LIONEL
v
THE ATTORNEY-GENERAL

COURT OF APPEAL
FERNANDO, J. AND
AMERATUNGA, J.
CA 57/99
H.C. KALUTARA 51/97
M.C. MATUGAMA 25891/NS
14 MARCH, 2002

Penal Code, section 296 - Trial without jury – Case of prosecution resting mainly on dying declaration – Deposition of witness read in evidence – Witness abroad – Evidence Ordinance, section 33 – Conditions under which a deposition of a witness could be led.

Four accused stood indicted for causing the death of "B". Two accused were acquitted, one was dead at the time of the trial and the accused-appellant was convicted of murder and sentenced to death.

The case for the prosecution completely rested on dying declarations said to have been made by the deceased to his mother, his mistress and to the police. The mother and the Police officer gave evidence. The deposition of the mistress was led under section 33 the of Evidence Ordinance, on the basis that she was abroad at the time of the trial.

On Appeal:

Held:

(i) Evidence of the mistress was vital to the prosecution case, as there was an apparent conflict between the evidence of the witness and the evidence of the deceased's mother, and there was also a suggestion by the defence that the mistress had an illicit relationship with another and over this matter there was a quarrel between the deceased and the mistress, and the former took to commit suicide.

(ii) In view of above the witness' personal attendance was vital to both sides and the trial judge should not have permitted the prosecution to lead the witness' deposition simply on the basis of a police report submitted to court one year before the trial stating that the mistress has gone abroad.

(iii) It appears that, the trial judge's mind was substantially influenced by the deposition of the deceased's mistress.

Per Amaratunga, J.

"It might be very reasonable to submit to much delay and considerable expense when the evidence of the deponent is vital to the success of the prosecution case or has a very important bearing on the guilt of the accused."

APPEAL from the judgment of the High Court of Kalutara.

Case referred to :

1. *R* v *Fernando* – 51 NLR 224, 40 CLW 55

Dr.Ranjit Fernando with *Sandamalie Munasinghe, Sandamalee Manatuga* and *Kavindra Nanayakkara* for accused-appellant.

Palitha Fernando , Deputy Solicitor-General for Attorney-General

Cur.adv.vult.

May 10, 2002

GAMINI AMARATUNGA J.

The accused-appellant, along with three others stood indicted in the High Court of Kalutara for causing the death of one Beedin at Molkawa on 4.6.1991. At the time of the trial one accused was dead. After trial by the High Court Judge sitting without a jury the other two accused were acquitted and the accused-appellant was convicted of murder and sentenced to death.

The case for the prosecution completely rested on dying declarations said to have been made by the deceased to his mother, his mistress and to the police. The mother of the deceased and the police officer who recorded the deceased's statement at the hospital testified at the trial. The deposition of the mistress, made at the preliminary inquiry in the Magistrate's Court was read in evidence under section 33 of the Evidence Ordinance on the basis that she was abroad at the time of the trial before the High Court. Before proceeding further I would like to make my observations regarding the learned trial

Judge's decision to allow the prosecution to lead the deceased's mistress' deposition in evidence.

It appears that the prosecuting state counsel has thought that she was entitled to lead the witness' deposition by simply showing to court that the witness has gone abroad and the trial judge too appears to have allowed the application of the State Counsel without much inquiry and as a matter of routine. One of the conditions under which a deposition of a witness could be led in evidence under section 33 of the Evidence Ordinance is that when the witness' presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the court considers unreasonable. Under circumstances of the case one circumstance which the judge ought to weigh is the nature and importance of the statement contained in the deposition. It might be very reasonable to submit to much delay and considerable expense when the evidence of the deponent is vital to the success of the prosecution case or has a very important bearing on the guilt of the accused.

In *R v. Fernando*[1] an application was made by the prosecution to read in evidence the depositions of four witnesses, recorded during the non-summary inquiry, on the basis that the four witnesses were at Tokyo, Bangkok, Singapore and Culcutta respectively. The defence objected to this application on the basis that there was no evidence that efforts had been made to secure the personal attendence of the witnesses in question. The trial Judge allowed the application of the prosecution holding that such evidence was unnecessary and that the Court was satisfied that the presence of the witnesses could not be obtained without an amount of delay and expense. In appeal the Court of Criminal Appeal held that the discretion of the trial Judge was exercised on insufficient material as there was no evidence of the actual delay and expense that would be involved in securing the attendence of the witnesses in question and that as the evidence of the witness in Culcutta was of a vital nature, the delay and expense involved in securing his attendence was not unreasonable under the circumstances of the case and steps should have been taken by the crown to secure his attendence at the trial.

In the instant case the evidence of the mistress of the deceased was vital to the prosecution case. There was an apparent conflict between the evidence of the witness and the evidence of the

deceased's mother as to the exact words uttered by the deceased at the time both of them simultaneously rushed to the place where the deceased was lying fallen after ingestion of a corrosive substance. There was also a suggestion by the defence that the mistress of the deceased had an illicit relationship with another man and over this matter there was a quarrel between the deceased and the mistress and the former thereafter took acid to commit suicide. In view of these matters the witness' personal attendence was vital to both sides and the trial judge should not have permitted the prosecution to lead the witness' deposition in evidence simply on the basis of the police report submitted to court one year before the trial stating that the witness had gone abroad. Accordingly I am of the view that the deposition of the mistress of the deceased was wrongly admitted in evidence. However since there was other evidence about the dying declarations made by the deceased I shall proceed to consider whether those dying declarations are acceptable and sufficient to sustain the conviction.

According to the medical evidence the cause of death of the deceased was the burns of the internal organs from the mouth to the intestines sustained due to ingestion of a corrosive substance. The doctor has stated that after the ingestion of the corrosive substance the deceased could have spoken with a coarse voice and that he could have been in his proper senses for sometime. According to the doctor, in view of the nature of the injuries to the internal organs the chance of death ensuing was more probable than not. The doctor's opinion was that no force had been used to pour or force the corrosive substance into the mouth of the deceased.

According to the mother of the deceased, on the date of the incident, when she was at the deceased's house the four accused came there around 8 p.m. She knew them well as three of the accused were her aunt's sons and the other was her aunt's son-in-law. They used to visit the deceased's house often to chat with him. On seeing them she went into the house and the deceased and the four accused remained in the front portion of the house. Thereafter the deceased went into the kitchen, took a jug and returned to the front portion of the house. Then she heard her son crying out '*Budu Ammo*'. On hearing his cry she and the deceased's wife rushed to the front of the house and found the deceased lying fallen in the compound. The deceased then said " ඇසිඩ් වක්කරලා බිව්වා" (that he poured acid and drank). At

that stage he never said that acid was administered to him or that acid was given to him by anyone. Thereafter her sister's son Jayasena came there and took the deceased to hospital. According to the witness when she first rushed to the front portion of the house in response to the deceased's cry of distress, the four accused were not there.

The witness has stated that later at the hospital the deceased told her, ලයනල් වත්කරලා දීලා බිව්වා - meaning that Lionel poured it and gave it to him and he drank it. According to the witness, as far as she knew there was no displeasure between her son and the accused and the deceased had no reason to commit suicide. In answer to a question posed by Court the witness has said that at the hospital the deceased said "බුදු අම්මේ මාව බේරාගන්න. මම බිව්වේ නැහැ." When she asked the deceased if she did not drink what happened he said ,ලයනල් වත්කරලා දීලා බිව්වා. The witness has stated that the deceased and the accused used to drink alcohol at the deceased's house.

In cross examination the witness was asked whether, when she gave evidence in the Magistrate's Court, she said that she heard her son crying out ඇසිඩ් පෙවුනෝ or something like that. Her reply was that what the deceased said was බුදු අම්මේ මාව බේරාගන්න. මට ඇසිඩ් පෙව්වා. Then she was asked whether she told the Magistrate's Court බුදු අම්මෝ මට ඇසිඩ් පෙව්වා ලයනල් පෙව්වා. To this question her reply was "බුදු අම්මෝ මට ඇසිඩ් පෙව්වා කිව්වා." Then the defence marked what she told the Magistrate's Court as D1 (proceedings of 31.8.99 commencing from 12.55 p.m. page 6) She has again repeated that the deceased shouted " බුදු අම්මෝ මාව බේරාගන්න. මට ඇසිඩ් පෙවුවෝ." Thus there is a substantial difference between her evidence in chief and the answers given in cross examination regarding the exact words uttered by the deceased when he was lying fallen after ingestion of a corrosive substance.

On 5.6.1991 at 10.00 a.m. (nearly 13 hours after the ingestion of the corrosive substance) police sergeant Prematilake attached to the Nagoda Hospital police post has recorded the deceased's statement at the hospital. According to his evidence at the time he questioned the deceased before recording the statement, the latter was able to speak and was in his proper senses. The statement of the deceased was produced in evidence marked P3. In his statement the deceased

has stated that on 4.6.1991 around 8 p.m. the four accused brought a bottle of arrack to his house and invited him for a drink. Then he brought a glass and gave it to Lionel (the accused-appellant) who filled it and gave it to him and he took the glass and poured its contents straight to his throat. When he felt the burning sensation in his throat he realised that they have given him acid and not arrack. Then he shouted out මට ඇසිඩ් දුන්නෝ. His mother came towards the front of the house and then the four accused ran away. The deceased has stated that he thought that he was given acid because he had an argument with Lionel at a wedding some time back.

Police have visited the scene of the alleged offence (deceased's house) three days after the incident. They have not found any container or a jug in the deceased's house.

Having considered the three dying declarations said to have been made by the deceased the trial Judge has come to the conclusion that the glass or the jug containing acid had been given to the deceased by the appellant. I have already pointed out that the deposition of the deceased's mistress has been wrongly received in evidence by the trial judge. We do not know and we have no way to ascertain to what extent the trial judge's mind has been influenced by this inadmissible evidence. The trial judge also has failed to properly consider the effect of the different statements attributed to the deceased by his mother. According to her, the very first statement made by the deceased was වක්කරගෙන බිව්වා. But under cross-examination she has said that what the deceased said was " බුදු අම්මේ මාව බේරාගන්න. මට ඇසිඩ් පෙව්වා" These two statements cannot be reconciled. However in view of the learned trial Judge's acceptence of the deceased's mistress' evidence the trial judge has not attached much importance to this apparent contradiction.

It also appears that the learned judge has attached some importance to an opinion expressed by the doctor to the effect that there were no signs to indicate that the corrosive substance has been forcibly administered to the deceased but has consumed it due to ignorance "නොදනුවත් කමින් ශරීරගත කරගත යුතුයි." I cannot see how a doctor could scientifically give such an opinion. He certainly is competent to say whether there were signs, compatible with forcible administration of the substance or not. However he cannot say whether the corrosive substance has been voluntarily and deliberate-

ly taken with the knowledge of the real nature of the substance or whether it has been taken in ignorance of the real nature of the substance. For instance if a person deliberately takes a corrosive substance with a view to commit suicide, the burn injuries sustained by him cannot in any way differ from the injuries sustained when the substance is taken in ignorance of the real nature of the substance. In such a situation the real reason for the ingestion of the corrosive substance is a matter within the peculiar knowledge of the person who has ingested the substance. In this case the opinion expressed by the doctor that the substance had been taken in ignorance of the real nature of the substance is not an opinion the doctor could have expressed on any scientific basis.

Thus it is not an expert opinion but a mere guess and as such it is not an opinion a court should have considered at all. However as I have already stated above it appears that the trial judge had placed reliance on this item of evidence in coming to the conclusion that the deceased has ingested the corrosive substance without knowing the real nature of the substance.

The trial judge has also relied on the accused's failure to visit the hospital to see the deceased as an item of evidence of the subsequent conduct of the accused. It is implicit from the trial judge's reasoning that they did not visit the hospital to see the deceased due to their awareness of their guilt. The evidence that the accused did not visit the hospital to see the deceased came from the evidence of the mother of the deceased. There was no evidence that she was with the deceased from the time of his admission to the hospital upto the time of his death. Evidence relating to the accused's failure to visit the deceased could have come only from a person who was continuously with the deceased from the time of the latter's admission to the hospital upto the time of his death. Even if there is such evidence, the accused's failure to visit the hospital could have been due to reasons other than the consciousness of guilt for instance the embarassment caused due to a wrong accusation.

The trial judge has also come to the conclusion that when the deceased was crying in pain after ingesting the corrosive substance the accused have fled from the scene due to their complicity in the incident. The deceased in his statement has stated that when his mother came the four accused ran away. However the deceased's

mother has not seen the accused running away from the scene.

The prosecution has called Jayasena who first came to the deceased's house on hearing the cries of distress. The prosecution has treated him as an adverse witness. He has stated that on the previous day there had been a quarrel between the four accused and the deceased. The prosecution had not been able to contradict this evidence. This supplies a motive for the accused to administer a corrosive substance to the deceased. But motive is a double edged weapon. The deceased also could have had a reason to implicate the accused due to this reason. The learned trial judge had failed to consider this aspect when he considered whether there was any motive for the deceased to falsely implicate the accused. There is also another matter he should have considered in relation to the deceased's motive. The evidence in the case is that the deceased mother never thought that the deceased would die.

If the deceased voluntarily took the corrosive substance as his first words වක්කරගෙන බිව්වා indicate – a possible chance of survival would have exposed him to a possible charge of attempted suicide. In such a situation as a way out a person could have attributed the act to some other person to exculpate himself. The learned trial judge has failed to consider this aspect when he considered whether the deceased could have had a motive to falsely implicate the accused.

In this case the trial judge has erroneously admitted the deposition of the deceased's mistress. It appears that his mind was substantially influenced by her evidence. If he has excluded her evidence – as he should have done – he was left with the evidence of the deceased's mother as to what her son told her. There is a serious discrepancy in her evidence about the exact words used by the deceased when she first spoke to him. The trial judge has not paid much attention to this discrepancy - perhaps due to the impression created in his mind by the evidence of the deceased's mistress. We are unbale to decide what reliance the trial judge could have placed on the deceased's mother's evidence if he has considered her evidence without being influenced by the deceased's mistress's evidence.

The absence of signs to indicate forcible administration of the corrosive substance was compatible with voluntary ingestion as well as administration of the substance by deceit. The statement attributed to

the deceased වක්කරගෙන බිව්වා is compatible with voluntary ingestion. The trial judge has not considered this aspect. If the deceased has in fact stated වක්කරගෙන බිව්වා the trial judge should have considered why he changed this version subsequently.

A detailed and careful consideration of the matters set out above should have been necessary in a case depending solely on a dying declaration contrary to the very first statement said to have been made by the deceased. We are unable to say whether the trial judge could have come to the same conclusion if he had carefully considered the matters set out above. If he had a reasonable doubt about the correctness of the statement made to the police by the deceased the accused should have been entitled to the benefit of it and in such a situation a court could not have legitimately expected an explanation from the accused.

Taking into consideration all those matters it is our considered view, that it is unsafe to allow this conviction to stand. Accordingly we allow the appeal, set aside the conviction and acquit the accused-appellant.

FERNANDO, J. – I agree.

Appeal allowed.