chilaw to give priority in listing this case for trial and to conclude as soon as possible.

Re-trial ordered.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL