

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

Complainant

**Court of Appeal Case No.**  
**HCC 260/2015**

V.

Watawalakankanamlage Martin

**High Court Chilaw Case**  
**No. HC 161/2006**

Accused

AND NOW BETWEEN

Watawalakankanamlage Martin

Accused Appellant

V.

Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

Complainant Respondent

**BEFORE** : **K. K. WICKREMASINGHE, J**  
**K. PRIYANTHA FERNANDO, J**

**COUNSEL** : K. A. Upul Anuradha Wickramaratne for  
the Accused Appellant.  
H. I. Peiris DSG for the Respondent.

**ARGUED ON** : 29.08.2019

**WRITTEN SUBMISSIONS**  
**FILED ON** : 11.01.2018 by the Accused Appellant.  
04.07.2018 by the Respondent.

**JUDGMENT ON** : 05.11.2019

**K. PRIYANTHA FERNANDO, J.**

01. The Accused Appellant (Appellant) was indicted in the High Court of Chilaw for one count of murder punishable under section 296 of the Penal Code. After trial the learned High Court Judge convicted the Appellant and sentenced him to death. Being aggrieved by the said conviction the Appellant preferred the instant appeal. The grounds of appeal as settled by the counsel for the Appellant at the argument of this appeal are;

1. Proceedings before his predecessor have not been properly adopted by the learned Trial Judge who finally decided on the case.

2. The learned Trial Judge has erred in law by admitting and adopting the deposition of the PW1 Damayanthi given in the non-summary inquiry held before Magistrate's Court of Chilaw, in evidence in the High Court Trial under and in terms of Section 33 of the Evidence Ordinance.

### **Ground of Appeal No.1**

02. Counsel for the Appellant submitted that the Trial Judge who finally decided on the case heard only the evidence of PW9. Evidence of all other prosecution witnesses had been led before his predecessors. Evidence of those witnesses were not adopted before him. It is the contention of the counsel that the learned High Court Judge therefore did not have the opportunity to observe the demeanour of the material witnesses.
03. Counsel for the Respondent submitted that Section 48 of the Judicature Act provides for continuation of proceedings before the succeeding Judge. Evidence of the main witness for the prosecution who testified before the learned Magistrate was adopted in the High Court in terms of Section 33 of the Evidence Ordinance and therefore the learned Trial Judge in any event could not have had the opportunity to observe the demeanour of the witness, counsel submitted.
04. According to the proceedings in this case in High Court of Chilaw, evidence for the prosecution had been led before two High Court Judges before Hon. High Court Judge Mr. R. A. Ranaraja assumed duties on transfer. On 04.03.2015 onwards Hon. High Court Judge Mr. R. A. Ranaraja continued to hear the case by recording evidence of the rest of the

prosecution witnesses and then the statement from the dock made by the Appellant.

05. Section 48 of the Judicature Act as amended provides for continuation of proceedings before the succeeding Judge when a Judge becomes disable to hear the case.

Section 48;

*.....In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committable for trial or otherwise, has been instituted or is pending such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh.*

*Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and reheard.*

06. Application of Section 48 when a Judge is transferred to another station was discussed by His Lordship Justice Sisira de Abrew in case of ***Herath Mudiyanseelage Ariyaratne V. Republic of Sri Lanka. (CA 307/2006 [17.7.2013])*** where it was said:

*'... I now again turn to the contention that succeeding HCJ in a criminal trial cannot, under Section 48 of the Judicature Act, continue with the proceedings recorded before his predecessor. When a HCJ is transferred from his station he ceases to exercise his jurisdiction in his area and thereby he suffers from disability to function as HCJ of the area. Thus, in my view, transfer of a HCJ from a station is covered by the words 'other disability' in Section 48 of the Judicature Act.'*

07. Therefore, it is clear that the learned High Court Judge Mr. Ranaraja who was the succeeding Judge had the discretion and the authority to continue with the case.
  
08. More importantly the proviso to Section 48 which was brought by the amended Act No. 27 of 1999 to provide for the Accused in a criminal case to demand that the witnesses whose evidence were recorded be re-summoned and reheard. That clear provision is made to avoid any prejudice that would cause to the Accused and also to give the Accused a fair trial. Although the Appellant was represented by counsel in the High Court no application was made to re-summon or rehear any of the witnesses. After waiving his right to demand to re-summon or rehear the witnesses, now at the appeal stage the Appellant cannot claim that he was prejudiced or was deprived of a fair trial. As rightly pointed out by the counsel for the Respondent, in any event the learned High Court Judge could not have observed the demeanour of the main witness PW1 as her evidence in the Magistrate's Court at the non-summary inquiry was adopted in the High Court.

Hence the ground of appeal No. 1 should necessarily fail.

### **Ground of Appeal No.2**

09. Counsel for the Appellant submitted that the procedure adopted by the High Court in admitting the previous evidence of PW1 led in the Magistrate's Court at the trial is unacceptable and it has deprived the Appellant of a fair trial. It was further submitted that the testimonies of the two witnesses called to say that the PW1 cannot be found are more or less hearsay and lacks evidentiary value.
10. Counsel for the Respondent submitted that the evidence to satisfy court that the witness cannot be found was properly led and the learned High Court Judge has recorded the evidence for the 2<sup>nd</sup> time and has satisfied himself. Evidence of PW1 was properly adopted, counsel submitted.

Section 33 of the Evidence Ordinance provides;

*“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 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.*

*Explanation- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."*

11. After leading evidence of Upul Renuka Jayalath who was the Superintendent of the estate and the 'Grama Niladhari' of the area, the learned Trial Judge was satisfied that the witness PW1 had left the area and cannot be found. As per the order of the learned High Court Judge dated 21.05.2013 (page 161 of the brief) she has clearly given good and sufficient reasons as to why she was satisfied that the witness PW1 cannot be found. Although warrants were issued to arrest PW1 since year 2007 police have failed to arrest her. The evidence of the above two witnesses were never challenged by the defence by cross examination although counsel appeared for the Appellant. This Court has no reason to interfere with findings of the learned High Court Judge that the PW1 cannot be found.
  
12. Proviso to Section 33 provides certain requisites that are necessary to adopt the evidence recorded in a previous judicial proceeding. The learned High Court Judge in her order has clearly discussed those requirements and given her mind before adopting the evidence under Section 33 (page 162).

Proceedings in the Magistrate's Court had been between the same parties. Appellant had the opportunity to cross examine the witness. The question in issue was substantially the same in the Magistrate's Court as in the High Court. Therefore, all requisites mentioned in the proviso to Section 33 are fulfilled. As per the explanation provided for in Section 33 non-summary inquiry falls within the judicial proceeding referred to in Section 33.

*'One application of the rule against hearsay evidence is that the evidence given in former judicial proceedings is relevant to the case before the court. Section 33 of the Ordinance provides an exception to this rule, when it states that evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant in a subsequent judicial proceeding, or in a later stage of the same proceeding provided that the conditions and safeguards laid down in section 33 are present. Such evidence is relevant for the purpose of proving the truth of the facts which it states. A criminal trial or inquiry is deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.'* (*The Law of Evidence (with special reference to the law of Sri Lanka) By E.R.S.R. Kumaraswamy Vol.1*)

13. Also, the learned High Court Judge in his final judgment dated 12.10.2015 has carefully analyzed all the evidence adduced at the trial including the adopted evidence of PW1. I see no reason to interfere with the judgment of the learned High Court Judge.

Hence, ground of appeal No. 2 also fails.



Judgment of the learned High Court Judge dated 12.10.2015 is affirmed.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K.K. WICKREMASINGHE, J**

I agree.

**JUDGE OF THE COURT OF APPEAL**