

1963 Present : Sansoni, J., and H. N. G. Fernando, J.

S. STEPHEN and 3 others, Appellants, and THE QUEEN, Respondent  
S. C. No. 60-63—D. C. (Crim.) Kandy, 739

*Evidence—Indictable offence—Deposition of a deceased witness—Mode of proving it.*

In a trial upon an indictment, the deposition made by a witness at the non-summary inquiry is not admissible in evidence after his death unless the original record of the non-summary proceedings is duly produced in evidence together with a certified copy of the deposition.

**A** PPEALS from a judgment of the District Court, Kandy.

*Colvin R. de Silva*, with *S. D. Jayewardene*, for the 1st Accused-Appellant.

No appearance for the 2nd Accused-Appellant.

3rd and 4th Accused-Appellants, in person.

*P. Colin-Thome*, Crown Counsel, for the Attorney-General.

November 11, 1963. SANSONI, J.—

Mr. de Silva has brought to our notice an irregularity which has taken place in the course of the trial. A witness, Abeyewardena, whose name was on the back of the indictment, had died before the trial began. The Crown Advocate who was prosecuting called evidence to prove the fact of death and then, according to the record, he moved to mark the deposition of the deceased witness, Abeyewardena, as P17 and to read it in evidence. He also moved to amend the indictment formally so as to include this deposition P17 as item 23 on the back of the indictment in the list of productions. The trial Judge allowed these applications.

But no witness was called to produce the deposition of the deceased witness made before the inquiring Magistrate. The correct course was for the original record of the non-summary proceedings to have been produced in evidence by the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record—See *The King v. Kadirgamar*<sup>1</sup>. A certified copy of the deposition should also have been produced by the witness. As these essential steps were not taken, the deposition was not in evidence.

We formally set aside the convictions in this case and send the case back for a re-trial before another Judge.

H. N. G. FERNANDO, J.—I agree.

*Case sent back for re-trial.*

<sup>1</sup> (1940) 41 N. L. R. 534.