1943
Dec. 3

KYRIACOS SAVVA v. REX.

[JACKSON, C.J., AND HALID, J.]

KYRIACOS SAVVA, *Appellant,*

v.

REX, *Respondent.*

(*Criminal Appeal No.* 1765.)

Deposition of witness taken in hospital—Cyprus Courts of Justice Order, Clause 124—*Notice to accused.*

Accused was charged with attempting unlawfully to cause death. On account of the condition of the man the accused had injured it was considered necessary to take his deposition in hospital. The accused was given only oral notice of the intention to take the deposition about half an hour before the time for taking it. Written notice under Clause 124 of the Cyprus Courts of Justice Order, 1927, was not given. The accused was present when the deposition was taken, and cross-examined the deponent. The deponent died shortly after. On the trial of accused for murder the admission in evidence of the deposition was objected to on the ground that clause 124 of the Cyprus Courts of Justice Order, 1927, had not been properly complied with.

Held : The deposition of a witness taken under clause 124 of the Cyprus Courts of Justice Order, 1927, is inadmissible in evidence unless written notice of an intention to take it has been given to the accused. The Court of Appeal will not set aside the conviction on the ground of the admission of such evidence unless it appears that the conviction depended upon its admission.

Appeal from the Assize Court held at Limassol.

Z. G. Rossides (with *S. Stavrinakis* and *A. Indianos*) for the appellant.

P. N. Paschalis, Crown Counsel, for the respondent.

The facts are set forth in the judgment of the Court which was delivered by :—

JACKSON, C.J. : This is an appeal from the Assize Court at Limassol where, on the 25th of May last, the appellant was convicted of manslaughter and sentenced to 15 years' imprisonment.

The grounds of appeal are :—

(*a*) that a deposition by the deceased man was wrongly admitted in evidence by the Assize Court, since the deposition had not been taken in accordance with the provisions of clause 124 of the Cyprus Courts of Justice Order, 1927.

(*b*) that, in convicting the appellant, the Assize Court relied wholly or in part on the evidence wrongly admitted.

It appears that the appellant was under arrest and in the custody of the police at the time that the deceased man's deposition was taken, having been charged with attempting unlawfully to cause the death of the deceased. The deposition was taken by the District Judge of Limassol in the District hospital, and the judge recorded that it was taken under clause 124 of the Cyprus Courts of Justice Order, 1927. The appellant was present and cross-examined the deceased.

It is in evidence that there was no affidavit of service on the appellant of notice to take the deposition, but there is no evidence on the record as to the notice given to him. It was, howeve

stated at the trial by Counsel for the Crown that there was no written notice, but verbal notice of " about half an hour's time ". Counsel further stated that written notice is never given.

It has been argued before us, for the appellant, that the reasonable notice required by the fourth paragraph of clause 124 of the Cyprus Courts of Justice Order 1927, must be a written notice, and reference was made to the case the *Queen* v. *Shurmer*, 17 Q.B.D., 1886 p. 323. That case turned on the interpretation of a section of an English statute, 30 and 31 Vic. c. 35, sec. 6, which contains a provision corresponding to the provision of the Cyprus law already quoted on the requirement of notice to the person against whom the deposition is to be read in evidence. In neither law is it expressly declared that the notice must be in writing.

In the English case a man was indicted for the rape of a girl who afterwards died. While he was under arrest and detained in custody by the police, he was told by a police sergeant that he was to be taken to the girl's house, where she was lying ill, for the purpose of taking her statement. He was taken to the house and was present during the recording of the statement and heard and saw all that took place. The girl's statement was admitted in evidence at the man's trial and he was convicted. The Court of Crown Cases Reserved held, by a majority of four judges to one, that the notice required by the statute must be in writing and that the girl's statement had been wrongly admitted. The conviction was quashed.

Mr. Paschalis, for the Crown, referred us to the case of *Rex* v. *Harris* in Vol. XXVI of Cox's Criminal Law Reports, at p. 143, and to clauses 104, 118 and 119 of the Cyprus Courts of Justice Order, relating to the taking of depositions. In the case of *Rex* v. *Harris* it was held that though a deposition might not be admissible under the act considered in the case of the *Queen* v. *Shurmer*, on the ground that written notice of an intention to take it had not been served on the accused, it might be admissible under another Act relating to the taking of depositions if the accused had full opportunity of cross-examining the witness. The Court then proceeded to consider the evidence before it on that point. The prisoner had actually cross-examined the witness, but, in considering whether she had had a fair opportunity to do so or not, Mr. Justice Avory said this : " No opportunity was given to her of securing the services of solicitor or counsel. I do not say that that is essential, but in determining whether there was a full opportunity of cross-examining I must have regard to the time at which the prisoner was first apprised of the intention to take the evidence. It was only an hour before the time she was in fact brought to the infirmary so, in my opinion, she had not a full opportunity of cross-examining the witness ". He therefore rejected the deposition.

In the case before us the appellant, like the prisoner in the English case, cross-examined the witness whose deposition was taken and while there is no evidence of the length of verbal notice given to him, there was a statement by Mr. Paschalis in the Court below that he had about half an hour.

It was not contended in the English case or before us or in the Court below that the statement in question was admissible as a dying declaration.

1943
Dec. 3

KYRIACOS SAVVA
v.
REX.

Guided by the authorities we have quoted, we are of opinion that the taking of the deposition of the deceased man in this case was governed by clause 124 of the Cyprus Courts of Justice Order, as indeed it was expressed to be in its caption, and that the deposition was inadmissible at the trial on the ground that written notice of an intention to take it was not given to the appellant.

There is nothing on the record to show that the Trial Court considered whether the deposition was admissible under other provisions of the law and they had in fact no evidence before them which would have enabled them to do so. Such information as they had all tended to shew that, in accordance with the opinion expressed by the Court in *Rex* v. *Harris*, quoted above, the accused had not had a full opportunity to cross-examine the witness.

While therefore we must decide that the deposition of the deceased man was wrongly admitted at the trial and that this particular point in the appeal must be decided in favour of the appellant, we have still to consider, under subsection 1 (c) of section 31 of the Courts of Justice Laws, 1935 to 1943, whether we should not dismiss the appeal on the ground that no substantial miscarriage of justice has occurred

For this purpose we have carefully reviewed the evidence and have heard the arguments of counsel upon it. We find that, quite apart from the deposition wrongly admitted, there was ample evidence before the Court upon which they must have reached the conclusion that they did. Their only reference to the deposition of the deceased in their judgment is as follows :— " The deceased in his deposition admits, at least, that he pushed the accused. From this we are inclined to hold that the blow which killed the deceased was struck during a heated quarrel in which weapons were used, and that the killing amounted to manslaughter, not murder ".

In fact the only significance which the Trial Court attached to the deposition, influenced the Court in favour of the appellant and in reducing the charge from murder to manslaughter.

For these reasons we are of opinion that this appeal must be dismissed.