

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

C.A Case No : CA: 138/2011

H.C.Thangalla Case No: 02/2009

Kalawila Pathirage Piyal Wickramarathne,
69,Dalkapallawatte, Kalawila,
Beruwala.

Accused Appellant

Vs.

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

Respondent

Before : **Vijith K. Malalgoda, P.C.J. (P/CA) &
S.Devika de L. Tennakoon, J.**

Counsel : Dharshana Kuruppu for the Accused Appellant
Yasantha Kodagoda, ASG for AG

Argued &

Decided on : 20.01.2016

Vijith K. Malalgoda, P.C.J. (P/CA)

This matter is coming up for argument today. The Accused Appellant in this case, Kalawila Pathirage Piyal Wickramaratne was indicted in the High Court of Tangalle for committing the murder of one Radolf Newro an offence punishable under Section 296 of the Penal Code.

It is brought to the notice of this Court by the learned Counsel that during the trial a witness by the name of Aroshan Nishantha Gamage Hemasiri, who is the witness No. 5 in the indictment was dead and his evidence at the non summary inquiry had been adopted before the High Court trial. However, when the application was made under Section 33 of the Evidence Ordinance, the prosecutor has failed to establish the death of the 5th witness.

Learned Counsel submits that this is one of the irregularity taken place during the trial. Secondly, he brings to the notice of Court the fact that the evidence of the said witness Aroshan Nishantha Gamage Hemasiri was recorded at the non summary inquiry under the provisions of Criminal Procedure Special Provisions Act No. 14 of 2005 and the witness was not tendered for cross-examination during the non summary inquiry.

The Section 10 of the said Act reads as follows:-

"A statement made by an expert witness or police officer and the deposition made by a witness tendered for cross-examination under this Section shall be deemed to be admissible in evidence in terms of Section 33 of the Evidence Ordinance."

When considering the above provisions it is clear that the Court to act under Section 33 of the Evidence Ordinance, it is required for the prosecution in the Magistrate's Court proceedings to tender the witness for cross-examination. Therefore, we observe that the order made by the learned High Court Judge to adopt the evidence of the said witness Aroshan Nishantha Gamage Hemasiri had been made without any legal sanctity. We further observe that the learned High Court Judge was mindful of this fact since he has referred to this fact in page 36 of this judgment but he decided to consider the said evidence since this witness is now dead.

The said conclusion by the learned High Court Judge is erroneous. When considering these issues, we observe that the learned trial Judge has considered inadmissible evidence when coming to the final conclusion in this case.

The learned ASG, Mr. Kodagoda, President's Counsel appearing for the Attorney General concedes this position and submits that the learned High Court Judge had considered inadmissible evidence when coming to the final conclusion.

Considering the submissions made by the both Counsel, Court decides to act under Section 328 (b) and decides to quash the conviction and the sentence dated 13.12.2011 and decides to send this case back to the High Court of Tangalle for a re-trial.

Since the incident in this case had taken place in the year 2004, learned High Court Judge is directed to give priority to this case and conclude this matter without any further delay.

Appeal is allowed.


PRESIDENT OF THE COURT OF APPEAL

S.DEVIKA DE L. TENNAKOON, J.

I agree.


JUDGE OF THE COURT OF APPEAL

LA/-

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