

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

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

C.A.Application  
No. APN 43/2015

**Complainant-Petitioner**

**Vs.**

High Court of  
Kurunegala No. 264/01

1. Ranmuthudewage Susantha Dhammika  
Rathnayake,

Alaluwa, Thalahitimulla, Kuliyaipitiya.

And 7 others

**Accused Respondents**

**Before** : P.R. Walgama J.

L.T.B. Dehideniya J.

**Counsel** : Warunika Hettige SSC for the Appellant.

Accused Respondents absent and unrepresented.

**Argued on** : 18.02.2016

**Decided on** : 29.04.2016

**L.T.B. Dehideniya J.**

This is a revision application filed by the Honorable Attorney General canvassing an order of the Learned High Court Judge of Kurunegala.

The AG indicted the accused for committing offences punishable under sections 140, 146 read with 296, 146 read with 409, 32 read with 296 and 32 read with 409 of the Penal Code. At the trial the prosecution moved to call the witness No. 1, Dilip Kumara Thisera who has given a statement to the police and was listed as a witness in the non summary inquiry but was not called to testify in the said non summary inquiry due to the unavailability. The defence objected to the calling of this witness at the trial on the basis that the said witness was not called as a witness in the non summary inquiry in the Magistrate Court. The Learned High Court Judge, after considering the submissions of both parties, determined that the Court is bound by the judgment of the Court of Appeal in Republic of Sri Lanka v. Lokuhettige Suranimala C.A. 104-105/93, dated 26.10.94 and disallowed the witness. Being aggrieved by the said order, the AG presented this revision application.

After supporting the application, notices issued on the accused but none of the accused appeared in court or represented. The case was taken up for argument without the accused-respondents.

The only issue in this case is whether the trial judge can call a person as a witness who was not called as a witness in the non summary inquiry. The purpose of holding the non summary inquiry is to ascertain whether there is a prima facie case against the accused to commit him for trial in a higher Court. The Magistrate is not required or empowered to decide whether the accused is guilty or not guilty at the non summary inquiry. His task is only to find out whether there is enough evidence to commit the accused for trial.

*SARAM v. WEERA. 1 NLR 95*

*In proceedings taken under chapter XVI. of the Criminal Procedure Code, a Police Magistrate has to take and record evidence for the prosecution with the view of ascertaining whether there is such a prima facie case made out against the accused as could justify him in*

*committing the accused for trial to a Superior Court, and not to determine his guilt or innocence which is in issue only in trials under chapter XIX.*

The Magistrate can commit the accused for trial if he is satisfied that there is a prima facie case against him, even without calling all the witnesses to testify before Court. As I pointed out earlier, the Magistrate is not going to decide the guilt or innocence of the accused, it is the High Court that is doing so. Therefore, even if the witness was not produced before the Magistrate, the trial judge (the High Court Judge) must have the benefit of hearing all the evidence.

Section 148 (1) of the Criminal Procedure Code specifies the way of recording evidence in the non summary inquiry. It says thus;

*(1) The Magistrate shall then take, in the presence of the accused and in the manner hereinafter provided, the statements on oath or affirmation of those who know the facts and circumstances of the case, and put them in writing (called the depositions):*

*Provided that the Magistrate shall not, except where the Attorney-General otherwise directs, summon and record the evidence of any expert witness but shall only cause such witness's report to be produced and filed of record.*

In the present case the learned Magistrate has recorded the depositions of the witnesses who were available at the non summary inquiry. The witness in question was not available.

Section 162 of the Code provides that the names of the witnesses whom the prosecution intends to call as witnesses to be entered in the indictment. The section reads;

162. (1) *Every indictment for trial in the High Court whether with or without a jury shall contain a list of witnesses whom the prosecution intends to call and another list of documents and things intended to be produced at the trial which documents and things shall be called "productions".*

*But anything in this subsection shall not be deemed or construed to debar the prosecution after notice to the accused, from calling any witness or producing any document or thing not specified in the indictment.*

In the present case the witness's name is listed in the list of witnesses and the accused had notice of it. The statement made to the police by the witness is available to the defence for questioning the witness.

Section 439 of the Code gives the authority to the trial judge to summon any person as a witness. What is necessary is to summon such a person is that it is essential to call that witness to arrive at a "just decision". The section reads;

*439. Any court may at any stage of an inquiry, trial, or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.*

In the present case the witness in question was not called to give evidence at the non summary inquiry because of his non availability. The record shows that a warrant of arrest had been issued but was unable to secure his presence in the Magistrate Court. In the case of *The King v. Aron Appuhamy* 51 NLR 358 a witness who was not called in the non summary inquiry, and who

was not listed in the list of witnesses, due to the unavailability, was allowed to be listed and called.

*The King V. Aron Appuhamy et al. 51 NLR 358 [Assize Court]*

*The Magistrate committed the accused for trial without examining a material witness whose whereabouts could not be traced. After the indictment was signed, but before the trial, the missing witness was discovered. The Attorney-General gave notice both to the accused and their legal advisers that he intended to move the Court of trial to amend the indictment by adding the name of the new witness. The defence was also supplied with a précis of the evidence which the witness was expected to give.*

*DIAS J.*

*The question, therefore, which I must now decide is whether in allowing this application, any substantial injustice or prejudice will be caused to the accused. No prejudice can possibly be caused to anybody by allowing the truth to be made manifest. Therefore, if there is a witness who should have been called in the Magistrate's Court but who, owing to his absence, could not be so examined, it cannot cause injustice to the accused, provided they have every opportunity of testing the evidence of the witness by cross-examination on oath.*

.....

*In the circumstances, therefore, although with some reluctance, I allow the application. I trust that applications of this kind will be more the exception than the rule.*

In the present case, the witness in question is already listed in the list of witnesses and it is not necessary to amend the indictment.

The facts in the case of Republic of Sri Lanka v. Lokuhettige Suranimala C.A. 104-105/93, CA minute 26.10.94, are different from the present case. In the above case witness in question was the only eye witness and the jury relied solely on this witness's evidence. In the present case it is not so. The learned Magistrate committed the accused for trial even without hearing the witness in question; which means that there is sufficient evidence other than the evidence of the witness in question.

Under these circumstances, I set aside the order of the Learned High Court Judge dated 11.02.2015 and hold that there is no bar for the prosecution to call Dilip Kumara Thisera as witness in this case.

Judge of the Court of Appeal

**P.R.Walgama J.**

I agree.

Judge of the Court of Appeal