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(1) of the Code of Criminal Procedure Act No. 15 of 1979

C.A. Case No: 218/2016

H.C. Kegalle Case No: 1786/2002

The Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

Perumal Punyamoorthi

Accused

-And Now Between-

Perumal Punyamoorthi

Accused-Appellant

-Vs-

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

Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Nayantha Wijesundara, AAL for the Accused-Appellant.

Madhawa Tennakoon, SSC for the Respondent.

Written Submissions of the Accused-Appellant filed on: 06/08/2018

Written Submissions of the Respondent filed on: 20/09/2018

Argued on : 21/02/2019

Judgment on : **26/03/2019**

A.L. Shiran Gooneratne J.

The 1st Accused-Appellant, (hereinafter referred to as the Appellant) was indicted together with the 2nd accused, Thyagaraja, (deceased at the time of trial) in the High Court of Kegalle, under Section 296 of the Penal Code for causing the death of Selwamuttu Pubalan, (hereinafter referred to as the deceased) and upon conviction the Appellant was sentenced to death.

The case for the prosecution entirely rests on circumstantial evidence.

Sellamuttu, (PW1), the sister of the deceased, states that when she was at the common water tap, close to her house, she heard the 2nd accused requesting the deceased to come to his house. Moments later Thamil Selvam, the daughter of the

2nd accused (Thiyagaraja) had cried for help, and when she entered the house of the 2nd accused, she had seen the deceased lying on the floor. At that point, the Appellant who was inside the house of the 2nd accused had thrown aside an axe which was in his hand and had run away. She also stated that, the 2nd accused told her that the Appellant attacked the deceased. The Appellant and the 2nd accused Thyagaraja were brothers who lived in adjoining line rooms which were interconnected. However, in cross-examination, PW1 claimed that she did not see the Appellant holding the axe or throwing it away and it was Thiyagaraja who told her about it.

Palaniandi Nadaraja (PW7), in his evidence stated that when he came to the place where the deceased was attacked, Thamil Selvam had told him that the Appellant had attacked the deceased. However, Thamil Selvam was not called to give evidence by the prosecution. It is observed that there were several others who were present at the scene of the crime, who have not been questioned by the police regarding this incident.

The prosecution also relied on the evidence given by Valliamma Sellamuttu (PW2), at the non-summery inquiry which was adopted in terms of Section 33 of the Evidence Ordinance, which is the only evidence the prosecution relied to prove its case.

When the case was taken up for argument, the counsel for the Appellant raised a preliminary ground of appeal questioning the procedure in admitting

statements under Section 33 of the Evidence Ordinance, as regards to witness No.2, who was reported dead at the time of trial.

It is to be noted that, in the instant case by order dated 10/07/2014, in Application C.A. 06/2012, this Court sent this case back for re-trial due to a procedural error arising out of an admission of a deposition under Section 33 of the evidence Ordinance as regards to PW8, who was reported dead at the time of trial, on the basis that the said deposition in the non-summery inquiry was not properly admitted in evidence. At the re-trial, the prosecution did not proceed to admit the said deposition of PW8, however, proceeded to admit in evidence the deposition of PW2, under the said section.

In ***CA. 06/2012, decided on 10/07/2014, Anil Gooneratne J.*** stated;

> *"it is essential to follow the 'dicta' in the above case and have the entire non-summary records of the proceedings produced before the High Court. The record of non-summary proceedings have not been produced. Only the statement P3 had been produced. Essential steps have to be complied with since the adverse party would be entitled to view the entire proceedings in the Court below."*

Counsel for the Appellant argues that the following essential steps which go to the root of this case were not complied with when admitting the deposition of PW2 in evidence;

(a) the deposition of PW2 admitted under Section 33 of the Evidence Ordinance was not given a separate marking and included in the list of productions of the indictment.

(b) the entire non-summery record of the proceedings were not produced before the High Court.

(c) the relevant evidence was not adduced by the prosecution from the witness who produced the deposition of PW2, subject to the infirmities in adopting such evidence.

PW13, the Registrar of the High Court of Kegalle, was called by the prosecution to produce the deposition of PW2 under Section 33 of the Evidence Ordinance. The proper custody of the record of the non-summery proceedings is not in question. The death of the deceased has also been admitted. At the conclusion of evidence of PW3, a certified copy of the said deposition was marked as "X". It is noted that, the statutory statement made by the accused under Section 151 of the Code of Criminal Procedure Act (CCPA), has also been given the same marking. The deposition marked "X" is not included in the list of productions in the Indictment. The entire proceedings of the non-summery inquiry was available in Court for perusal by counsel. The evidence given by the High Court registrar is confined only to the marking of the said deposition.

The learned High Court Judge, at page 8 of the judgment has narrated a part of the evidence given in cross-examination of PW13, which has no bearing to the culpability of the Appellant. However, at page 9 and 10 of the judgment the

learned trial judge has narrated the facts contained in the deposition without such content been led in evidence.

Therefore, the question arises,

Firstly, as to whether the trial judge can act on a deposition of a deceased witness, produced from proper custody, without the relevant facts deposed to, been led in evidence,

Secondly, whether the trial judge was mindful to the presumptions associated when admitting the said deposition in evidence.

It is observed that the said deposition was produced in evidence by PW13.

In ***Stephen and others vs. The Queen 67 CLW 48 (cited with approval by Gooneratne J. in C.A. 06/2012 supra), Sansoni J.*** held that;

> *"where a witness who has given evidence before the inquiring magistrate and whose name is on the back of the indictment dies before the trial, the correct procedure to produce the deposition of such witness is by calling the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record of the non-summary proceedings to produce it. A certified copy of the deposition should also be produced by the witness."*

E. R. S. R. Coomaraswamy in his book "the Law of Evidence" at page 500 cites, in assent to the case, 67 CLW 48 as follows;

> *"where witness who has given evidence before the inquiring magistrate and whose name is on the back of the indictment dies before the trial, the correct procedure to produce the deposition of such witness is not by amending the indictment and moving to mark and read the disposition in evidence, but by calling the Chief Clerk of the Magistrate's Court or another officer of the District Court connected with the custody of the record of the non-summary proceedings to produce it. A certified copy of the deposition should also be produced by the witness."*
>
> (emphasis is mine)

The above authorities could indicate that, the facts related in a deposition can be admitted by the learned trial judge under the relevant section by producing a certified copy of the deposition through a witness having custody of the record of the non-summery proceedings, without adducing the evidence in open court, as contended by the Counsel for the Respondent.

However, in ***Sheela Sinharage vs. Attorney General (1985) 1 SLR I, Ranasinghe J.*** (as he was then) approached the said issue in the following manner;

"there is, however, express provision in the Evidence Ordinance (Chap. 14), in Section 33, making evidence given by a witness in a judicial proceeding relevant in a later stage of the same judicial proceeding. Once such evidence becomes relevant at the stage of the trial, then such evidence would have also to be proved before the trial judge in the same way the other items of relevant and admissible evidence are placed before the trial judge in accordance with the express provisions of the laws of evidence or of criminal procedure. Facts which are relevant can be considered by the trial judge only if and when they are led in evidence before him at the trial in accordance with the relevant express provisions of law. A deposition made at a non-summary inquiry must, if relevant at the subsequent trial, be adduced in evidence in open court at the trial in the presence of both parties, just as much as the other relevant facts have to be led in evidence and proved at the trial in open court in the presence of the parties. This is what the law requires, and it has also been the inveterate practice."

As noted above, there is no evidence on record that the relevant facts in evidence deposed to by PW2, was led in evidence before the trial judge for his consideration in accordance with the provisions of the laws of evidence or criminal procedure. Therefore, in the instant case, by considering evidence deposed before the inquiring Magistrate, not led before the trial Court, the learned

trial judge has acted contrary to the requirements of the laws of evidence and criminal procedure, applicable in admitting witness depositions under Section 33 of the Evidence Ordinance.

In ***Regina V. D. M. Arthur Perera et al, (1956) 57 NLR 313 at page 326 (cited with approval in Sheela Sinharage Vs. Attorney General (Supra), Basnayake, A.C.J.*** observed that;

> *"evidence given by a witness in a previous judicial proceeding, even though it be that of an accused person, cannot be admitted in evidence in a subsequent proceeding accept in accordance with the provisions of the evidence Ordinance or the Criminal Procedure Code".*

The next issue raised by the Appellant, is whether the trial judge was mindful of the infirmities of the deposition of PW2, when adopting such evidence.

When admitting evidence given by a witness who has testified in a prior Judicial Proceedings in terms of Section 33 of the Evidence Ordinance, the learned trial judge should be mindful that the witness whose evidence is to be admitted, is not before Court to give evidence or to be cross-examined and he is unable to observe the demeanor and deportment of the witness.

We observe that there is no finding to the effect that the learned High Court Judge was mindful to the said infirmities before admitting the deposition of PW2. Therefore, for all the above reasons, it is unsafe to allow the conviction against the

Appellant to stand. Accordingly, we set aside the conviction and the sentence imposed on the Appellant and acquit the Appellant.

In the circumstances of this case the question that must be considered is whether this case should be sent back for re-trial. There is no application by the State, to have this case sent back for re-trial. As noted above, the deposition of PW2 at the non-summary inquiry is the only evidence that the prosecution has placed reliance against the Appellant. We are mindful that this is an appeal from a re-trial ordered by this Court. The offence is alleged to have been committed in 1999, and since then, the Appellant has spent a good part of his life in Court in pursuance of justice. When sending a case back for re-trial, the Court should not only be mindful of the injustice caused to the aggrieved party but also to the prisoner, accused of the offence.

In the above circumstances, we refrain from sending this case back for re-trial.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL