DOLAWATTE

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
SIVA SELLIAH, J., T. D. G. DE ALWIS, J. AND BANDARANAYAKE, J.
C.A. No. 27/84.
H.C. AVISSAWELLA No. 19/81.
DECEMBER 2, 3 AND 4, 1985.

Code of Criminal Procedure Act No. 15 of 1979 - Section 414 (1) – Admissibility of the case history of the patient – Absence of the persons who supplied the information – Absence of the doctor who examined the patient – Evidence Ordinance, section 32 (2).

Where the Medico Legal Report prepared by a Government Medical Officer was admitted in evidence under section 414(1) of the Code of Criminal Procedure Act No. 15 of 1979, the question for decision was whether the entry made by the Medical Officer in the cage pertaining to the case history of the patient in the said Medico Legal Report was admissible in evidence without the person who supplied such information being called.

Held–

In cases where the person giving the history (if it is not the patient) is not called then the rules pertaining to hearsay evidence would apply and where such person is not called as a witness, the value and weight of such evidence will be affected. The entirety of the Medical Report of the doctor was admissible under section 414(1) of the Criminal Procedure Code. The doctor being obliged in the course of his professional duty to make the entry under the relevant cage specifying case history the provisions of section 32(2) of the Evidence Ordinance are applicable to the admission of such an entry.

APPEAL from conviction in the High Court after jury trial.

Dr. Colvin R. De Silva with *M. V. De Silva* and *Miss Saumya de Silva* for accused-appellant.

Asoka de Silva, S.S.C. for respondent.

January 24, 1986.

SIVA SELLIAH, J.

Three accused were charged in this case for the attempted murder of Gamage Buddhadasa on 20.3.78 by throwing acid on him–an offence punishable under section 300 of the Penal Code read with section 32. The trial commenced on 26.10.83 before a jury and was concluded on 14.11.83. At the close of the case for the prosecution on the directions of the High Court Judge the 3rd accused was acquitted. At the conclusion of the trial the jury unanimously found the 1st accused Gamini Dolawatte guilty of having caused grievous hurt to Gamage Buddhadasa by throwing acid at him and blinding him in both eyes; they returned a 5:2 verdict of not guilty regarding the 2nd accused who was thereupon acquitted. The present appeal is by the 1st accused against his conviction and sentence of 5 years R.I. and fine of Rs. 250.

According to the prosecution evidence the father of the 1st accused was the owner of a field of which the injured Gamage Buddhadasa was the *ande* cultivator. The latter lived at Bomiriya. On 20.3.78 there had been a funeral close to the house of Buddhadasa and he had supplied a pot of tea to the funeral house; at about 6.15 p.m. accompanied by Udaya Kumar he had gone to fetch the pot back, and he had also gone further up to the boutique and bought some sprats. On the way back he observed 3 persons one of whom was the 1st accused Gamini Dolawatte. As he passed the house of Liyanage, when he was about 5 feet from Gamini Dolawatte, the 1st accused flung some liquid on his face–some of it fell on his eyes and he began to lose sight. He identified the 1st accused well. The evidence led at the trial has proved that he has lost the sight of both eyes completely as a result of the acid thrown at him. He shouted out that acid had been thrown at him. However when he shouted out he had not disclosed the name of the assailant but had merely stated that acid had been thrown at him. Udaya Kumar who was with him had run away. He was then taken to hospital where the doctor (Mrs. Coomarasamy) had found he had gone completely blind. The name of

Gamini Dolawatte as the assailant was not in the case history of the Medico Legal Report of Dr. Coomarasamy – it stated that an unknown person had thrown acid. That history had not been provided by Buddhadasa who was unconscious. Next morning he was examined by Dr. Fernando at the hospital – his case history was recorded by him and it was there he stated that Gamini Dolawatte had thrown acid at him. His statement however was recorded by the police – by I.P. Tillakaratne only on 28.3.78 – 8 days after the incident, and the High Court Judge has quite rightly severely reprimanded the police for the tardy manner in which the statement has been recorded and investigations made. The prosecution had also led the evidence of Missi Nona and Sirimawathi to establish that shortly prior to the incident the 1st accused was in the vicinity and had indeed come to her house with 2 others and asked her for some water which she gave him in a glass and went off to the funeral; Sirimawathi has said that she saw the accused going away from their house with two others and the accused was carrying a parcel in the shape of a bottle and she had asked him whether it contained arrack or medicine. The prosecution also led the evidence of Udaya Kumar who was accompanying Buddhadasa. He testified that there were three persons and one of them threw acid at Buddhadasa while the other two assaulted him and Buddhadasa shouted that acid had been thrown at him. Udaya Kumar had not identified the assailant. The police investigational evidence was also led and the High Court Judge has commented adversely on the evidence of I. P. Tillakaratne who had waited for 8 days to record the statement of a man who had been made blind by the incident. The two doctors who examined the patient were unable to give evidence as they were not in the country and their reports were produced through Dr. H. V. J. Fernando – who was the Professor of Forensic Medicine.

At the hearing before us the learned counsel who appeared for the 1st accused-appellant relied upon the principal contention that while the Medico Legal Reports of the two doctors who examined the injured on the night of 20.3.78 (Dr. Mrs. Coomarasamy) and on the morning of 21.3.78 (Dr. P. R. Fernando) were admissible in evidence under section 414(1) of the Criminal Procedure Code, nonetheless *the cage pertaining to the history of the patient in the said reports (P1 & P2) were not admissible in evidence without the persons who supplied such information being called and particularly in the absence of the doctors themselves* as this would constitute double hearsay; it

was his further contention that one did not know what the impact of this evidence would have been on the minds of the jury in finding the accused guilty of grievous hurt as in P1 (the report of Dr. P. R. Fernando) the case history is given as injury having been caused by the throwing of acid by Gamini Dolawatte and it was not possible to ascertain who had mentioned this to Dr. Fernando. The learned counsel further contended that the charge by the learned judge to the jury does not discuss how this problem was to be approached and dealt with by the jury and that as a result prejudice has been caused to the accused.

Section 414 (1) of the Criminal Procedure Code Act makes possible the use of any document purporting to be a report under the hand of a Government Medical Officer upon any person, matter or thing duly submitted to him for examination or analysis and report. It was the learned counsel's submission that accordingly what could thus be made use of was so much of the report as dealt with the examination of the patient and the injury found on him and not the case history as was entered by him on information as supplied by some other person who is not called as a witness. "Government Medical Officer" included any officer of the Department of Forensic Medicine of any faculty of medicine of the University of Ceylon, vide section 2 of the Criminal Procedure Code Act. Thus the report was by a competent person. I am of the view that the examination by the doctor commences with the ascertainment of the case history of the patient-this is a part of his professional duty as much as the physical examination and treatment and report thereon. Indeed it is necessary for the doctor to acquaint himself with the background even in normal circumstances before entering upon examination and treatment. *In cases where the person giving the history (if it is not the patient) is not called then the rules pertaining to hearsay evidence would apply and where such person is not called a witness, the value and weight of such evidence will be affected. The entirety of the medical report of the doctor was thus admissible under section 414(1) of the Criminal Procedure Code and the doctor was obliged in the course of his professional duty to make the entry under the relevant cage specifying case history and the provision of section 32 (2) of the Evidence Ordinance was applicable to the admission of such an entry.* It must however be borne in mind that such entry was intended for the purpose of ascertaining the history of the patient by the doctor or the injury sustained so as to give him the necessary background for treatment of the patient and was

not intended to be a complaint such as is made to a police officer regarding the incident; it is well possible that in some cases the case history may be provided by persons other than the patient himself as for instance where the patient is unconscious. In the instant case this seems to have been the position as the evidence of Buddhadasa shows that soon after he became blinded upon the throwing of acid he became unconscious and did not know what happened till he found himself in considerable pain in hospital and his evidence is that the first time he mentioned the name of Gamini Dolawatte as the person who threw acid at him was when he made his statement to I.P. Tillakaratne on 28th March 1978. The learned High Court Judge in his charge to the jury has rightly castigated the I.P. for having taken so long to record his statement and commented that in the predicament that Gamini Dolawatte was, a blinded person with injuries could not be expected to go in search of the police. In *Korossa Rubber Co. v. Silva 20 NLR 65 at 73* Wood Renton, C.J. having considered the objection that the statement of an absent witness to a Korala who had since died was not admissible in evidence, ruled that such statement was admissible and that the objection that the Korala's report introduced "double hearsay" is one that goes to the weight of the evidence, and not to its admissibility (at p.67). When this objection was raised before the learned High Court Judge at the trial he has ruled that there is no legal bar to the production of the report and that both the prosecution and the defence have the right to address the jury regarding the value of the note in the case regarding history and that he would also direct the jury on this matter in his address. In his address he has explained to the jury the circumstances under which Professor H. V. J. Fernando was giving evidence and producing the reports of Dr. Coomaraswamy and Dr. P. R. Fernando who were not available to give evidence. He has also explained that Dr. P. R. Fernando has recorded the history that one Gamini Dolawatte threw acid at Buddhadasa at Ihala, Bomiriya on 20.3.78 at 6.30 in the evening *but that there is no evidence before us as to who told this fact to the doctor* (the emphasis is by me). This cleary shows that the High Court Judge has clearly drawn the attention of the jury that this was *hearsay evidence as far as the case history is concerned and (in my view) draws a sufficient note of caution to the jury on this matter.* The learned judge has nowhere stated that this could be utilized by them as evidence against the accused. Indeed a consideration of the learned judge's summing up shows that he has quite fairly told the jury that there is the direct evidence of Buddhadasa against the 1st

accused and that there was the evidence of Missi Nona and Sirimawathi and that there was the evidence of two doctors that he had grievous injuries. He has thus expressly refrained from using the case history as provided in Dr. P. R. Fernando's report as any item of evidence against the accused. He has also stated that:

> "if you accept the evidence of Buddhadasa, then the evidence of Missi Nona and Sirimawathi corroborate that at the time of this incident the first accused has been very close to the place of incident.....if you accept that evidence, and if you hold accordingly, that the first accused threw acid on the face of Buddhadasa and caused him grievous hurt, and if you hold that the prosecution has proved that fact beyond a reasonable doubt, if you accept that the 1st accused caused injury by some corrosive liquid then you should find the 1st accused guilty of the charge. If you have a reasonable doubt that the 1st accused committed this offence you should give the benefit of the doubt to the 1st accused and acquit him."

On this charge the jury unanimously convicted him. I am unable to subscribe to the view that the learned High Court Judge had not correctly directed the jury regarding what they were to do with the case history in Dr. P. H. Fernando's report. Not only has he stated there was no evidence regarding who had provided that information and thus cautioned them, but also from the passage quoted above focussed their attention to the direct evidence and that it was for them to accept or reject the direct evidence and also that if there was any reasonable doubt the 1st accused should be acquitted. I therefore hold that no prejudice has been caused to the accused by the admission of the Medico Legal Reports in this case. A point was also made of the fact that when the acid was thrown at his face, Buddhadasa had not mentioned the name of Gamini Dolawatte when he shouted but had only shouted that acid has been thrown on him. I am unable to agree that this demonstrated that he did not know who his assailant was. When a person suddenly finds acid thrown on him and finds himself with blinding pain on him and his losing sight fast, he is not going to think of what lies ahead by way of evidence at a trial but instinctively shouts that acid was thrown at him. It was also contended that the first time Buddhadasa had mentioned the name of Gamini Dolawatte was when he made his statement to the police on 28.3.78. The learned High Court Judge has expressed in no uncertain terms utter dissatisfaction with the manner in which the police

investigation has been conducted and the statement of the injured recorded so long after the incident and has stated in the circumstances no blame could be attached to Buddhadasa for making a statement so late as a blind person could not be expected to go in search of the police who had been dragging their feet over their duty. The learned counsel also contended that prejudice has been caused to the accused as circumstances favourable to the 1st accused were not put to the jury by the learned judge, viz the absence of fingerprints of the 1st accused on the bottle and glass and that this had been a chance meeting and not a planned one. Regarding the former it was no part of Buddhadasa's evidence that the 1st accused threw acid at him from a glass or that this was the glass from which he threw acid. I. P. Tillakaratne had found the glass P4 and a bottle P5 (both smelling of acid) at the scene. The 2nd accused was implicated as a result of his fingerprints found on the glass and the 2nd accused in a dock statement has stated that he was compelled to hold the glass and hence his fingerprints were on it. The learned High Court Judge has given proper directions to the jury on this aspect of the matter and the jury have acquitted the 2nd accused which shows that they have accepted the 2nd accused's explanation as to how his fingerprints were on it. The evidence of Buddhadasa was that when he was about 5 feet from Gamini Dolawatte (1st accused) passing the house of Liyanage, the 1st accused looked at him and threw a vessel containing some liquid at his face and that 2 others assaulted him and that he had seen the 1st accused very clearly and that he identified him very clearly (vide page 7, 8 & 16). Under all these circumstances there was no need to advert to the absence of fingerprints of the 1st accused on the glass as Buddhadasa's evidence was that he threw a vessel containing acid at his face and that the acid alighted on his face. It was in these circumstances that the High Court Judge has referred to this as direct evidence. Further regarding the other point of this being an unexpected meeting, Buddhadasa lived at Ihala Bomiriya which was the place of incident whereas the 1st accused lived at Panadura. The Foreman of the jury himself has questioned Buddhadasa regarding the distance from Ihala Bomiriya to Gorakana, Panadura and about the participation of the 1st accused in disputes between his father and Buddhadasa regarding the paddy field belonging to the 1st accused's father of which Buddhadasa was ande cultivator and which appears to have provided the motive for this incident as Buddhadasa was refusing to give up possession of the paddy field. This questioning by the jury shows that it was quite alive to the question that the 1st accused and

Buddhadasa lived in two different places and did not meet on no expectedly. In these circumstances I am of the view that there has been no prejudice caused to the accused as a result of the High Court Judge not adverting to this point.

I am accordingly of the view that the contentions raised on behalf of the accused must fail and dismiss this appeal.

T. D. G. DE ALWIS, J.—I agree.

BANDARANAYAKE, J.—I agree.

Appeal dismissed.