GODAKANDA
VS
ATTORNEY-GENERAL

COURT OF APPEAL.
BALAPATABENDI, J.
BASNAYAKE, J.
CA PHC 194/05 (APN).
HC COLOMBO 2/904/2002.
SEPTEMBER 9, 27, 2005.

Penal Code-sections 102, 415-Indicted-Re-examination of witness-Application made by the prosecution to forward the questioned writing to EQD-Is it permissible ?- Evidence Ordinance, section 73-Methods of proving handwriting of a person- Proof by opinion ?

The trial Judge allowed the application of the prosecution made at the re-examination of the 4th witness to forward the questioned writing to the Examiner of Questioned Documents (E.Q.D.)

The accused-appellant moved in Revision.

It was contended that the High Court has no power to refer the writings to the EQD, such an order could only be made by a Magistrate at the investigation stage.

HELD :

(1) Our law recognizes two direct methods of proving the handwriting of a person :

(i) by an admission of the person who wrote it ;
(ii) by the evidence of some witness who saw it written.

(2) There are also three other modes of proof by opinion namely-
   (i) by the evidence of a handwriting expert (section 45)
   (ii) by the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question (section 47)
   (iii) opinions formed by Court on comparison made by itself (section 73).

(3) The High Court Judge was right in referring the disputed writing to the EQD for examination and report. Whatever opinion the EQD may express, it is for the Judge to decide the author of the disputed writings.

APPLICATION in Revision from an order of the High Court of Colombo.

Cases referred to :

1. State vs. Pali Ram – AIR 1979 SC 14 at 20.
2. Mailvaganam vs. Kandiah (1964) 66 NLR 427
3. Hira Lal Aggarawatte vs. State – AIR (1958) at 133
4. Kishore Singhe Deo vs. Prasad – AIR (1954) SC, 316
5. State vs. Paliram – AIR (1979) SC 14
6. Barendra Kumar Gosh vs. Emperor (1909) 11 Cr. LJ 453
7. R vs. Harvey (1989) 11 Cox cc 546
8. In Re Tilley (1961) 45 Cr App R 360
9. In Re Simith (1968) 52 or App R 848
10. In the O'Sullivan (1969) 2 ALL ER 237
11. In Re Simbodyal – The Times October 10 – 1991
12. In Re Jurner (1975) 1 QB 834
13. Kessarbai vs. Jethabai – AIR (1928) PC 277 at 281
14. Vander Hullsz vs. Attorney General 1988 2 Sri LR 414
15. R vs. Perera 57 NLR 449
16. Thuraisamy vs. Queen 54 NLR 449

Ranjith Abeysuriya, PC with Anil Silva and Dinal Phillips for petitioner.
Buwaneka Aluvihare, SC for Attorney-General.

Cur. adv. vult.

October 3, 2005.

ERIC BASNAYAKE, J.

The accused petitioner (hereinafter referred to as the accused) was indicted in the High Court of Colombo for committing an offence punishable under section 455 read with section 102 of the Penal Code for aiding and abetting to alter the original entry called *"Vensil"* to Apsara Venivel" in a document maintained by the Director of Intellectual Property. The indictment dated 23.5.2002 was handed over to the accused on 23.6.2002. The trial having commenced once before, started *de novo* on the application of the learned Counsel for the accused on 22.6.2005. The court having completed the evidence of three witnesses called the 4th witness and at the re-examination of the 4tn witness, an application was made by the prosecution to forward the questioned writing marked P2 ( ) (1) along with the specimen to the Examiner on Questioned Documents to compare and report. This was objected to by the defence. Anyhow this application was allowed by the learned High Court Judge. The accused in this application is seeking to revise the order of the learned High Court Judge dated 24.6.2005 on the grounds that :

(i) The order is bad as it was made after the trial had commenced.

(ii) Three years lapsed after the filing of the indictment.

(iii) The order permitted the prosecution to seek to remedy a weakness in its case.

(iv) No investigations can be permitted at this stage.

(v) Undue delay that would occur in concluding the trial would prejudice and inconvenience the accused.

When this case was called to support on 9.9.2005, the learned Senior State Counsel objected to the notice being issued on the Attorney General.

The indictment in this case is based on the entry marked P2 (1) (The main document being marked P2 and the relevant page containing the questioned entry No. 82287 marked P2. The 4th witness, namely, Mawanedasilage Princy, admittedly made entries in this register. The disputed entry had been made against the entry No. 82287 in the column under the heading for "short particulars". The entry as it appears at present is as follows

APSARA
VENiVE1

The witness Princy claimed responsibility for writing the letters "VEN" on the second row. She said the other letters, namely, APSARA/VE1, were interpolated by someone else. She categorically denied to having written the letters other than the three letters namely VEN. She did not say anything about the "1" which is found in the cage. Neither was she questioned about it by anyone. Under cross examination she had not changed her position. She said that she could not describe the similarities between the other letters she had written on the same page with that of the letters in the disputed writing.

Section 73 of the Evidence Ordinance is relevant which is as follows :-

> 73 (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.
>
> (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.

Sakaria J. states in *State vs. Pali Ram*[1] that "just as in English Law the Indian Evidence Act (which is identical to our Evidence Ordinance) recognises two direct methods of proving the handwriting of a person :

(i) By an admission of the person who wrote it.

(ii) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart there are three other modes of proof by opinion. These are :-

(1) By the evidence of a hand writing expert (section 45)

(2) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question (section 47)

(3) Opinion formed by the court on comparison made by itself (section 73)

All these three cognate modes of proof involve a process of comparison. In mode (1) the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (2) the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge or repetitive observance of the hand writing of the person concerned. In the case of (3) the comparison is made by the court with the sample writing or exemplar obtained by it from the person concerned" (emphasis added).

The learned counsel for the accused submits that the order of the learned Judge would cause grave prejudice to the defense due to the reason that the calling of expert opinion at this stage springs surprise on the defense. The learned Senior State Counsel submits that it is the unfair questioning of the defense counsel that prompted the prosecuting counsel in to making this application. While examining the evidence of this witness it appears that under cross examination this witness only confirmed what she said in examination-in-chief. She firmly stood by her evidence and admitted the three letters, namely, VEN were written by her and denied that she wrote the word APSARA and the letters VEI. She could not give the similarities and the differences between the disputed letters and the letters she had written elsewhere in that document.

It may not be pertinent to ask a witness to describe the similarities and the differences between the disputed writing and the admitted

writing. One can identify his or her own hand writing, but it is only an expert who is qualified to speak of the similarities and differences. It is these questions that led the prosecuting counsel to make an application to submit the writing to the E. Q. D. for examination and report. The learned Judge too would have thought of seeking a third opinion as a precautionary measure. Whatever opinion the E. Q. D. may express it is for the judge to decide the author of the disputed writings.

How could the accused be prejudiced ? It is the prosecution case throughout that the disputed writing was not written by the witness. The prosecution brought the best evidence to prove it. The witness denied the disputed writing in evidence. Therefore how could any reference to the E. Q. D. prejudice the accused ? If at all it is the prosecution that would suffer in the event the E. Q. D. identifies similarities.

The learned Counsel for the accused submits that the High Court has no power to refer the writing to the E. Q. D. He submits that an order could be made only by a Magistrate at the investigation stage. In *Mailvaganam Vs. Kandiah*[2] Alles J referring to section 73 states that "The words of the section are very wide and give the court the power to compel any person present in court, including an accused person, to give a specimen of his hand writing for the purpose of enabling the court to compare the handwriting of the suspect with the impugned writing". Section 73 entitled the court to assist itself for a proper conclusion in the interest of justice. *Hira lal Aggarwallar V. State* [3]. This section empowers any trial judge to direct any person present in court to write any words etc., for the purpose of comparison by the Court. From persons present in Court only during trial.

Persons are not brought to court by the police during the investigation stage to take down hand writings.

It has been decided in a number of cases that it is more appropriate if this comparison is done by experts. *Kishore Singh Deo vs. Prasad*[4], *State vs. Paliram*[5], *Barendra Kumar Gosh vs. Emperor*[6], *R vs. Harve*[7], *Tilley*[8], *Smith*[9],O' Sullivan[10] *Simbodyal*[11]. *Furner*[12] In *Kessarbai vs. Jethabai*[13] *Lord* Atkin observed "But their Lordships are unable to come to the same conclusion as the members of the Appellate Court. They would have thought it unsatisfactory and dangerous in any event to stake a decision in such a case as this on the correct determination of the genuineness of the signature by mere comparison with admitted signatures, especially without the aid of evidence of microscopic enlargement or any expert advice."

Therefore I am of the view that the learned High Court Judge was right in referring the disputed writing to the E. Q. D. for examination and report.

The learned Counsel for accused mentioned the cases of *Vander Hultsz vs. The Attorney General*[14], *R. vs. M. S. Perera*[15] and *Thuraisamy vs. Queen*[16] I am of the view th at these cases have no relevance to the present application. Due to the aforesaid reasons I am of the view that there is no merit in this application to issue notice on the Attorney General. Therefore notice is refused.

BALAPATABENDI J.—*I agree.*

Notice refused.

Application dismissed order of the High Court Confirmed.