In *Dakshina Ranjan Ghosh v. Omar Chand Oswal* [1] Sanderson C.J. said,—

"The decision of the learned Sub-ordinate Judge implies the importation of words into the section which cannot be found there. He would read the section as if it were ' in respect of any act purporting to be done by such public officer *bona fide* in his official capacity '. In my judgment it is not legitimate to construe the section by importing into the section words which do not appear in the section ".

In *Abdul Rahim v. Abdul Rahim* [2] there occurs the following passage in the judgment of Daniels and Neave JJ. :—

"The contention urged on behalf of the respondent in this Court is that which was adopted by the Court below, namely, that section 80 has no application unless the act complained of was done in good faith. On the language of this section the question seems to us to admit of no doubt. The section does not require that the act should have been done in good faith. It merely requires that it should purport to be done by the Officer in his official capacity. If the act was one such as is ordinarily done by the Officer in the course of his official duties and he considered himself to be acting as a Public Officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term ' purport '. The motives with which the act was done do not enter into the question at all ".

These cases were followed in *Muhammad Sharif v. Nasir Ali* [3] which was an action for malicious prosecution.

For the reasons given by me earlier in the judgment I would dismiss the appeal with costs.

PULLE J.—I agree.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1949 *Present :* **Jayetileke S.P.J. (President), Canekeratne J. and Gunasekara J.**

THE KING v. G. W. FERNANDO

APPEAL 29 OF 1949 WITH APPLICATION 72

S. C. 4—M. C. Colombo, 21,960

Court of Criminal Appeal—Evidence—Deposition of absent witness—Admissibility—Discretion of trial Judge—Circumstances for reviewing it in appeal.

The discretion of the court, under section 33 of the Evidence Ordinance, to admit in evidence the deposition of an absent witness on the ground that the presence of the witness cannot be obtained without unreasonable delay and expense may be reviewed by the Court of Criminal Appeal when a manifest injustice is disclosed.

[1] *(1923) Indian Law Reports, 50 Calcutta 994.*
[2] *(1924) All India Reporter, 46 Allahabad 851.*
[3] *(1930) All India Reporter, 53 Allahabad 742.*

APPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

E. D. Cosme, with *O. M. da Silva*, for the accused appellant.

H. A. Wijemanne, Crown Counsel, with *Ananda Pereira, Crown Counsel*, for the Crown.

Cur. adv. vult.

June 27, 1949. JAYETILEKE S.P.J.—

The main objection taken at the argument before us was that the deposition of Mr. Peterson, the assistant accountant of the Hong Kong and Shanghai Banking Corporation, was wrongly admitted in evidence. Mr. Peterson left the Island shortly after he gave evidence in the Magistrate's Court and, at the date of the trial, was employed at the branch office of the Corporation at Calcutta. The learned Judge admitted the deposition in evidence under section 33 of the Evidence Ordinance (Cap. 11) on the ground that the presence of the witness could not be obtained without an amount of delay and expense which, under the circumstances of the case, was unreasonable. Section 33 [1] reads :—

"Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable."

Ameer Ali [2] says :—

"The Court has no discretion as to admitting a deposition when the witness (1) is dead or (2) cannot be found or (3) is incapable or (4) is kept out of the way; the deposition of such witness is declared to be relevant and must therefore be admitted. The Court has such a discretion in the case of the circumstances mentioned at the close of the section."

Ameer Ali [3] says further :—

"The last ground for admitting the deposition of an absent witness is governed by three considerations,—the delay, the expense, and the circumstances of the case. Of the last 'one of the chief which the

[1] *Evidence Ordinance, section 33 (Cap. 11).* [2] *Law of Evidence p. 365.*
[3] *Law of Evidence p. 369.*

Judge has and ought to weigh, is *the nature and importance of the statements contained in the deposition*. It would be unreasonable to incur much delay and expense when the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial. On the other hand, 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, or has a very important bearing upon the guilt of the accused '. "

In *The King v. Beyal Singho* [1] the power of this Court to review the discretion exercised by the trial Judge where a manifest injustice is disclosed was recognised.

In the present case the main charge against the accused was that he had conspired with an unknown person to forge Mr. Peterson's signature and that of one of the receiving shroffs to a paying-in counterfoil (P1) acknowledging the deposit of a sum of Rs. 78,000 to the credit of his account with the Corporation. On this charge Mr. Peterson was a vital witness. In the Magistrate's Court he admitted that the signature on P1 looked like his but he denied that it was his. Mr. Nagendra, the Government Examiner of Questioned Documents, in his reports P26 and P27 stated that he was unable to say definitely whether P1 was a forgery but in the witness box he said " I reached the opinion that P1 is a forgery." The evidence on deposition (A5) of Mr. Muthukrishna, an expert on handwriting, shows that Mr. Muthukrishna was of opinion that P1 was not a forgery. In view of the similarity between the impugned and genuine signature of Mr. Peterson, and in view of the conflict of evidence between the two experts, we think that, in the interests of the accused, the jury should have been given the opportunity of seeing Mr. Peterson in the box.

No evidence was led as to what delay was likely to be occasioned by a postponement of the trial and as to what expense would have to be incurred to procure the attendance of Mr. Peterson. Having regard to the fact that Calcutta is about 12 hours flying distance from Ceylon we do not think that the delay or expense would be very much.

In *Empress of India v. Mula* [2] it was held that it is only in extreme cases of delay and expense that the personal attendance of a witness should be dispensed with.

We are of opinion that the deposition of Mr. Peterson was inadmissible under the circumstances of this case. We would set aside the conviction and sentence and send the case back for a fresh trial.

Sent back for fresh trial.

[1] *(1946) 48 N. L. R. at p. 25.*

[2] *I. L. R. 2 All. at p. 646.*