Appellate Court Judgements

(Unreported)

2015

Criminal Law

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Colombo High Court Lawyers' Association

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Editor

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Section 241 of the Code of Criminal Procedure Act; The trial against the accused appellant was held in absentia. Only the evidence of the Gramaseva Niladari was led by the prosecution to satisfy the court on the fact that the accused appellant was absconding. Neither the evidence of any police officer nor the mother of the accused was led.

Held that, there had been no sufficient evidence before the High Court Judge to justify that the accused-appellant was absconding court and to make an order under section 241 of the Criminal Procedure Code to continue with the trial in absentia.

iii. Priyantha Peiris V AG CA 52/2012 **107**
Decided on 28/07/2015
H.N.J. Perera, J

Section 241(1) of the Code of Criminal Procedure Act; Only the evidence of the warrant executing officer had been led to satisfy the court that the accused appellant was absconding.

Held, that there was no concrete and cogent evidence before the learned trial judge to justify the order he made to commence the trial and proceed in the absence of the accused appellant.

Further held, delay alone should not prevent a party from seeking redress under revisionary jurisdiction from this court.

Section 32(1)(b)

iv. Tiran P.C. Alles Vs AG SC.FR 171/15 **113**
Decided on 02.09.2015
Sripavan C.J.

any Peace Officer may without an order from a 'Magistrate and without a warrant, arrest any person .....who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

Held, the burden is on the Peace Officer to place sufficient material to satisfy Court that the deprivation of petitioner's liberty is no arbitrary, capricious and unreasonable.

iv. Jagath Perera V Gothami Ranasinghe and 4 others SC FR 1006/2009 **183**
Decided on 15/12/2015
Sisira de Abrew, J

Petitioner had been arrested and his teeth were fractured as a result of using minimum force by the 2nd Respondent.

Held that, in a police station where there is a platoon of police officers, a police officer does not have to use such a high force to control an unarmed man. The Petitioner has suffered mental and physical torture and was subjected to cruel and inhuman treatment by the 2nd Respondent. Further held that it is the duty of the police to maintain law and order in the country and the police must take every step to instill confidence in the minds of the people in their day to day operation.

3. Grave Sexual Abuse

- **Chandrasomasiri V AG CA 191/2013** **53**
  Decided on 30/04/2015
  K.K. Wickramasinghe, J

Section 365 B (2)(b) as amended by Act Nos.22 of 1995 and 29 of 1998; There were some major Contradictions, omissions and also loopholes on the part of the case for the prosecution and no reasons were given for the belated statement of the victim and the delay of producing him to a doctor for the examination.
Held that it is unsafe to convict the accused appellant with the available evidence.

- **Don Gunapala alias Kade Mama V AG CA 219/2012** **65**
  Decided on 15/05/2015
  H.N.J. Perera, J

Section 365(b) 2(b) of the Penal Code as amended by Act no.29 of 1998; The main and sole witness in the case was the prosecutrix. Her evidence was not corroborated in any material.
Held that, an accused person in a charge of rape or of a similar offence can be convicted on the uncorroborated evidence of the victim only when her evidence is such a character as to convince the court that she is speaking the truth.
Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence, where such evidence is not credible.

4. Murder

i. Section 27 of the Evidence Ordinance

- **H.M.Anura V AG CA 300/2008** **17**
  Decided on 29/01/2015
  Anil Gooneratne, J

Section 27 of the Evidence Ordinance; Accused appellant was indicted for murder and robbery. The only item of evidence against him was a section 27 recovery.
Held that, a recovery made under section 27 of the EO would only demonstrate that the accused party had the knowledge and the whereabouts of the fact discovered. Based on that alone, it would be highly unsafe to convict the accused appellant.

ii. Section 33 of the Evidence Ordinance

- **MahindaJayaratne V AG CA(PHC)APN 49/2014** **29**
  Decided on 26/02/2015
  Chitrasiri, J

Section 33 of the Evidence Ordinance;The question arose was whether the accused had both the right and the opportunity to cross-examine the deceased witness whose statement recorded in the earlier proceedings was to be marked in evidence at the trial.
Held that the said right to cross examine was not in existence at the time her statement was recorded due to the express provisions found in section 7(1) of the Code of

- **Sunil Harischandra V AG CA 255/10** **49**
  Decided on 23/03/2015
  Vijith Malalgoda PC, J (P/CA)

Section 296 and 316 of the Penal Code; Injuries were caused to one witness by the accused appellant by using a razor as per her evidence. None of the witnesses had seen how the deceased received injuries and they were caused by a reasonably heavy weapon.

Held that the prosecution has failed to prove the murder charge beyond reasonable doubt.

- **Piyathissa V AG CA 45/2013** **73**
  Decided on 08/07/2015
  H.N.J. Perera, J

Section 296 read with section 32 of the Penal Code; There were three eye witnesses in whose evidence contradictions and omissions were marked by the defence at the trial. Also the defence was compelled by the trial judge to close their case on the same day when the counsel for the accused appellant moved for a date to call evidence for the defence.

Held that,

1.) the contradictions and omissions with regard to how they were able to identify the accused appellant under such circumstances are very material and important to determine whether the prosecution had proved the identity of the accused appellant beyond reasonable doubt.
2.) Injustice had been caused to the accused appellant who was facing the charge for capital punishment by being denied a fair trial

- **Mohamed Akram V AG CA 76/2013** **87**
  Decided on 17/07/2015
  H.N.J. Perera, J

Section 296 and 380 of the Penal Code; The prosecution case rests solely and squarely on circumstantial evidence. Identification of the jewellery, supposed to have been discovered under section 27 statement, was highly unsatisfactory.

Held that, the totality of the evidence led in this case does not lead to an inescapable and irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased.

- **Piyasena V AG CA 250/2012** **93**
  Decided on 20/07/2015
  H.N.J. Perera, J

Section 296 of the Penal Code read with section 32 of the Penal Code; Accused appellant was convicted for murder based on common intention.

Held that, the inference of common intention should never be reached unless it is a

necessary inference deducible from the circumstances of the case. There should be evidence direct or circumstantial, of prearrangement or some other evidence of common intention.

- **Thushan Kumara V AG CA 122/2014** **123**
  Decided on 10/09/2015
  H.N.J.Perera, J

Section 296 of the Penal Code; evidence of two witnesses was that they heard the deceased uttering "Kumara, don't kill us". There were two accused by the name of Kumara and none of the witnesses can with certainty identify which accused the deceased was referring to.

Held that, it is well settled law that when the conviction is solely based on circumstantial evidence, prosecution must prove that no one else but the accused committed the offence. Totality of the evidence led in this case does not lead to an inescapable and irresistible inference and conclusion that it was the accused appellant who inflicted injuries on the deceased.

- **Duwe Balage Dias V AG CA 53/2014** **141**
  Decided on 29/09/2015
  K.K.Wickramasinghe, J

Section 296 and 316 of the Penal Code; Re-trial; Evidence led by the prosecution is inadequate to support a conviction against the accused appellant. Only eye witness of the case, was not available to give evidence at the trial. Sending the case back for re-trial was considered.

Held that, appellant has already been in remand for 13 years to date. Keeping him in the prison for a long period will be worth at the end if the evidence given by this eye witness at the preliminary inquiry is strong enough to build a strong case against the appellant, however her evidence does not reveal any participatory presence of the appellant. Also this incident had occurred 17 years before. Therefore, it is not a fit and proper case for a re-trial.

- **Perumal Sivanandan and others Vs AG CA 72/2013** **167**
  Decided on 16/10/2015
  Vijith Malalgoda J

Section 296 & 315 of the Penal Code; Whether the procedure adduced by the learned High Court Judge is in violation of the rules of Natural Justice and also Article 4 of the ICCPR Act No . 56 of 2007.

Held that the assigned counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused.

In the instant case sufficient time was not allowed. No material as to show whether the copy of the indictment was served on the assigned counsel or not. The evidence of two lay witnesses, two doctors, two police officers and the registrar were concluded on the

same day. The learned High Court Judge had failed to afford a fair trial to the accused.

- **Tikiri Bandage Siripala Vs AG CA 127/2010** **171**
  Decided on 23/10/2015
  H.C.J.Madawala, J

Section 296 of the Penal Code; Failure to establish the identity of the corpus. Also contended that the items of circumstantial evidence are wholly inadequate to support the conviction.

Held the evidence in the case is not at all sufficient to warrant the application of Ellenbrough principle. It is not the function of a court to supply what is wanting or deficient in evidence. These principles cannot be called to aid to compensate laxity, negligence, ignorance and lethargy on the part of the investigators. The prosecution has failed to prove charges beyond reasonable doubt.

5. Poisons, Opium and Dangerous Drugs Ordinance

- **Suramya Damayanthi Perera V AG CA 320/2012** **61**
  Decided on 08/05/2015
  H.N.J. Perera, J

Section 54A(d) and 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance amended by Act No.13 of 1984; The learned trial judge in his judgment came to a conclusion that there are no vital contradictions in the evidence of the two main witnesses either inter se or per se eventhough he found himself that the evidence of those witnesses are inconsistent.

Held that, in this type of cases it is the evidence of the police officers who are trained officers of state are the main witnesses. Therefore the courts are duty bound to be careful in accepting and acting on the evidence on face value.

- **Asoka V Narcotic Bureau and AG CA 179/2013** **103**
  Decided on 24/07/2015
  P.W.D.C. Jayathilake, J

Section 54 of Poisons, opium and Dangerous Drugs (amendment) Act no.13 of 1984; Chief investigating officer who led the raid was not available to give evidence at the trial. WPC failed to answer some vital questions.

Held that, the court condones that a police witness testifying in court perusing notes of another police officer is not a healthy practice in criminal proceedings. Suspects are always helpless before police officers. Therefore, court should also be considerate about what suspects state without being attentive only to what police officers state.

6. Public Property Act

- **Wikrama Hennayaka V AG CA 148/1997** **147**
  Decided on 02/10/2015
  Vijith K. Malalgoda PC J (P/CA)

Section 5 (1) of the Offence Against the Public Property Act No.12 of 1982 read with section 386 of the Penal Code;

Held that,

1) The Learned Trial Judge has a duty to fairly and adequately consider the said defence before rejecting the same.
2) In order to constitute misappropriation under our law it is not necessary that there should be an innocent initial taking. If the initial taking of the property not in the possession of anyone is dishonest, then too the offence is made out.

7. Rape **43**

- **Kolamba Arachchige Sarath and another V AG CA 297/12**
  Decided on 12/03/2015
  P.W.D.C. Jayathilake, J

Section 364(2)(g), 380 of the Penal Code; A case of gang rape, robbery and house trespass with common intention for committing an offence; Identification of the offenders was in issue. Only evidence against the accused appellants was the direct evidence of Witnesses. But not only did they admittedly fail to mention the names of the offenders in the 1st complaint but also there were contradictions inter se in their evidence.

Held that, the accused appellants are entitled to receive the benefit of the doubt. The learned trial judge has acted on emotions as the crime was one condemned ethically by the society.

153

- **Heen Banda V AG CA 129/2013**
  Decided on 07/10/2015
  H.N.J. Perera, J

Section 354 and 365B(2)(b) of the Penal Code as amended by Act No.22 of 1995; Medical evidence does not support the evidence of the prosecutrix and therefore the case depended only on the evidence of the prosecutrix.

Held that, the evidence of the prosecutrix is not credible. And it is not safe to act on her evidence.

157

- **Rohana Peiris V AG CA 155/2014**
  Decided on 09/10/2015
  H.N.J. Perera, J

Section 364(1) of the Penal Code; Belated complaint, Medical evidence does not support the evidence of the prosecutrix.

Held that, an accused in a charge of rape can be convicted on the uncorroborated evidence of the prosecutrix only when her evidence is of such a character as to convince the court that she is speaking the truth. Prosecution in the instant case, does not satisfy the test of probability.

161

- **Ajantha Kumara Vs. AG CA 72/2014**
  Decided on 14.10.2015
  H.N.J Perera , J

Section 369 (3) of the Penal Code; The crucial issue was whether the prosecutrix had been subjected to sexual intercourse between the period as alleged by the prosecution. Medical evidence contradicted the prosecutrix's story.

Held that, the trial Judge has refrained from making any assertion in respect of the crucial issue. This non direction on the vital question of fact tantamount to a grave error of Law, which is sufficient to vitiate the conviction.

175

- **Jinapalge Sumathipala and others Vs AG CA 09/2013**
  Decided on 09/11/2015
  H.N.J.Perera, J

Section 364(2) (g) of the Penal Code; Gang rape; A belated complaint. Prosecutrix's story was not corroborated by the doctor.

Held that when the victim is not a credible witness it is not safe to act on the evidence of the victim. The evidence given by the Prosecutrix is not convincing and it is unsafe to convict on the uncorroborated evidence of the Prosecutrix.

8. Re-trial 47

- **H. Victor and 2 others V AG CA 231/2006**
  Decided on 19/03/2015

Vijith Malalgoda PC, J (P/CA)

Section 296 and 314 of the Penal Code; A trial before a Jury;

Held that, the inadmissible material placed before the jury during the trial had caused prejudice against the accused.

79

- **Susantha Perera V AG CA 122/2013**
  Decided on 09/07/2015
  K.K.Wickramasinghe, J

Section 364(2)(e) of the Penal Code as amended by Acts No.22 of 1995 and No.29 of 1998; Eventhough the accused appellant was initially charged under above section, at the conclusion of the trial he was acquitted of that charge and found guilty under section 345 of the Penal code. Counsel for the accused appellant raised a preliminary objection on the premise that the charge of the appellant that was ultimately found guilty of, is not a lesser offence of the charge of rape that he was initially charged with.

Held that, the learned High Court Judge had not taken steps to amend the indictment and read the new charge to the Appellant. Accused appellant was not given an opportunity to defend himself on the charge that he was ultimately convicted on. Re-trial ordered.

- **Mohamed Siras alias Jan V The Democratic Socialist Republic of Sri Lanka**
  CA 179/2010
  Decided on 11/09/2015
  H.C.J. Madawala, J

Section 54A(d) of the Poisons Opium and Dangerous Drugs Ordinance; Learned High Court Judge has taken into account information books notes and the substantive evidence given in court had been rejected on the strength of the I.B. notes.
Held that the trial judge in the present case has perused I.B notes not at the trial or inquiry but at the time he wrote the judgment. Although a trial judge is permitted to peruse the I.B notes for clarification, he should peruse the same at the trial or inquiry giving an opportunity for the defence counsel to examine and granting him an opportunity to cross examine if necessary. The trial judge has erred in that regard.

9. Robbery 97

- **Samarasekara and three others V AG CA 76/2012**
  Decided on 23/07/2015
  P.W.D.C. Jayathilake, J

Section 380 read with section 32 of the Penal Code; Identification of the accused; there is discrepancy between the evidence of two witnesses as to the act committed by the 4th accused appellant.
Held that, there is no evidence to convict the 4th accused for the charge of robbery.

10. Revisionary Jurisdiction 189

- **Ajith Priyankara V Urban Development Authority CA PHC APN 25/2013**
  Decided on 04/12/2015
  P.R. Walgama, J

Section 28A(3) and 13(4) of the Urban Development Authority Act; Revisionary Jurisdiction; Held that, the Revisionary jurisdiction is an extraordinary power that appellate court will exercise only in a situation where a irreparable damage or grave miscarriage of justice has occurred.

11. Sentence 19

- **Tenison Ridgway Kern V AG CA 222/2005**
  Decided on 30/01/2015
  P.R. Walgama, J

Section 456, 454 and 459 of the Penal Code; Accused Appellant did not challenge the conviction but only sought the sentence to be commuted to one of suspended sentence.
Held that, the accused appellant was a youth of 21 years at the time of the commission of the alleged incident, he has no previous convictions of this nature and has shown

remorse. It is a fit and proper case for a suspended sentence. 23

- **Abdul Rahim and others V AG SC Appeal 67/2011**
  Decided on 16/02/2015
  Aluwihare PC, J

Regulation 2 of Emergency (Restricted use of Outboard Motors) Regulation No.8 of 2006; There is an inconsistency between the Sinhala and English texts of the said Regulation.

Held that in the event of an inconsistency between texts of a statute or any other law, it is the Sinhala text that would prevail.

35

- **Samantha Sampath V AG SC Appeal 17/2013**
  Decided on 12/03/2015
  Eva Wanasundera, J

Section 364(2)(e) of the Penal Code; Minimum Mandatory sentence;

Held that, any mandatory minimum sentence imposed by the provisions of any ordinary law, is in conflict with Article 4(c), 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the judge hearing the case. Sentencing is the most important part of a criminal case and the judge who has seen, felt and smelt the case should be given the discretion in sentencing.

69

- **Sirisena Senadheera V AG CA/187/2009**
  Decided on 28/05/2015
  Vijith K. Malalgoda PC J (P/CA)

Section 303 of the C.P.C.; The charges had been hanging over him for well over 24 years. The accused was only 32 years old when he committed the offence and now he is 62 years old.

Held, Taking all these matters into consideration this court is of the view that the appellant should not be incarcerated for an offence committed 30 years ago. Ends of Justice will be met be substituting a team of 2 years rigorous imprisonment and suspend it for a period of five years from today. In addition a fine Rs. 15,000/- is ordered with a default team of six months simple imprisonment.

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

Kopiwattegedera Jayasinghe

ACCUSED-APPELLANT

C.A. No. 07/2011
H.C. Kandy 30/2009

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE : Anil Gooneratne J. &
P. R. Walgama J.

COUNSEL : Nimal Jayasinghe for the Accused Appellant
Dilipa Peiris S.S.C. for the Complainant-Respondent

ARGUED ON : 11.12.2014

DECIDED ON : 28.01.2015

Anil Gooneratne J.

This was a murder case, and the case had been originally heard in the High Court of Kandy. The proceedings of 28.11.2006 indicates that the indictment was read to the Accused-Appellant and he pleaded not guilty. On that day itself evidence had been led. This case at a certain stage was transferred to the High Court of Nuwara Eliya. Proceedings of 11.03.2010 indicates that the previous proceedings had been adopted and trial proceeded. The learned counsel for Accused-Appellant at the hearing of this appeal took up a preliminary issue and submitted to court that the required jury option as per Section 195(e)(e) of the Code of Criminal Procedure Act had not been complied with and moved that the conviction and sentence should be quashed and the case sent back to the relevant High Court for a fresh trial.

The learned Senior State Counsel however drew the attention of this court to the proceedings of 28.7.2010 (pg. 100) and submits that at the conclusion of the trial the learned trial Judge had inquired of the above fact from the parties concerned and it is recorded that the counsel who appeared for the Accused-Appellant had submitted that as from the beginning of the case the Accused had consented for a non-jury trial.

The question is whether at a very late stage such a requirement as in Section 195(e)(e) of the Code could be expressed to court? Further is it the position that the learned High Court Judge should as required by law find out from the Accused himself and record it in such a manner as the Accused had uttered to court by his own words, of a jury option.

In Nimal Bandara Vs. The State 1996(1) SLR 214 wherein it was held that the failure to comply with the Provisions of Section 195 sub-section (ee) and sub-section (F) is a fatal irregularity, at pg. 215 it is stated that at a trial before the High Court the court is required to inquire from the Accused whether or not he elects to be tried by a Jury ... This is a recognition of the basic right of an accused person to be tried by his peers .... In Wijesena Silva & Others Vs. A.G 1998 (3) SlR 309 ... held

(1) Court is required to inquire from the accused whether or not he elects to be tried by a Jury. This

is a duty imposed on the trial judge upon receipt of indictment. This duty implies no discretion

but a mandatory obligation on the part of the High Court Judge.

"This is a recognition of the basic right of an accused person to be tried by his peers". Per de Silva J.

"It can never be said that if an accused is defended by a counsel the Trial Judge is relieved of his statutory obligations. The right to be tried by a jury is not given to the counsel but to the accused person.

It is the duty of the trial Judge himself to inquire from the Accused- Appellant whether he needs to be tried by a jury or he prefers for a non-jury trial. It appears that such a provision need to be interpreted strictfy, may be because it is a basic right of the Accused. It is preferable to record it in question and answer form.

I also note in S.C. 24/2008 per J.A.N. de Silva J.

As long as it is in the statute book that the accused can elect to be tried by a jury the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non observance of this procedure is an illegality and not a mere irregularity.

The two important matters that emerge are

(a) Trial Judge has an obligation to inquire from the Accused whether he elects to be tried by a jury
(b) Judge has to inform the Accused that he had a right to that effect.

If (a) & (b) above are not adhered to, it could be argued that the Accused-Appellant had been denied a fair trial. The concept of a fair trial is imperative and recognized by the provisions and our Constitution, and could never be denied. What should be done at the beginning cannot be

done at the end. I do not think that a defect could be cured in the manner referred to in proceedings of 28.7.2010 (folio 100). Further it is important to record the very words uttered by the Accused-Appellant. There seems to be a clear breach of Section 195(e)(e) of the Code. Therefore we proceed to set aside the conviction and sentence and send the case back to the High Court for a fresh trial.

Fresh trial ordered.

JUDGE OF THE COURT OF APPEAL

P. R. Walgama J.
I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

H.M. Anura

APPELLANT

C.A. No. 300/2008
H.C.Avissawella No. 29/2002

Vs.

Hon. Attorney General
Attorney General's Department
Colombo-12

RESPONDENT

BEFORE : Anil Gooneratne, J. &
H.C.J. Madawala, J.

COUNSEL : Tenny Fernando for the Accused-Appellant.
Rohantha Abeysuriya D.S.G. for the respondent.

ARGUED AND
DECIDED ON : 29th January, 2015.

Anil Gooneratne, J.

The accused-appellant has been indicted on three counts in the High Court of Avissawella. Count No.1 relates to the murder of one Stephen Perera, an offence punishable under Section 296 of the Penal Code. Count No.2 refers to a case robbery amounting to a sum of Rs. 1050/= cash and cigarettes and a cassette recorder valued as described in the indictment in a sum of Rs.2500/=, an offence punishable under Section 380 of the Penal Code. Count No.3 relates to retention of stolen items as described in the said charge of the indictment. Learned Deputy Solicitor General submits to Court that Count Nos. 2 and 3 have been drafted in the alternative. We have heard both Counsel regarding the facts of this case. It is the position of the learned defence Counsel that the only item of evidence referred to by the prosecution is a Section 27 recovery. i.e. a recovery of a part of a cassette tape recorder. Both Counsel agree that the said item namely, a part of the cassette tape recorder does not belong to the deceased person. Evidence has transpired in the High Court that the cassette in question belongs to the bakery owner (as described in the indictment). The accused party as well as the deceased party were employs of the bakery run by a person called Hettiarachchige Sanath Chandralal (PW1). Learned defence Counsel emphasis the fact that the only item of evidence as stated above is a Section 27 recovery. Learned Deputy Solicitor General submits that the accused on the day of the incident has informed the owner of

the bakery that he intends to see a musical show at Biyagama and on that basis he had left the bakery in the evening. Both Counsel submit that the evidence that transpired in the High Court indicate that the deceased was on the day in question, was within the premises of the bakery. Learned Deputy Solicitor General submits that the personal effects of the accused party were removed. The above observation has been made by the police and the bakery owner. It is also submitted on behalf of the State that a book which was in the possession of the bakery owner containing particulars of the accused party more particularly, the page containing the name and address of the accused was torn. According to the submissions of learned Deputy Solicitor General the above are the only items of evidence that the prosecution has been able to place before the trial Court.

Learned defence Counsel submits that an omission has been highlighted in the trial Court as regards the position of the accused party leaving on the day in question to see a musical show. He also submits that another omission has been highlighted in respect of the missing piece of the cassette recorder. Learned defence Counsel submits that the above omission has been referred to by the learned High Court Judge and according the defence Counsel the 1st statement made by the complainant does not refer to any particular part of a cassette recorder. The dock statement made by the accused-appellant reveals that he has left the bakery due to the fact that he was not properly paid. That seems to be the explanation provided by the accused party.

In all the above facts and circumstances of this case, it would be highly unsafe to act on the evidence placed before the trial Court. In any event a recovery made under Section27 of the Evidence
Ordinance would only demonstrate that the accused party had the knowledge and the whereabouts of the fact discovered. Based on that alone, it is the view of this Court that it would be highly unsafe to convict the accused-appellant. The evidence placed before the learned High Court Judge does not indicate that the prosecution has proved its case beyond reasonable doubt. Material is not at all convincing to enable this Court to affirm the conviction. As such, we set aside the conviction sentence and proceed to acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.
I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Tenison Ridgway Kern

ACCUSED-APPELLANT

CA Appeal No. 222/2005
HC Colombo Case No. 9299/98

Vs

Honourable Attorney General

RESPONDENT

Before : Anil Gooneratne, J. &
P.R. Walgama, J.

Counsel : Dr. Ranjit Fernando for the Accused Appellant
S. Thrairajah, DSG takes notice on behalf of the Respondent

Decided on : 30.01.2015

P.R. Walgama. J.

The Accused- Appellant (herein after sometimes called and referred to as the Accused) has preferred the instant appeal against the judgment and the conviction of the Learned Trial Judge in the case bearing No. HC- Colombo- 9299/1998 by which judgment the accused was convicted and sentenced to 10 years of rigorous imprisonment and in addition a fine of Rs. 10,000/ carrying a default sentence of 1 year rigorous imprisonment.

The accused was indicted inter alia, on two counts, for making a forged document and there by committing an offence punishable under section 456 of the Penal Code and for using the said forged document as a genuine document, there by committing an offence punishable under section 454 and 459 of the Penal Code.

The facts stemmed from the case for the prosecution was thus;

The Accused was an assistant staff officer at Sampath Bank at the relevant period of which the said alleged offence was committed. It is also to be noted that along with him one Selvarajah was also employed as a Staff Officer at the said Bank.

The Accused attempted to debit a customer's account by tendering the said document which is a forgery. The alleged act of forgery was detected through the computer process. It is the position of the Defence that before any money was debited from the said account as it was detected no financial loss has been caused to the Bank.

It is pertinent to note that the Accused- Appellant does not challenge the conviction, nevertheless urged the sentence to be commuted to one of suspended sentence. The Counsel for the accused in making the above application has also adverted court to the following facts herein below mentioned.

That the vital evidence relevant to the matter in issue was prevented due to the absence of above said Selvarajah. Further the EQD's report was not an exhaustive, as there were infirmities such as uncertainty as to the forged writing. It is contended by the Counsel for the Accused that the Sampath Bank at the relevant period was a newly set up Bank and there were lapses and shortcomings in the process of issue of vouches and payments are concerned. Besides it said that the learned Trial Judge who delivered the judgment did not have the opportunity of observing the demeanor deportment of the prosecution witnesses.

The Counsel for the Accused -Appellant has stated the following facts to buttress the position of the Accused which warrants a non custodial sentence, that;

The accused was only 21 years of age and was engaged in employment for the first time.

The accused is now 44 years of age with a broken family as a result of this litigation and facing the agony of the mother suffering from terminal cancer.

Further it was stated in Court; that the accused repents for the said involvement and pleads for mercy. Counsel for the Accused has cited the following case law to fortify his claim for a non custodial sentence.

In the case of K.R. KARUNARATNE .VS. THE STATE- 78 .NLR- 413, it was held a long period of delay in concluding the case is a fact for consideration in deciding the nature of the sentence and is valid to impose a non custodial sentence, considering the nature and the gravity of the offence committed.

In imposing a suspended sentence Their lordships have observed thus;
'In the instant case it is viewed the charges had been hanging over his head for well over 20 years.' Therefore in the attended circumstances this Court is of the view, that it is justify to follow the rationale of the above case, in imposing a non custodial sentence in the case in hand.

It was also held in the case of ATTORNEY- GENERAL .VS. DEVAPRIYA -{1990} by Their Lord Ship SARATH .N. SILVA that a term of imprisonment is not warranted because (i) thirteen years has lapsed since the commission of the offence, (2) the will lose his employment and related benefits, (3) a substantial fine has been Imposed which would meet the ends of justice.

In a similar non custodial sentence was imposed in a case where the accused was charged for committing grievous hurt, convicted and sentence to a team of the months of rigorous imprisonment. Therefore it abundantly clear even a conviction of an offence, a jail term is imperative our superior courts had taken a broader view, by considering the future of the accused and the nature of the crime committed, in imposing a suspended sentence.

The above procedure was followed in the case of ANANDA .VS. ATIORNEY GENERAL-(1995) 2 SLR -315 which held thus;

a. An accused has a right to be tried and punished for an offence committed, within a reasonable period of time, depending on the circumstances of each case. A delay of over 18 years to dispose of Criminal case is much long period by any standard, delays of this nature are generally regarded as mitigating factors.
b. It appears that the appellant has turned over a new leaf.

More interestingly in the case of KUMARA .VS. THE ATIORNEY GENERAL -(2003) 1 SLR-139

A case where the accused was charged of murder. The accused pleaded guilty to the charge on the basis of a sudden fight. The learned Trial Judge in entering a conviction, sentenced the accused to seven years rigorous imprisonment. In addition a fine of Rs. 500/ was imposed, carrying a default sentence of six months rigorous imprisonment. In varying the above sentence by commuting the jail term to a suspended sentence Their lordship have observed thus;

A suspended sentence is a means of re- educating and re-habilitating the offender rather than alienating or isolating the offender. That no offender should be confined to, in a prison unless there is no alternative available for the protection of the community and to reform the individual,

Their Lordships were also of the view that suspended sentence with its connotation of punishment and pardon is supposed to have integrative powers.

It was contended by the Learned Counsel for the accused that at the time of the commission of the alleged incident that accused was a youth of 21 years, and has no previous convictions of this nature. In addition he had shown remorse and pleads for clemency.

In the above exposition of the facts and decisions of our Superior Courts in similar situations of this nature has adopted a broader view by commuting a jail term to a suspended sentence.

Therefore in the said back drop we are of the view that it is fit and proper to vary the sentence of the jail term to a suspended sentence. Hence the sentence is varied in part. Nevertheless the fine and the default sentence will stand as it is

Appeal is allowed in part.

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne. J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal to the Supreme Court

SC Appeal No. 67/2011
SC (SPL) Revision No. 187/2010
High Court Case No. HC-5309/10

Honourable Attorney-General
Attorney-General's Department
Colombo-12.

COMPLAINANT

Vs.

1. Ayiduroos Abdul Rahim
2. Shavul Hameed Nasir
3. Abdul Baffoor Amanullah
4. Sahibu Mohideen

1. Ayiduroos Abdul Rahim
No.2, Re-settlement Village
Aajarawatta
Norochchole.

2. Shavul Hameed Nasir
No.A1, Kandakuliya.
Kalpitiya.

3. Abdul Gaffoor Amanullah
Samagipura
Puttalam

4. Sahibu Mohideen,
No.8 7/1, Obanbaduda Road,
Puttalam.

Vs.

Honourable Attorney-General,
Attorney General's Department,
Colombo-12.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

1. Ayiduroos Abdul Rahim
   No.2, Re-settlement Village
   Aajarawatta
   Norochchole.

2. Shavul Hameed Nasir
   No.A1, Kandakuliya.
   Kalpitiya.

3. Abdul Gaffoor AmanulIah
   Samagipura
   Puttalam

4. Sahibu Mohideen,
   No.8 7/1, Obanbaduda Road,
   Puttalam.

ACCUSED - PETITIONERS- PETITIONERS

Vs.

Honourable Attorney-General
Attorney-General's Department
Colombo 12.

COMPLAINANT-RESPONDENT RESPONDENT

BEFORE : Priyasath Dep, PC. J
Buwaneka Aluwihare, PC J &
Sarath de Abrew, J

COUNSEL : Faiz Musthapha, PC for the Accused-Petitioners-Petitioners.
Ms. V. Hettige, SSC for the Complainant-Respondent-Respondent.

ARGUED ON : 10-12-2014

DECIDED ON : 16-02-2015

ALUWIHARE PC.J

The Accused-Appellants (hereinafter the Appellants) had been indicted before the High Court of Colombo for having been in possession of seven boat engines (outboard motors), exceeding fifteen horsepower, thereby violating Regulation 2 of Emergency (Restricted use of Outboard Motors) Regulation No.8 of 2006 (Hereinafter referred to as, the Regulations).

When the case came up for trial before the High Court on the 30th of November 2010, all appellants tendered an unqualified plea of guilty and the court proceeded to convict the Appellants and then were accordingly sentenced.
Each Appellant was imposed a three months term of imprisonment and a fine of Rupees five hundred thousand was imposed, with a default sentence of one year imprisonment. In addition the seven outboard motors that were in the possession of the Appellants were forfeited to the state.

The attention of this court was drawn to the Gazette Notification, bearing No.14 7/24 dated 29th December 2006 issued under the Public Security Ordinance (Chapter 40), under which the appellants were indicted.

In the English version of the Gazette Notification, Regulation No.6 reads as follows:-

"Any person who commits an offence under paragraph (2) of regulation 2, or paragraph (4) of regulation 3 or paragraph (2) of regulation 4 of the regulations, shall on conviction after Trial by the High Court established under Article 154P of Constitution for the Western Province Holding in Colombo , be liable to rigorous imprisonment for a term not less than three months and not exceeding five years and to a fine not less than Five Hundred Thousand Rupees and the outboard motor , water scooter or swimmer delivery vehicle used in or connection with the commission of the offender shall be forfeited to the Republic".

However in the Gazette Notification published in Sinhala Regulation No. 6 read as follows:-

"මෙම නියෝගවල දෙවන නියෝගයේ දෙවන ඡේදය යටතේ හෝ 3 වන නියෝගයේ 4 වන ඡේදය යටතේ හෝ 4 වන නියෝගයේ 2 වන ඡේදය යටතේ වූ වරදක් සිදුකරන යම් නැනැත්තෙකු සිදු කරන කොළඹදී පවත්වනු ලබන බස්නාහිර පළාත සඳහා අාණ්ඩුක්‍රම ව්‍යවස්ථාවේ 154 පී ව්‍යවස්ථාව යටතේ සිදුවන ලද මහඅධිකරණයක් විසින් පවත්වනු ලබන නඩු විභාගයකින් පසු වරදකරුවකු කරනු ලැබීමේදී මාස 3 ක නොඅඩු සහ අවුරුදු පහකට නොවැඩි කාල සීමාවක් සඳහා බරපතල වැඩ ඇතිව බන්ධනාගාර කිරීමකට හෝ රු.500,000 කට අඩු නොවන දඩයකට යටත් විය යුතු අතර එම වරද සිදුකිරීම සඳහා හෝ භාවිතා කරන ලද පිටත සවි කරන ලද එන්ජින් ජල ස්කූටරය හෝ පිහිනුම්කරුවන් රැගෙන යාමේ වාහනය ජන රජය වෙත රාජසන්තක කරනු ලැබිය යුතුය."

It was contended by the learned Counsel on behalf of the Appellants that the Regulation No. 6 referred to above the Sinhala text is different to that of the English text of said Regulation. In view of the inconsistency between the Sinhala and English texts of this Regulation, it was submitted by the Counsel that the publication in Sinhala is the authoritative Regulations and it is the Sinhala Regulations that should prevail in the event of an inconsistency. In view of the above, it was contended on behalf of the Appellants that the High Court is only empowered either to impose a sentence of rigorous imprisonment for a term not less than three (3) months and not exceeding five (5) years or to a fine of not less than Five Hundred Thousand Rupees, but cannot impose both, that is, a term of imprisonment and a fine. It was submitted that the imposition of three (3) months imprisonment and the fine of Rs. 500,0001 - on each of the appellants by the learned Judge of the High Court, by her order dated 30th November 2010, therefore is an illegal sentence.

When the matter came up before the Court of Appeal their Lordships made order, suspending the sentence of imprisonment of three months imposed by the High Court for a period of ten (10) years, but did not interfere with the fine of Rs. 500,000 that was imposed on each of the Appellant.

Thus the complaint in the main by the Appellants is that the Court of Appeal without considering the Regulation No. 6 of the Gazette Notifications bearing No. 1477/24 dated 24th December 2006, declined to interfere with the fine imposed on each Appellant, without giving any reasons.

Although the Appellants complain, that the Court of Appeal by its order dated 9th February 2011 suspended the sentence of imprisonment imposed on the Appellants but did not interfere with the fine imposed on each of the Appellants without any reason. It must be noted that the Appellants came before the Court of Appeal on the premise that the minimum mandatory sentence imposed by Regulation 6 of the Emergency (Restricted use of Outboard Motors) Regulations No.8 of 2006 is unconstitutional and is in conflict with Articles 4 (c), 11 and 12 (1) of the Constitution and therefore is illegal.

In fairness to their Lordships of the Court of Appeal it must be pointed out that the case on behalf of the Appellants was presented before the Court of Appeal on the above premise, citing the decision of this court in Reference No 03/2008, wherein this court held that a minimum mandatory sentence in a statute is in conflict with Articles 4 (c), 11 and 12 (1) of the Constitution and the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion.

It was also argued before the Court of Appeal that the sentence imposed by the learned trial judge on the Appellants was excessive, but the inconsistency of the texts in Sinhala and English versions of Regulation 6 in the relevant Gazette, was never brought to the attention of the Court of Appeal.

It is contended on behalf of the Appellants that in the event of an inconsistency between the texts of a statute or any other law, that it is the Sinhala text that would prevail and this court is inclined to accept the said argument. The learn d Senior State Counsel who represented the Attorney General also subscribed to the views expressed on behalf of the appellants. Thus, as the law stands, any person convicted of an offence under paragraph (2) of Regulation 2 or paragraph (4) Regulation 3 or paragraph 2 of Regulation 4 of Emergency (Restricted use of Outboard Motors) Regulations No. 08 of 2006, is only liable to be punished with a term of imprisonment referred to therein OR with a fine not exceeding Rupees 500,000 and imposition of a term of imprisonment and a fine would certainly be an illegal sentence.

Having considered the legal position as to the sentence referred to above, I make order setting aside the order of the Court of Appeal dated 9th February 2011.The fine of Rupees 500,000 imposed on each of the appellants by the High court by its order dated 30th November 2010 is also hereby set aside. Subject to the said variation the sentence imposed by the learned High Court Judge by the said order is affirmed.

It has been brought to the attention of this court that the Appellants have already served the term of three months imprisonment imposed on them. The High Court is further directed to verify this fact before the sentence is brought into operation. The appeal is partly allowed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C J
I agree.

JUDGE OF THE SUPREME COURT

Sarath de Abrew J
I agree.

JUDGE OF THE SUPREME COURT

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

T. A. Mahinda Jayarathne
Uda Thammita, Ganemulla
Kirindigalla
Ibbagamuwa .

ACCUSED-PETITIONER

C.A.[PHC] APN No.49/2014
HC.KURUREGALA
CASE NO. 151/2009
M.C.KURUNEGALA
CASE NO.NS.14/077

Vs

Hon. Attorney General
Attorney General's Department
Colombo 12

COMPLAINANT-RESPONDENT

BEFORE : K.T.Chitrasiri, J.
W.M.M.Malinie Gunaratne, J.

COUNSEL : D.Kurruppu with Nimali Chandrasekera for the Accused- Petitioner
Dilan Ratnayake SSC for the Complainant-Respondent

ARGUED ON : 21.11.2014

WRITTEN : 15.12.2014 by the Accused-Petitioner

SUBMISSIONS : 16.12.2014 by the Complainant-Respondent

DECIDED ON : 26.02.2015

K.T. Chitrasiri, J.

Accused-petitioner (hereinafter referred to as the accused) was indicted in the High Court of Kurunegala under Section 296 of the Penal Code for committing murder of Y.M.Ramani Dissanayake and under Section 300 of that Code for attempting to commit murder on E.M.Loku Menike. When the matter was proceeding before the learned High Court Judge of Kurunegala, prosecution moved to mark the statement (P4) given by Loku Menike at the non-summary inquiry. Said application had been made in terms of Section 33 of the Evidence Ordinance since Lokumenike has passed away by then. (vide at page 97 in the appeal brief) Learned Counsel for the accused objected to have the aforesaid statement of Loku Menike admitted in evidence since

no questions were put to her by the accused in cross examination. Learned High Court Judge of Kurunegala having overruled the objection by the accused made order permitting the prosecution to mark the said statement of Loku Menike for the reason that the accused had the opportunity to cross-examine Loku Menike at the non-summary inquiry though he has not made use of it.

Being aggrieved by the aforesaid decision of the learned High Court Judge, the accused filed this revision application and sought a direction on the learned High Court Judge preventing the statement of Lokumenike being produced in evidence under Section 33 of the Evidence Ordinance and accordingly to have the impugned order set aside.

Aforesaid Section 33 of the Evidence Ordinance reads thus:

> "Evidence given by a witness in a judicial proceeding, or before any person authorized 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 or expense which, under the circumstances of the case, the court considers unreasonable:
> Provided -
> (a) that the proceeding was between the same parties or their representatives in interest;
> (b) that the adverse party in the first proceedings had the right and opportunity to cross-examine;
> (c) that the questions in issue were substantially the same in the first as in the second proceeding. "

The above provision of law allows to admit evidence given in judicial proceedings as admissible for the purpose of proving the truth of the facts when that witness is dead, provided the said evidence had been between the same parties; and the accused had the right and the opportunity to cross-examine the witness whose statement is to be admitted in evidence; and that the issue was substantially the same in both the proceedings. Admittedly, both proceedings in this matter had been between the same parties and the questions/issues in those proceedings were substantially the same. Then the question arises whether the accused had **both the right and the opportunity to cross-examine** the deceased witness whose statement recorded in the earlier proceedings is to be marked in evidence.

I will first look at the issue, as to the **availability of the right of the accused to cross -examine** the witness. Therefore, it is necessary to consider whether the accused in this case had the right in law to cross examine Loku Menike at the non-summary inquiry held before the learned Magistrate. At the commencement of the non-summary inquiry, learned Magistrate has stated that he commenced the said inquiry under Section 146 of the Code of Criminal Procedure Act No.15 of 1979. (vide at page 42 in the appeal brief) Such a conclusion as to the applicable law

implies that the learned Magistrate may not have been aware of the significant change, namely taking away the right to cross examine the witnesses at the non-summery inquiry that came into existence with the enactment of the of Code of Criminal Procedure (Special Provisions) Act No.15 of 2005. Otherwise he would have stated that he is resorting to the Code of Criminal Procedure Act because the period of validity of the aforesaid Act No. 15 of 2005 has lapsed by then.

Section 6(3)(b) and 6(5)(b) of the aforesaid Act No.15 of 2005 have clearly taken away the right to cross-examine the witnesses by the accused or by his pleader at a non-summary inquiry.

Section 6(3) (b) of Act No.15 of 2005 reads thus:

> ***"The Magistrate shall not permit any cross -examination of the witness by the accused or his pleader,*** *but the Magistrate may put to the witness, any clarification required by the accused or his pleader of any matter arising from the statement made by the witness in the course of the investigation, or any additions or alterations to his original statement if any, and may put to the witness any clarification which the Magistrate himself may require of any such matter. Every clarification so made shall be recorded."*
> *(emphasis added)*

Section 5 (b) of Act No.15 of 2005 reads thus:

> ***"The Magistrate shall not permit any cross - examination of the witness by the accused or his pleader*** *but the Magistrate may put to the witness, any clarification required by the accused or his pleader of any matter arising from the account given, or additions or alterations made, by the witness or may put to the witness any clarification that the Magistrate himself may require of any such matter.*
> *(emphasis added)*

However, the aforesaid Act No.15 of 2005 was in existence only for a period of two years from the date of its coming into operation namely from 31st May 2005. Therefore, at the time Loku Menike gave evidence before the learned Magistrate, the right to cross examine witnesses at a non-summery inquiry ensured in the Code of Criminal Procedure Code No.15 of 1979 was not in existence. Therefore, one may come up with a strong argument that the learned Magistrate is correct when he decided to commence the non-summery proceedings under section 146 of the Code of Criminal Procedure Act No.15 of 1979.

Indeed, it is the contention of the learned Senior State Counsel at the argument stage of this appeal. He further submitted that the learned Magistrate has also given the opportunity for the accused to cross-examine Loku Menike since those proceedings had been conducted under the Code of Criminal Procedure Act.

However, it is necessary to note that another Act was subsequently enacted namely; The Code of

Criminal Procedure (Special Provisions) Act No.42 of 2007 whereby a provision similar to Section 6(3) (b) and 6(5) (b) of the Act No. 15 of 2005 have come into place with having retrospective effect. Accordingly, the provisions contained in the Act No. 42 of 2007 was effective from 31st may 2005 for a period of two years. Hence, it is clear that the **Parliament by introducing specific provision had clearly intended to take away the right to cross examine the witnesses at a non-summery inquiry** that included the matters which came up within a period of two years commencing from 31st May 2007. The law referred to above is clearly seen in Section 7(1) of the Act No. 42 of 2007 and it stipulates thus:

> "The provisions of this Act shall be in operation for a period of two years commencing from the thirty-first day of May, 2007"

The aforesaid Section 7(1) of the Act No.42 of 2007 clearly shows that the other provisions of the Act are applicable to the proceedings held before the learned Magistrate in this case as well. It is so, since the recording of the evidence of Lokumenike has taken place on 29.06.2007 which fell within two years from 31.05.2007.

In the circumstances, I will now turn to look at the law that should prevail when express provision is found to have retrospective effect of a particular enactment. Maxwell on The Interpretation of Statutes (Twelfth Edition) explains how it should be implemented.

> **Pending Actions -**
> *In general, when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights" (At pages 220 and 221)*

> **Procedural Act. -**
> *The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and* ***if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode.*** *"Alterations in the form. of procedure are always retrospective, unless there is some good reasons or other why they should not be". (At page 222)*
> *(emphasis added)*

> **Statute plainly retrospective -**
> *The rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it". And this, like the presumption itself, is in accord with the theoretical intention of Parliament for "allowing the general inexpediency of retrospective legislation, it cannot*

be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong". (At page 225)

When the law referred to above is implemented to the case at hand, it is clear that the **right of the adverse party to have an opportunity to cross-examine** as required by the proviso (b) in Section 33 of the Evidence Ordinance has ceased, at the time, the statement of Loku Menike was recorded since the said right to cross-examine was not in existence due to the express provisions found in the Act No. 42 of 2007.

Therefore, the Law referred to in Section 7(1) of the Act No. 42 of 2007 cannot be disregarded even though the certification of the Act has been on a date subsequent to the date on which the statement was recorded. Accordingly, it is my view that Sections 6(3) (b) and 6(5) (b) read with Section 7(1) of the Act No.42 of 2007 show that the right of the accused to cross-examine the witness Loku Menike at the non-summery proceedings had ceased at the time she gave evidence before the learned Magistrate.

Hence, the statement of Loku Menike recorded on 29.06.2007 at the nonsummary inquiry cannot be made admissible in evidence under Section 33 of the Evidence Ordinance since the right to cross-examine the witness Loku Menike had been taken away with the enactment of the Act No.42 of 2007 with retrospective effect.

For the aforesaid reasons, this application is allowed. Accordingly, the order dated 13.12.2013 of the learned High Court Judge is set aside. The Learned High Court Judge is directed, not to allow the prosecution to produce the statement of the witness Loku Menike in the proceedings against the accused-petitioner.

Appeal Allowed

JUDGE OF THE COURT OF APPEAL

Malinie Gunaratne, J.

I agree

JUDGE OF THE COURT OF APPEAL

IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter, of an Appeal with Special Leave to Appeal granted by Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 17/2013
S.C.Spl. LA No. 207/2012 C.A.No .. 297/2008
HC. Kurunegala No. 259/2006

Hon. Attorney General
Attorney General's Department,
Colombo 12.

COMPLAINANT

Vs.

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

ACCUSED

And Between

Hon. Attorney General
Attorney General's Department,
Colombo 12.

COMPLAINANT-APPELLANT

Vs.

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

ACCUSED-RESPONDENT

And Now Between
Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

ACCUSED-RESPONDENT - APPELLANT

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

COMPLAINANT-APPELLANT-RESPONDENT

BEFORE : Eva Wanasundera, PC. J
Sarath de Abrew, J. &
P. Jayawardena,PC. J.

COUNSEL : Nimal Muthukumarana for Accused-Respondent-Appellant.
Yasantha Kodagoda, DSG. for Attorney-General.

ARGUED ON : 05.11.2014

DECIDED ON : 12.03.2015

Eva Wanasundera, PC.J.

In this case, Special Leave to Appeal was granted on the questions of law contained in paragraph 21(a) of the Petition dated 01.10.2012. The said question is as follows:-

"Is the judgment of the Court of Appeal contrary to law and bad in law?"

The Attorney General who is the Complainant-Appellant-Respondent in this case (hereinafter referred to as the 'Respondent'), forwarded an indictment on 04.08.2006 against the Accused-Respondent-Appellant(hereinafter referred to as the "Appellant") to the High Court of Kurunegala for having, on a day between 01.08.2003 and 31.3.2004 committed the offence of rape punishable in terms of Section 364(2)(e) of the Penal Code with regard to W.C. Janitha Perera, a girl under 16 years of age. On 28.10.2008 when the case was taken up for trial in the High Court of Kurunegala, the Appellant pleaded guilty to the charge and the learned High Court Judge committed the Appellant on his own plea of guilt. Thereafter, the High Court imposed a term of 2 years rigorous imprisonment suspended for a period of 10 years and a fine of Rs.5000/- with a default . sentence of 1 year rigorous imprisonment and also ordered the payment of Rs.200,OOO/- as compensation to the victim of the crime W.C. Janitha Perera.

Being aggrieved by the punishment imposed on the Appellant by the High Court, the Respondent Attorney General preferred an appeal to the Court of Appeal. On 24.07.2012, the Court of Appeal pronounced the judgment setting aside the punishment in the nature of the suspended term of imprisonment imposed by the High Court and substituting therefor the minimum term of imprisonment that may be imposed for the offence, ie. 10 years rigorous imprisonment. However the Court of Appeal did not interfere with the fine and the order for compensation imposed by the Leamed High Court Judge. The Appellant has appealed from the judgment of the Court of Appeal and Special Leave was granted by this Court as aforementioned on one question of law .

The argument of the Appellant at the hearing of this appeal was that the judgment in the case of SC. Reference No. 03/2008 recognizes the imposing of sentences below the minimum mandatory sentence after considering the circumstances of the particular case and that the present case should be reviewed accordingly. The Appellant prays that this Court should exercise its discretionary power and affirm the High Court judgment which imposed a sentence below the minimum mandatory sentence to the Appellant setting aside the Court of Appeal judgment. The argument of the Respondent was that the judgment in SC. Reference 03/2008 with regard to the constitutionality of the penal provision in Section 364(2)(e) of the Penal Code amended by Act No. 22 of 1995 concerning the minimum mandatory term of imprisonment, is outside the jurisdiction of the Supreme Court and should therefore not serve as a valid or binding precedent. The Deputy Solicitor General further argued that upon the conviction of any person for having committed an offence in terms of Section 364 (2)(e) of the Penal Code, i.e. statutory rape', the Court is obliged to impose a term of rigorous Imprisonment which is not less than 10 years.

The facts in this case can be narrated as follows. The Appellant, a labourer in occupation had married the victim's sister. They had no children in that marriage. The victim's sister had left the country without the consent of the husband about an year after the marriage. The Appellant was then invited by the victim's parents ie. his mother in law and father in law, to come and live with them in their house. The victim was a 15 year old girl attending school. Only four of them lived in that house. The girl was found to be pregnant when her mother took her to the hospital when she was unwell. Then the pregnancy was 5 months old. The parents stopped her going to school; told the Appellant not to come home again; took her to another village and kept her there, with an older married couple who had no children, having in mind to hand over the baby to them when it is born. The parents did not go to the Police. The victim girl did not make any complaint at that time to the Police.

Most unexpectedly, some outsider had informed the Police of the area that the Appellant and the victim were mysteriously missing from that house. It is only then that the Police had launched an investigation and found that the girl was away in another house whereas the Appellant was living with his parents in his village close by. The statement made to the Police revealed that the girl was only 15 years old, and then the Appellant was taken into custody and was later enlarged on bail.

The victim gave birth to a baby girl on 19.07.2004 in the Kuliyapitiya Base Hospital. It is the Appellant who informed the Registrar of Births of the area that the baby girt was born, according to her birth certificate filed of record. It is mentioned therein that the father of the baby is the Appellant, A.M. Samantha Sampath and that the parents were not legally married. It is accepted that at the time of her birth, the baby girl Sanduni Wasana had a father, the Appellant and a mother, the victim.

The Attorney General forwarded an indictment to the High Court dated 04.08.2006. It was taken up for trial on 28.10.2008 for the first time. The Appellant pleaded guilty to the charge of rape of a girl below 16 years and he was subject to punishment by the High Court under Section 364(2)(e) of the Penal Code as amended by Act No 22 of 1995. The baby Sanduni Wasana is being paid maintenance by the Appellant and moreover he visits the school as the father of the child when called upon to do so; has arranged the transportation to and from the school and sends money to maintain the child. The High Court imposed a punishment of 2 years RI. suspended for 10 years and imposed a fine and compensation.

The Attorney General appealed against this sentence to the Court of Appeal. It was argued on 24.07.2012 and decided also on 24.07.2012, i.e. on the same day and the Court of Appeal set aside the suspended sentence and imposed a punishment of 10 years rigorous imprisonment. It is from that judgment that the Appellant is before this Court.

In my mind, the sole question to be decided is whether a mandatory minimum sentence imposed by statute i.e. Section 364(2)(e) of the Penal Code stifles the hands of the Court imposing the punishment thus taking away the judicial discretion in sentencing or whether Court is bound to impose the mandatory minimum sentence. Since the said sentence, according to the judgment of the Supreme Court in S.C. Reference 03/2008, is in conflict with Articles 4(c), 11 and 12(1) of the Constitution, the High Court held that it is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

I believe that every Judge who sits in a Court and hears the case in the Court of first instance gets the opportunity not only to hear the case but also to see the case with the physical eye, to smell the case, to feel the case and to fathom the case with the present mind. The Judge could hear the words of evidence and observe the body language of those who give evidence.

In this case, leave aside the victim of rape and the Appellant, there exists a child born into this world as a consequence of the sexual intercourse between the two and that child is a girl child who is now over 10 years of age. She is getting the benefit of the father and the mother as at present. The Appellant is willingly working for support of the child.

The Charter on the Rights on the Child as declared in the Children's Charter 1992 to which Sri Lanka has proclaimed to be a party, Article 03(2) reads thus:- "The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body ". Article 7 of the same reads:- uA child shall be registered immediately after birth and shall have the right from birth to a name, right to acquire a nationality and as far as possible the right to know and be cared for by his parents".

In the case of Dharma Sri Tissa Kumara Wijenaike Vs. Attorney General (SC. Appeal No. 179/2012- minutes of 18.11.2013) Justice Tilakawardane commented that "the decision appears to be based on the reality that the Court is the upper guardian of a child".

In the present case, there is an existing 3rd person in the picture, ie. the 10 year - old girl who is born and living in this world as a result of the victim and the Appellant having had sexual intercourse. It is the Appellant who is the father of the child who at all times concerned has truly and sincerely declared to be the father and is parenting and minding the child born to the victim. It is a special case where the Court has to give its mind to a 3rd party who happens to be in existence as a consequence of statutory rape to which the father of the child has pleaded guilty to. Supposing the Appellant is sent to jail for 10 years to come, the girl child of 10 years at present will not get the love and affection, care and support of the father to whom she looks up to at present and would not ever understand the concept of the State punishing him for 'statutory rape' committed on her mother, for which the girl is made to suffer for no wrong committed by her at any time in her life, during her prime childhood which is included in the 10 years of rigorous imprisonment i.e. until she is 20 years of age. This fact is a matter of grave concern of this Court as "the Court is the upper guardian of any child on earth".

I would like to analyse the judgment in the case of S.C. Reference 03/2008. It was matter of a Reference made to the Supreme Court in terms of Article 125(1) of the Constitution of th Democratic Socialist Republic of Sri Lanka, made by the High Court Judge of Anuradhapura inquiring "whether Section 364(2) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995 has removed the judicial discretion when sentencing an accused convicted of an offence in terms of that Section." The Learned High Court Judge had submitted her observations to the effect that the medical report negates the use of force and support the position that sexual intercourse had been consensual. The Supreme Court stated that even though the woman's consent was immaterial for the offence of rape when she is under the age of 16 years, a woman's consent is relevant for a Court, in the exercise of its discretion in deciding the sentence for such an offence. The High Court Judge had also noted that a custodial sentence of 1 0 yrs. R.I. would not benefit the complainant. The Supreme Court had also observed that there was no mandatory minimum sentence before the Amendment No. 22 of 1995 to the Penal Code, when it made the determination in SC Ref. 03 / 2008.

The Supreme Court considered Article 4(c), Article 11 and Article 12(1) of the Constitution, in S.C. Reference 03/2008. This case discussed many Special Determinations such as SC/SD 6/98, 7/98, 4/2003 and 5/2003 where it was decided that the Bills before Parliament in the respective Determinations which tried to impose 'mandatory minimum sentences' were held to be inconsistent with Articles 4(c), 11 and 12(1) of the Constitution. The reasons attributed to the said decisions were as follows:-

(a) The imposition of mandatory minimum sentences would result in legislative determination of punishment and a corresponding erosion of a judicial discretion and a general determination in advance of the appropriate punishment without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender and his age, and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence and the likelihood of reform and rehabilitation.

(b) The imposition of mandatory minimum sentences would result in imposing identical sentences in case where court thinks it appropriate and where Court thinks it most inappropriate which amounts to treating unequals as if they were equals, in violation of Article 12(1).

(c) The effect of imposition of mandatory minimum sentences would amount to an erosion of an essential judicial discretion in regard to sentencing. There would be gross disparities in sentences, which will not only violate the principles of equal treatment but may even amount to cruel punishment.

The Supreme Court held in S.C. Reference 03/2008 that "as far as Section 364(2)(e) of the Penal Code is concerned, the High Court has been prevented from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion due to the minimum mandatory punishment prescribed in Section 364(2)(e). Having regard to the nature of the offence and the severity of the minimum mandatory sentence in Section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution."

In the present case in hand, the learned Deputy Solicitor General argued that S.C. Reference 03/2008 judgment is contrary to the limitation on judicial review as contained in Article 80(3) of the Constitution and is therefore unconstitutional and outside the jurisdiction of the Supreme Court.

In that case, the Supreme Court also held that,

"Article 80(3) only applies where the validity of an act is called into question. However, Article 80(3) does not prevent a Court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a Court to determine the applicable law in the event of a conflict between two laws. This is a function that has been exercised by this Court from time immemorial".

I find that the issue in the present case is a conflict between the provisions in an ordinary law, ie. the Penal Code and the provisions in the Constitution. The Constitution is accepted as the Supreme Law of the country and the ordinary laws derive their validity from the Constitution. The provisions in the ordinary law should be interpreted in the light of the Constitutional provisions. The Constitution should be used as a flash¬light on the provisions of the ordinary law. Any mandatory minimum sentence imposed by the provisions of any ordinary law, in my view is in conflict with Article 4(c) 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the Judge hearing the case. For example, the State files criminal cases against persons in the society: then these persons face the charges in Court and defend themselves: at the time of conviction, Court hearing the criminal case has no doubt that the accused is guilty or not. If the State proves its case without any doubt, the suspect is found guilty; otherwise he is acquitted. Court has 'no discretion' in that part of the trial which is decided on the evidence before court. It is only in deciding on the punishment that the Court has a discretion. When a minimum mandatory sentence is written in the law, the Court looses its judicial discretion. That part of the

law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer. The Judge who has seen, felt and smelt the case should be given the discretion in sentencing, considering all the circumstances of the case, the consequences of a sentence, whether it serves as cruelty to the wrong doer, the victim or any other person affected by that sentence etc. Sentencing is the most important part of a criminal case and I find that provision in any law with a minimum mandatory sentence goes against the judicial discretion to be exercised by the Judge.

In the present case, we must look at the big picture with the victim of rape the Appellant, the father of the child born, and the 10 year- old girl child who was born into this world as a result of the victim having been raped. The victim of rape never complained to the Police until after a pregnancy of 5 months when Police on its own came to the victim in search of her when an outsider informed the Police of her missing from home. There was no chance for the victim to give evidence as the Appellant pleaded guilty to the charge of statutory rape of the victim. There is a bar for the victim and the Appellant to enter into a marriage as the Appellant is already legally married to the victim's sister who is living abroad. The child is being looked after by the Appellant father in the eyes of the society, and the child is dependent on the income earned by the Appellant.

In these circumstances I hold that the Learned High Court Judge had correctly imposed a suspended sentence of "2 years RI. suspended for 10 years". I agree with the decision of the Supreme Court in S.C. Reference 03/2008 and uphold the conclusion of that case that the minimum mandatory sentence in Section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

I set aside the judgment of the Court of Appeal dated 24.07.2012 and affirm the judgment of the High Court dated 28.10.2008. However, I order no costs.

JUDGE OF THE SUPREME COURT

Sarath de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

P. Jayawardena,PC. J.

I agree.

JUDGE OF THE SUPREME COURT

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

High Court (Kalutara)
Case No. H.C.395/04
C.A. Case No: 297/12

Vs..

1. Kolamba Arachchige Sarath
2. Kolamba Arachchige Siripala

ACCUSED

AND NOW

1. Kolamba Arachchige Sarath
2. Kolamba Arachchige Siripala
   Kithulgalvila, Mahagama

ACCUSED APPELLANTS

Vs.

Democratic Socialist Republic of Sri Lanka.

Respondent

BEFORE : H.N.J. Perera, J
P.W.D.C. Jayatidiake, J

COUNSEL : Charith Galhena for the Accused Appellant.
Shanil Kularatne SSE for the Respondent

ARGUEDON : 14.11.2014

DECIDED ON : 12.03.2015

P.W.D.C. Jayathilae. J

On 1st of May in the year 2000, 19 year old Nisansala went to bed with her husband Sunil Kumara at about 8.30 in the night. Nisansala was an employee at Body line Garments and her husband was an employee of Damro. They were suddenly woken up by a sound at midnight. When they came to open the door thinking that was the mother of Sunil Kumara who was residing close by, they have noted that the front door was opened. Then at once six persons, three from the front door and three from the back door entered in to the living room of their small house. Three of them dragged Nisansala to the bed room which was partitioned by polythene sheets while the other three were holding the husband in the living room. One of the persons entered in to the house was armed with a sword and others with knives. All of them were carrying torches.

The 1st and the 2nd Accused Appellants who were among the three persons who had taken Nisansala in to the bed room and raped her. They threatened her that she and her husband would be killed. Nisansala and her husband identified the 1st and the 2nd Accused Appellants when they removed the clothes which they have used to cover their faces. They robbed her gold chain and the pendant and it was revealed that they have also taken cash worth Rs: 2500/= collected in a till.

Kolamba Arachchige Sarath and Kolamba Arachchige Siripala respectively the 1st and 2nd Accused Appellants have been indicted on 6 counts punishable under the Penal Code. The charges brought against were being members of an unlawful assembly, punishable under Sec. 140, committing unlawful assembly with common intension to commit robbery punishable under Sec. 443 read with Sec. 146, committing robbery while being members of unlawful assembly punishable under Sec. 380 read with Sec. 146, committing gang rape punishable under Sec. 364(2), committing trespass by entering in to Nisansal's house with common intention for committing an offence, punishable under Sec. 443 read with Sec.32, committing robbery of jewellery worth Rs: 12,800/= and cash worth Rs: 2500/= punishable under Sec. 380 read with Sec.32, of the Penal Code.

After trial they have been convicted for all charges level against them and have been sentenced in the following manner.

The 1st and the 2nd Accused Appellants were sentenced for six months imprisonment for the 1st count. They were sentenced for five years rigorous imprisonment for the 2nd count. Ten years rigorous imprisonment and a fine of Rs: 10,000/= carrying a default sentence of three months simple
imprisonment, for the 3rd count. Twenty years rigorous imprisonment and fine of Rs: 20,000/= carrying a default sentence of three months simple

imprisonment and also a payment of compensation Rs: 400,000/= by each to the victim for the 4th and 5th counts. The trial judge has stated that no sentences would be passed for the 6th and 7th counts as they are alterative charges. The judge has further directed all the imprisonment sentences to be effected consecutively. Being dissatisfied with the convictions and the sentences the 1st and 2nd Accused Appellants have preferred this appeal.

The main contention of the counsel for the Accused Appellant was that there was a great doubt about the identification of offenders. Nisansala has come to reside in that place 8 months prior to the incident after her marriage. She had seen the Accused Appellants prior to the incident as they were the residents of that area, but she didn't know them by their names.

Nisansala's husband is a person from the same area and also a relative of the Accused Appellants and both the Accused Appellants were known to him from their childhood. The counsel for the Accused Appellants contended, if Nisansala and her husband identified the Accused Appellants at the time of the incident, names of the Accused Appellants would have been mentioned in the 1st complaint made to the police which has not been done. Even though Nisansala and her husband have identified the Accused Appellants at the identification parade there are contradictions inter say, in evidence and in the statements made at the identification parade, submitted the counsel.

The learned judge has analyzed the evidence of Nisansala and her husband together with the evidence of the Judicial Medical Officer and has come to the conclusion that there is no doubt that the incident of rape had taken place. He has rejected the allegation made on behalf of the Accused Appellants that they have been shown to the witnesses at the police station prior to the identification parade.

As there were no circumstantial evidence against the Accused Appellants the only evidence available was the direct evidence of Nisansala and her husband. The validity of the evidence of them entirely defends on the accuracy of the identification of offenders at the time of the incident. When considering the evidence of Nisansala and her husband as a whole it is obvious that all persons entered in to the house were covering their faces at the beginning. According to Nisansala she could identify the Accused Appellants when the face coverings come off. while she was being raped.

Incident of rape had taken place inside the bed room which was partitioned with polythene sheets. At that time Nisansala's husband was being held by some of the offenders in the living room.

It is not clearly mentioned the exact moment the Accused Appellants faces were seen by Nisansala's husband. He has admitted that he had known the Accused Appellants from their childhood, as they were residing about 400m away from their house. Furthermore he has admitted he did not mention their names in the complaint because he could not properly identify them.

Despite the fact that the Accused Appellants had alledgely been shown to the witnesses prior to the identification parade, identification of them in the parade couldn't be considered as an act of so much validity, because witness should have been aware that two neighbors had been arrested in this connection. If the police were able to take two persons into custody out of the six, the police could have been able to elicit several more matters with regard to the incident through these two persons such as the others involved, jewelry and money robbed and weapons and other materials used. However, the police have not discovered any of the above. It is a golden thread

spreading throughout the criminal law that a criminal charge has to be proved beyond reasonable doubt. If a reason can be pointed out that leads to doubt, it denotes whether the occurrence or existence of the incident has been proved beyond reasonable doubt.

In the instant case each and every point discussed above could be pointed to create doubt about the fact that whether the two persons arrested had actually committed the offence. Therefore, I am of the view that the Accused Appellants are entitled to receive the said benefit of doubt. As such, it appears

that the learned trial judge has failed to be mindful of the above state of affairs and has acted on emotions as the crime that had taken place was one condemned ethically by the society. Similarly, the civilized society accepts that one innocent person being convicted is worse than a thousand culprits being acquitted. Therefore, this court decides to set aside the conviction and the sentences imposed and acquit the Accused Appellants.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera J

I agree

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

H. Victor
H. Sumanadasa
H. Preethirathna

C.A. No.231/2006
H.C.Kalurtara No. 126/2002

PETITIONERS

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : Vijith K. Malalgoda PCJ (P/CA) &
H.C.J. Madawala, J.

COUNSEL : Tirantha Walaliyadde P.C. for the
Accused-Appellants
Dappula de Livera A.S.G. for the respondent.

ARGUED AND
DECIDED ON : 19th March, 2015.

Vijith K. Malalgoda P.C.J. (P/CA)

The three accused-appellants along with another accused was indicted in the High Court of Kalutara for the murder of Halwaturage Sirisena an offence punishable under Section 296 of the Penal Code and causing hurt to one Mallawarachchige Lalitha Padmini an offence punishable under Section 314 of the Penal Code. At the conclusion of the High Court trial before a jury by an unanimous verdict all three accused were found guilty on the first count and acquitted on the 2nd count. The 4thaccused was found not guilty on all counts. Being dissatisfied with the said order, the three accused-appellants had preferred this appeal to this Court. Learned President's Counsel appearing for the accused appellants at the very outset submitted that he would be challenging the conviction on the basis that lot of inadmissible material had placed before the jury during the trial and therefore it is unfair to stand the conviction against them. In support of his contention, he brings to the notice of this Court the evidence led at page 265 of witness I. P. Sivagurunathan who was the main investigating officer. I. P. Sivagurunathan in his evidence had submitted on 3rd October 1990 he was attached to Mathugama Police Station and around 9.50p.m when he was out on some official work he has met three persons namely, Halwathurage Surnanadasa, Halwathurage Victor and Halwathurage Preethiratne who are the accuseds in this case and when

questioned them, they informed him that one Sirisena had attacked them and they in return attacked Sirisena but they didn't know as to what happened to Sirisena. Learned Counsel submits that this evidence is inadmissible. He further submits that when the three accused were giving evidence on oath at the trial, they were cross-examined by the prosecutor and contradictions running into more than 60 were marked from their statement and he brings to the notice of this Court of the learned High Court Judge's summing up at page 798 where the learned trial Judge had referred to the above contradictions and informed the jury not to consider them as evidence but to consider the contradiction when considering the credibility of the accused's version. We in fact observed one such contradiction at page 415 of the brief to the effect "තමා මෙහෙම පොලිසියට කිව්වාද? ඊටපසු අපි සමඟ සිටි කාගේ හෝ පහරකින් ඔහුගේ ඔලුව තුවාලවී බිම වැටුනා" which was marked as P16 and submits that all this material was placed before jury and the jury was prejudiced against the accused when they found the accused guilty of the murder count. In support of his contention Mr. Walaliyadde President's Counsel for the accused-appellant brings to the notice of this Court several decisions by the Supreme Court and Court of Appeal including Ranjit Fonseka vs. The Attorney General 1990 1 SLR page 50 and King vs. Kalubanda 15 NLR page 422. Learned Additional Solicitor General at this stage concedes that inadmissible material had been placed before the jury, has caused grave prejudice to them, but Learned Additional Solicitor General's contention was that if the jury was properly directed, the jury wouldn't have come to the same conclusion, but would have come to a conclusion where the accused would be found guilty for culpable homicide not amounting to murder. Learned Additional Solicitor General submitted that this Court can consider the above and impose suitable sentence on the accused. Since the appellant in this case is insisting that this Court should consider the merits of this case and come to a finding whether the jury had come to a correct finding from the material placed before them, we are not going to consider the submissions of the Additional Solicitor General.

We are of the view that the inadmissible material placed before the jury during the trial had caused prejudice against the accused and therefore, we decided to set aside the verdict of guilty and order a retrial in this matter. The appeal is allowed and the conviction and sentence on all three accused are set aside. Registrar is directed to return this case record to the High Court of Kalutara and we direct the High Court Judge of Kalutara to expeditiously conclude this matter since the alleged offence was conunitted as far back as in the year 1990.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against an order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs,

CA No.255/10
H.C Balapitiya 587/03

Sunil Harischandra
Jayabima, Karandeniya.

ACCUSED

And

Sunil Harischandra
Jayabima , Karandeniya.

ACCUSED-APPELLANT

Hon. Attorney-General
Attorney-General's Department
Colombo 12.

RESPONDENT

BEFORE : Vijith K. MaJalloda PC J (P/CA)
H.C.J. Madawala J

Counsel : A.K. Chandrakantha for the Accused-Applicant
H.I Peris S.S.C for the Complaint- Respondent

Argued On : 13/02/2015, 20/02/2015

Decided On : 23/03/2015

Vijith K. Malalgoda PC J (P/CA)

The Accused Appellant was indicted before the High Court of Balapitiya on two Counts namely,

a) Committing murder of Ranasinghe Premadasa on 061h April 2004, an offence punishable under sec. 296 of the Penal Code.

k) Causing hurt to one Hewa Dewage Gunawathie during the same transaction, an offence punishable under sec. 316 of the Penal Code.

At the conclusion of a trial before the High Court Judge, the accused was found guilty on both counts by the learned High Court Judge on 21st October 2010 and sentenced as follows,

a) Count 1- Death Sentence

b) Count 2- 2 years Rigorous Imprisonment.

Being dissatisfied with the above order the Accused had preferred an appeal to this Court.

At the trial prosecution has led the evidence of Hewa Dewage Gunawathie injured and the wife of the deceased, Ranasinghe Jayaseeli daughter of the deceased and the injured. Wickramasinghege Ariyadasa, a neighbor and few official witnesses.

According to the evidence of Gunawathie this incident had taken place around 12.30 in the midnight. At that time she was sleeping on a mat in the sitting hall of her house.

Her daughter was sleeping on the bed in the adjourning bed room. When she got up from her sleep after hearing of some sound she saw the Accused who is her husband's brother's son,inside the house with the aid of a red color bulb burning beneath the statue of Lord Buddha. When she tried to switch on the light, Accused switched off the main switch and thereafter cut , her with a razor and ran away. She called her daughter and ran out of her house calling for help.

Witness Ariyadasa who is a neighbor of the deceased and Injured, confirms this position and said that the injured told him "හොරු ඇවිල්ලා අපිව කැපුවා" when this statement was confronted with witness Gunawathie, under cross examination by the defense her answer was

ප්‍ර:- තමන්ට යෝජනා කර සිටින්නේ හොරු පැන්නා කියලා කිවුවේ ඒ ආපු පුද්ගලයා හඳුනා නොගත් නිසාය කියලයි.

උ :- හොරු පැන්නා කියාලා කිව්වේ, නම කිවුවා නම් අපිට ජීවත් වෙන්න බැහැ. ඒකයි මම හොරු පැන්නා කියලා කිව්වේ.

(Page- 126)

According to the evidence of Inspector of Police Jagath Samarasinghe, he visited the injured Gunawathie at the hospital the following day but she was not in a position to make a statement but

he could obtain some information from her. He visited the house of the accused on the 6th itself but he was not found at home. The suspect was arrested on 8th of April two days after, by a different office.

Witness Jayaseeli has corroborated her mother and said that when she came to the sitting room there was some light similar to moon light inside the house and with the aid of that she could identify the accused who was struggling with her mother. She has seen the Accused leaving the house from the rear door.

According to the investigation, the person who has entered the house used the roof to enter by removing some roof tiles and the fact that there was moon light inside the house cannot be ruled out.
However, as agreed before us by both the counsel, non of the witness had seen how the deceased received injuries. His body was found outside the house with sharp cutting wounds caused by a reasonably heavy weapon (page 175)

ප්‍ර :- මෙම මරණකරුගේ මරණයට හේතුව වශයෙන් ඔබ මොකක්ද සඳහන් කලේ ?

උ :- සියලුම කැපුම් තුවාල සලකා බැලීමේදී පෙනී යන්නේ හොඳින් කැපෙන සුළු තරමක් බරැති ආයුධයකින් මරණකරුට පහර දීමක් සිදු වී ඇති බවයි. මෙම ආයුධය කැත්තක්, මන්නයක් හෝ කඩුවක් විය හැකියි.

Witness Gunawathie who received injuries had said that the Accused caused injuries on her body using a razor. No MLR was marked at the High Court trial in support of her injuries but according to a document marked P2 at the High Court trial, witness was admitted to the hospital on 6/04/1994 under BHT 21869 but the relevant document was destroyed after 5 years.

Even if this court decides to accept the version of witness Gunawathie to the effect that she was cut by the accused causing injuries to her, we have to further conclude that the weapon used by the accused at that time was a razor. None of the witnesses had neither seen any other weapon with the accused nor, the Police recovered such weapon at the scene of crime or from any other place during their investigation. This creates a serious doubt in our mind whether the injury caused to the Deceased was committed by the Accused or by any other person.

The Indictment against the Accused carried two simple counts of Murder and Causing Injury. They are not coupled with section 32 of the Penal Code to include "with another unknown to prosecution", since no such proposition is born out from the prosecution evidence. Under these circumstances I conclude that the prosecution has failed to prove beyond reasonable doubt the first count in the Indictment.

However both witnesses had managed to identify the accused as the person who inflicted injuries

on the injured. Accused is a known person to both the witness and non of the eye witnesses implicated the accused for the Murder of Premadasa. This Court is of the view that the witnesses were truthful witness and they only spoke of things, what they saw at that time. With regard to Count 2, in the Indictment, I see no reason to interfere with the conviction by the learned High Court Judge since there is sufficient evidence to find the accused guilty of Count2.

The Senior State Counsel brings to our notice the decision in Bandara Vs Republic of Sri Lanka, (2002 -2sri Lanka 277) and requested us to consider enhancing the sentence already imposed on count 2, even without an appeal from the state.

We observe at this stage, that the circumstances of the said case are different to the present case. In the case of Bandara Vs Republic the accused faced 16 charges, for causing death of 16 people by rash and negligent driving. The sentence imposed by the High Court was a jail term of 30 months on each count and the sentences to run concurrent. In that case Amarathunga J observed, "Therefore, in this case he deserves a longer Period of imprisonment.....to deliver a message to all those who have no respect for other persons right to life and property..... This Court will never hesitate to use its powers under section 336 in appropriate cases." The circumstance of the present case does not warrant such consideration. The accused was in remand since the date of conviction. i.e. 21.10.2010 considering all these facts we are not inclined to enhance the sentence imposed by the High Court. We set aside the death sentence imposed on count one and acquit the Accused from count one and confirm the conviction and sentence imposed on count two. The jail term of two years imposed on count two will operate from today. Registrar is directed to communicate this order to the High Court of Balapitiya and return the record to High Court of Balapitiya to communicate this decision to the accused and issue a fresh committal on the accused. Appeal is partly allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala,

I agree,

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against an order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Amarasinghe Arachchilage Chandrasomasiri,
KurudugahahenaJanapadaya,
455/ A, Kandewatta,
Arnithiriwela.

ACCUSED-APPELLANT

C.A.No : 191/2013
H. C. Kegalle No : 2573/06

Vs.

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : H. N. J. Perera, J. &
K. K. Wickramasinghe, J

COUNSEL : Harendra Perera for the Accused-Appellant.
Dileepa Peris SSC. for the Attorney General.

OARGUED ON : 03th March 2015

DECIDED ON : 30th April 2015

K. K. WICKRAMASINGHE, J

This is an appeal from a conviction for 'Grave Sexual Abuse' under sec. 365 B (2) (b) as amended by Act Nos. 22 of 1995 and 29 of 1998, at a trial held at the High Court of Kegalle.

The accused-appellant had made a dock statement denying the act of grave sexual abuse.

The learned High Court Judge, after considering the submissions made by both counsel for the prosecution and the defense, convicted the accused-appellant and imposed 15 years rigorous imprisonment with a fine of Rs. 10,000 and a default sentence of 2 years simple imprisonment.

The evidence relied on by the prosecution were; that the victim (first witness), Subasinghe Aarachchilage Pradeep Indika Subasinghe (then 12 years of age) and his brother (second witness) visited the accused's residence (a hut) to collect some books as informed by the accused with the consent of their father (third witness). The accused gave some money to the brother, who was then 9 years of age, to buy some goods and sent him to the shop. According to the evidence of the victim, after the brother left, the accused closed the door of the hut and has placed him on the bed. Thereafter the accused placed his male organ in between the legs of the victim, moved it up and down and he stopped the act after the sperms shredded all over the thighs of the victim. When the brother was coming back the victim was outside the hut with eyes filled with tears. Thereafter the accused had given some books, pencils, etc ... to both of them and then the victim had come home with his brother. In the evening he had narrated the incident to his father and the aunt (liangakoon Aarachchilage Indrani). After two days from the incident the aunt went with the victim and lodged a complaint about an 'attempt of a sexual attack'. No statement from the victim was recorded at that time. Hence the complaint was only in regard to an "attempt of a sexual attack" the matter was investigated by the minor crimes unit. The victim's statement was recorded after one month from the incident. Thereafter the police started the investigations. The victim was examined by the doctor after a month. The doctor was unable to observe any injuries on the victim.

However, in this case the accused neither gave nor called any evidence at the trial other than to prove certain contradictions in the evidence of the witnesses for the prosecution. In his dock statement he merely denied the allegation.

The accused appellant made the appeal on the basis that the prosecution had not proved its case beyond reasonable doubt' and the grounds for the appeal as mentioned in the petition of appeal are as follows;

a) The victim (first witness for the prosecution) has admitted a suggestion made by the defence counsel by saying that 'he does not remember the incident happened on that particular day completely.

   Thus, the evidence given by the first witness cannot be regarded as a credible evidence to convict the accused appellant. Therefore this creates a reasonable doubt where the privilege of the doubt should be given to the accused.

b) The second witness, the brother of the victim, has stated at the stage of preliminary examination that 'he was not aware of the incident that his brother had faced when he was going to the police station'. Therefore, the evidence of the second witness cannot be used to corroborate the evidence given by the victim.

c) Evidence of the third witness (the father of the victim) contradicts with the evidence given by the victim.

d) Even though the ninth witness, the then O. I.C, of the Ruwanwella Police Station stated that the 1st complaint on his behalf had been made by one Hangakoon Aarachchilage Indrani on 26.01.2002 and even though she was listed as a witness of the prosecution, she had never been testified before the court.

e) Until the inquires started on 28.02.2002 regarding the complaint made on 26.01.2002, no statement from the victim had been recorded and even though such a statement was recorded after a month from the first complaint, that statement contradicts with his oral evidence in court.

f) The tenth witness, the medico legal officer, by giving evidence, accepted that she. examined the victim after 1 and 1/2 months from the incident and further the medical legal reports also silent as to a sexual attack that had taken place or at least to any injuries which show any such attempts.

When we analyze the evidence given by the victim in court, as pointed out by the learned counsel for the accused-appellant, it is clear that the victim has stated that 'he does not remember the incident that happened on the particular day completely' as an answer to a suggestion made by the defense counsel. The answers he had given to the questions put to him at the stage of examination, cross-examination and re-examination also proves that he has given evidence without a clear memory of the incident.

At page 49 of the brief shows that the learned State Counsel has questioned the victim as to the date he made the complaint to the police. Thereby, accepting the suggested date by the learned State Counsel, he had stated in the court that he did make the complaint on 2002.02.28 which was two days after the incident. But according to the police report, as pointed out by the learned defense counsel at the stage of cross-examination (at pages 64 and 65), the complaint was made on 2002.01.26. and not in fact on 2002.02.28. On 2002.02.28 the victim has only given a statement to the police officer who was conducting the inquiries regarding the complaint made on 2002.01.26 by the victim's aunt. Furthermore the victim answering to a question raised by the learned defense counsel (at pages 65 and 66) has stated that in his statement to the police on 2002.02.28 he stated to the police that the incident happened two days before the date of the statement. But as the learned defense counsel had brought to the notice of the victim (at page 66) he in fact, in his statement to the police, has stated that the incident happened about a month before the date of the statement. Then in the court the victim had mentioned that he could not remember what he actually said to the police in this regard.

The victim answering a question at the examination in chief has stated that 'the accused removed his (the accused's) sarong completely and the accused was fully naked at that time' (at pages 56 and 57). This contradicts with his statement to the police. In his statement to the police he has stated that 'the accused raised his sarong up to his chest.

It is important that the victim giving evidence in court has stated (at page 58) that while the accused was committing intercrural sexual intercourse with him, he was lying on the bed upwards and the accused's face was facing down towards his face. This contradicts with his statement to the police on 2002.02.28. According to the statement, the victim has specifically stated that at the time of committing the offence, the victim was lying on the bed face down.

Fuurthermore, the victim has given evidence to the fact that when they were coming back home from the accused's hut, he told to his brother about the incident happened to him up to some extent (at page 61). But this contradicts with the evidence given by the brother (at pages 77 and 78). The brother in his evidence has stated that 'until he came home from the accused's hut he was unaware that such an incident had happened to the victim.

There is another very strong point which shows that this incident in issue was totally not in the memory of the victim at the time of giving evidence. There is evidence to prove that the victim was admitted to the Base Hospital Avissawella on 2002.03.01 and examined by Dr. W.M.D.T.P. Wijemanna on 2002.03.02. The victim has stated that he was not examined by a doctor at any time after going to the Ruwanwella police station and he did not go to any hospital (at page 63).

It is very important that the brothers evidence before court contradicts with his own statement to the police on 2002.03.01 regarding how he came to know about the incident that happened to the victim.

When the learned State Counsel asked what happened at the victim's home after they came from the accused's hut, the witness (brother of the victim) answering that particular question has stated that "aunt was at home and asked me to get ready to go to Ruwanwella at night". Then he has stated that after they came to the police only he asked what happened. However, that answer was not clear at all (at page 77). It is very important that in court, he has said that he was unaware of the incident happened to the victim until he went to the police station. This contradicts with his statement to the police on 2002.03.01. There he has stated that 'after they came home from the accused's home the victim divulged the thing done by the accused to him to the father and the aunt and then both father and the aunt went to meet the accused.

The victim while examining has stated that his father went to meet the accused after he divulged the incident that happened to him after coming back home from the accused's hut. But the father or the brother has not supported this evidence in court. None of them has given evidence stating that the third witness met the accused just after the victim informed him (the father of the victim) about the incident.

It is noted that according to the evidence given by the victim's brother, he has mentioned that they went to the police in the night (at page 77). However, it was proved that none of the members of the victim's family went to the police on the same day that the incident happened. So this cannot be the night of the day the victim and the brother came home from the accused's hut. On the other hand, if this witness was referring to the night of the day on which their aunt made the complaint (2002.01.26), it creates a doubt by his statement that he was unaware of the incident taken place inside the accused's hut to the victim as it was after two days from the incident. However, it is clear that he was not referring to the date that he made the statement to the police as that statement was given at 10.50 in the morning.

The second witness has also stated in court that 'when he was coming back to the accused's hut from the shop, the victim was walking down from the accused's hut with eyes filled with tears and then went to one 'Kandy aunt's' house which was about 100m from the accused's hut (at page no. 77). However, neither the 1st witness (victim) nor the second witness, in their statements said to the police, that the victim went to the house of 'Kandy aunt' just after the incident and also that this 'Kandy aunt' was not called as a witness at the trial.

When we consider the judgment delivered by the learned High Court judge it seems that she was misdirected by considering that the victim correctly admitted the suggestion made by the learned counsel for the prosecution regarding the date of first complaint and the date on which the incident happened. She has held that the evidence given by the second witness at the stage of cross-examination did not create any reasonable doubt on proving the evidence given by the victim. However, considering the evidence given by the second witness regarding how he came to know the incident the victim faced, and with regard to the things happened after both of them came home from the accused's hut, a doubt creates as to the delay of making the first complaint and the things happened after they came home.

It is important to note that the learned High Court Judge has failed to consider the fact that even though the first and the third witnesses has stated that they informed the incident to the 'grama niladhari' first and then upon his directions the complaint was made after two days from the incident this was not stated by any person to the police at any stage or the delay for the first complaint was not stated to the police at any stage. The fact of meeting the 'grama niladhari' has been told only to the court after 11 years from the incident. And it is doubtful because;

a) the victim, who didn't have any memory of going to a hospital or the fact that a doctor examined him remembered the fact of informing the incident to the 'grama niladhari' with all necessary information (the 'grama niladhari' was not present on the day after the incident, therefore they met him on the next day. Then he directed them to go to the police and that was the reason for making the first complaint two days after the incident) (at pages 62,69 and 70),
b) the third witness has never gone to the police station with regard to this matter even though the victim had complained to him about this incident on the same day evening and no statement was recorded from him by the police. As the learned defence counsel has argued, this behaviour of the third witness is doubtful as the father of the victim.
c) that particular 'grama niladhari' was not called as a witness by the prosecution.

Furthermore, the learned High Court Judge has applied the 'Ellenboro dictum' by sighting a list of cases to deny the dock statement made by the accused upon the ground that the prosecution had made a strong case before the court. When we consider all of the above mentioned contradictions and omissions, question arises as to whether the prosecution had made a strong case before the court.

In a criminal matter, the burden of proving lies for the prosecution to prove his case beyond reasonable doubt. In the case of Perera Vs. Naganathan {1964} 66 NLR 438 it was held that, an expression of preference of the prosecution story is not enough to fulfil the requirement of proof 'beyond a reasonable doubt'. The great scholar Glanville Williams in Mathematics of proof (1979) Crim. L. Rev. 297, 340, has explained the term "beyond reasonable doubt" as it must be "satisfied that you can feel sure",

The learned State Counsel sighting the case K. W.Rupasinghe alias Wilson Vs. The Republic of Sri Lanka CA 179/2005 has stated in the written submissions that it was decided; "when evidence of a victim of sexual abuse satisfies the test of probability and promptness it can be acted upon". The facts of that case and the base upon which the judgment was given in that case are much different from the present case. There the accused appellant had pleaded the defence of "allbl" and the main question in issue before the court was whether the accused appellant had entered the victim's room within that particular time period or not. In that case there were no questions as to any delay of making the first complaint or the absence of medical evidence. Furthermore, in that case the accused's evidence also supported the view that there was a possibility of him to commit that alleged offence within the alleged time period. On this behalf only the court had held that "when evidence of a victim of sexual abuse satisfies the test of probability and promptness it can be acted upon". Therefore, that cannot be applied to the present case.

The learned State Counsel has also pointed out in the written submissions that the accused in his dock statement has merely denied the allegation and he has given no explanation for the allegation levelled against him by the minor victim. As we have mentioned above, in Criminal matters the 'burden of proof lies on the prosecution. The defence has no burden to prove that he is innocent and the innocence of the defendant is presumed until proven guilty. However, according to the well established 'Ellenboro dictum', as pointed out by the learned High Court Judge, when the prosecution has established a strong case against the defence, the defence must produce an acceptable explanation to the court. If he failed to give such an explanation, that can be taken as a negative point against him. For example, in the case of Seetin Vs The Queen (1965) 68 NLR 316, the Court of Criminal Appeal accepted the directions given to the jury by the learned Trial Judge which stated that, "The burden of proving the case against the accused is on the Crown. There is no burden cast on the accused to prove their innocence. The accused are presumed to be innocent, and that is a presumption that continues right up to the end of the case. If, after a consideration of all the evidence, you come to the conclusion that the Crown has not proved its case beyond reasonable doubt, then the accused are entitled to be acquitted .... If you are satisfied that the Crown has proved beyond reasonable doubt that five accused entered the hut, and if you are satisfied that a prima facie case has been made out by the prosecution, then, you will ask yourselves the question: "Has the Crown proved its case beyond reasonable doubt?" And if the Crown has proved its case beyond reasonable doubt, you might be justified in asking

the question: "Is there not an explanation which we would have liked to hear from the accused?" "Would we not like to have known what the accused were doing that night?"."

When we apply this to the present case, it is clear that the fact of the mere denial of the allegation by the accused in his dock statement can only be considered when we are satisfied that the prosecution has proved its case beyond reasonable doubt.

In the present case there are some major contradictions, omissions and also loopholes on the part of the case for the prosecution as we have mentioned above. Mainly, according to the police evidence (fourth witness) the first complaint was made on 2002.01.26 by one Iliangakoon Arachchilage Indrani who was listed in the list of witnesses of the prosecution (at page 87) about an attempt of a sexual attack. However, this virtual complainant was not called up for the prosecution and has never testified before the court in order to obtain a clear clarification about the complaint made by her to the police.

The reasons given by the first witness and the third witness for the delay of the first complaint was doubtful and if the virtual complainant was called as a witness she would have given an explanation as to why she didn't make the complaint soon after the incident.

Furthermore, no reasons were given for the belated statement of the victim and for the delay of producing him to a doctor for the examination. According to the evidence given by the doctor, as a result of the delay there were no evidence of any injuries and therefore even the medico legal report (P1) was silent as to a "Grave Sexual Attack". This P1 would have been the best evidence to corroborate the evidence of the victim if the victim was produced before the doctor without any delay.

Accordingly, except the evidence of the victim which was with a lot of infirmities, there was no other evidence to prove the commission of the alleged offence beyond a reasonable doubt.

Therefore, it is unsafe to convict the accused appellant with the available evidence.

We acquit the accused appellant.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFFERED TO:

1) Perera Vs Nagana than (1964) 66 NLR 438
2) K. W.Rupasinghe alias Wilson Vs. The Republic of Sri Lanka CA 179/2005
3) Seetin Vs The Queen (1965) 68 NLR 316

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Maileen Arachchige Suramya Damayanthi Perera,

ACCUSED-APPELLANT

C.A.Case No:- 320/2012
H.C.Colombo Case No:-237/01

Vs.

Hon.Attorney General
Attorney General's Department,
Colombo 12.

Before : H.N.J.Perera, J. &
A.H.M.D.Nawaz, J.

Counsel : Neranjan Jayasinghe for the Accused-Appellant.
Shanaka Wijesinghe D.S.G for the Respondent

Argued On : 10.02.2015

Written Submissions : 26.02.2015

Decided On : 08.05.2015

H.N.J.Perera, J.

The accused appellant was indicted in the High Court of Colombo under section 54 A(d) & 54 A(b) of the Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for being in possession and trafficking 9 grams of heroin on or about 29.09.1999 at Mattakkuliya. The learned High Court Judge by his judgment dated 27.07.2012 found the accused-appellant guilty of the charges, convicted and sentenced the accused-appellant to Life imprisonment on each count. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The version of the prosecution was that on an information received from a private informant by S.I.Basnayake of the Police Nacotic Bureau arranged and conducted a raid. I.P.Nihal Perera with a police party which included S.I.Basnayake P.C. 19427 P.S.17859 Wickremasinghe, P.C. 30762 Senaratne, P.C.19427 Gamini, P.C.6486 Chaminda, P.C. 3024 Bandara, P.C. 25141 Guneratne and W.P.C.Priyani . They were all dressed in civil except for P.C.Gamini who was in the uniform. All of them including the informant left towards Mattakkuliya Samagipura in the vehicle No. 61-7856 at 14.45 and came up to the police post Mattakkuliya.

According to the evidence of I.P. Perera thereafter S.I. Basnayake and WPC Priyani with the

informant proceeded towards Wickremasinghe road on foot. Thereafter the informant proceeded alone towards Wickemasinghe pura and came back in a little while and informed I.P.Perera that the said woman was seen near the Budu Medura of the Housing scheme wearing a flowered dress and to go and search her. Thereafter I.P.Perera with S.I.Basnayake and W.P.C.Priyani proceeded on foot towards the said Housing scheme and saw a woman wearing a flowered dress near the Budu Medura. Witness Perera accosted the accused-appellant and discovered a rose coloured celephane bag in her right hand with heroin. Having taken the accused-appellant into custody the accused-appellant was taken to the Nacotic Bureau and the witness I.P.Perera testifies as to the sealing of productions and the witness WPC Priyani also refers to the acts of the main investigation officer IP Perrera with regard o the arrest, detection, sealing, and handing over productions to witness Sunil Perera .

Prosecution led the evidence of two witnesses who participated in the raid in order to prove the case beyond reasonable ground.

The learned High Court Judge in his judgment came to a conclusion that there are no vital contradictions in the evidence of the two witnesses either inter se or per say.

The defence case was that the accused-appellant was at home she heard someone knocking at her door. She opened the door and saw Wimal Perera and a group of persons in front of her door. They questioned her about the whereabouts of her husband and she said that he has gone to work. Thereafter they took her to custody stating that they were in fact looking out for her and that her name also appears in the list.

It is contended by the Counsel for the accused appellant that the learned trial Judge has arrived at the said conclusion without taking into consideration the following contradictions.

(1) According to SI Nihal Perera P.C Gamini was in uniform and according to witness WPC Priyani all the officers were in civil.

(2) According to SI Nihal Perera the informant was present from the time they left the Nacotic Bureau. And according to witness WPC Priyani the informant joined them on their way.

(3) According to SI Nihal Perera they had gone to Mattakkuliya area and the vehicle had been stopped near the police check point at Mattakkuliya. And according to him with him IP Basnayake ,WPC Priyani and the informant had got off the vehicle and four of them had walked about 75 meters in a wide road named Sri Wickema Road and reached a small road to their left side which is between two lines of houses. It was h evidence of IP Nihal Perera that police officers stopped near the entrance to the narrow road and the informant walked in to the lane and came back in five minutes and told that the accused-appellant is coming out from her house wearing a frock. According to the said witness Perera having given the information the informant left and that he with the witness Basnayake and WPC Priyani went in and took the accused appellant into the custody near the Budu Medura. According to WPC Priyani the vehicle proceeded in Sri Wickema road passing the police check point and stopped in a place in between two lines of houses. According to this witness she remained in the vehicle and the informant got off the vehicle and walked into the narrow

road and she was taken by Witness Nihal Perera only after the informant came back and gave the information of the accused-appellant to Witness Nihal Perera.

The WPC Priyani had categorically stated that the accused-appellant who was coming out of the house was shown to witness Nihal Perera by the informant.

The learned trial Judge after analysing the evidence of the two main witnesses for the prosecution has come to the conclusion that the evidence given by the said witnesses are inconsistent.

Section 134 of the Evidence Ordinance reads as follows:-

No particular number of witnesses shall in any case be required for the proof of any fact.

In fact as a matter of inveterate practice, more than cautiousness specially in drug related offences, where raids are conducted by trained police officers, it is fair to require corroboration. It is only then the defence will have the opportunity to challenge the veracity or the credibility of the prosecution witnesses and get an opportunity to contradict the said witnesses. To mark contradictions per se, where trained and experienced police officers give evidence in seemingly impossible. In this type of cases it is the evidence of the police officers who are trained officers of state are the main witnesses. Therefore the courts are duty bound to be careful in accepting and acting on the evidence on face value.

E.S.S.R.Coomaraswamy in The Law of Evidence Volume 2 Book 1 at page 395 dealing how the police evidence in bribery cases should be considered has stated as follows:-

"In the great many cases, the police agents are, as a rule unreliable witnesses. It is all ways in their interest to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinized. Particularly where their evidence is the only corroborating evidence of the evidence of the accomplice".

R.K.W.Goonasekera in his book "Bribery" at page 93 commented on this fact as follows:-

"More than once the Supreme Court has been disturbed by the tendency of trial judges to treat the evidence of prosecution witnesses in bribery cases with particular sanctity. In Mohamed Saleem's case the court observed that the evidence of prosecution witnesses does not carry any presumption of truth and should not be given undue weightage. In Siriwardene V. The Attorney General the Chief Justice cautioned trial judges against proceeding upon irrebuttable presumption that police officers engaged in the bribery commission's Department always speak the absolute truth as this would be to deny the accuse the opportunity of a fair trial."

By the same token the same principles should apply and guide the Judges in the assessment of evidence of excise officers in narcotic cases. In this case the prosecution has led the evidence of two witnesses who took part in the raid. The SI Perera's evidence is contradicted by the evidence of PWC Priyani in many aspects. There is a doubt as to who was speaking the truth whether it was SI Perera or the WPC Priyani. It is also not very clear whether at the time she gave evidence she

had the notes before her or whether she gave evidence from her memory. There is no clear evidence that the police received any information about a woman suspect at that time. When the evidence of the two witnesses is taken together their evidence contradicts each other. The learned trial Judge too has arrived at the conclusion that the evidence of the two main witnesses is inconsistence. There is a doubt as to whether the witness WPC Priyani was in fact present at the time of the arrest of the accused-appellant.

The evidence led by the prosecution indicates that the accused appellant had been taken into custody near her house. But strangely the police had not cared to search the house of the accused¬appellant. The accused-appellant has denied the fact that WPC Priyani ever arrested her or searched her. She has categorically stated that no WPC was present at that time. The accused - appellant has mentioned that Wimal perera has come to her house, obviously referring to SI Nimal Perera. It is very clear that the trial judge has rejected the evidence of the accused-appellant for trivial reasons.

The function of an appellate court in dealing with a judgment mainly on the facts from court which saw and heard witnesses has been specified as follows by Macdonnel C.J.in the King V. Guneratne 14 Ceylon Law Recorder 174:-

"I have to apply these tests as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact:

(l) Was the verdict of the judge unreasonably against the weight of the evidence,
(2) Was there misdirection either on the law or the evidence;
(3) Has the court of trial drawn the wrong inferences from the matters in evidence.

Similarly Wijewardene, J, stated in Martin Fernando V. Inspector of police, Minuwangoda 46 N.L.R.210, that:-

"An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight "Where "a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."

For the aforesaid reasons I find that it is unsafe to allow the conviction to stand. Accordingly I set aside the conviction and the sentence dated 27.07.2012.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

A.H.M.D.Nawaz, J
I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No.15 of 1979 as Amended.

Kinippuli Arachchilage Don Gunapala alias Kade Mama

ACCUSED-APPELLANT

C.A.Case No:-219/12
H.C.Gampaha Case No:-123/11

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Before : H.N.J.Perera, J & P.W.D.C.Jayathilake, J.

Counsel : Saliya Peiris for the Accused-Appellant
Dilan Ratnayake S.S.C. for the Respondent

Argued On : 29.01.2015/06.02.2015

Written Submissions : 19.03.2015

Decided On : 15.05.2015

H.N.J.Perera, J.

The accused-appellant was indicted on two counts in the High Court of Gampaha for committing the offence of grave sexual abuse on Hettiarachchige Navodaya Prabashini between the 1st of January 2011 and 17th October 2011, an offence punishable under section 365(b) 2(b) of the Penal Code as amended by Act No 29 of 1998.

After trial the learned High Court Judge convicted the accused appellant on the first count and acquitted him on the second. The accused-appellant was sentenced to 10 years RI with Rs.10,000/- fine. Being aggrieved of the aforesaid conviction and sentence the accused-appellant had preferred this appeal to this court.

The case for the prosecution was that the victim H.Navodaya Prabashini was 9 years old at the

time of the incident. It is her position that on this day she and her brother with two other children was playing near a Rambutan tree and when the other children went in search of the ball Gunapala alias Kade mama dragged her away and abused her. She says she was threatened not to tell her parents about the incident. She first stated that she was subjected to a similar incident twice. learned Counsel for the accused-appellant urged four grounds of appeal as militating against the maintenance of the conviction .It is submitted that the learned trial Judge has failed to consider the contradictions which went to the root of the case and also failed to -

(a) analyse the case for the defence including the evidence given by the accused-appellant

(b) failed to give reasons in his judgment for rejecting the defence version

(c) comply with section 283 of the Code of Criminal procedure Act No.15 of 1979 requiring giving reasons

(d) has deprived the accused a fair trial as envisaged by Article 13(3) of the Constitution.

The main and sole witness in this case is the prosecutrix in this case. Her evidence is not corroborated in any material or particularly by the other witnesses.

The doctor has examined Prabashini on 05.11.2011. At that time he was aware of the history narrated to him by Prabashini, to the effect that she was sexually abused by the accused-appellant on 11.10.2011 that is about six days prior to her10th birthday. The doctor has examined her after about three weeks from the date of the incident and had not observed any internal or external injuries on Prabashini. But he does not exclude the possibility of the offence being committed on Prabashini. In my opinion the medical evidence does not support the evidence of the prosecutrix. Thus the case depends only on the evidence of the prosecutrix.

In Premasiri V.The Queen 77 N.L.r 86 Court of Criminal Appeal held:-"In a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the jury that she is speaking the truth."

In Sunil and another V. The Attorney General 1986 1 SLR 230 it was held:-

"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused-appellant acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted even in the absence of corroboration."

I shall now consider whether the victim in the present case has given truthful evidence. The victim was only 9 years at the time of the incident. It was her evidence that she was praying with her brother and other two children near the Rambutan tree. When the other three children went in search of the ball the accused-appellant who she refers to as Kade Mama dragged her away in to the kitchen of his boutique and abused her. She says she was threatened by the accused-appellant not to tell this to her parents. She first stated that she was subjected to a similar incident twice, but in cross¬examination she said she was subject to abuse only once. The defence has marked this contradiction as V1 where she had told the police that on another day she went to the boutique with her brother and the accused-appellant having sent her brother away dragged her into the kitchen and molested her.

Witness Sanjeewani who is the victim's mother said that her daughter told her about the incident on 4.11.2011. She further state that her daughter came home around 2.pm . She said she went to the boutique leaving the daughter with her brother and came back within 15 minutes. Then her daughter said 'that a man showed a knife to her and called her". Witness Sanjeewani said her daughter had claimed that the man was on the other side of the window. It is clear that the mother had checked with others and has found out that there was no such person. Again in the evening the girl has claimed she could see someone waving at her with a knife in hand. She also has claimed that she saw someone hiding in the shrubs behind her house, which could not be seen by anyone else, and she got frightened by the same.

As contended by the learned Counsel for the defence, when this evidence is considered in the light of her mother's evidence it is apparent that the prosecutrix was suffering from some form of delusion or was imagining things. The accused-appellant gave evidence from the witness box wherein he denied the incident. He states that on the night of the 4th November 2011 he was set upon by the relatives of the prosecutrix who assaulted him and thereafter he was arrested. He claimed that there was an animosity with the prosecutrix's family over some money being owed to him.

In this case the prosecutrix's evidence is not corroborated by any other witness. Even the doctor's evidence does not directly support the evidence of the prosecutrix. The whole case depends on the sole evidence given by the prosecutrix. Has she given truthful evidence? Is it safe to act on her evidence without any other evidence to corroborate her evidence. I hold the view that an accused person in a charge of rape or of a similar offence can be convicted on the uncorroborated evidence of the victim only when her evidence is such a character as to convince the court that she is speaking the truth.

As contended by the Counsel for the accused-appellant I am of the view that it would be unsafe to convict the accused-appellant on the uncorroborated evidence of the prosecutrix. The evidence of the mother of the prosecutrix confirms the position that the prosecutrix was imagining or being delusional. The learned trial Judge has clearly failed to consider whether it was safe to convict the

accused¬appellant on the evidence of the prosecutrix in the light of his own finding that she was suffering from some mental confusion. The learned D.S.G also has conceded that the approach of the trial Judge in this case is not correct.

For the aforesaid reasons I find that it is unsafe to allow the conviction to stand. Accordingly I set aside the conviction and the sentence dated 03.09.2012, and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 331 of the Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs,

Sirisena Senadheera,
Dhunkalavewa Gedara,
Helambagaswala,
Thissamaharamaya.

ACCUSED

CA/187/2009
H.C Hambantota -02/2001

And,

Sirisena Senadheera,
Dhunkalavewa Gedara
Helambagaswala,
Thissamaharamaya.

ACCUSED-APPELLANT

Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

RESPONDENT

Before	:	Vijith K. Malalgoda PC J (P/CA) & H.C.J. Madawala J
Counsel	:	W. Dayaratne with Subash Gunathilaka For the Accused-Applicant Shanil Kularatne sse for the Respondent
Argued On	:	10.02.2015
Written Submission On	:	13.03.2015
Decided On	:	28.05.2015

Vijith K. Malalgoda PC J (P/CA)

Accused Sirisena Sendeera was indicated before the High Court of Hambantota on three Counts, namely; one Count under section 298 of the Penal Code for causing the death of one Thilakacharige Somadasa by rash and negligent act to wit. Connecting live Wires to a fence and two Counts of causing injuries to Thilkacharige Ariyasena and Thilakacharige Thedoris offences punishable under section 328 of the Penal Code during the same transaction.

The alledged incident had taken place on 7th March 1985 which is almost 30 years ago. At the High Court trial four lay witnesses namely, Thilakacharige Ariyasena, Thilakacharige Thedoris, Sundarabandarage Sapeena and Thilakacharige Somasiri and few other official witnesses had given evidence.

Deceased is the son of the injured Thedoris and witness Sapeena. Other injured Ariyasena is the brother of the Deceased and son of the other two witnesses.

According to the witnesses, the incident had taken place inside of an adjourning coconut Estate and all witnesses had gone near the fence after hearing cries of the deceased during the -night According to witness Ariyasena, after seeing his brother fallen inside the Estate he tried to help him through the fence and he too got electrocuted. This witness had taken different positions during his evidence and the trial Judge had disbelieved him and rejected his evidence with regard to the incident.

Witness Thedoris had taken up the position that when he tried to help the deceased he too got electrocuted. Non of these witness speaks as to the person who is responsible for this and as to how the deceased got electrocuted during the night.

According to the evidence of Sapeena she had seen the deceased son fallen inside the Land belonging to one Ariyawansa and as she observed some light is moving in the body, she suspected that her son was electrocuted and rushed to the "Dunkala Gedara" and requested the accused who was there to switch off the electricity. The suspect went behind the house and when she returned she noticed the people who gathered at the scene had taken the injured out of the Estate up to a bunt, in order to dispatch him to the hospital.

Witness Somasiri too had gone near"Dunkala Gedara" with his mother and requested the accused who was working there to switch off the Electracity.

Both these witnessés confirmed that the only person they saw at "Dunkala Gedara" on that day was the Accused. According to them the Land Lord Ariyawansa was not seen on that day.

The Appellants position before us was, that it is unsafe to conclude that it is the accused who is responsible for connecting the live wire to the fence even though it is a clear act of rash and negligent.

At the trial the Accused has made a dock statement. In the dock statement he had said that "he along with 4-5 others worked in this estate and the owner had gone to Kurunegala a week before entrusting him to look after the house. People called him and said someone has got electrocuted but, he is unaware of anything. Accused is silent on the fact whether he switched off the electricity or not.

Learned Senior State Counsel brought to the notice of this court the evidence of the investigation officer, with regard to the recovery of some wires from the scene of crime. (at page 140 of the brief)

ප්‍ර :- මොන වගේ කම්බියක්ද ?

උ :- හීන් කම්බියක්, ඉන් එක් කෙලවරක් වත්තේ පහලට වත්තේ මායිමට වන්නට වූ නෙරළු වැලකට ගැටගසා ඇත. මෙම ස්ථානයේ සිට නෙරළු වැලට මීටර් 67ක් දිගය. එක් කෙලවරක් ඔස්සේ ගිය විට නිවස දෙසට දිව යයි. මෙම හීන් කම්බිය මීටර් 63.7ක් පමණ ගිය විට එය කටු කම්බියකට යා කර එම කටු කම්බිය මීටර් 39ක් දුර ගිය විට නැවත හීන් කම්බියකට යා කර එම හීන් කම්බිය මීටර් 23ක් දුර ගොස් යකඩ කම්බියකට නැවත එම යකඩ කම්බිය මීටර් 36ක් ගිය විට නැවත අළු පාට පී.වී.සී. සින්ගල් 18 හීන් කම්බියකට යාකර එම හීන් කම්බිය මීටර් 59.2ක් දුරක් ගියවිට එම කම්බිය නැවත මීටර් 92ක් දුර ගියවිට සුදු පාට පැක්සිකල් වයර් 02ක් යාකර එම වයර් කෙළවර ආයකටුවකට සම්බන්ධකර නිවස පිටුපස ඇති බල්බයක හෝල්ඩරයක ඇති ජීව කම්බියකට සම්බන්ධ කර ඇති බව පෙනේ.

Learned Senior State Counsel further submitted that without the knowledge of the suspect such a thing cannot be carried out when the master of the house is away from the house nearly for one week as admitted by the accused in his dock statement. The evidence of Sapeena and Somasiri establishes the fact that it is the accused who switched off the connection when they made a request from him.

According to the evidence of ASP Eardly Fernando who was the investigating officer, the electricity connection obtained from a holder was connected to various types of wires including barbwire, had gone interior to the estate nearly 400 meters. It is understood from the above circumstances, the person who had masterminded the said operation, would have done it to protect the estate from thieves.

Even though right to protect property is guaranteed under our Law, the Law does not approw an act of this nature to protect somebodies property. The above act goes well beyond mere matter of compensation and shows disregard for the life and safety of the others which amounts to a crime against the state. As held in the case of Andrew Vs. DPP (1937) 2 All ER 556 'In order to establish Criminal Liability the facts must be such that, in the opinion of jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. (emphasis added)

When considering the evidence of Sapeena, Somasiri and Eardly Fernando I see no reason to interfere with the decision of the learned High Court Judge to convict the accused. The learned High Court Judge has imposed a sentence of 4 years Rigorous Imprisonment on count 1 and 6 months Rigorous Imprisonment on each counts 2 and 3.

As pointed out by the counsel for the Accused Appellant the offence had been committed in the year 1985, 30 years ago. The charges had been hanging over him for well over 24 years. The accused was only 32 years old when he committed the offence and now he is 62 years old.

Taking all these matters into consideration this court is of the view that the appellant should not be incarcerated for an offence committed 30 years ago. Ends of Justice will be met be substituting a team of 2 years rigorous imprisonment and suspend it for a period of five years from today. In addition a fine Rs. 15,000/- is ordered with a default team of six months simple imprisonment.

Sentence imposed on counts 2 and 3 will remain unchanged and will run concurrent to the sentence on the 1st count and that too will be suspended for 5 years. Subject to the above variations, the appeal is dismissed.

Registrar is directed to return this Record to the High Court of Hambantota for the implementation of the above order.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No.lS of 1979 as amended.

Korale Gedera Piyathissa,
Kethewatte, Hingula.

ACCUSED-APPELLANT

C.A.Case No:-45/2013
H.C.Kegalle Case No:-2737/07

Vs.

The Hon. Attorney General,
Attorney-General's Department,
Colombo 12.

RESPONDENT

Before : H.N.J.Perera, J. &
P. W .D.C.Jayathileke, J.

Counsel : Anil Silva P.C. with Niranjan Jayasinghe for the Accused-Appellant
Thusith Mudalige S.S.C. for the Respondent

Argued On : 27.01.2015/29.01.2015

Written Submissions : 20.03.2015/21.05.2015

Decided On : 08.07.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Kegalle for committing the murder of one Kapila Priyantha Padmakumara on 12.02.2003 thereby committing an offence punishable under section 296 of the Penal Code read with section 32 of the Penal Code. After trial the accused-appellant was convicted and sentenced to death on 05.06.2013. Being aggrieved by the said conviction and sentence the accused¬appellant had preferred this appeal to this court.

The prosecution has led evidence of three eye witnesses who are said to have seen the incident. The facts pertaining to this case and the back ground to the incident may be set out briefly as follows.

Gayani Rupika the younger sister of the deceased was a resident of the house where the incident had taken place. The said house is situated at Hingula by the side of the Kandy-Colombo road. The said house is situated about two to three feet from the main road. On the day of the incident at about 1.30 p.m in the afternoon the deceased was in the compound expecting the arrival of a three wheeler to go home. At this time a van came from the direction of Mawanella and stopped in front of the house. There had been five persons inside the van and three of them had got off the vehicle. All of them were wearing black gowns worn by Muslim women and their faces were also covered. By this time her elder brother had gone inside the house to feed the baby. One of the three persons who had got down from the van had shouted "he is the person, shoot him, shoot him". The deceased who was in the compound ran and jumped down the embankment. At that time two of the three persons gave a chase after the deceased.

By then the elder brother who was having meals inside the house had opened the doorand come out whereupon one of the persons who had arrived in the van had shouted "he is the person, shoot him". Then one of them had shot at the elder brother and the witness had identified the said person who shot at the brother as the accused-appellant. She was able to identify the accused-appellant as he was shooting the elder brother the mask he was wearing came out as a result of the gun hitting it and it fell on to the ground. According to witness Gayani the person who first shot the deceased also shot the elder brother Wimalasena.

According to this witness she was able to identify the person who first shot the deceased and thereafter her brother Wimalasena as a result of the face cover which the accused-appellant was wearing had fallen to the ground .

Witness Wimalasena the elder brother of Gayani had stated in evidence that he heard a gunshot and has come out of the house and seen a white van parked by the side of the road and three persons in the compound and two of them carried guns. They were wearing the dresses worn by Muslim women and their faces were covered with black colored nets. As he came out of the house he saw his brother the deceased run from behind the house towards the stream. Then another shot was fired but was not sure as to who fired the shot as there were two persons with guns. According to this witness his brother had jumped in to the stream and he noticed that the black colored net which was covering the face of the accused-appellant was removed. He was clearly able to identify the accused-appellant who shouted saying "shoot the other person too", The witness at this stage is said to have inquired from the accused appellant as to what wrong he has done. Just then the other person had fired at him and it struck the wall.

The other witness the wife of the witness Wimalasena, Sudu Menike too had been in the compound looking at the Mango tree from which branches were been cut. She had seen a white coloured van and there were two persons inside the van. She has also seen three persons clad in the dress of Muslim women in the compound. She had identified the accused-appellant when his cap fell down.

When one analyze the evidence given by these three witnesses some common factors have been revealed by them. The perpetrators had come in a white colored van. Some of them had been dressed in black colored gowns the Muslim women wear. They had their faces covered in black nets. The deceased had been in the compound and had run towards the stream when they fired at him. They have also fired at the witness Wimalasena when he came out from the house. Thereafter they gave a chase after the deceased who ran towards the stream and fired at him.

According to all three witnesses they were able to identify the accused appellant who came to their compound dressed like a Muslim woman and covering his face because the net he was wearing to cover his identity came out as a result of the gun he was carrying accidentaly hitting his face. It is very clear from the evidence given by these witnesses that the perpetrators clearly wanted to hide their identity from the witnesses. The witnesses identified only one person and that is the accused¬appellant. The three witnesses were able to identify the accused-appellant because the .net he was wearing to cover his face came out suddenly. According to witness Gayani it fell down and the accused¬appellant immediately wore it back. That would have not taken even a minute. It is not the position of the said witness that the accused appellant thereafter stayed or remained without covering his face throughout the incident.

According to the said witness Gayani the accused-appellant had been wearing a mask and it fell on to the ground when the accused-appellant was shooting the elder brother Wimalasena. It is her position that the accused-appellant put it on immediately.
But witness Wimalasena contradicts this position by saying that he saw the accused-appellant near the stream with another person when the deceased was shot at and that the accused-appellant's face was not covered. By that time the face cover or the black net the accused¬appellant was wearing to cover his face was not to be seen.

According to Sudumenike, the wife of witness Wimalasena her husband has not come out of the house as the perpetrators had fired at him when he opened the door She has further stated that the witness Wimalasena had pulled the sister inside the house and closed the door. Witness Sudumenike had further stated that the accused-appellant was wearing a hat to cover his face but she was able to see the bearded face of the accused-appellant as the hat fell on to the ground. It is to be noted that according to witness Gayani the accused-appellant had his face covered with a black net. And further she does not state that the accused appellant was wearing a cap at the time of the incident.

Counsel for the accused-appellant at the trial has marked several . omissions and contradictions made by the prosecution witnesses in their statements to the police.
The witness Sudu Menike had stated in her evidence that she was able to identify the accused-appellant as a result of the cap he was wearing coming off, and that she was able to see the bearded face of the accused-appellant. According to other witnesses the three persons who came into the compound was covering their faces with black coloured nets. No other witness had mentioned above the beard the accused-appellant had or about the hat he was wearing at the time.

Later she refers to the said hat as the covering the accused-appellant had to hide his face. This witness also had stated that she saw the accused-appellant inside the van and he was in the other corner of the van. According to her statement made by her just one hour after the incident she had seen the accused-appellant immediately when the van arrived and he was seen inside the van. She has stated that she clearly recognized the accused-appellant inside the van and referred to him as piyatissa. This clearly gives the impression that the accused-appellant did not have anything to cover his face when he was seen by this witness inside the van for the first time. This clearly is contradictory to the position she has taken whilst giving evidence in court.

According to witness Gayani Rupika the three persons who entered the compound was wearing black gowns worn by Muslim women and their faces were all covered. According to her the accused-appellant had been wearing a mask to cover his face or to hide his identity but it came off as he was firing a shot at the deceased. She had stated that the mask the accused-appellant was wearing came off as a result of the gun hitting the face cover as he shot her elder brother. It is her evidence that the accused-appellant shot the deceased as well as her brother Wimalasena.

The learned trial Judge has in her judgment stated that even though the · defense drew the attention of court to several contradictions and omissions, these contradictions are not that important as they have not gone to the root of the case.

This court is of the view that the several contradictions and omissions marked by the defense in this case are of importance. The main issue in this case is whether the said witnesses were able to identify the accused- appellant as one of the persons who arrived in the van and shot at the deceased and the other witness. There is no doubt that all three persons who came into the compound were wearing dresses Muslim women wear covering the whole body and also they were covering their faces with masks or black nets. The witnesses who gave evidence in this case were not able to identify the other persons who came to their compound on that day. Except the witness sudumenike who has said that the accused-appellant was wearing a hat, and the two other eye witnesses who gave evidence in this case had stated that they were able to identify the accused-appellant as the black net or mask he was wearing to cover his face came off accidently. And the witness Gayani had stated that the said net fell on to the ground and the accused-appellant immediately picked it up and covered his face up again.

Therefore the fact that the black covering or the net, the accused appellant had to hide his face came off and the witnesses were able to clearly identify the accused-appellant is an important fact which goes to the root of this case. It is to be noted that this witness Gayani had not stated to the police that she was able to identify the accused-appellant as the net he was wearing to hide his face fell to the ground. The court will have to carefully analyze the evidence of the said witness and decide whether the court could believe and act on the evidence given by the said witness with regard to this fact. Therefore the contradictions and omissions with regard to how they were able to identify the accused appellant under such circumstances are very material and important to determine whether the prosecution had proved the identity of the accused-appellant beyond reasonable doubt.

The trial judge has stated in her judgment that the prosecution was able to lead evidence to show that there was political rivalry between the two parties. There is always the possibility of the prosecution witnesses falsely implicating the accused-appellant in this case. The witnesses were not able to identify the other two who had come into their compound wearing black gowns and black nets. But they were able to identify the accused-appellant because the net he was wearing came off accidently. Under the said circumstances one has to carefully consider whether the said witness Gayani had sufficient time to identify .the accused-appellant. There are important contradictions and omissions in the statements they have made immediately after the incident to the police regarding the identity of the accused appellant in this case. This court observe that the trial Judge appears to have misdirected herself regarding the infirmities relating to the identification of the accused-appellant by these witnesses. It is the duty of the trial Judge to deal with them and decide whether such infirmities go to the root of the case. The learned trial Judge should have considered the entirety of the evidence that has been led before her and carefully consider whether the contradictions and omissions marked were material and whether it was safe to act on the identification of the accused-appellant by the said witnesses.

The function of an appellate court in dealing with a judgment mainly on the facts from a court which saw and heard witnesses has been specified as follows by Macdonnel C.J. in the King V. Guneratne 14 Ceylon Law Recorder 174:-

"I have to apply these tests, as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact:

(l) Was the verdict of the Judge unreasonably against the weight of the Evidence,
(2) Was there misdirection either on the law or the evidence
(3) Has the court of trial drawn the wrong inferences from the matters In evidence.

Similarly Wijewardene, J stated In Martin Fernando v. Inspector of police Minuwangoda 46 N.L.R 210, that;

"An appellate court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight." Where" a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."

There is yet another matter to be mentioned. The trial had proceeded day to day basis. It should be commended as it is the best way to proceed to trial before a High Court on a criminal trial.

On 30.05.2013 the prosecution had closed its case at around 1.45 p.m. The court had called for the defence and had explained to the accused-appellant about his rights of giving evidence and calling for witnesses on behalf of the defence. At that stage the Counsel for the accused-appellant had moved for a date to call evidence for the defence. The court had rejected the said application stating that the case had been taken for trial on day to day basis and the time was around 1.45.p.m.

Thereafter the accused-appellant had given evidence under oath and after the conclusion of the accused-appellant's evidence the Counsel had made yet another application to adjourn the trial for another day to call a witness to give evidence on behalf of the accused-appellant. The prosecution had objected to the said application and the learned trial Judge had proceeded to reject the said application of the Counsel for the accused-appellant. Thereby compelling the Counsel for the accused to close the case for the defence. At a glance it can be seen that some injustice had been caused to the accused-appellant who was facing a charge for capital punishment. The prosecution had led evidence on three consecutive days until 2.45.on the 3rd day. The accused-appellant is entitle to have a fair trial. And in our view the application made on behalf of the accused-appellant should have been allowed.

For these reasons. I am of the view that the verdict of the trial Judge is unreasonably against the weight of the evidence· and that it is not safe to convict. the accused-appellant on the available evidence in this case. Therefore I set aside the conviction and sentence of the learned High Court Judge of Kegalle dated 05.06.2013 and acquit the accused appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against an order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Salpadoruge Ivan Susantha Perera,
No. 76/C/1, Dickwela Road,
Horagasmulla, Divulapitiya.

ACCUSED-APPELLANT

C. A. No. : 122/2013
H. C. Negombo Case No.: H. C. 214/06

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : H. N. J. Perera, J. &
K. K. Wickramasinghe, J.

COUNSEL : Nihara E. Rodrigo, PC with G. Dissanayake for the Accused Appellant.
Harippriya Jayasundara, DSG for the Attorney General.

ARGUED ON : 27th of May 2015

WRITTEN SUBMITIONS : 27th of May 2015

DECIDED ON : 09th of July 2015

K. K. Wickramasinghe, J.

The Accused-Appellant, herein after referred to as the 'Appellant', in this case was indicted in the High Court of Negombo on a charge of statutory rape committed on one Salpadoruge Anusha Sandamali on 29.03.2003, which is an offence punishable under the s. 364 (2) (e) of the Penal Code as amended by Acts No 22 of 1995 and No. 29 of 1998.

After the conclusion of the trial, the learned Trial Judge acquitted the Appellant of the charge he was indicted and convicted him for an offence under s. 345 of the Penal Code (as amended) for

causing sexual harassment and sentenced him to a term of 4 years rigorous imprisonment and imposed a fine of Rs. 5000/= with a default term of one month simple imprisonment. The learned Trial Judge also ordered the Appellant to pay Rs. 200 000/= as compensation to the victim in this case.

Being aggrieved by the said conviction and the sentence the Appellant preferred an appeal to the Court of Appeal seeking to set aside the conviction and sentences imposed upon him.

The learned Counsel for the Appellant raised a preliminary objection on the premise that the charge of the Appellant that was ultimately found guilty of, is not a lesser offence of the charge of rape that he was initially charged with. Therefore the conviction and the sentence are bad in law as he was not given an opportunity to defend himself on a charge under s. 345 of the Penal Code.

The learned Counsel DSG for the Respondent conceded to the above mentioned objection and moved court to send this case for retrial on a charge of s. 345 of the Penal Code.

The Victim in this case was 11 years and 6 months at the time that the incident took place. The Appellant was the father of a childhood play mate of hers and he was living in front of her house. His wife was also living with him at that time in the same house. However, the Appellant had never come to the Victim's house before this incident.

On the day in question one of the aunts of the Victim called Malini Fonseka, who lived next to her house (about 10m or 12m away from her house), had called her while she was watching television in the evening at about 4.00 to 5.00 pm in the evening and requested her to allow the Appellant to collect cow dung from her compound. When she came out, the aunt was near the fence and the Appellant was at the aunt's garden. He had two small bags (about a size of tennis ball) in his hand and came to the garden of the Victim's house. She showed him the cow dung which were in front of her house but, he said that they are not dry and therefore not suitable for his purpose. Then she said to him that they have another lot at the back of the house and showed him the way to the back of her house. While the Appellant went back from outside of the house, she went back through the house. She stopped at the door of the kitchen and watched the Appellant checking the lot of cow dung at the back. The Appellant returned saying that, that lot is also not dry and asked whether he can go out through the house.

While they were going through the house and just after they entered the dining room, the Appellant hold the Victim by her shoulder and pressed her back against the wall. When she tried to shout out, the Appellant closed her mouth with his hand. Then the Appellant kissed her lips, put his tongue inside her mouth, touched her body and raised the frock that she was wearing.

Then he put the sarong which he was wearing, down, pressed his penis on the Victim's female genitals and moved it for about 3 or 4 seconds. The Victim had pushed the Appellant away and she had run to a house which belongs to another aunt (Nandawathi) of hers.

The house on the other side of the Victim's house also belonged to one of her uncles. That was also about 10m away from her house. However, the house that she ran to, just after the incident,

was about 4 houses away from her house. At the time she ran to that aunt's home, her aunt, the daughter of that aunt (Upulika) and two other neighbour girls called Surangi (PW 3) and Menaka (PW 4) were there in that house. Then she informed them that the Appellant raped her. Then the daughter of the aunt Nandawathi and the prosecution witness no. 3 ran down the road and informed the villages about the incident. At that time, the aunt and the fourth witness of the prosecution had examined the Victim and they had come back to the Victim's house with the Victim. When they were coming, the Appellant was in the garden of the house next to the Victim's house which belonged to one of the Victim's uncles and the villages had gathered around at the Victim's house. Also the Appellant's wife had come to that place and she had said that her husband was innocent.

The Appellant also refused that he had committed such an offence and he had scolded the Victim for telling lies. Furthermore, it was the Appellant who had gone to the police station before the Victim.

However, after the Victim's parents arrived home they found cow dung inside the house and they argued that how can they find cow dung inside the house if the Appellant didn't come inside the house. Then the parents of the Victim had gone to the police station with the Victim, and inside the police station they met the Appellant. At that time the Victim's clothes which she was wearing at the time of the incident were given to the police by her parents. Then she was sent to the hospital by the police. According to the evidence given by the doctors who had examined her even though they have not observed any injuries on her they have not ruled out labia majora penetration (page 243 of the brief). They were at the conclusion that an erect penis has entered but not gone deep and had given an opinion that there has been a penetration between the vaginal lips (page 284 of the brief).

When the police examined the house of the Victim, they had also observed cow dung inside the kitchen of the Victim's house (page 336 of the brief).

At the trial, the defence had not called any witnesses on behalf of the Appellant but the Appellant had made a dock statement. In his statement, he had admitted that he went to the Victim's compound to collect cow dung (page 361 of the brief). His statement totally corroborate with the Victim's evidence up to the point that he went to the back of the Victim's house to collect cow dung while the Victim was standing near the kitchen door and he came back without collecting cow dung from there as they were also not dry. According to the statement, at that time the Victim's uncle who lives next to the Victim's house was near the fence and he asked that uncle whether he can collect some cow dung from his garden. Then he jumped to the road from Victim's house and entered that Uncle's garden. There that Uncle's wife had showed the Appellant the place where the cow dung were and the Appellant had collected some cow dung from there. When he was just about to go home after collecting cow dung some villages gathered to the house of the Victim and asked the Victim what happened. Then she had told that she was raped by the Appellant. Then the Appellant had scolded the Victim saying not to lie and he had asked them to come with him to the police station. Then they all went inside the house of the Victim and some women, including the mother of the Victim and the wife of the Appellant, took the Victim in to a

room and checked her. When they came back, they had informed all the others that nothing had happened to her. Then a villager called one Lal had asked the Appellant to make a complaint to the nearby police station as this will create a problem to the Appellant in future. Then he had gone to the police station and while he was inside the police station the Victim had come there with her parents. Then the police had taken statements from both the Victim and the Appellant and they had been sent to a doctor in order to examine them fully. According to the Appellant's statement, the Victim had made such a false complaint against him in order to get money from him.

After considering all these facts, the evidence given by all the witnesses and the dock statement made by the Appellant, the learned Trial Judge had come to a conclusion that the Appellant was not guilty of the offence he was indicted. Considering available evidence, we too agree with this decision of the learned Trial Judge.

As the learned DSG had clearly mentioned in her written submissions, that the Appellant was not given an opportunity to defend himself on the charge that he was ultimately convicted on. It is so true that the ingredients of the charge of rape are different from the ingredients that must be proved in a charge of sexual harassment. Therefore, both the conviction and the sentence imposed by the learned Trial Judge are bad in law.

However, although the learned Trial Judge has adopted an incorrect procedure, he has placed reliance on the evidence of the Victim when arriving at a decision in this case.

In the case of Upul de Silva v. Attorney General 1999 (2) it was held that "re-trial must necessarily be limited to the offence or offences upon which the accused had been convicted by the trial Court, and against which he had preferred an appeal and none other." In the case of Banda and Others v. Attorney General (1999) 3 SLR 168 at page 171, Justice FND Jayasuriya held "The issue whether a re-trial should be ordered or not would depend on whether there is testimonially trustworthy and credible evidence given before the High Court."

By going through proceedings it is evident that the learned High Court Judge had not taken steps to amend the indictment and read the new charge to the Appellant. Therefore we too agree with the preliminary objection raised by the Counsel for the Appellant. But at this junction considering the evidence and other legal issues it would be relevant to consider the full case of Kahandagamage Dharmasiri Bogahahena v. The Republic of Sri Lanka SC Appeal 04/2009 decided on 3rd February 2012, Her Lordship Justice Thilakawardane held that "A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presided to see that a guilty man does not escape. One is as important as the other. Both are public duties [Ambika Prasad and another V State (Delhi Administration) 2000 SCC Cri 522]".

Therefore considering the above, we set aside the conviction and the sentence imposed by the learned High Court Judge and send this case for re-trial.

Appeal of the Accused is partly allowed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) Upul de Silva v. Attorney General 1999 (2) SLR
2) Banda and Others v. Attorney General (1999) 3 SLR 168
3) Kahandagamage Dharmasiri Bogahahena v. The Republic of Sri Lanka SC Appeal 04/2009

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Rasaiya Amarthalingam
Ward Road,
Eruwil, Kalawanchikudi.

CA. NO. 96/2013
H.C. Batticoaloa No. 359/85

APPELLANT

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : H.N.J. Perera, J. &
K. K. Wickramasinghe, J.

COUNSEL : Jayantha Weerasinghe P.C. with Sanjith Senanayake and Dinesh de Zoysa for the Accused appellant.
P. Kumararatnam D.S.G. for the respondent.

ARGUED AND DECIDED ON : 10th July, 2015.

H.N.J. Perera, J.

In this case the accused-appellant had been charged for committing an offence punishable under Section 296 read with Section 32 of the Penal Code causing the death of one Sinnathamby Thangavadivelu alias Thangavelu on or about 23rd March 1990. Learned Counsel for the accused-appellant brings to the notice of Court that the trial had proceeded in the absence of the accused-appellant and some of the evidence had been recorded on 15.06.1987 before the learned High Court Judge and thereafter the order had been made to . continue the trial in his absence. It is the submission of Counsel for the accused-appellant that there is no sufficient evidence to come to the conclusion that the accused-appellant had been absconding Court and the police have failed to lead any evidence of any police officer to confirm the fact that the accused-appellant was absconding, although, no evidence had been led on that day the accused-appellant was in fact under the custody of the S.T.F. Perusal of the said proceedings of 15th June 1987 shows that evidence had been led of the Gramaseva Niladari of Vellavelly. He had stated that he visited the house of the accused-appellant and came to know that the father of the accused-appellant was dead and the mother was living and they were unable to state any whereabouts of the accused-appellant. Counsel also brings to the notice of this Court, that the said Gramaseva Niladari had not stated to Court when in fact he had visited the residence of the accused-appellant and

prosecution also has failed to lead the evidence of the mother to substantiate the fact that the accused-appellant was absconding at that time. On a perusal of the evidence led before the High Court, we are of the view, that there had been no sufficient evidence before the High Court Judge to justify that the accused-appellant was absconding Court and there was no evidence before the learned High Court Judge to make an order under Section 241 of the Criminal Procedure Code to continue with the trial in his absentia. On perusal of the order of the High Court Judge, it is seen that he has merely mentioned that there is no possibility of producing the accused before Court. It is very clear that the Judge has not considered the evidence before him to find out whether in fact the accused-appellant was absconding Court.

At this stage, Counsel for the Respondent submits the fact that there had been no sufficient evidence before the High Court Judge to proceed with the case under Section 241 of the Criminal Procedure Code. Therefore, Counsel moves that the conviction and the sentence imposed on the accused-appellant be set aside and this case be sent back for re-trial.

We set aside the conviction and the sentence of the accused-appellant imposed by the learned High Court Judge dated 07.11.2012 and send the case back for re-trial against the accused-appellant on the said indictment. The learned High Court Judge is directed to dispose of this case as expeditiously as possible.

JUDGE OF THE COURT OF APPEAL

K.K. Wickramasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

Mohamed Sameem Mohamed Akram

ACCUSED-APPELLANT

C.A.Case No:-76/2013
H.C.Matara Case No:-11/2009

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

Before : H.N.J.Perera, J. & K.K.Wickremasinghe, J.

Counsel: : Niranjan Jayasinghe for the Accused-Appellant
Shanil Kularatne S.S.C. for the Respondent

Argued on : 12.05.2015/21.05.2015

Written Submissions : 29.05.2015

Decided on : 17.07.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Matara for two counts, for committing the murder of one Uyanahewa Mangalika an offence punishable under section 296 of the Penal Code and for committing the offence of robbery punishable under section 380 of the Penal Code. After trial the accused-appellant was convicted for the first count and sentenced to death on 03.05.2013. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The prosecution case rests solely and squarely on circumstantial evidence.

According to the prosecution on 6th September 2006 deceased left the house around 8.00 a.m saying that she was going to Kataragama with her friends, and was found murdered on the 9th September 2006. According to the witness the mother of the deceased the deceased was unmarried and on 06 .09.2006 left the house in the morning at about 8 a.m saying that she is going to Kataragama with some of her friends. The accused-appellant was married to her elder daughter Kanthi and was her son-in law and was living with them in the same house.

According to witness the mother of the deceased she came to know that the deceased had not gone to Kataragama. It is her position that the accused-appellant had inquired from the factory where the deceased worked and later had gone to the police station with the father of the deceased to make a complaint.

The mother of the deceased had very categorically stated that the accused-appellant was living with them and she did not find him missing from the house any time.

It is well settled law that when the conviction is solely based on circumstantial evidence prosecution must prove that no one else but the accused committed the offence.

In Podisinghe V. King 53 N.L.R 49, it was held that in the case of circumstantial evidence it is the duty of the trial Judge to tell the Jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

In Don Sunny V. The Attorney General 1998 (2) S.L.R 1, it was held that the charges sought to be proved by circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. The fact that the accused had the opportunity to commit the said murder is not sufficient. The prosecution must prove that the act was done by the accused alone and must exclude the possibility of the act done by some other person.

In the Queen V. Kularatne 71 N.L.R 534, the Court of Criminal Appeal quoted with approval the dictum of Whitemeyer, J. in Rex V. Blom as follows:-

"Two cardinal rules of logic governs the use of circumstantial evidence in the criminal trial:-

(l) The inference sought to be drawn must be consistent with all the Approved facts. If it does not, then the inference cannot be drawn.

(2) The proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt. Whether the inference sought to be drawn is correct."

There is no direct evidence in this case. The items of evidence relied by the prosecution is purely circumstantial.

The other item of circumstantial evidence on which the prosecution relied on was the recoveries made by the police under section 27 of the Evidence Ordinance. It was contended by the Counsel for the accused-appellant that the statement marked and produced as P13 is contrary to section 27 of the Evidence Ordinance. And according to section 27 of the Evidence Ordinance, what can be led in evidence is the part of the statement that distinctly relevant to the fact discovered. He contended that section 27 statement had not been properly admitted in evidence. The accused-appellant had been represented by Counsel at the trial and when the learned prosecuting State Counsel made an application to mark in evidence these portions of the statements in consequence of which certain items had been discovered by the police, no objection had been raised by the Counsel for the accused-appellant. We have carefully perused the evidence pertaining to the recording of the statement of the accused-appellant by the police and the discovery of the said items and we are not satisfied with the said evidence led at the trial.

In Etin Singho V. The Queen 69 N.L.R 353, it was held that if the Jury believed that the 2nd accused made the statement P17, all that was proved was that he had knowledge of the whereabouts of club Pl. The fact discovered as a consequence of P 17 was confined to that knowledge on the part of the 2nd accused .There was no proof before the court that Pl was in fact used in the assault on the deceased.

Held further, that the Jury should have been told that the 2nd accused's knowledge of the whereabouts of the club should not be treated by them as an admission that he used that club to attack the deceased.

According to the mother, the deceased was wearing 4 rings, 2 chains, 2 bracelets, 1 bangle and a pair of ear rings at the time she left the house. It is very clear that she had given a list of jewellery which the deceased owned or had at the time of her death. She had stated that the deceased was wearing all the above items at the time she left the house.

According to her evidence police had come on 15.09.2006 and taken a bracelet which was in their custody. According to her evidence the bracelet was pawned by the accused-appellant on 22. 08.2006. That is on a date much prior to the date the accused is said to have committed this offence. This evidence clearly contradicts the evidence given by the mother of the deceased to the effect that she saw the deceased wearing the said bracelet when she left the house on 6th September 2006. The learned Counsel for the accused-appellant contended that therefore the police evidence regarding the section 27 recoveries is highly suspicious and create a reasonable doubt.

It was also submitted that the fact that the chain was also recovered by the police in consequent to the statement made by the accused¬appellant is also highly suspicious and unacceptable. According to the police this particular chain was discovered in the premises belonging to Freelan Institute and no person from the said Institute was called to give evidence. It is also highly suspicious whether a person who had committed murder and had obtained a chain from the possession of the deceased would keep the chain in an unsafe place as mentioned in the evidence. It was further submitted that said chains are very common and there is no evidence as to special characteristics which enable the mother of the deceased to distinguish the said chain from the other chains.

According to witness Fahim the two rings which was given to him by the accused-appellant had been given to a person named Upul Udayaratne. According to Udayartne he states that he melted them and made new items and the police came and recovered the jewellery which was in his shop. The said witness Fahim had stated that he cannot recollect the date he received the rings from the accused-appellant. The witness Udayaratne too had failed to mention the date on which he had received the said rings from witness Fahim.If in fact the accused-appellant had made the statement P13 to the police, all that was proved was that he had knowledge of the whereabouts of the said articles. The fact discovered as a consequence of P 13 was confined to that knowledge on the part of the accused-appellant.

As stated earlier the mother's evidence as to the identification of the jewellery owned by the deceased is highly unsatisfactory. The mother of the deceased had very categorically stated that the deceased was wearing the said bracelet when she left the house on 6th September 2006. But the evidence led in this case clearly establish the fact that the said bracelet was in the custody of the Pawn Shop and that it had been pawned on 22.08.2006 a date prior to 6th September. As submitted by the Counsel for the appellant it is also doubtful whether a person going on a trip would wear such an amount of jewellery as mentioned by witness Vinitha.

Witness Kanchana Priyadarshini claims to be the last person who had seen the deceased. She had been a close friend of the deceased. The said chain was not shown to her or evidence had been led as to the jewellery which the deceased was wearing at the time she met the deceased.

The deceased mother's evidence clearly establish the fact that the accused-appellant was living with them at her residence. The said witness does not state that the accused-appellant was found missing or was not at home during the said period. This establishes the fact that he had been living with the deceased's family from 6th September till the time the body of the deceased was discovered. There is evidence to show that the deceased's mother or anybody else suspected the accused-appellant about the disappearance of the deceased. The evidence led in this case also confirms the fact that the accused-appellant had gone to the work place of the deceased and inquired about her - whereabouts. The accused-appellant had also gone to the police station with the father of the deceased to make a police complaint about the disappearance of the deceased.

Consideration of circumstantial evidence has been vividly described by Pollock C.B in R. V. Exall [1866] 4 F & F 922 at page 929, cited in King V. Guneratne [1946] 47 N.L.R 145 at page 149 in the following words:-

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then, if anyone link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of rope might be insufficient to sustain the weight, but three strands together may be quire of sufficient strength. Thus it may be circumstantial evidence there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than mere suspicion; but the three taken together may

create a conclusion of guilt with as much certainty as human affairs can require or admit."

The items of circumstantial evidence referred to earlier in this case in my opinion are insufficient to sustain the weight of the rope. Further the totality of the evidence led in this case does not lead to an inescapable and irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased. The prosecution has failed to prove the case beyond reasonable doubt and rebut the presumption of innocence. For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this judgment, I set aside the conviction and sentence of the learned High Court Judge of Matara dated 03.05.2013 and acquit the accused- appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 Of 1979 as amended.

Ratnasinghe Wattage Piyasena

ACCUSED-APPELLANT

C.A.Case No:-250/2012
H.C.Tangalle Case No:-03/2003

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

Before	:	H.N.J.Perera, J. & K.K. Wickremasinghe, J.
Counsel	:	Anil Silva P.C. with Nalaka Jayasuriya for the Accused-Appellant S. Wijesinghe D.S.G for the Respondent
Argued On	:	19.03.2015
Written Submissions	:	12.06.2015
Decided On	:	20.07.2015

H. N. J. Perera, J.

The 1st accused-appellant with three others in this case were indicted in the High Court of Tangalle for having committed the murder of one Ratnasinghe Wattage Chamil Pradeep on 27.06.2000 an offence punishable under section 296 of the Penal Code read with section 32 of the Penal Code. Therefore the case for the prosecution was presented on the footing that all four accused-appellants were actuated by a common murderous intention at the time the deceased Chamil Pradeep was killed. After trial the 1st accused-appellant was convicted and sentenced to death. This appeal is from the said conviction and the sentence.

The salient facts established by the evidence were as follows:-According to the evidence of Kusumalatha the mother of the deceased when she was at home she heard someone calling out for the deceased. She cannot exactly say who it was. A short time later she heard the other witnesss Anil Pradeep shouting "mother elder aiya is stabbed". She rushed out of the house and saw the witness Anil Pradeep bringing the deceased home. The witness Anil Pradeep further said that Alli mama stabbed".(the deceased 4th accused). The deceased also is alleged to have said "mother save me, Alii mama stabbed me."

The witness Kusumalatha I the mother of the deceased further stated that she saw the 1st, 2nd and the 3rd accused and that the 1st accused¬appellant was seen close to the house with a gun in his hand. She had categorically stated that there was no animosity among the parties and they were in good terms.

The witness Anil Pradeep said on 27.06.2000 at about 5.30-6.00 p.m he was returning from the house of his grandmother, he saw the deceased struggling with the 4th accused. The 2nd accused was trying to prevent the struggle. Suddenly the deceased - fell down and he rushed and tried to carry the deceased. Then he noticed blood on his hands and saw the 4th accused having a blood stained knife in his hands. When he carried the deceased he saw the 1st and 3rd accused a short distance away and the 1st accused-appellant had a gun and threatened to shoot his brother. The witness had categorically stated that the 1st accused-appellant was standing with a gun near the entrance gate to his house and that he had to pass the 1st accused-appellant and go to his house. This witness had further stated that he then told the accused-appellant not to shoot the deceased his brother but to shoot him instead. By that time the deceased had been stabbed by the 4th accused and as he was carrying the deceased home and the deceased fell near the first accused. He shouted and the mother came running towards them and the 1st accused-appellant just stood near the house without doing anything.

It is clear from the evidence led in this case that the fatal blow was dealt by the 4th accused. The evidence given by the witness Anil Pradeep very clearly establish the fact that the 1st accused-appellant was standing near the house of the deceased some distance away from the place of the incident. In this case both witnesses state that the 1st accused-appellant was standing a short distance away from the scene of offence. It will be seen that there was literary no evidence to justify a conclusion that the 1st accused-appellant too assaulted the deceased person.

It had to be established by the prosecution that the two accused (the 4th and the 1st accused) were acting with a common intention. The evidence against the 1st accused-appellant was that he was merely near the house of the deceased with a gun in hand and had threatened to shoot the deceased after the deceased had received the fatal blow from the 4th accused. Apart from this there is no other evidence of a common intention between the 1st and the 4th accused.

It is the contention of the Counsel for the accused-appellant that taking into consideration all the items of evidence, the inference of common intention cannot be drawn in this case and the 1st

accused-appellant should not be held responsible for what the 4th accused did and therefore he should be acquitted.

It is the duty of the prosecution to satisfy beyond reasonable doubt that a criminal act has been committed, that such act was committed by several persons, that such persons at the time the criminal act was committed were acting in the furtherance of the common intention of all. And that such intention is an ingredient of the offence charged, or of some minor offence. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. There should be evidence direct or circumstantial, of prearrangement or some other evidence of common intention.

In the case of common intention liability is imposed on the offender on the basis that both actus reus and mens rea has been committed by him. A common meeting of minds has been identified as an essential pre requisite for the imposition of criminal liability on the basis that the accused shared a common intention. The agreement or the common design required for the imposition of liability may have been arrived at immediately before the offensive act was committed. Mere presence of the accused at the scene is not sufficient to establish that he shared a common intention upon which liability could be imposed on him. (King V. Assappu 50 N.L.R 324, Piyathilaka and 2 others V.Republlc of Sri lanka [1996]2 Sri. L.R 141).Though the accused did not commit any physical act, yet liability could be imposed on him on the basis that his presence was participatory presence. In a murder case it is imperative that the accused entertain a murderous intention with the perpetrator of the offending act. In the instant case according to the main eye witness Anil Pradeep only the 2nd and the 4th accused had been near the deceased at the time of the incident. The 2nd accused had tried to prevent the struggle. According to this witness he had seen the 1st accused-appellant and the 3rd accused standing at a distance away from the place of the incident. The 1st accused-appellant had done nothing. He was standing near the gate of the deceased house holding a gun. The 1st accused-appellant had done nothing or said anything to indicate that he entertained the same intention of the 4th accused. There is no evidence to indicate that the accused-appellant was actuated by a common intention with the doer of the act namely the 4th accused at the time the offence was committed. According to the said witness it was only after the 4th accused had stabbed the deceased that the 1st accused-appellant had uttered the words that he will shoot the deceased.

The question then, in regard to the 1st accused-appellant, is whether his presence near the scene of the incident was a participatorv presence in the sense that he was there as sharing a common intention with the 4th accused to cause the death of the deceased.

The learned President's Counsel for the accused-appellant submitted that the charge against the

1st accused-appellant cannot be maintained as the evidence is insufficient. The Counsel submitted that to maintain a charge on the basis of common intention the mere presence is not sufficient. The prosecution must prove an overt act manifesting his intention.

In Queen V. Vincent Fernando 65 N.L.R 265 Basnayake, J. has stated as follows:-

"A person who merely shares the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under section 32 a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act. The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind. In the Penal Code the words which refer to acts done extend also to illegal omissions."

In the case of Arivaratne V. Attorney-General S.C. 31/92 SCM 15.11.93, G.P.S.de Silva has reiterated that the inference of common intention must be not merely a possible inference, but an inference from which there is no escape. The facts revealed that, the principal witness speaks only of the presence of the 1st accused-appellant standing near the house of the witness with a gun in hand, little away from the scene of the incident. The 1st accused-appellant had uttered the words "I will shoot him". This utterance was made after the 4th accused had stabbed the deceased person .

Having considered the evidence against the 1st accused-appellant I am of the view that evidence is insufficient to sustain the conviction. Therefore I am of the view that the 1st accused-appellant should be acquitted.

Appeal allowed. 1st accused-appellant acquitted.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 in the Democratic Socialist Republic of Sri Lanka .

C.A. Case No. 76/2012
H.C.(Kegalla)

Vs.

Dissananyaka Mudiyanselage Samarasekara.

And 03 others.

ACCUSED

AND NOW
Dissananyaka Mudiyanselage Samarasekara.

And three others 1st to 4th

Vs.

Hon. Attorney General, .
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : H.N.J. Perera, J
P.W.D.C. Jayathilake, J

COUNSEL : Anil Silva PC for the 1st Accused Appellant.
Indika Mallawarachchi for the 2nd and 3rd Accused Appellants.
Tenny Fernando for the 4th Accused Appellant.

: H.L. Peiris S.S.C. for the Respondent.

ARGUED ON : 21.01.2015, 27.05.2015

DECIDED ON : 23.07.2015

P.W.D.C. Jayanthilake. J

On 19.07.2004 at 15 hours, Police Station Mawanella received a telephone call about a robbery of

cigarettes. According to the information, the robbery had taken place at Buttawa Junction. Chief Inspector, Jagath Pushpakumara who was the officer-in-charge immediately arranged four teams of police officers to arrest the robbers. He himself went along with a team of officers for investigation. On information gathered from several places ultlmatelv he reached the place called Kempitiyakanda where he found the white colour van which was delivering cigarettes.

The person in-charge of sale, his assistant and the driver were there. After questioning them, the chief inspector advised them to go the police station. Thereafter, he went in search of the robbers towards Halgiriya. On the way, he stopped a three wheeler moving in the position direction. There were 3 persons except the driver in it. He searched the three of them. The 1st person was wearing a green colour T-shirt and carrying a cream colour bag, on which the word, "Adidas" had been written.

In searching the bag, the Chief Inspector found a hand grenade with letters "SFG", a pointed knife, a bunch of keys and two cigarette bundles. The person was identified as Adigodagamage Samarasekara alias Dissanayaka MudiyanseJage Samarasekara of Kahagollakade, Kumbawela Ella, Bandarawela. The 2nd person he searched was Nishantha Samaranayaka of Ihala Kotte Makchelwala. He was wearing a brown trouser. He too had a hand granade, a pointed knife with him. The identity card of Wasantha Kumara Jayasinghe was found in his possession. There was a cellular phone also in his trouser pocket. The 3rd person who was wearing a red t-shirt and a light ash colour pair of trousers had a toy pistol in his waist. Another person has been arrested by sub inspector Dhammika Lal in the same night. The person by the name Shantha Samaranayaka of Ihala Kotte, Makelwala was arrested when he was travelling in a private bus. A toy pistol and cash worth Rs. 1080/= had been found in his possession. The four suspects arrested were produced to the Police Station with the productions recovered from them.

Dissanayake Mudiyanselage Samarasekera, Thunivepura Devayalage Nishantha Samaranayaka, Jayathilakalage Anil Tharanga and Thunivepura Devayalage Shantha Samaranayaka were indicted under four counts. All four Accused were indicted for committing the robbery of cash and cigarettes to the value of Rs.. 350000/= punishable under Sec. 380 read with Sec.32 of the Penal Code. Count No.2 and 3 were against the 1st Accused for having in possession a knife at the time of the said robbery punishable under Sec. 383 and having in possession a hand bomb punishable under the offensive Weapon Act. The 4th Count was against the 2nd Accused for having in possession a hand bomb punishable under the offensive Weapons Act. All four Accused were found guilty of the 1st Count levelled against them.

The 1st Accused had been acquitted of the 2nd Count. The 1st Accused had been found guilty of the 3rd Count and the 2nd Accused had been found guilty of 4th Count. They had been sentenced in the following manner.

"All four Accused were sentenced to ten years rigorous imprisonment with a fine of Rs. 25000/= carrying a default term of two and a half years imprisonment for the 1st count. The 1st Accused was sentenced to five years, rigorous imprisonment with a fine of Rs. 25000/= carrying a default

term of one and a half years . imprisonment for the 3rd count. The 2nd Accused was sentenced to five years, rigorous imprisonment with a fine of Rs. 25000/= carrying a default term of one and a half years imprisonment for the 4th count. Being dissatisfied with the said convictions and the sentences Accused Appellants have preferred this Appeal to this court."

Though the learned counsel for the 2nd and 3rd Appellants initially made submissions challenging ,the conviction, subsequently confined her submissions to the question of sentence. The learned President's Counsel who appeared for the 1st Accused Appellant and the learned the counsel who appeared for the 4 Accused Appellant made submissions challenging the conviction.

The salesman Thilak, and van driver Anuruddha and a boutique owner Siddik have given evidence as the eye witnesses to the incident. The evidence of Siddik was that four persons had come to his boutique prior to the incident and had tea. Thereafter, he had seen one of those persons getting on the driver's seat of the van and had driven towards Rambukkana passing his boutique. Siddik had identified the 1 "Accused Appellant at the identification parade as the person who asked whether tea was available in his boutique. Thilak had identified the 1st, 2nd and 3rd Accused at the parade as the persons who were inside the van at the time of the incident. Thilak had failed to identify the 4th Accused according to the parade notes. Instead, he had shown one of the assisting people in the parade. But, it is stated in the parade notes that the witness had seen the suspect Shantha Samaranayaka going away from the van carrying cigarettes. The witness had identified the r'. 2nd and 3rd Accused Appellants when testifying in court. The 3rd Accused Appellant had identified as the person who pushed him into the van, lifting by his legs. And the 2nd Accused Appellant as the person who had been going away carrying cigarettes. Anuruddha had identified all four Accused Appellants at the parade. He had identified the 4th Accused Appellant as the person who had left the van and the 1st Accused Appellant as the person who had placed the knife on the neck. Anuruddha too had been unable to identify the Accused Appellants when giving evidence.

The learned counsel for the lst Accused Appellant submitted that there is a serious doubt whether the witnesses had seen the persons who were in the van. He raised the question whether the witnesses had seen momentarily the persons and whether it was a safe identification, but whether the witnesses had actually seen the Accused. The learned trial judge had not appreciated this distinctlon, he argues.

The evidence revealed on identification at the trial was the testimony of Siddik. He was the one who stated that the 1st Accused Appellant came to the boutique and asked for tea and then saw him driving towards Rambukkana passing his boutique. But, the learned trial judge had stated her opinion about the reliability of his evidence in the following manner.

When studying the demeanour and deportment of this witness, the memory of this witness was found to be unreliable. Therefore, the evidence of Siddik does not attach any evidentiary value to the prosecution case. The other allegation brought against the identification of Accused Appellants was that Tilak and Anuruddha were at the police station when the Accused Appellants were brought there. Therefore, the submission is that a situation where there is strong possibility that witnesses have seen the Accused before the identification parade.

The 4th Accused Appellant has been arrested when he was traveling in a bus. Though it is clear that when he was arrested, the police officer who arrested him knew the person who was wanted to be arrested by name, it is not clear how the said police officer found that a person called Shantha Samaranayaka was involved in this case. Even the chief investigating officer, namely, A.S.P Jagath Pushpakumara has not clarified this matter. The learned counsel for the a" Accused Appellant contended that there is discrepancy between the evidence of Tilak and Anuruddha in regard to the person who had left the van carrying cigarettes because while Anuruddha had identified the 4th Accused at the parade as the said person Tilak, testifying in court, had identified the 2nd-Accused as the person who had done so. The learned counsel refers to R.Vs Turnbull 1977 QS 224 and Arch bold Criminal Proceeding and practice 2008 chapter 14 p 1425, in order to show the guideline to be followed when there is "mistaken identification". It is stated that the judge should warn the jury of the special need for caution before convicting the Accused in reliance on the correctness of the identification or identifications. The other item of evidence available against the 4th Accused Appellant is recovery of Cigarettes under Sec. 27(1) of the Evidence Ordinance. The relevant statement had marked as "I can show the police the fertilizer bag containing cigarettes". The counsel for the 4th Accused Appellant alleged that the material produced in evidence, in connection with the said statement was a cardboard box and not a fertilizer bag. Referring to Queen Vs D.I. Albert 66 NlR 543, submits that the fact recovered must be strictly construed or/and confined to the fact deposed by the Accused in the police custody. Therefore, his argument is that evidence with regard to recovery under Sec.27 of the Evidence Ordinance cannot by admitted against the 4th Accused Appellant. When the evidence revealed against the 4th Accused Appellant is carefully considered the question arises whether there are items of evidence that could be relied upon undoubtedly.

The 1st, 2nd and 3rd Accused Appellants had been arrested immediately after the incident by the police while they were travelling in a three wheeler within a distance of 2 1/2 km from the place of incident. The 1st Accused Appellant had admitted the fact that he had been arrested when he was in the three wheeler, though the 2nd and 3rd Accused Appellants had stated nothing specifically about the place where they had been arrested nor had they denied the fact that their arrest had taken place while traveling in a three wheeler.

But the 4th Accused Appellant had stated that he had been arrested at his sister's place at Peradeniya.

When considering the matters discussed above in respect of the evidence against the 4th Accused Appellant we are of the opinion that there is no evidence to convict him for the charge of robbery. Therefore this court set aside the conviction and the sentence against the 4th Accused Appellant and acquit him from the charge levelled against him.

The counsel for the 2nd and 3rd Accused Appellants submitted the following facts in order to mitigate the sentences passed on them.

I. The 2nd and 3rd Appellants were the 1st offenders with no criminal offenses whatsoever.

II. The 2md Accused Appellant was 18 years at the time of incident whilst the 3rd Accused Appellant was 22 years then.

III. As it is borne out by the proceedings, the 2nd and 3rd Appellants at the time of trial were national boxers undergoing international training and participating at international matches having successfully represented' Sri Lanka at International Boxing Competitions.

IV. Consequent to the said incident of robbery, the Appellants were sponsored by Mas Holdings (Pvt) Ltd who to date are the sole sponsors of their careers in the field of sports.

In this Appeal, while the 1st Accused Appellant maintained his appeal against both, the conviction and the sentence, the 2nd and 3rd Accused Appellants confined their Appeals only to the sentence. This situation has given rise to the question that when the 1st Accused Appellant's Appeal is dismissed, in case the reliefs are granted to the 2nd and 3rd Accused Appellants in respect to the sentence, whether these grants are applicable to the 1st Accused Appellant as well. My answer is that it depends on the facts and the circumstances of the case. As far as the facts and the circumstances of this case concerned, it is not fair that the 1st Accused Appellant is subject to punishment in one way and the 2nd and the 3rd in another way- On the other hand, we do not intend to interfere with the term of imprisonment and the fine imposed by the learned trial judge except making the custodial sentences passed on 1st and 2nd Accused Appellant effective concurrently. Accordingly, this court dismisses the Appeals of 1st, 2nd and 3rd Accused Appellants subject to the above variation.

Appeal of the 1,2,3 Accused Appellants dismissed.

Appeal of the 4th Accused Appellant Allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera, J

I agree

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 in the Democretic Socialist Republic of Sri Lanka.

C.A. Case No.179/2013
H.C. (Colombo)
Case No, 1157/2013

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs.

Hettiarachchige Asoka,
No. 22/G7, Sedawatte, Wallampitiya.

ACCUSED

And

Hettiarachchige Asoka,
No. 22/G7, Sedawatte, Wallampitiya.

ACCUSED APPELLANT

Vs.

1. Narcotic Bureau,
   Police Headquarters,
   Colombo.

2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

COMPLAINANT RESPONDENT

BEFORE : P.W.D.C. Jayathilake, J
H.N.J. Perera, J

COUNSEL : Ananda Hettiarachchi with
Wimukthi Jayasinghe for the Accused Appellant.
Dilan Ratnayake S.S.C. for the Respondent.

ARGUED ON : 06.02.2015

DECIDED ON : 24.07.2015

P.W.D.C. Jayathilake. J

Sub Inspector Tennakoon had left the Narcotic Bureau at 9.20 a.m and reached Peliyagoda bus halt and was at the Kelani bridge between 10.15 and 10.20 a.m, and arrested a woman named Asoka around at 10.25 a.m there. There was a parcel in the bag carried by her which contained 75g and 400mg of heroin. Sub Inspector Tennakoon was accompanied by police constable Pushpakumara and woman police constable Shyama, Sub Inspector Tennakoon's private spy too was there. The Police Team came by the police jeep, the jeep stopped near the Peliyagoda Kovil and three of them and the spy walked to the said bus halt leaving another 4 constables in the jeep. Sub Inspector Tennakoon and his two assistants were in civil dress.

Hettiarachchige Asoka, the Accused Appellant was indicted for having in her possession 20.4g of heroin under Sec. 54 of "Poisons, opium and Dangerous Drugs (Amendment) ACT, No.13 of 1984". She was convicted and sentenced to life term imprisonment after trial. Being dissatisfied with the conviction and sentence, the Accused Appellant preferred this Appeal to this court.

The police constable Pushpakumara and woman Police Constable Shyama gave evidence at the trial, but Sub Inspector Tennakoon had not been a witness as he was not available for the trial.

The evidence of Pushpakumara and Shyama was that they had seen Sub Inspector Tennakoon who was with the spy taking the bag from the Accused Appellant and searching it. W.P.C. Shyama had searched the Accused Appellant only after coming back to the Narcotic Bureau. The defence suggested to the prosecution witnesses that this sort of arrest had not taken place at the said place and it was a fabricated story. The Accused Appellant in her dock statement has stated the following.

"I was bathing my daughters child around 9.00 a.m. Then, three officers arrived. A woman, of course, did not come. Sub Inspector Tennakoon asked who Asoka was. Then I said, it was me. He asked me to come to get a statement from me. The police jeep was near the guard room. Renuka was in that place. Leaving her there, I was taken away, saying that a statement be taken from me. But I knew nothing."

The learned counsel for the Appellant alleged that an irreparable damage has been caused to the Appellant by the failure of the prosecution to lead evidence of Sub Inspector Tennakoon who was the chief investigating officer who led the raid. The Appellant was convicted on the hearsay evidence, hence witness No. 2 Pushpakumara or witness No.3 Shyama couldn't answer in respect of the vital facts of the raid because they had not made investigation notes.

It has been held in the case, "The state Vs Nihal" (2011 BLR 273) that "Unlike in the case where

an accomplice or a decoy is concerned in any other case there is no requirement in law that the evidence of a police officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars".

His lordship Justice Suresh Chandra, in this statement, has referred to the police officer who conducted the investigation or the raid. There, His lordship has further emphasized, "However caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender"

The learned Senior State Counsel in replying to the counsel for the Appellant submitted that though the prosecution listed Sub Inspector Tennakoon as witness No.1, he was not called because he had migrated from the island. He further submitted that this had deprived the prosecution of the opportunity to call the best evidence in this case. According to the learned Senior State Counsel witness No.2 had participated in the raid and had observed every aspect of the arrest of the Appellant, the sealing of the productions and the handing over of them. But, Senaka Pushpakumara, witness No.2 of the indictment in his evidence, has admitted that he did not make notes about the raid. Therefore, it is obvious that he has given evidence after nearly seven years of the raid by perusing the notes made by Sub Inspector Tennakoon.

The court condones that a police witness testifying in court perusing notes of another police officer is not a healthy practice in criminal proceedings in my opinion.

The woman police constable Shyama is not a credible witness, says the counsel for the Appellant as she did not answer some vital questions and always stated that she did not remember. For instance, Shyama did not remember the clothes worn by the Appellant, didn't know the place of detection, couldn't say whether the informant spoke with Sub Inspector Tennakoon, did not know where the bus stop was situated, couldn't state from which direction the Appellant came to the bus stop. It appears that an opinion occurs to anyone who peruse the evidence of Shyama, that she may not have participated in the raid.

But, the argument of the Senior State Counsel is that the learned trial judge in this case had had the advantage of hearing all the witnesses before him prior to the judgment being considered. He states that this allowed the trial judge to observe the demenour and deportment of all witnesses including the Accused and the defence witnesses whereby the trial judge was well placed to decide on whether the prosecution of the case was tenable or whether the defence version causes a doubt in the prosecution case.

When considering this point, the matter raised by counsel for the Appellant regarding an arrest of a woman called Renuka by Sub Inspector Tennakoon comes into play. The learned counsel alleged that learned state counsel who conducted the prosecution case in the trial court did not draw the learned trial judge's attention in respect of the entries made by Sub Inspector Tennakoon

relating to Renuka. He has cited the case Kapila Ratnayaka Vs. A.G (Court of Appeal 70/2006). In the said case, it has been held that it is the duty of the prosecution to present all facts against as well as in favour of the Accused. If not there would not be a fair trial.

The learned trial judge has rejected the dock statement of the Accused Appellant giving two reasons. One is the fact that she was bathing a child when the police team arrived at her place, has not been suggested to the prosecution witness. The other is the inability of the police team to reach the Accused Appellant's place by 9.00 0' clock in the morning. But the learned trial judge has not paid any attention to the matter referred to, by the Accused Appellant about a woman called Renuka.

Suspects are always helpless before police officers. Therefore, court should also be considerate about what suspects state without being attentive only to what police officers state.

When considering the facts revealed in evidence, I am of the opinion that prejudice has been caused to the Accused Appellant on the failure of calling the main witness, namely, Sub Inspector Tennakoon who had organized and conducted the raid and arrested the Accused Appellant. Therefore, the conviction of the Accused Appellant shall not stand as many reasons exist for doubt about the prosecution case. In the circumstances, I set aside the conviction and the sentence passed by the trial court and acquit the Accused Appellant.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera, J

I agree

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No.1S of 1979 as amended.

Samarasekera Mudiyanselage Priyantha Peiris

ACCUSED-APPELLANT

C.A.Case No.52/2012
H.C.Anuradhpura Case No. 241/2002

Vs.

The Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENT

Before : H.N.J.Perera, J. &
K.K.Wickremasinghe, J.

Counsel : Dr. Ranjith Fernando for the Accused-Appellant
Sanjeewa Dissanayake S.S.C. for the Respondent

Argued On : 08.06.2015

Written Submissions : 24.06.2015/06.07.2015

Decided On : 28.07.2015

H.N.J.Perera, J.

The accused-appellant was indicted before the High Court of Anuradhapura for being in possession of an automatic Gun on 18.06.1997 punishable under section 22(3) read with section 22(1) of the Firearms Ordinance as amended by Act No. 22 of 1996 .

The accused-appellant was tried in absentia, found guilty and convicted and sentenced on 7th June 2005 to life imprisonment and to a fine of Rs . 2500/-.

An application for retrial was made on behalf of the accused-appellant in terms of section 241(3) of the Code of Criminal Procedure Act when he was produced from remand custody before the High Court Judge on 23.02.2012.

After inquiry the court made order refusing the application for trial de novo, on 18.05.2012. Aggrieved by the said order, conviction and sentence the accused-appellant had preferred this appeal to this court.

If an accused person wishes to make an application for a trial de novo he should follow the criteria laid down in section 241(3)(b) of the Code of Criminal Procedure Act.
Section 241(3) states :-

241(3) Where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (1) of paragraph (a) of subsection (1) or under paragraph (b) of that subsection he appears before court and satisfies the court that his absence from the whole or part of the trial was bona fide then-
(b) Where the trial has been concluded, the court shall set aside the conviction and sentence, if any, and order that the accused be tried de novo.

The main contention of the Counsel for the accused-appellant in this case was that only evidence led before the learned High Court Judge was that of the Sub Constable Punchihewa who has stated that he received a warrant-which he could not execute. He had further stated that he went to the residence of the accused and spoke to the father of the accused but he received no information about the whereabouts of the accused-appellant. He had further testified that he recorded the statement of the Grama Sevaka and got to know that the accused had left the area about 3-4 years ago. He had also stated that he inquired from the Justice of the Peace of the area but could not get any information about the accused-appellant. It was the contention of the Counsel for the accused-appellant that the, order of the learned High Court Judge to have a trial in absentia was based on hear-say testimony of the Police Officer Punchhewa who had stated to court that the father of the accused-appellant, the Grama Sevaka, and the J.P. of the area had told him with no statements produced or anyone of them called to testify to that effect.

The proceedings of 18.05.2004 very clearly shows that only the evidence of the said police officer Punchihewa had been led by the prosecution in this case to satisfy court that the accused-appellant was absconding. No other witness had given evidence. The prosecution had failed to lead the evidence of the father of the accused-appellant, the Gramasevaka, or the Justice of the Peace , the witnesses to whom the police officer had referred to in his evidence to corroborate the same. In this instance, the court heard the evidence of the process server of the Madirigiriya Police Station, police constable Punchihewa and was satisfied with his evidence that the accused-appellant was absconding.

In the order of the Learned High Court Judge dated 18.05.2012 it is stated that the evidence of the father of the accused-appellant, the Grama Sevaka and the police officer had been led and that there was evidence to indicate that the accused-appellant was absconding at the time the order was made.

According to section 241 (3) of the Code of Criminal Procedure Act, after the conclusion of the trial if an accused person in his absence if he appears before court and satisfies the court that his absence at the trial was bona fide the court shall set aside the conviction and sentence and order that the accused be tried de novo.

The learned trial Judge had proceeded with the trial in the absence of the accused-appellant and had pronounced judgment on 07.06.2005. The accused-appellant was produced from remand custody before the High Court on 23.02.2012. The accused-appellant had been produced before the High Court after a lapse of six and a half years from the date of the pronouncement of the judgment and sentence by the trial Judge. An application for re-trial had been made on behalf of the accused¬appellant in terms of section 242(3) of the Code of Criminal Procedure Act.

It was the position of the accused-appellant that the indictment against him had been filed in High Court after five years and that he did not receive any summons 'or knew that there was a warrant issued to arrest him in this case. The main contention of the Counsel for the accused¬appellant was that although the High Court Judge had proceeded to hear the case against the accused-appellant in his absentia there was no sufficient evidence led under section 241 (1) of the Criminal Procedure Act, before the learned trial Judge to come to a conclusion that the accused-appellant knew about this case and that he was absconding from court.

In Rajapaksa V. The State 20011 SLR 2V 161 it was held that the period of time within which an appeal should be preferred must be calculated from the date on which the reasons are given. In this case the conviction and sentence was given on 07.06.2005. The petition of appeal was lodged on 01.06.2012. The appeal is therefore clearly out of time.

It was the contention of the Counsel for the Respondent that the accused-appellant cannot prefer an appeal against the order made under section 241 (3) of the Code of Criminal Procedure Act, since an order refusing to vacate the judgment and sentence made under section 241 (3) of the C.P.C. is not covered by section 331(1) as section 241 (3) does not confer a right of appeal.

In C.A. Appeal No. 155/2000 the Court of Appeal held that there is no provision made for appeals against the orders made under section 241

The learned Counsel for the accused-appellant invited this court to exercise the revisionary powers in terms of section 364 of the Code of Criminal' Procedure Act.

In Sudage Gamini Rajapakse V. The State (2001) 1 SLR161 it was further held that an application in revision should not be entertained, save in exceptional circumstances. In addition to that the party must come to court without unreasonable delay.

In the instant case there is a delay of nearly five years. In my view delay alone should not prevent a party from seeking redress under revisionary jurisdiction from this court. If the party can satisfy that there are exceptional circumstances to exercise the revisionary jurisdiction of the appellate

court like in this case the court would be in a position to exercise its revisionary powers and grant redress to a party concerned.

In the instant case it is clearly seen that the only evidence the prosecution had led before the learned High Court Judge to satisfy the court that the accused-appellant was absconding is of the police officer Punchihewa's evidence. His evidence had been led by the prosecution on 18.05,2004. He had stated that he received a warrant to be executed from the High Court of Anuradhapura against the accused-appellant in this case but he was not able to execute it. He has stated that he had gone to the given address and questioned the father of the accused¬appellant but could not get any information about the whereabouts of the accused-appellant. He had also stated that he met the Grama Niladari and inquired about the whereabouts of the accused-appellant and came to know that the accused-appellant had, not been seen for about 3 to 4 years in that area. The police officer Punchihewa had further stated that he inquired about the accused from a Justice of Peace but could not get any information about the accused-appellant. The said witness Punchihewa had even failed to give the name of the J.P. from whom he had inquired about the accused-appellant. He had not stated in his evidence how many times he had attempted to execute the warrant against the accused. The evidence of this officer only indicate that the accused-appellant was not to be found in the said area.

As submitted by the Counsel for the accused-appellant the prosecution had failed to lead the evidence of the father of the accused-appellant, the Grama Sevake Niladari of the area or of the J.P from whom the witness Puncihewa had inquired about the accused-appellant. Only the evidence of the police officer Punchi hewa had been led before the court to satisfy the trial Judge that the accused-appellant was in fact absconding.

The learned High Court Judge had refused the application of the accused-appellant made under section 241 (3) of the C.P.C on the basis that a trial in abstentia had been done correctly after hearing evidence of the father of the accused-appellant, Grama Sevaka Niladari and the Police officer.
In the case of Rajapaksa V. The State the evidence of the father of the accused and of the Grama Niladari had been led before court. In that case there was concrete and cogent evidence before the learned trial Judge to justify the order he made to commence the trial and proceed in the absence of the accused-appellant. But in the instant case no such evidence had been led and the learned trial Judge had acted on the basis that all these witnesses had given evidence before court.

Therefore it is manifestly clear that the learned High Court Judge when he made the order refusing the application made. by the accused¬appellant under section 241 (3) of the C.P.C had mistakenly believed and acted on the basis that the evidence of the parties whom the police officer had referred to in his evidence had been recoded prior to making the order under section 241 (1) of the C.P.C to proceed to trial in the absence of the accused-appellant. Therefore this court cannot agree with the conclusion arrived by the learned trial Judge that his predecessor had made a correct order after considering the evidence led under section 241 of the father of the

accused, the Grama Niladari, and the Police officers evidence.

The accused-appellant was tried in abstentia and convicted and sentenced to life imprisonment together with a fine. In our opinion there was no concrete and cogent evidence before the learned trial Judge to justify the order he made on18.05.2004 to commence the trial and proceed in the absence of the accused-appellant. Although the accused-appellant has no right of appeal from the order made by the le-arned High Court Judge on 18.05.2012 refusing his application made under section 241 (3) of the C.P.Code, we find that this is a fit and proper case to exercise our revisionary powers of this court. Accordingly we set aside the judgment and the order dated 18.05.2012 made by the learned High Court Judge and order trial de novo.

Application allowed. Trial de novo ordered.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Tiran P.C. Alles
No. 345/33, Kuruppu Lane,
Colombo 8.

PETITIONER

S.C. FR Application No. 171/15

Vs.

1. Mr. N.K. lIIangakoon
   Inspector General of Police Police Headquarters Colombo 01.

2. Mr. Mevan Silva,
   Superintendent of Police,
   Director, Special Investigations Unit
   Police Headquarters
   Colombo 01.

3. Mr. M.D.C.P. Gunatilleke
   Inspector of Police,
   OIC Unit 1
   Special Investigations Unit
   Police Headquarters Colombo 01.

4. Mr. Ruwan Gunasekera
   Assistant Superintendent of Police
   Police Media Spokesman
   Police Headquarters
   Colombo 01.

5. The Hon. Attorney General
   Attorney General's Department,
   Hulftsdorp, Colombo 12.

RESPONDENTS

BEFORE : K. Sripavan., C.J.
E. Wanasundera,P.C., J.
R. Marasinghe, J.

COUNSEL : Romesh de Silva, P.C. with Sugath Caldera for Petitioner.
Yasantha Kodagoda, P.C., Additional Solicitor General with
Ms. Viveka Siriwardene, Deputy Solicitor General for Attorney General.

ARGUED ON WRITTEN SUBMISSIONS FILED : 30.07.2015

DECIDED ON : 05.08.2015

DECIDED ON : 02.09.2015

Sripavan, C.J.

The Petitioner's complaint is that there is an imminent danger of the petitioner being arrested without due process of law being followed and the Petitioner apprehends that such arrest would be solely on political grounds and mala fide thereby becomes unlawful, arbitrary and capricrous.

Learned Additional Solicitor General referred to Section 32(1)(b) of the Criminal Procedure Code and argued that any Peace Officer may without an order from a 'Magistrate and without a warrant, arrest any person .....who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

The relevant question would therefore be whether it was reasonable for the Peace Officer on whom the power is conferred to be satisfied of the existence of the facts, the existence of which empowered him to make the arrest. I am of the view that the burden is on the Peace Officer to place sufficient material to satisfy Court that the deprivation of petitioner's liberty is no arbitrary, capricious and unreasonable. The standard of review is consonant with the approach to the interpretation of statutory provisions vesting power, should be based on objective standards and subject to review as to its reasonableness.

Article 13(1) of the Constitution embodies a salutary principle safeguarding the life and liberty of the subject and must be complied with by the Executive. The Executive, the legislature and the Judiciary are the creation of the Constitution. The language of the Constitution should b interpreted and effect given to it as a paramount law to which all other laws must yield. Thus, the Constitutlon is but a higher form of statutory law. Article 13(5) provides that every person shall be presumed innocent until he is proved guilty. These Articles coupled with the constitutional mandate to secure and advance fundamental rights bind the judiciary to make just and equitable orders and directions under Article 126(4). Further, Article 12 prohibits any arbitrary, capricious

and/or discriminatory action. It is now well settled that powers vested in the Sate, public officers and public authorities are not absolute or unfettered but are held in trust for the public to be used for the public benefit and not for improper purposes. Where a Police Officer has discretion the exercise of that discretion would also be subject to Article 12 as well as the general principles governing the exercise of such discretion.

It may be appropriate to refer to the observations of Scott L.J. in Dumbell Vs. Roberts (1944) 1 All E R 326 at 329 cited by Gratiaen J. in Muthusamy Vs. Kannangara (1951) 52 N.L.R. 324 at 330 as follows:

"The principle of personal freedom, that every man should be presumed innocent until he is found guilty applies also to the Police function of arrest... for that reason it is of importance that no one should be arrested by the Police except on grounds which the particular circumstances of the arrest really justified the entertainment of a reasonable suspicion."(emphasis added)

It is for the Court to determine the validity of the arrest objectively. In Dissanayaka Vs. Superintendent, Mahara Prison and Others (1991) 2 5 L R 247 at 256 Kulatunga, J. emphasized that "the Court will not surrender its judgment to the executive, for if it did so, the fundamental right to freedom from arbitrary arrest secured by Article 13(1) of the Constitution will be defeated. The executive must place sufficient material before the Court to enable the Court to make a decision, such as the notes of investigations including the statements of witnesses, observations etc. without relying solely on bare statements in affidavits."

The documents filed by the 2nd Respondent along with his affidavit dated 04.06.15 reveal the following :-

1. The document 2Rl is the first complaint to the Inspector General of Police. complaint is dated 25.02.2015 whereas the rubber stamp of the office Inspector General of Police bears the date as 01.02.2015, on the first complaint
2. Paragraph 5 of the said affidavit of the 2nd Respondent states that the complaint 2R1 relates to a fraud involving Emil Kanthan and the former President. Thus, the complaint is not against the Petitioner.
3 The two agreements referred to in paragraphs 9(j) and 9(1) of the said affidavit with regard to the construction of 400 houses each by RADA both in Trincomalee and in Batticaloa are not before Court. There is no evidence to establish that the said I agreements were entered into by the Petitioner on behalf of RADA.
4. Paragraph 9 (n) of the said affidavit states that upon the request of the Petitioner in his capacity as the Chairman of RADA, the Additional Government Agent/District Secretary, Batticaloa issued a letter certifying that the work relating to Jaya Lanka Housing Programme had commenced. There is no evidence to show the number of houses that had not been constructed.
5. No statements from the Government Agents/Divisional Secretaries of Trincomalee and Batticaloa during the relevant period are filed for the consideration of Court.
6. The only evidence to show that the Petitioner received money was based on the

confession made by Shanthi Kumar Gajan Kumar to the learned Magistrate on 21.05.2015 marked 2RS. The learned Magistrate 'translated Gajan Kumar"s statement made in English language into Sinhala Language and recorded it.

7. The proceedings in S.C.FR 184/07 dated 17.11.2008 marked H shows that the Attorney.General presented an indictment against the Petitioner to the High Court of Colombo and that the Attorney-General would not be objecting to the grant of bail when the indictment is served in the High Court. The proceedings before the High Court is not before this Court in order to ascertain whether the same allegations or complaints against RADA were inquired into by the Police and an indictment was served against the Petitioner by the Attorney General.

No evidence has been placed before Court to establish that the Petitioner is interfering with any witnesses or might interfere with any of the witnesses. Whenever the Police requested the Petitioner to present himself for investigation, he has complied with such requests.

In any event, by an Order issued by the Magistrate, Colombo Fort, the foreign travel of the Petitioner has been banned.

Considering the totality of the material placed before Court, I do not see any justifiable or reasonable grounds to arrest the Petitioner. Court is therefore inclined to grant leave to proceed for the alleged imminent violation of Articles 12(1) and 13(1) of the Constitution by the second and third respondents.

The parties are directed to maintain the "status quo" as at today until the final hearing and conclusion of this application. Objections of the respondents to be filed within 4 weeks from today. Counter objections if any, within two weeks thereafter.

CHIEF JUSTICE

E. Wanasundera, P.C.,J

I agree.

JUDGE OF THE SUPREME COURT

R. Marasinghe, J.

I agree.

JUDGE OF THE SUPREME COURT

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 331 of the Criminal Procedure Act No. 15 of 1979

Commission to Investigate Allegations of Bribery or Corruption,
No.36, Malalasekara Mw,
Colombo 07.

COMPLAINANT

Vs

Illukpitiyage Jayantha Darmasiri
Illukpitiya,

ACCUSED

CA262/2007
HC Colombo No. B 1621/2006

and now between

Illukpitiyage Jayantha Darmasiri
Illukpitiya,
"Susiri Villa" Ihala Kosgama, Kosgama.

ACCUSED-APPELLANT

Vs,

Commission to Investigate Allegations of Bribery or Corruption,
No.36, Malalasekara Mw,
Colombo 07.

COMPLAINANT RESPONDENT

Before : Vijith K. Malalgoda PC J (P/CA) &
H.C.J Madawala J

Counsel : Anil Silva PC with Nandana Perera for the Accused-Appellant
Shanil Kularatne SSC for the AG

Argued On : 09.07.2015

Order On : 04.09.2015

Vijith K. Malalgoda PC J (P/CA)

The Accused- Appellant along with another person by name U.U.C. Gunawardena was indicted before the High Court of Colombo by the Commissioner General of Bribery and Corruption on three counts. The 1st and 2nd counts of said. indictment referred to two charges under section 16B and 19C of the Bribery Act for solicitation of Rs. 6000/- from one Kollure Appuhamilage Nimal Padmasiri against the 1st accused namely U.U.C. Gunawardena. The 3rd count of the said indictment referred to a charge of accepting a gratification of Rs. 6000/- from the said Kollure Appuhamilage Nimal Padmasiri an offence punishable under section 19C of Bribery Act against the Accused Appellant.

At the conclusion of the said trial the Learned High Court Judge had acquitted the 1st Accused both counts. against him and convicted the Accused-Appellant and sentenced him for four years rigorous imprisonment with a fine of Rs. 5000/- in default one year imprisonment and additional forfeiture of Rs. 6000/- with a default term of one year imprisonment.

Being dissatisfied with the said conviction and sentence the Accused- Appellant had preferred this Appeal.

The prosecution version of this case can be summarized as follows;

The virtual complainant of this case Kollure Appuhamilage Nimal Padmasiri is a resident from Gothatuwa, Angoda On the day in question he had gone to the Ministry of Environment in Kosswatta and when he was returning home in his bicycle, at Ambagaha Junction he noticed a yellow colored van parked by the side of the road. He saw his wife inside the van and on making inquiries he got to know that his wife had been taken in to custody by the officers of Angoda police station. He went direct to the Angoda Police Station and met the Accused- Appellant who was a Police Sergeant attach to Angoda Police Station.

He questioned the Accused-Appellant as to why his wife was arrested without arrack and at that stage the Accused- Appellant told him that he has to pay arrears Rs. 3000/- and another Rs. 3000/-for the current month and all together Rs. 6000/- was demanded from the complainant. The position taken up by the virtual complainant was that he has to pay Rs. 3000/- to the 1st and 2nd accused every month to engage in his illicit arrack business. He promised to bring Rs. 6000/- within two or three days and he was asked to come to courts on the following day to bail out his wife.

He was further informed by the Accused-Appellant that he (the Accused-Appellant) will enter a wrong date in the books maintain at the Police Station and that his wife will get discharge once Rs.6000/- is paid to the Accused-Appellant.

The following day he got his wife bailed out and went to a pawning centre in order to raise some money by pawning some jewellery to pay the Accused -Appellant. The person at the pawning

center directed him to the Bribery Department to lodge a complaint.
At the High Court trial in addition to the virtual complaint his wife Padmalatha, Investigation Officer Senewirathne Bandara who acted as the decoy and Chief Inspector of Police Wasantha were called as witnesses.

The virtual complainant in his evidence did not refer to any solicitation by the 1st accused, even though there are two counts of solicitation one under section 16B of the Bribery Act and the other under section 19C of the Bribery Act. In the absence of any evidence with regard to solicitation by the 1st accused, the Learned High Court Judge had correctly acquitted the 1st accused. Learned Counsel for the 2nd Accused-Appellant challenged the evidence given by the virtual complainant, Kollure Appuhamilage Nimal Padmasiri and Kodagoda Gamage Padmalatha wife of the virtual complainant based on contradiction mark per say and inter say. According to the evidence of Padmasiri, he went to the Ministry of Environment in that morning but a contradiction was marked as 2D1, with his police statement to the effect; (page 56)

ප්‍ර : ගෙදර එන වේලාවේ පොලීසිය දැකලා පැනලා ගියාද ?

උ : නැහැ

ප්‍ර : ඔවුන් එනකොට පැනලා ගියා කියලා කිවුවාද ?

උ : එහෙම පැනලා දිවුවේ නැහැ
(එම කොටස 2 වි 1 වශයෙන් ලකුණු කර ගරු අධිකරණයට ඉදිරිපත් කරමි)

Following contradiction was marked from the statement of Padmalatha during her evidence (page 75)

ප්‍ර : පොලීසිය තමාව අත්අඩංගුවට ගන්නා දිනයේ පොලීසිය එනවා දැකලා ස්වාමිපුරුෂයා පැනලා ගියාද?

උ : නැහැ

ප්‍ර : "එදත් පොලීසිය එනවා දැකලා ස්වාමිපුරුෂයා පැනලා දිව්වා" එහෙම කිවුවාද අල්ලස් එකට

උ : නැහැ

එම කොටස 2.වි.2 ලෙස ලකුණු කරයි.

with regard to the search carried out by police at her residence, following contradiction was marked as 2.D.3 (at page 75)

ප්‍ර : තමාගේ ගේ හැමතැනම පරීක්ෂා කර බැලුවද ?

උ : නැහැ

ප්‍ර : "ඊට පසු පොලීසිය ඇවිත් ගේ හැමතැනම අරක්කු හෙව්වා" එහෙම කිව්වද?

උ : ඒ දවසේ මොකුත් හෙව්වේ නැහැ
එම කොටස 2 වී 3 ලෙස ලකුණු කර ඉදිරිපත් කරයි.

The following omission was also marked by the defence during the evidence of Padmalatha (page 76)

ප්‍ර : තමා කිව්වා අත් අඩංගුවට අරගෙන වාහනේ දාගෙන යනකොට මහත්මයා හම්බවුනා කියලා ?

උ : ඇවිල්ලා තවත්තාගෙන ඉන්නකොට මම මහත්තයා දැකලා අත වැනුවා
ප්‍ර : ඒ බව අල්ලස් දෙපාර්තමේන්තුවට කරපු කට උත්තරයේ කොහේවත් සඳහන් කර නැහැ කියලා පිලිගන්නවාද ?

උ : මට මතක නැහැ, එදා සිද්ධිය කිව්වා.

Whilst referring to the above contradictions and omissions, the counsel for the Accused-Appellant took up the position that the two lay witnesses had deviated from their police statements before the High Court in order to corroborate each other and therefore the said contradictions and omissions are important and it goes to the root of the case.

When the defence was called, PC14119 Sujith Priyantha was summoned to give evidence as a defence witness, According to his evidence, on 5th July 2002 a police party consist of IP Nevil de Silva Sub Inspector Gunawardana (2nd Accused) PS 12327 PCC 19334, 38859 RPC11815, police assistants 480 and 2634 had conducted a raid at No 657/1 Elhena - Gothatuwa and arrested a woman into custody, but PC324341 Ilukpitiya was not a member of the said raiding party.

According to the evidence of Senevirathne Bandara the decoy, the transaction took place at a communication and he was listening to the dialog between the complainant and the 2nd Accused. At that time the complainant informed the 2nd Accused that he brought the Rs. 6000/- which was demanded and when money was handed over, he specifically said that out of Rs 6000/-, Rs 2000/- for the Accused, Rs 2000/- for Gunawardena and balance 2000/- for Udaya. 2nd Accused took the money and put it inside his trouser pocket and went out from the communication. At that stage the witness had signaled IP Wasantha who was stationed outside the communication and IP Wasantha had arrested the 2nd Accused. When IP Wasantha tried to arrest the 2nd Accused, he threw the money away.

Witness Wasantha, who was the Chief Investigation Officer, had corroborated the evidence of the decoy and confirmed the fact that the arrest took place outside the communication.

However, the complainant had given a different interpretation to the raid. According to him contacted the 2nd Accused and informed him that he had come with the money and waiting for him at the communication. At that stage the decoy too was inside the communication. When the 2nd Accused came inside, he informed the accused that he brought the money and counted it and gave it to the 2nd Accused. 2nd Accused informed him "if you want you even sell arrack on road now" and put the money inside his trouser pocket. At that stage the inside the communication, held the 2nd Accused from his collar and the 2nd accused put some currency notes inside his

mouth and threw the balance away. When the money was thrown 2nd Accused was near the door step of the communication and the rest of the police officers were standing just outside the communication.

Complainant does not corroborate the decoy on the fact that, there was specific reference by him with regard to whom the money should go. It is also observed by this court that there is a major contradiction between the complainant and the decoy as to who arrested the Accused and where was the arrest took place. According to the decoy and IP Wasantha, the arrest took place outside the communication by IP Wasantha but according to the complainant, the arrest took place inside the communication by the decoy. This position is further confirmed by Lorita Shyamalie the sales personal at the communication, to the effect that a group of persons had taken a man away from the communication, and later she was informed by them that they are from Bribery Department.

Court. further observes that none of the police officers in their evidence had referred to the 2nd Accused putting some money inside his mouth and when witness Wasantha was specially questioned on this, (at page 107) his answer was that the 2nd Accused tried to throw the money away.

Both Accused preferred to make dock statements when they were called upon for their defences. 1st Accused denied taking part in any raid at the complainants' house along with the 2nd Accused and in fact he had assisted his Officer in Change on this day. Since he conducted few raids at the complainants' house before, the complainant was not in good term with him.

The second Accused in his dock statement took up the position that he went to the communication on that day to meet a person who volunteered to provide some information and after meeting the complainant, he informed the complainant that he will pass the information to the relevant officers and when he tried to come back, some money was forced to him. When he threw the money away, he was arrested by the bribery officials.

Learned Counsel for the Accused -Appellant whilst referring to the judgment, submitted that, the Learned High Court Judge had failed to consider the defence version and to evaluate the evidence led in the trial.

In the case Chandradasa V. Queen 72 NLR 160 the court of Criminal Appeal concluded, that "It is the duty of a Trial Judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the jury.

Even though the present case is not a jury trial, we observe that, the Learned Trial Judge has a duty to consider the defence case, however it is weak, before coming to a conclusion. He should

have at' least rejected the defence case giving reasons for his rejection. In the present case he acknowledges the evidence of the defence witness PC 14119 Sujith Priyantha but failed to evaluate the said evidence, with the rest of the defence case and accept or reject the defence version, given to this case.

"In the case of Moses Vs State 1999(3) SLR page 401 His Lordship Justice Hector Yapa remarked, "a duty is cast on the Judges to give reasons for their decisions as their decisions are subject to review by Superior Court".
The trial judge, in the present case has not only failed to give reasons for his decision but also failed to give reasons for the rejection of the defence case.

As pointed out by me earlier, there are contradictions and omissions produced at the trial and the Learned Trial Judge had failed to consider the contradictions per say with regard to evidence of the two lay witnesses and contradiction inter say between the complainant and the official witnesses, in addition to his failure to give reasons for his decision and failure to give reasons for the rejection of the defence case.

I am not in favour of ordering a retrial in the present case for the reason that as I have concluded earlier, some of the contradictions and omissions produced during the trial goes to the root of this case. I further conclude that the contradictions I have pointed out between the evidence of the official witnesses and the lay witness, creates a reasonable doubt on the trap laid by the officers of the Bribery Commission. For the reasons discussed above the appeal is allowed and the conviction and the sentence on the Accused-Appellant is set aside.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Appeal allowed and the conviction and sentence set aside.

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Mirissa Galappaththige
Thushan Kumara

C.A.Case No:-122/2014
H.C.Monargala Case No:- 199/2008

Vs.

Hon Attorney General
Attorney General's Department,
Colombo 12.

Before	:	H.N.J.Perera, J & K.K.Wickremasinghe, J.
Counsel	:	Neranjan Jayasinghe for the Accused-Appellant H.I.Peiris S.S.C for the Respondent
Argued On	:	04.06.2015/02.07.2015
Written Submissions	:	15.07.2015
Decided On	:	10.09.2015

H.N.J.Perera, J.

The accused-appellant with three others were indicted in the High Court of Monaragala for committing the murder of one Edirimannage Chandramali on 27 06.2000 punishable under section 296 read with section 32 of the Penal Code. The third accused was dead at the time of the trial. After trial without Jury the Learned High Court Judge acquitted the 1st and the 3rd accused and convicted the accused-appellant and imposed the death sentence on 02.09.2014. Being aggrieved of the conviction and sentence, the accused-appellant had preferred this appeal to this court.

The prosecution case rests on the evidence of D.Hemapala, the husband of the deceased and D. Mahendra Maduranga the son of the deceased and section 27 recovery.

According to prosecution witnesses the incident had taken place on 27.06.2000at around 11p.m.According to witness Hemapala a bottle lamp was burning inside the house. He had stated

that he heard some sounds around his house and he was asked to open the door saying that they are from police. Thereafter they broke open the door and came inside the house. According to witness Hemapala three people came inside the house wearing camouflage uniforms similar to Army uniforms According to him one person came in and kicked him and he fell down and further states that he saw something about 1 1/2 feet long like a pistol in the hand of one person and it was aimed at him. He states that the deceased came near him and they held her from her hair and pushed her towards the door. Then he says that the deceased fell near the door step and he heard the deceased uttering "Kumara don't kill us" and at that time he heard a sound of a gun and the people who came ran away.

Mahendra Maduranga the son of the deceased was not listed as a witness in the indictment initially but was added as a witness after the conclusion of the evidence of the doctor.

According to Maduranga the son of the deceased he was only 14 years at the time of the incident and says that he did not see any weapon in the hands of anyone who came into the house on that day. He too testified that the deceased told "don't kill Kumara".

In King V.Asrivadam Nadar 51 N.L.R 322 it was held that:-

When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge or the Jury as the case may be must bear in mind following weaknesses. (a)The statement of the deceased person was not made under oath .
(2)The statement of the deceased person has not been tested by cross examination.

In the case of Queen V. Anthonypillai 68 C.L.W 57 it was held that the failure on the part of the learned trial Judge to caution the Jury as to the risk of acting upon a dying declaration, being the statement of a person who is not a witness at the trial and as to the need to consider with special care the question whether the statement could be accepted as true and accurate had resulted in a miscarriage of justice.

It Is important to note that among the four accused three accused get the name of Kumara in their names. Both witnesses, the husband and the son of the deceased had clearly stated that they were not able to identify the persons who came into their house on that day as they were covering their faces with caps. But the witness Maduranga had proceeded to identify the second accused as a person who had come into house that night from the shape of his body and by the name Kumara. According to him his mother only referred to the 2nd accused as Kumara. According to his evidence it is clear that he knew at the time of the incident one of the persons came on that day was Kumara and that is the 2nd accused. But the witness had clearly admitted in cross examination that he had not mentioned about the 2nd accused to the police. It was the contention of the Counsel for the accused-appellant that this clearly indicates that the witness Maduranga did not know at the time he made the statement to the police that it was the 2nd accused-appellant who came in to their residence that night.

The witness Hemapala had stated that there are two persons in the na me of Kumara-Sumith Kumara and Thushan Kumara. Therefore he cannot say to whom the deceased referred to as Kumara. He had categorically stated that he was not able to identify any of the persons who came in to their house that night as they had covered their faces with caps. Therefore he was not aware that any person by the name of Kumara had come into their house that night. But the deceased had mentioned the name Kumara. In my opinion the learned trial Judge has failed to consider the weaknesses of the dying declaration made by the deceased.

Further according to the evidence led in this case the deceased prior to the incident had made a complaint to police regarding a theft of a cow. According to witness Hemapala the said complaint had been made against the 2nd accused-appellant Thushara Kumara. But according to the police evidence on the day of the incident in the morning the deceased had made a complaint against the 3rd accused-Sumith Kumara. This clearly shows that there was in fact a doubt as to which Kumara the deceased had referred to in her dying declaration.

The police evidence also confirms the fact that the witness Hemapala had made two statement s to the police on the same day.

It is not clear whether the learned trial Judge had directed his mind to the inherent weaknesses in the dying declaration and the risk of acting upon the said dying declaration. The prosecution must prove beyond reasonable doubt that the deceased referred to the 2nd accused appellant when she said 'Kumara'.

The witness Hemapala's evidence is that at the time he went to the police station on 09.07.2000 all the accused were at the police station and he in fact stated that the 3rd and the 4th accused made a confessionary statement to him to the effect that they killed the deceased. He had not stated that the 2nd accused-appellant had made such a statement to him. Therefore as submitted by the Counsel for the accused-appellant there is always the possibility of the deceased referring to any other Kumara other than the 2nd accused-appellant in this case. Further the fact that the witness had seen all three accused at the police station on 09.07.2000 is contradicted by the police evidence that the 2nd accused-appellant was taken into custody on 10.07.2000 at 15.30.

Therefore it was contended by the Counsel for the accused-appellant that it is unsafe to rely and act on the I.B notes and the evidence of police.

The gun which had been recovered was 3 1/2 feet. The gun was not shown to the witnesses. Only witness Hemapala states that he saw a weapon like a pistol about 1 1/2 feet long. The said weapon had also not shown to the doctor and the doctor had said without seeing the weapon he cannot express any opinion on that matter. According to the evidence there had been two T shirts. It is not clear as to which T shirt was recovered on the statement made by the accused-appellant. It was further submitted that there was a serious doubt as to the T shirt which was recovered as a result of section 27 recovery.

It is well settled law that when the conviction is solely based on circumstantial evidence prosecution must prove that no one else but the accused committed the offence.

In Don Sunny V. Attorney General 1998 (2) S.L.R.1, it was held that the charges sought to be proved by circumstantial evidence the items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

In the case of The Queen V.Kularatne 71 N.L.R 534, the Court of Criminal Appeal quoted with approval the dictum of Whitemeyer J. in Rex V. Blom as follows:-

Two cardinal rules of logic governs the use of circumstantial evidence in the criminal trial:-

(1) The inference sought to be drawn must be consistent with all the approved facts. If it does not, then the inference cannot be drawn.

(2) The proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inferences sought to be drawn is correct."

There is no direct evidence as to the identity of the accused in this case.
The item of evidence relied by the prosecution is purely circumstantial. On a perusal of the judgment of the learned trial Judge it is very clear that the trial judge had not considered all the material evidence that had been led before him at the trial by both parties.

Consideration of circumstantial evidence has been vividly described by Pollock C.B in Regina V.Exall [1866] 4 F&F 922 at page I cited in King V. Guneratne [1946] 47 N.L.R 145 at page 149 in the following words:

"It has been set that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then, if anyone link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight : but three strands together may be quire of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which raise a reasonable conviction or more than a mere suspicion : but the three taken together may create a conclusion of guilt with as much certainty has human affairs can require or admit."

The items of circumstantial evidence referred to earlier in this case in my opinion is insufficient to sustain the weight of the rope. Further totality of the evidence led in this case does not lead to an inescapable
And irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased. The prosecution has failed to prove the case beyond reasonable doubt and rebut the presumption of innocence.

For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this

judgment, I set aside the conviction and sentence of the Learned High Court Judge of Monaragala dated 02.09.2014 and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of Appeal in terms of section 331(1) of the code of Criminal Procedure Act No 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Mohamed Nawas Mohamed Siras alias Jan

ACCUSED

CA/179/2010
(High Court Case No 2298/05)

And,

Mohamed Nawas Mohamed Siras alias Jan

ACCUSED-APPELLANT

Vs,

The Democratic Socialist Republic of Sri Lanka

RESPONDENT

Before: Vijith K. Malalgoda PC J (PICA) &
H. C. J. Madawala J

Counsel: Neranjan Jayasingbe for tbe accused appellant
Shanaka Wijesinghe DSG for the A.G.

Argued on: 07/08/2015
Judgment Date: 11/09/2015

H. C. J. Madawala J

This is a case where the Accused Appellant was indicted under section 54A (d) of the Poisons Opium and Dangerous Drugs Act as Amended, for having in possession of 5 grams of Heroin.

After trial the accused appellant was convicted for the above offence and was sentenced to life imprisonment.

Aggrieved by the said convictions and sentence the accused appellant has preferred this appeal to this court. The learned counsel for the accused appellant urged the grounds of appeal as militating against the maintenance of the conviction, as stated in paragraph 6 of the petition of appeal .

We heard the submissions of both parties and have considered same. According to the evidence led in this case the version of the prosecution was that information was been received by a private informant by Police Sub inspector Rangajeewa who informed the main witness sub inspector Paul Fernando the said information, that a person named "Jan" is selling Heroin near the house of Dhammi. According to the tip off received from the informant inspector Paul Fernando arrange a raid and conducted and took all necessary step to search the members of the raid team and proceeded in the vehicle with the said team to the house of Dhammi. This team had met the informant near the state printing corporation at Baseline road, Borella at 19.05 and at that time the informant had informed that Jan is still selling Heroin at the same place. Only Paul Fernando and Rangajeewa got down from the vehicle and they came near the Magazine road where the informant showed and pointed out the suspect. Paul Fernando and Rangajeewa proceeded about 200 meters in the Magazine road and turn to his right and walked about 100 meters and from there on another narrow road for 5 meters. Then he saw the accused appellant who had in his hand a bag with money amounting Rs.37730/= and was searched on the road and found a parcel of Heroin in his right trouser pocket. That was a green coloured bag and there was a knot in it. They also found a key of the house of Dhammi from the custody of the accused and entered the house using the said key, Which was an Upstairs house. According to 'the evidence led in the trial the said house had been used by the Heroin users. The accused appellant had temporary occupied the ground floor of this house.

On being informed by the informant, SI Paul Fernando together with SI Rangajeewa arrested and searched the accused and there after having found the bag with money and the heroin parcel the accused was produced to the Police Narcotics Bureau and the productions were sealed in the presence of the appellant.

Accused Appellant in his dock statement took up the position that, he was taken in to custody by the police at about 6 O'clock at the Borella Junction. As he has lost his job two years ago, one of his uncle has requested to him to meet him at 10 O'clock in the following morning. When he was walking along the Magazine Road in order to buy a cigarette, a person has come and held him by his T shirt and has asked whether he was Shantha. The said person questioned "ධම්මිකා කියන ගැනිගේ බඩු විකුණන්නේ උඹ නේද?" He has replied that he does not know and was going to meet his girlfriend. There after the two officers had assaulted him and took him to a three storied house. The door behind the house was opened and the two officers had said "උඩ බඩු තියෙන තැනින් අරන් දීපන් නැත්නම් හොයලා ගන්නවා" He has said that he doesn't know and that he is not a

resident There after three or four officers came to the kitchen and searched the pantry cupboards and there after searched the tiles on the floor. However they did not find anything there. There after they took him upstairs and went in to a room where they found a bed and two pillows. The said persons searched the pillow and the mattress and whilst they were searching the pillow they found some money inside the pillow case. There was also wooden stair case and the officers tapped and broke open the stair case and found a parcel. He said that he did not know anything and that he was not Shantha and he was a Muslim named "Jass".

On a perusal of the written submissions tendered to court the main contention of the accused appellant was that the learned High Court Judge perused the I.B. extracts and came to a conclusion at the time of preparing the Judgement without putting it to the witness that the notes that were entered by both officers are similar. It was contended by the defence that no opportunity was given to cross examine the witness as to the contents that were in the I.B. and the substantive evidence given in Court had been rejected on the strength of the I.B. notes. It was submitted that the Learned Trial Judge in his Judgement at page 5 has stated as follows, "රංගජීව තම විමර්ශන සටහන් වල සාක්ෂි දන්වන ආකාරයට සටහන් තබා ඇති පදනම පෙනී යන අතර පෝල් ප්‍රනාන්දුගේ විමර්ශන සටහනේ ද ඒ ආකාරයට රංගජීවගේ සාක්ෂියට ගැලපෙන බව පෙනී යයි " If he had not adopted the contents of the I.B. as evidence Learned High Court Judge could not have stated what was said in Court by Rangajeewa is not correct. The Learned High Court Judge who adopted the contents of the I,B. as evidence and rejected the evidence given at the trial and comes to a conclusion that according to I.B. notes there is no difference regarding the distance. In this situation Learned High Court Judge was refusing the substantive evidence on the strength of the entries in the I.B.

We find that the Learned High Court Judge has taken into account information books notes in some instances to reject the evidence in the case. We find this is a clear misdirection. In the case of Peiris vs, Eliyathamby 44 NLR 207 Hearne J. held: "Entries in a Police Information book cannot be used as evidence for the purpose of testing the credibility of a witness". In the case of Inspector of Police Gampaba vs, Perera 33 NLR 69 : Where, examining the complaint and his witness, the Magistrate cited the Police to produce extracts from the information book for his perusal, before issuing process. Held," that the use of information book was irregular". It was further decided that applying the principles laid down in the above judicial decisions that in Criminal Trial Judges are not entitled to use statements of Police and not produced in evidence to discredit witness. Accordingly we hold that in the present case the trial Judge was wrong when he rejected the dock statement of the accused appellant without giving any reasons for same.

Section 110 (4) Code of Criminal Procedure Act No. 15 of 1979 read as follows,
"Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused not his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely

because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply:"

The court observes that section 110(3) of the Criminal Procedure Act lays much emphasis on statement made to the Police in the course of investigations to be used according to the provisions of the evidence ordinance are subject to limitations there in Thereafter the next subsection section 110(4) contemplates to give the trial Judge assistance in the conduct of the trial or inquiry and permit the judge to peruse the statement only to assist him at such trial or inquiry The strict limitation placed under the said section is to prevent the Judge using such material as evidence. The section used in contemplates merely to assist the Judge but evidence to be led or which surface cannot be made use of by the trial judge and if the judge decides after perusing the statement to use it as evidence in any form would be a total prohibition which results in a miscarriage of justice. However a mere perusal by the trial Judge of I.B. extracts for purpose of clarification would not be objectionable as per se section 110(4) of the Code of Limitation if at all under section 110(4) is not to use of as evidence.
Sheela Sinharage Vs. The Attorney General (1985) 1 SLR 1: Held-
Section 110 (4) of the code of Criminal Procedure Act. No. 15 of 1979 empowers the High Court Judge to use a statement made at a non-summary proceeding to aid him at the trial but it cannot be used as evidence in the case. Under section 33 of the evidence Ordinance given by a witness in a judicial proceeding can be proved at the later stage of the trial in accordance with the provisions of the laws of evidence and criminal procedure. But here the High Court Judge perused the evidence given' at the non-summary inquiry of the deceased's statement to Dr. Wass and used material contained in it for the purpose of his judgment without having taken any steps to have such material placed before him in evidence. This procedure is illegal and cannot be justified.

Keerthi Bandara vs. Attorney General:
Quare: (4) It is for the Judge to peruse the information book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial.

We observe that in the present case before us the said I.B. notes have been perused by the learned High Court Judge not at the trial or Inquiry but at the time he wrote the judgement. Although a trial judge is permitted to peruse the I.B. notes for clarification he should peruse same at the trial or inquiry giving an opportunity for the defence counsel to examine same and granting him an opportunity to cross examine if necessary . As such we find that the learned trial Judge perusing the I.B. notes at the time he is writing the judgement is not permitted. As such we hold that the learned High Court Judge has erred in this regards.

Further we find that the net quantity according to Narcotic Bureau 15 gram and 200 mg. According to Government Analyst the quantity they received was 13.4 grams no evidence had

been obtained from the Government Analyst as to the reason for the discrepancy. The Learned High Court Judge has failed to address his mind for the above issue.

For reason set out above I hold that the Trial Judge had failed to ensure a fair trial to the Accused Appellant and there for decides to order a fresh trial.

Appeal partly allowed Re-trial ordered.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of Appeal in terms of section 331(1) of the code of Criminal Procedure Act No 15 of 1979.

Director General,
Bribery and Corruption Commission,
No.36, Malalasekara Mw,
Colombo 07.

COMPLAINANT

CA/216/2011
HIC Colombo B1605/05

Vs,

Kaggoda Arachchige Dayalatha,
Agricultural Quarters,
Kiriwehera.Kandaketiya.

ACCUSED

And,
Kaggoda Arachchige Dayalatha,
Agricultural Quarters,
Kiriwehera.Kandaketiya.

ACCUSED-APPELLANT

Vs,
Director General,
Bribery and Corruption Commission,
No.36, Malalasekara Mw,
Colombo 07.

COMPLAINANT-RESPONDENT

Before : Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J

Counsel : Neranjan Jayasinghe for the Accused-Appellant
Wasantha Perera for the Respondent

Argued On : 16.06.2015

Written Submission On : 27.07.2015

Order On : 23.09.2015

Vijith K. Malalgoda PC J (P/CA)

The Accused-AppeIlant was indicted before the High Court of Colombo by the Commissioner General of Bribery and Corruption on four counts under section 19 (b) and 19 (c) of the Bribery Act 38 of 1974 as amended by Bribery (amendment) Act No 09 of 1980 for solicitation of Rs. 50,000/- and accepting Rs. 10,000.

After trial before the High Court, the Accused-Appellant was found guilty of all 4 counts and the High Court had imposed on each count 1 year rigorous imprisonment suspended for 5 years with a fine of Rs.5000/-, in default 3 months imprisonment with an additional forfeiture of Rs. 10,000/-Being dissatisfied with the above conviction and sentence the Accused-Appellant had preferred this appeal.

The prosecution version of this case can be summarized as follows;
The Accused-AppelJant was working as the Grama Niladhari for the Grama Niladhari Division Badulu Oya- East Kandeketiya during the time relevant to this case.

The virtual Complainent Nadeeka Dissanayake was married to an Army solider and the said husband went missing when he was working at Mulativu Camp and death certificate was also issued on him. Nadeeka was receiving a pension using this period and one condition for her to receive benefits from the Army was that she should remain single without getting married again. However it is in that she was living together with one Palitha Karunarathne during this period and she had a Child from the said Karunarathne.

During the early part of year 2000 Anny had informed her that she is entitled to receive Rs, 185,000/- compensation and wanted her to produce a certificate from the Grama Niladhari to the effect that she was not entered in to a marriage again.

Complainant position before the High Court was that, when she went and met the Accused-Appellant who was the Grama Niladhari of her division, she demanded Rs. 50,000/- in order to issue the said certificate. However the Accused- Appellant had issued the said letter on 07.01.2000.

Virtual complainant had received the cheque on 14.02.2000 and deposited it at the bank. Complainant had gone and met the Accused -Appellant with her mother and the said Palitha Karunarathne and gave Rs.I0, 000/- to the Accused -Appellant and she was asked by the Accused to pay the balance but the complainant did not pay the balance to the Accused-Appellant.

The complainant had admitted that there was a rumor during this period in the village that the complainants missing husband had come back to the village. The Accused Grama Niladhari had

visited the house of the complainant to inquire the above facts for several times and also informed the AGA of the rumor and requested him to stop the payment of her pension.

The position taken up by the complainant before High Court was that she never complained to the Bribery Department until the officers from the AGA's office visited her house in year 2003 to inquiry as to why she is not collecting her pension.

Complainant admits making two statements one to the officers of the AGA's office, and the other: to the Bribery Commissioners Department.

In addition to the virtual complainant, her mother Anulawathy and her paramour Palitha Karunarathne were also called as witnesses for the prosecution.

Both Anulawathy and Karunarathne in their evidence referred to the acceptance of sum of Rupees 10,000/- by the Accused-Appellant but contradicted each other as to how the transaction took place. According to the evidence of Nadeeka Dissanayake (86) she went with Palitha to give the money to the Accused-Appellant but under cross examination she admitted going with her mother and Palitha both (102). With regard to the person who carried the money, withness Palitha and Anulawathy contradicted each other.

According to Palitha it is Anulawathy who had the money at that time (127) but according to Anulawathy it is her daughter who had the money (144). There two witnesses contradict each other again with regard to the handing over the money to the Accused. According to Anulawathy the money was handed over to the Accused by her daughter in presence of all three witnesses including Palitha (145) in the verandah of the Accused's house. But according to Palitha the transaction took place inside the house of the Accused-Appellant and the witness did not see the transaction, even though he heard the conversation.

Counsel for the Accused-Appellant submitted the importance of the above contradictions, in the light of the delay in making the complaint to the Bribery Department. He further submitted that the Learned Trial Judge had erred in Law by failing to evaluate the evidence of the Prosecution witnesses. When the Prosecution concluded its case, the Accused-Appellant opted to give evidence on oath. During her evidence the Accused-Appellant took up the position that, on the request of the complainant she issued a certificate confirming that she lives single but since there was a rumor in the area, that her husband had come to the village and that she was living with another, she informed AGA of the area of this position requesting him to suspend her pension temporarily about two months later.

In January 2001 she was transferred to a different division and therefore she was unaware of any steps taken subsequent to the initial suspension of the pension by the AGA on the request of the Accused-Appellant as well as on a letter received from the Army Head Quarters. In April 2002 she was transferred back to the same Garama Niladhari Division. Even during this period she had no contacts with the complainant and she never met her or made any request to cancel the suspension.

The Accused-Appellant in her evidence referred to the conduct of the AGA who assumed duties in mid 2002, alleging that it is this AGA who got the complainant to lodge a faults complainant against her. This court observed that the Accused-Appellant had taken up this position right throughout her defence and in fact complainant had admitted in her evidence, that the said AGA had visited her house on few occasions during the period she made statements to the officials of the AGA' office and Bribery Department.

The counsel for the Accused-Appellant submitted that the Learned High Court Judge has failed to consider the evidence given by the Accused-Appellant on oath in the light of several contradictions marked in the evidence of the lay witnesses.

In the case of Chandradasa V. Queen 72 NLR 160 the Court of Criminal Appeal concluded that it is the duty of the Trial Judge to place a defence, however weak and insubstantial it may appear to be fairly and adequately before the jury.

Even though the present case is not a jury trial, we observe that the Learned Trial Judge has a duty to consider the defence case; however it is weak, before coming to a conclusion. He should have at least rejected the defence case giving reasons for his rejection. In the present case we observe that the learned High Court Judge had narrated the evidence given by the Accused- Appellant (page 270-271) but failed to give reasons for the rejection of the said evidence.

In addition to the Accused-Appellant, the defence had called another witness on behalf of the defence. The said witness, who was attached to the AGA's Office as a Management Assistant, had given evidence based on the documents maintained at the said AGA's Office.

According to his evidence the complainant's pension was suspended with effect from 22rd March 2000, but by letter dated 29.03,2000 AGA had written to the complainant asking her to collect the pension. However the complainant by letter dated 51b April 2000 again made an appeal for the payment of her pension. Even thougb the Accountant of the AGA' s Office had made specific order to pay the said pension to the complainant, she had not collected the said salary until 2004 where she had made another request for the payment of her pension.

When go through the said evidence, which is based on the documents maintained at the AGA' s Office, the only conclusion this court can reach is that, the complainant for reason best known to her had decided not to collect the pension of her missing husband.

The Accused-Appellant was not functioning as the Grama Niladhari of the said division between January 2001 to April 2002, but even during the said period the complainant had not made any attempt to obtain her pension.

The Learned Trial Judge had only narrated the said evidence but failed to give reasons for the rejection of the said evidence.

This is an open inquiry commenced after three years to the alleged solicitation and acceptance. When considering the delay in marking the complainant along with the contradictions marked

inter say between the lay witnesses; I am not in favour of accepting and acting upon the above evidence.

For the reasons adducted above I allow the appeal and set aside the conviction and sentence imposed by the Learned High Court Judge.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL

Appeal allowed conviction and sentence set aside .

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of Appeal in terms of section 331of the code of Criminal Procedure Act No 15 of 1979.

Duwe Balage Dias,
Welikada Prison,
Colombo 9.

ACCUSED-APPELLANT

C. A. No. : CA 53/2014
H. C. Matara Case No.: HC 54/09

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : H. N. J. Perera, J. &
K. K. Wickremaslnghe, J.

COUNSEL : Kolitha Dharmawardana with Chaminda Diloka Mannakkara for the Accused-Appellant.
Hiranjan Pieris, SSC for the Attorney General.

ARGUED ON : 10th of June 2015

WRITTEN SUBMITIONS : 08th of July 2015

DECIDED ON : 29th of September 2015

K. K. Wickremasinghe, J.

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In this case, there were two accused. The accused namely, Hewa Maddumage Karunadasa and Duwa Balage Dias were indicted at the High Court of Matara for having committed the death of Nallapperuma Arachige Lional on 20.03.1998, thereby committing an offence punishable under sec. 296 of the Penal Code and for having committed grievous hurt on Liyana Arachige Indrani in the course of the same transaction, thereby committing an offence punishable under sec. 316 of the Penal Code.

The first accused was absconding and the learned Trial Judge decided to hold the trial in absentia after considering all the evidence to the fact that the first accused was absconding under sec. 241 of the Code of Criminal Procedure.

This case was tried by a Judge without a Jury upon the request of the second accused. At the conclusion of the trial on 25.02.2014 both accused were convicted by the learned High Court Judge for both the charges. The first accused was convicted in absentia as he was absconding to date.

Thereafter the first and the second accused were sentenced to death for the charge of murder and two years rigorous imprisonment had been imposed on them for the charge of grievous hurt.

This is an appeal by the second accused (hereinafter referred to as the appellant) against the said conviction and the sentence.

According to the evidence given by the legal wife of the deceased, the first witness for the prosecution, the injured party was the mistress of the deceased and the first accused was the husband of the injured. Six months prior to the incident the injured had come with the deceased to the house of the deceased and since then she had been living in the deceased's house.

On the day of the incident this witness had gone to her parents' residence with her children at about 8 pm. That house was, about 1 and 1/2 miles away from the deceased's house. There were only the deceased and the injured left in the house of the deceased in that night. When this witness was in her parents' residence, one Piyadasa had come and informed her that the injured was beaten. Then she had gone to her husband's house and on her way to that house she had met the injured. The injured was coming towards her and she was crying. At that time the witness had noticed the fingers of the injured were cut and she had questioned the injured with regard to these injuries.

Then the witness had gone to the house of the deceased with the injured, there she had noticed that all the doors of the house were open and had seen the deceased lying on the floor, inside the house. According to her, the body of the deceased was covered with blood. Thereafter, the witness had taken the injured to the hospital.

However, according to the witness, she had never known the appellant before she came to the Magistrate's Court to give evidence. She had only known the name "Dias" before the case but not the appearance of the person (vide page 60 of the brief).

In the Trial Court, the JMO who conducted the post-mortem on the deceased, the doctor who Inspected the injured and the police officers who conducted the Inquiry had given evidence for

the prosecution. However, according to all those evidence, the only fact that had been proved was the death of the deceased and nothing more than that. The police had recovered weapons (a sword a 'keththa, chopper/catty) and a 'manne' knife (machete/cleaver) upon the direction of the appellant on a statement made to the police (under sec. 27 of the Evidence Ordinance). Those weapon were hidden under the bed of the first accused. According to the evidence given by the JMO who conducted the post-mortem on the deceased and the doctor who inspected the injured, the injuries that they found on the bodies of both deceased and the injured were cut injuries, could have been caused by the weapons found by the police. According to the testimony of the JMO, the cause of death was due to "respiratory difficulties due separation of trachea following assault by sharp weapon". None of these evidence show a clear connection between the alleged offence and the appellant.

The Counsel for the appellant submits that the evidence led by the prosecution is totally inadequate to support a conviction. It is clear that, Indrani, the only eye witness of this case, had given evidence at the non-summary inquiry but had not given evidence at the trial. She was supposed to have been dead at the stage of the Trial. Even though the Court records reveal that the State Counsel had informed the Court that Indrani was dead and therefore he is willing to produce her evidence given at the non-summary inquiry under sec. 33 (1) of the Evidence Ordinance, it was only an application. Neither the death certificate nor other evidence had been produced to prove the death of the witness. No steps had been taken to produce the evidence given by this witness at the non-summary inquiry at the stage of the trial.

In the case of Kekulkotuwage Don Anton Gratien v. The Attorney General (C.A. 226/2007),decided on 01.07.2010, no evidence was led before Court to establish the fact that the witness had gone abroad. Justice W. L Ranjith Silva held in his judgment that "The correct procedure would be for the prosecution to lead the evidence of the wife of the witness and the Grama Niladhari and provide an opportunity for the defence to cross examine the witness. It is after such inquiry, ... , that a court should allow such application. The Trial Judge was duty bound to follow the established procedure before he arrived at his decision to adopt such a course". In that case, he also cited the case Sajjan Singh v. Emperor (1925) 26 Cr.L.J. 1489 where the court held "if the prosecution seeks to lead the deposition on the basis that the witness is dead then the death of the witness must be proved."

In the present case the learned Senior State Counsel also submitted to the Court that he concedes the fact that no proper evidence had been led under section 33 of the Evidence Ordinance before the High Court. Furthermore, he agreed on the fact that the evidence led at the trial was insufficient to arrive at a finding of guilt against the appellant and did not support the conviction.

Then the learned Senior State Counsel moved that this case should be sent back for retrial. However, the learned Counsel for the appellant submitted that this is not a fit and proper case which has to be ordered re-trial due to inadequate evidence.

The sec. 335 (2) (a) of the Code of Criminal Procedure provides that, "In an appeal from a conviction by a Judge of the High Court at a trial without a jury the Court of Appeal may reverse the verdict and sentence and acquit or discharge the accused or order him to be re-tried." In the case of **Warangoda Nandana Ratnasuriya v. The Hon. Attorney General (CA. 58/2005)**, decided on 19.12.2008, Justice Sarath de Abrew held that according to this section "a discretion is vested in the Court whether or not to order a re- trial in a fit ease, which discretion should be exercised judiciary to satisfy the ends of justice ... ". **Accordingly, the decision to order a re-trial should very much depend upon to satisfy the ends of justice**. Furthermore he held four grounds that the Judge should consider when deciding whether a particular case should be sent for re-trial or not.

Those grounds are;

1. The nature of the evidence available.
2. The time duration since the date of the offence.
3. The period of incarceration the accused person had already suffered.
4. The trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime

In the case of Banda and Others v. Attornev General (1999) 3 SLR 168 at page 171, Justice F. N. D. Jayasuriya held "The issue whether a re-trial should be ordered or not . would depend on whether there is testimonially trustworthy and credible evidence given before the High Court."

In the present case, the appellant had been convicted by the learned Trial Judge for the offences on the basis of 'common intention'. However, as I have mentioned above, the evidence of the only eye witness to this incident had not been properly produced at the trial under sec. 33 of the Evidence Ordinance. As pointed out by the learned counsel for the appellant, even if this Court ordered a re-trial it would only result in providing the State to find out whether that witness was dead or not and to take steps thereafter to adopt the evidence given by the witness at the non-summary inquiry. The appellant will have to languish in incarceration during this period which may be considerably long. Keeping the appellant in the prison for this whole period will worth at the end if the evidence given by this eye witness at the preliminary inquiry is strong enough to build a strong case against the appellant.

The death of the witness was not proved at the Trial. Therefore I am not aware whether the witness was in fact dead or not. Even if the death of this witness was properly proved at the re-trial and thereafter her evidence given at the non-summary inquiry were properly adopted; such evidence only reveals that 'the appellant was only present at the scene with others in a manner as if he came to the scene to keep company'. It doesn't even reveal that the appellant was armed with any type of a weapon or he was spying or remaining as a guard in order to aid the others' act and there was no participatory presence.

According to the Court Record the Appellant was first remanded on 28th August 1998 and had been in and out of remand until 2002. Since 2002 he has continued to be in remand for a total

period of over 13 years to date. Furthermore, this is an incident occurred 17 year before (in 1998). In the case of Werangoda Nandana Ratnasuriya v. The Hon. Attorney General (C.A.58/2005),decided on 19.12.2008, Justice Sarath de Abrew has held that" it must be noted that as the alleged offence has been committed on 07.02.99, almost 10 years have elapsed since the date of the offence. In a long line of case law authorities, our Court have consistently refused to exercise the discretion to order a retrial where the time duration is substantial"

Therefore, I am of the view that this is not a fit and proper case to send for re-trial.

Based on all above, I set aside the conviction and the sentence with regard to the appellant and acquit the appellant. This judgment does not affect the conviction and the sentence imposed on the first accused, by the learned Trial Judge.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

01) Kekulkotuwage Don Anton Gratien v, The Attorney General (C.A. 226/2007)
02) Sajjan Singh v. Emperor (1925) 26 Cr.L.J. 1489
03) Warangoda Nandana Ratnasuriya v. The Hon. Attorney General (C.A. 58/2005)
04) Banda and Others v. Attorney General (1999) 3 SIR 168
05) Keerthi Bandara v. Attorney-General (2) SLR 245

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of Appeal in terms of section 331(1) of the code of Criminal Procedure Act No 15 of 1979.

The Democratic Social 1st Republic of Sri Lanka

COMPLAINANT

Vs,
Wikrama Hennayaka.

CA/148/1997
He Colombo Case No 519511992

ACCUSED

And,
Wikrama Hennayaka.

ACCUSED-APPELLANT
Vs,
Hon. Attorney General,
Attorney General's Department,
Colombo 12.

COMPLAINANT-RESPONDENT

Before : Vijith K. MalaIgoda PC J (P/CA) &
H. C. J. Madawala.,J

Counsel : Anil Silva PC for the Accused-Appellant,
Rohantha Abeysooriya DSG, for the A.G.

Argued On : 26.05.2015

Written Submissions On : 12.08.2015

Order On : 02.10.2015

Vijith K. Malalgoda PC J (P/CA)

The accused-Appellant was indicted before the High Court of Colombo on two counts namely,

1. Cheating of one Nagur Adumei Nona Hanina the Accountant of Education Employees
- Thrift and Lending Society for a sum of Rupees 50,000/- and there by committed an offence

punishable under section 5 (2) of the Offence Against Public Property Act No 12 of 1982 read with section 398 of the Penal Code.

2. In the alternative to the above count, misappropriated a sum of Rs. 50.000/- obtained from one Nagur Adumei Nona Hanina, the Accountant of Education Employees Thrift and Lending Society an offence punishable under section 5 (1) of the Offence Against Public Property Act No.12 of 1982 read with section 386 of the Penal Code.

According to the Prosecution the alleged offence had committed on 11.11.1990, 25 years ago and the evidence of five lay witnesses were led at the trial including the evidence of witness Nagur Adumei Nona Hanina who was the Accountant of the said society during the time relevant to this case,

At the conclusion of the prosecution case, when the defence was called by the Learned Trial Judge the accused preferred to make a dock statement, and called one witness namely Mankotte Kankanamge Mallika.

The Learned Trial Judge acquitted the Accused-Appellant on the 1st count and convicted him for the 2ad count (which is an alternative count to the 1st count) and sentenced him for two years Rigorous Imprisonment and a fine of Rs. 150,000 with a default sentence of 08 months Rigorous Imprisonment.

Being dissatisfied with the above conviction and sentence the Accused-Appellant had preferred this Appeal.

Prosecution version of this case can be summarized as follows. The Accused-Appellant was the Secretary and the CEO of the Education Employees ,Thrift and Lending Society during the time relevant to this case. Witness Nagur Adumei Nona Hanina was the Accountant of the said Society. The said Nona Hanina was the main witness for the prosecution. During her evidence she had given evidence to the effect that on number of occasions the Accused-Appellant had requested ber to issue money to him on chits submitted by him, and since she knew that the said monies were obtained not for any official work, she maintained a private book to enter the said transactions. However when the accused got to know that she maintained a private book, he took the said book from her custody. Since the Accused-Appellant held a very powerful position she had no alternative but to carry out his orders.

However in this instance, instead of a chit, the Accused-Appellant had presented a voucher for Rs. 50,000/- and the said voucher was prepared to make a payment to the National Paper Corporation for 250 paper packets.

The said voucher was prepared in the handwriting of the Accused-Appellant and it was approved by him. Generally the vouchers are prepared by the branch which requires the money and it was to be approved by the General Manager, but since the Accused-Appellant had prepared and approved the said voucher she was bound to carry out his direction and therefore she had made the payment to him.

An audit officer of the National Paper Corporation one VidanaJage Daiwin Siripala Soysa was called as a witness for the prosecution and according to him the Corporation did not supply paper to the Society as referred to in P-Il.

The next witness summoned by the prosecution was Yalagalage Wimal Ratnasiri Peiris. This witness was a Co-operative Inspector attached to the Department of Co- operative Development, and he was entrusted with the conduct of an audit at the complainant society. According to him the said society was a registered Co- operative Society with the Department of Co-operative Development and therefore the Commissioner of Co-operative Development had authority under the Co-operative Societies act to conduct an audit quarry.

According to (his witness a cash shortage was discovered during his audit quarry and according to the books maintained by Ms. Hanina (the previous witness) total receipts during this period was Rs. 10,202,908.01 and total Deposit was Rs. 9, 331, 994.08 and the cash is hand was 249,185.82. Therefore the shortage discovered during his audit quarry was Rs. 705,399.10.

But when the books maintained by her were further perused, he observed serious lapses from the part of the accountant and he discover 27 cheques to the value of Rs. 405,987.31 encashed on the instruction of the Director Board and CEO and another 10 cheques to the value of Rs. 37,387.50 were found to be deposited but not entered in the books. With these discoveries shortage was reduced to Rs. 262,026.29. According to the wi tness, the accountant's explanation to the said shortage was that she gave money on notes submitted to her and P 11, the voucher in question in the present case was produced as one of such notes received by her.

Witness Peiris during his evidence had admitted that he questioned the Accused-Appellant with regard to P-Il and a statement was recorded to that effect and the said statement was produced marked P-14.

The explanation given by the Accused-Appellant was that, the said money was obtained to be given to one Anura Perera of Dinesha Enterprises in order to purchase printing papers for an urgent printing work undertaken by the said Dinesha Enterprises and the money was given to Anura Perera by Ms. Hanina in his presence and two days later, the said money was returned to Hanina by the said Anura Perera in his presence.

Even though this position was not confronted with witness Hanina, a letter send by the said Hanina to this witness was marked under cross examination as "ඇ-19".

Witness Peiris admitted receiving the said. letter from Hanina during his investigation [Page 168] and according to the said letter, Hanina had admitted receiving Rs. 100,000/- from Anura Perera of Dinesha Enterprises.

When the case for the prosecution was closed, the Accused-Appellant preferred to make a statement from the dock. According to his dock statement, the amount referred to this indictment was obtained to be given to one Anura Perera of Dinesha Enterprises. According to the Accused-Appellant there was a shortage of papers during this period due to setting fire to Embilipitiya Paper Factory and since the society was in a hurry to get 10,000 children's saving books printed through Dinesha Enterprises, on the request of Mr. Anura Perera for an advance of Rs. 50,000/- to purchase paper, the said money was given to him by witness Hanina in his presence and the said money was return to the Accountant in his presence few days later.

The position taken by the counsel for the Accused-Appellant before this court was that the Learned Trial Judge had failed to consider the said Dock statement, which was corroborated by document P-14 and මී-19 a letter written by the main prosecution witness Ms. Hanina to witness Ratnasiri Peiris who conducted the audit quarry.

In the case of Chandradasa V. Queen 72 NLR 160 the Court of Criminal Appeal concluded that it is the duty of the Trial Judge to place a defence, however weak and insubstantial it may appear to be fairly and adequately before the Jury.
Even though this is a trial before Judge, the trial judge has a duty to fairly and adequately consider the said defence before rejecting the same.

In the present case we observe that the Learned Trial Judge had narrated the dock statement at length but rejected the said statement for the reason that it cannot be believed that, the accountant, had failed to make any note when the money was returned, by the Accused who is the CEO of the society. In this regard the Learned Trial Judge had failed to consider document marked මී- 19.

Learned Counsel for the defence further Argued before us that the Learned Trial Judge had heavily relied on the evidence of witness Hanina and decided to act upon her evidence purely based on her demeanour in court. When considering the serious lapses observed by the officer who conducted the audit with regard to the work of Hanina, I agree with the submissions made by the Learned Counsel that it is unsafe to act on the uncorroborated testimony of Hanina.

The next issue before us is, to consider whether the prosecution has established the charge of misappropriation in this case.

The Learned Trial Judge after analyzing the evidence had proceeded to discharge the Accused-Appellant from the count of cheating which is the 1st count in the Indictment. Since the two counts in the Indictment are alternative counts, I see no reason for the trial judge to record a discharge in the 1st count, since the court had the discretion to convict the accused for either of the offences.

The second count is one under section 386 of the Penal Code, read with the provisions of section 5 of Offences against Public Property Act No 12 of 1982.

Section 386 of the Penal Code reads as follows;

"Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

In a case of Criminal Misappropriation actus reuse comprise three facets namely,

a. There should be misappropriation or conversion of the property by the accused
b. The properly must be movable property
c. The property should belong to a person-other than the accused

The requisite mens rea of this offence derives from the element of dishonesty and it was considered as an initial innocent taking of the property followed by a guilty state of mind at a later stage in a series of decided cases including Kanavadipillai Vs. Koswotte (1914) 4 Balasinghamis Notes 74, Peiris Vs. Anderson (1928) 6 Times of Ceylon Reports 49 and Gratiaen Perera 61 NLR 522, until it was overturned in the case of Attorney General Vs. Menthis 61 NLR 561. In the case of Menthis Sinnethamby J observed that "The Penal Code departed in this respect from the English law and made it an offence to misappropriate property even if the original possession was honest. Explanation 2 it seems to me, was merely intended to emphasize the difference between the law in England and under the Code but it does not postulate that in order to constitute criminal misappropriation the initial taking must always be honest. Indeed it suggests that an initial dishonest taking also amounts to criminal misappropriation for it states that a person who finds property and takes it "for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly", thereby suggesting that if the finder does not take it for such a purpose he will be guilty of the offence. The main provisions. of Section 386 make dishonest misappropriation at any stage an offence; Explanation 2 only provides for a special case where the initial taking is honest and its intended to protect the finder of property not in the possession of anyone so long, and only so long, as his continued possession of that property is honest. If, of course, the property taken was in the possession of some person the resulting offence would be theft.

In my opinion, therefore in order to constitute misappropriation under our law it is not necessary that there should be an innocent initial taking. If the initial taking of the property not in the possession of anyone is dishonest then too the offence is made out. In regard to this, I agree with the view expressed
by Justice Moseley in Salgado V. Mudali Pulle (supra). "

However when going through the judgment of the Learned High Court Judge I observe that instead of considering the legal provisions required to be established a charge under section 386, the trial judge had proceeded to consider the requirement to establish a charge under section 388 a charge under Criminal Breach of Trust.
Whilst discussing the provision of section 388 of the Penal Code Learned Trial Judge had applied

the evidence led in the trial for the legal requirement in a charge of Criminal Breach of Trust and concluded that the Accused had used or disposed of that property in violation of any legal contract expressed or implied which he has made touching the discharge of such trust (page 29 and 30 of the Judgment).

In the absence of consideration under section 386 of the Penal Code, whether the Accused-Appellant
"dishonestly misappropriated or converts to his own use" the said money, specially in the light of documents marked P-14 and P-19. I observe that it is unsafe to conclude that the available material is sufficient to convict the Accused-Appellant for the second count.

For the reasons adduced above I allow the appeal and set aside the conviction and sentence imposed on the Accused-Appellant.

Appeal allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala., J.
I agree,

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Wijethunga Mudiyanselage-
Heen Banda Accused-Appellant

C.A.Case No:-129/2013
H.C.Kurunegala Case No:-134/2010

Vs.

Attorney-General
Attorney Generals Department,
Colombo 12.

RESPONDENT

Before	:	H.N.J.Perera, J. & K.K. Wickremasinghe, J.
Counsel	:	Dr. Ranjith Fernanando for the Accused-Appellant M.C.Dileepa Peeris S.S.C. for the Respondent
Argued On	:	23.03.2015
Written Submissions	:	25.0S.201S/23.06.2015
Decided On	:	07.10.2015

H.N.J.Perera, J.

The accused-Appellant in this case was indicted before the High Court of Kurunegala for kidnapping and raping a girl named Sandhaya Sunjeewani Kumari on 05.06.2008 offences punishable under section 354 and 365 B {2} B of the Penal Code as amended by Act No. 22 of 1995. After trial the accused-appellant was convicted for both counts and was sentenced to 3 Years R.I. and to a fine of Rs.5000/-on the first count and to 7 Years R.I and to a fine of Rs.5000/- on the second count. The accused-appellant was also ordered to pay Rs 100,000/- as compensation to the victim.

Learned Counsel for the accused-appellant urged four grounds of appeal as militating against the maintenance of the conviction.

1. The delay in complaining the incident to police.
2. The consistency and probability in the victim's version
3. The Medical evidence does not corroborate the victim's stance
4. The delay in pronouncing the judgment.

According to the prosecution the victim was a 15 years old girl. The victim having returned home from school went on her peddle bike in search of her mother. The victim's mother had gone to the paddy field, whilst riding the accused-appellant who is well known to her, blocked her road way at a junction. Case for the prosecution was that the accused appellant dragged the victim along ground, her mouth gagged with hand . and taken to a shrub area removed all her clothing. The accused appellant also removed his clothes and inserted his penis into her vagina until it was painful, lay on top of her for about five minutes and got up. Thereafter she too got up took the bicycle and went home. Her mother was not at home and she bathed and washed her clothes.

The evidence led in this case indicate the she complained about the incident to her mother and it was conveyed to the father after he came back home. A complaint was made to the Galigamuwa police Station two days after the incident on 07.06 2008. In this case the parents of the victim had initially complained to the Village Peace Committee. The said Committee had advised them to complain the alleged incident to the police. In this case an explanation had being elicited from the victim regarding the delay in making the complaint of rape.

In Sumanasena V. Attorney General [1999] 3 Sri.L.R 137 it was held that:-

"Just because the witness is belated witness court ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness."

In this case the victim and her mother had given a plausible reason for the delay in making a complaint to the police therefore it is not a ground to reject the evidence of the victim as alleged by the Counsel for the Accused-appellant.
In this case the victim had clearly stated that the accused-appellant dragged her along the ground. She had also said that it was a jungle like area with thorny bushes around. She was naked at the time she was raped by the accused-appellant. She also stated that she fell down and although she was not able to give the exact distance had stated that the accused-appellant dragged her along the ground some distance.

The Doctor A.H.Sunil Piyasena who examined the victim did not find any injuries in her vagina. According to the Doctor there was no injuries to be seen on her body. She was examined by the said Doctor on 08.06.2008 at 9.15 am at the Kurunegala General Hospital. The prosecutrix had stated to the said Doctor who examined her that the accused-appellant dragged her into the jungle, and while she was on the ground lifted her frock, pulled down her panty half way down and inserted his penis into her vagina. The short history given to Doctor does not appear to be compatible with her testimony in the High Court. The Doctor has stated to court that there were no external injuries found in the prosecutrix. The said witness failed to find any injuries pertaining the sexual intercourse complained of. For the above reasons' hold that the· medical evidence does not support the evidence of the prosecutrix that she has been raped. Thus the case depends only on the evidence of the prosecutrix.

In Gurcharan Singh Vs State of Haryana AIR 1972 S.C. 2661 the Indian Supreme Court held thus:-

"As a rule of prudence, however, a court normally looks for some corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated."

In Premasiri V. The Queen 77 N.L.R 86 it was held:-

"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth."

In Sunil and another V. The Attorney General 1986 ! S.l.R230 it was held that:-

"Corroboration is only required if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman, victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

Here, in the instant case the Doctors evidence does not corroborate the evidence of the prosecutrix. The case for the prosecution is that the accused-appellant dragged the prosecutrix some distance. According to her own evidence, this was a jungle. She has stated that there were thorny bushes around the place. According to the police the incident had taken place in a shrub jungle. It was at a place about 100 meters away from where the bicycle was found. The accused-appellant had, in fact dragged the prosecutrix for about 100 meters into the jungle. The grass at this place was crushed. If the prosecutix was raped on a surface of this nature after removing her clothes, one has to expect injuries on the posterior side of her body. Apart from that according to her evidence she had fallen on the ground and the accused-appellant had dragged her along the ground. She had in fact struggled with the accused-appellant when she was on the ground and when he was on top of her body. But no injuries what so ever had been observed by the Doctor who examined her. No injuries were observed in any part of her body by the Doctor who examined her on 08.06.2008 at 9.15 a.m. According to the prosecutrix this incident had taken place on the 05.06.2008 at about 2.30 p.m. The prosecutrix evidence in my view does not satisfy the test of probability. According to the police witness the victim had been dragged for about 100 meters in to the jungle from the road. The prosecutix's bicycle had fallen by the side of the road. There is no evidence to show that the accused even tried to hide the bicycle or did hide the bicycle. Therefore the bicycle would have been lying on the ground on the road until the

prosecutrix took it and came back home in the bicycle. This road is being used by the people in the neighborhood. This incident is said have taken place around 2.30 p.m. It is highly unlikely for anyone to leave the bicycle on the road for other persons to observe it. Anyone would have noticed the bicycle and that would have raised the suspicion as to the whereabouts of the owner of the bicycle.

I hold that the evidence of the prosecutrix is not credible. And it is not safe to act on her evidence. For the above reasons, I hold that the evidence of the prosecutrix is not reliable and could be believed. I, therefore, hold that it is unsafe to allow the conviction to stand. I. therefore, set aside the conviction and the sentence and acquit the accused appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

Polwaththegedera Widanalage
Rohana Peiris

ACCUSED-APPELLANT

C.A.Case No:-155/2014
H.C. Chilaw Case No:-90/2004

Vs.

The Attorney General
Attorney General's Department,
Colombo 12.

Before : H.N.J.Perera, J &
K.K. Wickremasinghe, J.

Counsel : Neranjan Jayasinghe for the Accused-Appellant
Shanaka Wijesinghe D.S.G. for the Respondent

Argued On : 06.07.2015

Written Submissions : 15.07.2015/13.08.2015

Decided On : 09.10.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Chilaw under section 364(1) of the Penal Code for committing an offence of rape on Suriya Hetti Adikari Mudiyanselage Sureka Nilanthi on or about the 26.02.2000 at Aththanganaya, Chilaw. After trial the learned High Court Judge convicted the accused and sentenced him to 10 years rigorous imprisonment and imposed a fine of Rs.7500/- carrying a default sentence of 6 months simple imprisonment and further he was ordered to pay compensation of a sum of Rs.25,000/- carrying a default sentence of 6 months simple imprisonment. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

According to prosecution the prosecutrix was a married woman. Her husband was an army officer and who came home once in two weeks and the prosectrix lived alone with her four year old child at home. The prosecutrix sold liquor in the house and the friends of her husband came to her house and they used to consume liquor at her place when the husband was not at home.

According to the prosecutrix she was sleeping in the night with her four year old child on the bed and she woke up due to a flash light of a torch and she saw a person covering his face below the mouth level from a handkerchief. Her version is that she struggled but did not scream and the accused-appellant put pressure on her neck from the bed sheet. When she was struggling the torch fell down and she says she identified the accused-appellant from the voice and from the rest of the body which was not covered. She did not make any attempt to hit him or bite him or even did not attempt to wake up the child who was sleeping close by on the bed. She further states that the accused-appellant told her that he was having a knife and because of that she did not scream but did not see a knife. According to her the husband came home 5 days after the incident. On the same day she told him about the incident and went to the police station to make a complaint on the same day.

It was contended on behalf of the accused-appellant that this incident had taken place with the consent of the prosecutrix. It was also the position of the accused-appellant that since the husband has questioned her about the accused-appellant she made this false allegation. It was further submitted that the prosecutrix's evidence cannot be believed and highly unreliable and not corroborated by any other evidence and that the prosecution has failed to prove the charge against the accused¬appellant beyond reasonable doubt.

In this case according to the prosecution the incident had taken place on or about the 26th February 2000. The complaint to the police had been made on 12.03.2000. The Doctor R.M.S.Kusumsiri Rathnayake had examined the prosecutrix at the General Hospital Chilaw on 13.03.2000. The prosecutrix had stated to the Doctor that a person known to her had raped her on 26.02.2000. The Doctor did not find any injuries in her vagina since she is a married woman with a child. But stated penetration is still possible without any injuries been caused to the vagina. The prosecutrix. was examined by the Doctor after about 15 days from the date of the incident. In any case in my view the medical evidence does not support the evidence of the prosecutrix. Thus, the case depends only on the evidence of the prosecutrix.

In Premasiri V. The Queen 77 N.l.R 86 Court of Criminal Appeal held:-

"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth."

In Sunil and another v. The Attorney General 1986 1 SLR 320 it was held that:-

"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused-appellant acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

I shall now consider whether the victim in the present case has given truthful evidence. The victim was a married woman with a child of four years old at the time of the incident. Her husband was employed as an army officer and came home once in two weeks. Unlike other innocent women the evidence in this case disclose that she sold liquor in the house and that the friends of her husband came to consume liquor at her place when the husband was not there. According to the prosecutrix the accused-appellant came to her house with two other friends both of them are known to her one being Nalaka spent about half an hour and went.

According to the evidence of the prosecutrix she did not tell about this incident to anyone, not even to her parents who was living about 1/4 mile from her place. She did not inform the brother of her husband who lived close to her; house although she was in good terms with them. She has failed to give any reason for not doing so.

According to the prosecutrix she had met the witness Nalaka about three days after the incident and had told him to give a message to the accused-appellant to see her at her house. She has stated that she wanted to ask the accused-appellant as to why he has done a thing like that to her. She also has stated that the accused promised to give her a gold chain of five soverigns and she would be able to see him if she comes to the boutique the next day. Witness Nalaka Devasiri too testified that he met the prosecutrix after about three days from the day he visited her house with the accused-appellant. He had stated that the prosecutrix inquired about the accused-appellant from him. He also stated that he informed the husband of the prosecutrix that the prosecutrix was always inquiring about the accused-appellant from him. In fact this witness has said that the prosecutrix inquired about the accused-appellant three days after the said visit with the accused-appellant to her house and again about a month later. Witness Nalaka had questioned the prosecutrix as to why she is searching for the accused-appellant so much, to which she has not replied. It was contended by the Counsel for the accused-appellant that the said incident had taken place with the consent of the prosecutrix and since the husband has come to know from the witness Nalaka that she had inquired about the accused-appellant several times and had questioned her about it she made this false allegation against the accused-appellant.

The said incident had taken place on 26.02.2000. The complaint to the police was made only on 12.03.2000. The complaint was made belatedly because she was waiting for her husband to come home. The prosecution has not called the husband of the prosecutrix or listed him as a witness. No plausible explanation has been given as to why the prosecutrix did not inform about this incident immediately to the brother of Her husband who was living close by. The prosecutrix had also not informed her parents who was living about a " of a mile away from her; residence about the incident. In fact the prosecutrix had failed to give any plausible reason for not making a prompt complaint to the police.

The evidence of the witness Nalaka clearly shows that the prosecutrix had tried to contact the accused-appellant through him. This had clearly aroused the suspicion of the witness Nalaka who in turn had informed about it to the husband of the prosecutrix. The conduct of the prosecutrix in trying to contact the person who had raped her is. rather strange. It is clearly seen from the evidence of the prosecutrix that she has not tried to inform anybody about this incident although she had ample opportunity to do. She could have informed this incident to her parents or the brother-in-law who was living close to her residence and could have made a prompt complaint about this incident to the police. But instead she had tried to contact the accused-appellant and waited a long time until her husband had questioned her about the accused appellant to inform about this incident to him. Her evidence in my view does not satisfy the test of probability.

I am of the view that an accused-appellant in a charge of rape can be convicted on the uncorroborated evidence of the prosecutrix only when her evidence is of such a character as to convince the court that she is speaking the truth.

In Sumanasena V. Attorney General [1999] 3 SriL.R 137 it was held that evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law.

The evidence of the prosecutrix is not corroborated by any other evidence. Is not cogent and impressive. I therefore hold that the story of the proseutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. For these reasons I hold that there is a very serious doubt in the truth of the prosecutrix's story that sexual intercourse was performed against her will. To establish a charge of rape, the prosecution must prove that the accused-appellant committed sexual intercourse on the prosecutrix and that the said inter course was performed without her consent. There is a reasonable doubt that it was performed without her consent. Therefore the court has to conclude that the charge of rape has not been proved beyond reasonable doubt. The accused-appellant is, then, entitled to be acquitted.

I have earlier pointed out that the story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. Further I have pointed out that the prosecutrix was not a credible witness. Therefore the court should reject her evidence and acquit the accused-appellant. For the above reasons, I hold that the prosecution has not proved its charge beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the accused-appellant of the charge with which he was convicted.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

Lekamwasam Liyanage Ajantha Kumara

ACCUSED-APPELLANT

Vs.

The Attorney General,
The Attorney General's Department,
Colombo 12.

C.A.Case NO:-72/2014
H.C.Badulia Case NO:-265/2003

Before : H.N.J.Perera, J &
K.K. Wickremasinghe, J.

Counsel : Sharon Serasinghe Assigned for the Accused-Appellant
A.R.H.Barry S.S.C for the Respondent

Argued On : 11.03.2015/15.5.2015

Written Submissions : 22.06.2015

Decided On : 14.10.2015

H.N.J.Perera, J.

the accused-appellant was indicted before the High Court of Badulla for committing rape on Lekamwasam Liyanage Lasanthi during the period of 1st to 31st August 2001 an offence punishable under section 364 (3) of tile P,enal Code.

After trial on 20.05. 2014 the accused-appellant was found guilty as charged and was convicted and sentenced 15 years rigorous Imprisonment and to a fine of Rs. 20,000/- carrying a default sentence of 06 months simple imprisonment. Aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court. Learned Counsel for the accused-appellant urged three grounds of appeal as militating against the maintenance of the conviction.

(l) When there was serious doubts in the credibility of the prosecution case, the learned trial Judge has convicted the accused-appellant without considering those doubts,
(2) When the medical evidence creates a reasonable doubt, the learned trial Judge has convicted the accused-appellant
(3) The learned trial judge has not considered the dock statement when giving the judgment.

According to the prosecution the prosecutrix lived with her parents and she had two sisters and three brothers. Her eldest brother Ajantha Kumara in this case was married and lived with his family in the adjoining land. The accused-appellant served in the Sri Lanka Army during the war and as a result of injuries, he resigned from the Sri Lanka Army. On the day of the alleged incident only the prosecutrix was at home and she was sitting near the front door of the house. The accused-appellant came inside and closed the door. As the prosecutrix felt suspicious, she tried to get up from her chair. When she got up the accused-appellant held her tight and threatened to kill her if she struggled. The accused-appellant wanted to know whether she still had the affair with the boy called Eranda the prosecutrix denied she had anything to do with him. Then the accused-appellant wanted her to prove that nothing bad had happened to her and pushed her on to the bed, raised her skirt, inserted his penis into her vagina and committed rape on her. After the act she found blood on her genital area. The accused-appellant threatened her . to kill her if she told this to anyone and also said that he had done the same thing to her sister Samanthi.

According to the prosecutrix the accused-appellant had been assaulting , and harassing her and she left the house on 29.05 2002 at 5.45 a.m in the morning without informing anyone and went to the Badulla Railway station and took the train to Colombo. According to the prosecutrix the alleged incident of rape took place in August 2001 and because of the continuous harassment she received from the accused-appellant she left the house and went to Badulla by train on the 29.05.2002 after about 9 months from the date of the incident. She speaks only of one incident of sexual harassment from the accused-appellant. She does not state that because of the continuous sexual harassment from the accused¬appellant that she was compelled to leave her house.

It is to be noted that the prosecutrix never informed her parents about this incident. She states that the accused-appellant threatened her with death if she disclose this to anyone. But yet she states she informed her sister about the incident and sister did nothing. She has not informed her mother of the incident. Therefore It is not clear as to why she failed to inform her mother or any other member of her family a bout the incident. Further, the prosecutrix never made a voluntary complaint to the police about the alleged incident. She has stated that she informed about the incident to one of her sister. But the said sister was not called to give evidence in this case. The proseutrix also failed to inform her mother about this incident. Although the mother had made a statement to the police, she too was not called to give evidence on behalf of the prosecution in this case. The prosecutrix came out with this story only when she was arrested by the Panadura police after she tried to commit suicide. She has failed to disclose about the said incident to anyone until then. She came out with the story only after she was arrested by the Panadura police and was subjected to a medical examination by the J.M.O. Kandeketiya. In my opinion she has failed to give a plausible explanation for the undue delay in making a complaint to the police regarding the incident. In fact her evidence shows that she never intended to make a complaint to the police about this matter.

Future evidence led by the prosecution in this case clearly indicate that she had left her house because of the harassment meted out to her by the accused-appellant. She has never stated to court that it was because of the sexuall harassment by the accused-appellant. The prosecutrix had stated that the accused-appellant questioned her about a person called Eranda and asked her whether she is having an affair with the said person. The prosecutrix has further admitted that her younger brother' Aradhana too had advised her against the affair with the said boy called Eranda.
According to the medical report marked P2 she has been examined by Dr. Thalagune on 03.06.2002 at 3.25 p.m. In the short history given to the doctor she has stated that she was raped by a known

person. The prosecutrix has not mentioned the name of the person who raped her. It is further stated that the hymen was lacerated and bleeding. The prosecutrix had been examined by two doctors and the prosecution marked the other medical report issued by Dr. Bandara as P2a. The prosecutrix had been examined by the said doctor on- 2nd June at 9 a.m. In the short history it is stated that 'She has had intercourse with a known person, four months ago. Hymen is not intact. In P2a it is not stated that she had been raped but that she has had intercourse with a known person. The name of that person not mentioned. Clearly there is some contradiction in the history given by the prosecutrix to the two doctors. The learned trial judge has failed to consider and analyse the said evidence which is favorable to the accused-appellant in this case. Further whilst giving evidence the prosecutrix had admitted a letter shown to her by the defence. The said letter had been written by her. In the said letter she had referred to the person Eranda and asked whether Eranda has come to the village. She has further stated that she does not think that he will come back to the village because he destroyed her character (respect). There is no mercy from her to him. This clearly indicates that something really serious has taken place between her and Eranda. And that she is net prepared to forgive him for the harm done. This evidence is very important when one consider the fact that there was an allegation made by her brothers that she was having an affair with the said person. In fact the prosecutrix has admitted whilst giving evidence that her younger brother Anuradha advised against it. The prosecutrix had failed give a plausible explanation for stating so. The accused-appellant had in his dock statement has clearly referred to this piece of evidence. But the learned trial Judge had clearly failed to consider and analyse the said evidence which in my opinion is very favourable to the accused-appellant in this case. In Kathubdeen V. Republic of Sri Lanka [1998]3 Sri.L.R 107 it was held that it is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.

As contended by the Counsel for the accused-appellant I am also of the opinion that the evidence given by the prosecutrix is not credible.

In Sumanasena V. Attorney General [1999]3 Sri.L.R 137 it was held that: -
"Just because the witness is belated witness court ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness."

In this case the victim has not given a plausible reason for the delay in making a complaint to the police. In fact the evidence of the prosecutrix in this case clearly shows that she never intended to make a complaint about this incident to the police. In fact she has not disclosed this incident to her mother either. Evidence led in this case very clearly establish the fact that she made this complaint after about 9 months of the incident because she was taken into custody by the Panadura police for attempting to commit suicide.

In Gurcharan Singh V. State of Haryana A.LR 1972 S.C 2661 the Indian Supreme Court held thus:-

"As a rule of prudence, however, a court normally looks for some
corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated"

In Premasiri V. The Queen 77 N.L.R 86 it was held that:-
"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of: such a character as to convince the Jury that she is speaking the truth."

In Sunil and another V. The Attorney General 1986 1 S.L.R 230 it was held that:-

"Corroboration is only required if the witness requiring corroboratlon is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

In the case of Director of Public Prosecutions V. Hestet[1973] A.C. 296, 315(H.l}; [1973]3 All ER 1056:-

"The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent party is lessened if conviction is based upon the testimony of more than one acceptable witness. Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroborating is · nat to give validity or credence to evidence which is deficient or suspect or: incredible but only to confirm and support that which as evidence is sufficieht and satisfactory and credible; and corroborative evidence.only fill 'its role if it itself is completely credible evidence."

Further in King V. Athukorale 50 N.L.R 256 Justice Gratiaen states thus:-.

Where an accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not' from the prosecutrix herself. A complaint made by the prosecutrix to the police in which she implicated the accused cannot be regarded as corroboration of her evidence.

The crucial issue that arose for determination by the learned trial Judge in the instant case was whether this girl had been subjected to sexual Intercourse between the period commencing from 1st August to 31st August 2001 as alleged by the prosecution. According to the evidence given by her, the alleged incident took place somewhere in June 2001 or thereafter. To the police she has stated August 2001. The history given by her to the Doctor states sexual intercourse/ rape took place about 4 months prior to the date she was examined by the doctor namely 4 months prior to 2nd or 3rd June 2002. That is in February 2002. Dr.D.C.Rupersinghe in his evidence has stated that it is probable that

the said old tear observed in the hymen of the prosecutrix would have been caused four months prior to the date of examination. The trial Judge has failed to seriously evaluate and consider the said contradictory nature of evidence led in this case.

In Premadasa V. State C.A 15/99, H.C Anuradhapura 01.06.2000 it was held:-

(l) According to the medical Expert the probable date would be 16.08.1998 or a date prior to that date. Neither the State Counsel nor the trial Judge had invited her to elucidate her opinion any further or elaborate the grounds upon which the opinion was based.

(2} The crucial issue was whether the prosecutrix had been in fact ravished on 22.08.1998 by the accused-appellant. The trial Judgebas refrained from making any assertion in respect of this matter.

(3) This non direction on a vital question of fact tantamounts to a grave error of law which is sufficient to vitiate the conviction.

I hold that the evidence of the prosecutrix is not credible. And it is not safe to act on her evidence. For the above reasons, I hold that the evidence of the prosecutrix is not reliable and could be believed. I, therefore, hold that it is unsafe to allow the conviction to stand. I. therefore, set aside the conviction and the sentence and acquit the accused.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against an order of the High Court under section 331 of the Code of Criminal Procedure Act No 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

1) Perumal Sivanadan
2) Arumugam Ganeshan
3) Arumugam Punniyamoorthy
4) Murugesu Pathmanathan
Labbokelle Estate, Labukelle.

ACCUSED

CA/72/2013
H.C Nuwara Eliya 119/2009

And,

1) Perumal Sivanadan
2) Arumugam Ganeshan
3) Arumugam Punniyamoorthy
4) Murugesu Pathmanathan
Labbokelle Estate, Labukelle.

ACCUSED-APPELLANTS

Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

RESPONDENT

Before : Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J

Counsel : Dhanaraja Samarakoon for Accused-Appellants
Haripriya Jayasundera DSG for the Attorney General

Argument On : 01.09.2015

Decided On : 16.10.2015

Vijith K. Malalgoda PC. J (P/CA)

The four Accused-Appellant in this case were indicted before the High Court of Nuwara Eliya on two counts for committing the murder of Ramakrishnan an offence punishable under the section 296 of the Penal Code and voluntary causing hurt to one Rasaiya an offence punishable under section

315 of the Penal Code. The said trial was commenced on 22nd March 2007 and Prosecution witness number one had given evidence on that day. All Accused-Appellants were defended by a retained counsel on that day and the said witnesse's evidence was concluded on the same day and further trial was fixed for the 20th of November 2012.

It is brought to the notice of this court by the counsel who represented all 4 Accused, that the procedure adduced by the Learned High Court Judge on zo" November 2012 is in violation of the rules of Natural Justice and also Article 4 of the ICCPR Act No. 56 of 2007. According to the proceedings on 20lh November 2007, the case has come up before a new High Court Judge on that day. Since the case was part heard before the previous High Court Judge, the parties had agreed to adopt the evidence led before the previous High Court Judge and to proceed with the rest of the case. At the time the said order was made all 4 accused were represented by the same defence counsel who defended them on the previous day,

However subsequent to the said order was made and the prosecuting counsel moved to call the other evidence, defence counsel had informed court that he doesn't have any instructions from the Accused since none of the accused had met him to give instructions and therefore he requested per mission to withdraw from the case. The court after allowing the application of the defence counsel to withdraw from the case, assigned a counsel to represent all 4 accused. The said assignment was recorded in the proceedings at 10.45 am and immediately thereafter at 10.45 am the next witness for the prosecution was called to give evidence. According to the submission made by the counsel for all 4 accused, the entire persecution case was concluded on the same day leading the evidence of the two Jay witnesses Judicial Medical Officer who conducted the post mortem of the deceased person, the Medical Officer who examined (he injured, two Investigating Officers and finally leading the evidence of the Officiate Registrar of the High Court. Thereafter further trial was put off for 22nd November 2007 and all 4 accused were remanded until that day. On 22nd all 4 accused made dock statements and concluded their cases. Based on the above circumstances it was brought to the notice of this court by Learned Counsel for the Accused-Appellants that the Accused -Appellants were denied of a fair trial by the said conduct of the Honorable High Court Judge of Nuwara Eliya.

Article 13 (3) of the constitution guarantees a fair trial and the said article reads as follows;

13 (3) any person charged with an offence shall be entitJed to be heard, in person or by and Attorney - at-Law, at a fair trial by a competent court.

Section 4 -1, (b) of the ICCPR Act No 56 of 2007 read as follows;

4-1). A person charged of a criminal offence under any written law, shall be entitled-

b.) defend himself 1D person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;

In the present case, when the retained counsel withdrew from the case the Learned High Court Judge had correctly assigned a counsel to represent them but, whether he permitted the said assigned to get

ready for his case is a matter this court will have to consider at this point. In the case of Murugaiya Shamila Devi Vs, the Attorney General (CA 262/2009) Her Ladyship Justice Rohini Marasinghe observed that "assuming that the Accused had requested for an assigned counsel, then the assigned counsel on behalf of the accused must be afforded the opportunity to prepare the case for the Accused."

In the case of the Queen Vs, A.K. Peter (1961) NLR 120 Basnayake CJ held that,

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"The only ground urged by learned counsel for the appellant is that when the trial commenced on 20th January the accused's counsel who had been retained by him did not appear, and that at 11 am on that day counsel was assigned to defend the accused and the case was taken up for trial at 12.30 pm. It is submitted by Learned Counsel for that appellant that the time allowed for assigned counsel to prepare the case was not sufficient. He has drawn our attention to the fact that the defence was gravely prejudiced by the situation in which assigned counsel was placed. We agree that assigned counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused. In the instant case sufficient time was not allowed."

In the present case the Learned High Court Judge after assigning in the counsel, had proceeded to take up the trial without giving any opportunity for the assigned counsel to get ready in this case. There is no material before us to show whether the copy of the indictment was served on the assigned counsel or not. As pointed out by me earlier the evidence of two lay witnesses, two doctors, two police part heard before the previous High Court Judge, the parties bad agreed to adopt the evidence led before the previous High Court Judge and to proceed with the rest of the case. At the time the said order was made all 4 accused were represented by the same defence counsel who defended them on the previous day.

However subsequent to the said order was made and the prosecuting counsel moved to call the other evidence, defence counsel had informed court that he doesn't have any instruction from the Accused since none of the accused had met him to give instructions and therefore he requested permission to withdraw from the case. The court after allowing the application of the defence counsel to withdraw from the case, assigned a counsel to represent all 4 accused. The said assignment was recorded in the proceedings at 10.45 am and immediately thereafter at 10.45 am the next witness for the prosecution was called to give evidence. According to the submission made by the counsel for all 4 accused, the entire persecution case was concluded on the same day leading the evidence of the two Jay witnesses Judicial Medical Officer who conducted the post mortem of the deceased person, the Medical Officer who examined (he injured, two Investigating Officers and finally leading the evidence of the Officiate Registrar of the High Court. Thereafter further trial was put off for 22nd November 2007 and all 4 accused were remanded until that day. On 22nd all 4 accused made dock statements and concluded their cases. Based on the above circumstances it was brought to the notice of this court by Learned Counsel for the Accused-Appellants that the Accused -Appellants were denied of a fair trial by the said conduct of the Honorable High Court Judge of Nuwara Eliya.

Article 13 (3) of the constitution guarantees a fair trial and the said article reads as follows;

13 (3) any person charged with an offence shall be entitJed to be heard, in person or by and Attorney - at-Law, at a fair trial by a competent court.

4 -1, (b) of the ICCPR Act No 56 of 2007 read as follows;

offices and the officiate registrar were concluded on the same day. Considering all these issues I conclude that th Learned High Court Judge bad failed to afford a fair trial to the accused m this case

The Learned Deputy Solicitor General who represented the Attorney General did not contest this matter and I appreciate the position taken up by state in this case.

For the reasons adduced above I set aside the conviction and sentences imposed by Learned High Court Judge on all 4 accused-appellants and order a fresh trial before a different High Court Judge.

Appeal allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala. J.

I agree,

JUDGE OF THE COURT OF APPEAL

Appeal allowed.

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against an order of the High Court under section 331 of the Code of Criminal Procedure Act No 15 of 1979.

Tikiri Bandage Siripala

ACCUSED-APPELLANT

CA/127/2010
H.C.Anuradhapura CA No 107/08)

Vs,

The Hon. Attorney General,
A ttomey General' 5 Department
Colombo 12

RESPONDENT

Before : Vijith K. Malalgoda PC J (P/CA) &
H. C. J. Madawala J

Counsel : Iodika Mallawarachchi for the Accused Appellant
Shanaka Wijesinghe DSG for tbe A.G.

Argued on : 01/09/2015

Judgment Date : 23/10/2015

H. C. J. Madawala J

The Accused Appellant was indicted in the High Court of Anuradhapura in case no. 107/08, that on an about 7th October 2003 the Accused-Appellant caused the death of one Punchi Appuge Dhannasena alias Sena and there by committed an offence punishable under sec. 296 of the Penal Code. The Appellant pleaded not guilty to the offence and the case was taken up for trial and at the conclusion of the trial the Appellant was found guilty and was sentenced to death, On being aggrieved by the said Judgment the Appellant has preferred this app al.

When this matter came up for hearing on 17-07-20) 5 the case was argued and on conclusion both parties under took to file written submissions if necessary. The matter was fixed for judgment on 23-10-2015. We have considered the oral and written submissions of both parties. The prosecution case rests solely on circumstantial evidence. The prosecution version was that the ena and the appellant had engaged in an exchange of words near a boutique around 7.30 am on 07- J 0- 2003. Thereafter again the deceased and the appellant had an exchange of ords at the ho of prosecution witness

Piyasena around 10.30 am on 07-10-2003 and thereafter the d had left, However thereafter the body of the deceased being recovered from an abandoned house belonging to the accused appellants brother, Siripala made a dock statement denying any involvement complicity in the commission of the crime. The grounds of appeal was that

I) Learned Trial Judge failed to comply with sec. 196 of the CPC which section is a Mandatory Statutory Provision non-compliance of which necesssarily vitiates the conviction.
2) Prosecution has failed to establish the identity of the Corpus.
3) Items of Circumstantial Evidence are wholly inadequate to support the conviction
4) LTJ erred by applying the Ellenborough principle to the instant case.

It was the contention of the appellant that the learned Trial Judge failed to comply with sec, 196 of the Criminal Procedure Code which section is a Mandatory Statutory Provision, non-compliance of which necessarily vitiates the convictions. The learned counsel for the appellant submitted that sec.196 of the Criminal Procedure Code stipulates that when the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged. It was submitted that the said Mandatory Statutory Provision has not been complied. The indictment had been handed over to the accused. but however the corresponding journal entry which is at PI 13 of trial brief does not indicate that sec.196 of the Criminal Procedure Code has been complied with.

Accused-Appellant further submitted that the prosecution has failed to establish the identity of the corpus. It was submitted by the accused- appellant that the prosecution has not led any evidence with regard to the identification of the body at the post of the mortem examination, The Medical Officer has testified that the body was identified by his wife and the brother-in-law of the deceased. However it was submitted this amounts to hearsay as prosecution has totally failed to elicit this evidence from the wife of the deceased at the trial. It was further submitted that the defence has not admitted this fact in terms of sec 420 of the Criminal Procedure Code and accordingly that this ground alone warrants an acquittal.

It was also contended that the items of circumstantial evidence are wholly inadequate to support the conviction. The items of circumstantial evidence against the appellant are as follows,

- The fact that the deceased was last seen in the company of the appellant engaging in an exchange of words. The deceased was last seen in the company of the appellant 7.30 am and 10.00 am on 07-10-2003 having an exchange of word.

It is trite law that where the case is based on circumstantial evidence and the prosecution is relying on the last seen theory, it is incumbent upon the prosecution to fix the exact time of death.

In The King vs. Appuhamy it was held thus "in considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance of the prosecutor has failed to fix the exact time of death of the deceased."

In State of U.P. vs. Satish and Ramreddy Rnjeshkarna Reddy vs, t te of A.P.

It was held that the last seen theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is small that the possibility of any person other than the accused being the author of the crime becomes impossible.

We find that the instance case revolves around the last seen theory, it was incumbent upon the prosecution to the fix the exact time of death so as to narrow the time gap between the time that the deceased was seen with the appellant and the time of death, thereby excluding the possibility of a 3rd party being the perpetrator of the crime. In the instance case the doctor has testified that according to the information he had received the body had been recovered around 11.30 am and that he agrees with such conclusion. It was submitted that this is wholly hearsay and the police evidence is that they received information about the body being found in an abandoned house only at 3.15 pm. Accordingly it was submitted that the prosecution has totally failed to fix the exact time in the instant case. It was also submitted that the afore said evidence of the Medical Officer is not calculated according to any acceptable forensic methods and that the doctor had merely stated that he agrees with the information provided relating to time of death which is wholly unacceptable as the time of death has to be assessed by any of the following methods ..

- Progress of changes that occur after death, such as hypostasis, cooling of the body and rigor mortis
- Cessation or stopping or bodily functions after death such as passage of food in the gastrointestinal tract, and, Insect found on a putrefied body

It was submitted that the instance case the doctor has failed to calculate the time of death and has therefore not given any media, reasons and grounds for his finding but has merely agreed with the information provided to him which is wholly unacceptable. In the circumstances I conclude that the prosecution has failed to fix the exact time of death and in that backdrop the fact that the deceased was last seen in the company of the appellant cannot be considered as an incriminating item of evidence against the appellant.

The respondent took up the position that the accused appellant was last seen in the company of the deceased and the failure by the accused to offer an explanation establishes his guilt.

The only evidence in the present case is that the accused was last seen with the deceased and that there was an argument between them and thereafter the dead body of the deceased was found from and abandoned house belonging to the accused appellant's brother. As such we hold that there is no duty cast on the accused appellant to explain as to how the deceased body came to the house"
There is no evidence as to who stabbed the deceased to death.

In our view of the evidence in this case is not at all sufficient to warrant the application of Ellenbrough principle. It is not the function of a court to supply what is wanting or deficient in evidence. These principles cannot be called to aid to compensate laxity, negligence, ignorance and lethargy on the part of the investigators.

Accordingly we are of the view that the prosecution has failed to prove charges against the accused appellant beyond reasonable doubt. As such we set aside the conviction and the sentence of the High Court Judge and acquit and discharge the accused. Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Criminal Procedure Code Act No.15 of 1979 as amended.

(1) Jinapalage Sumathipala
(2) K.Anura Dissanayake
(3) W.M.Sunil Weerasinghe Bandara
(4) Sirimanalage Wasantha Kumara

ACCUSED-APPELLANTS

C.A.Case NO:-09/2013
H.C Anuradhapura Case No:-59/2007

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

Before : H.N.J.Perera, J. &
K.K. Wickremasinghe, J.

Counsel : Anuja Premaratna for the Accused-Appellants
Shanil Kularatne S.S.C for the Respondent

Argued On : 07.07.2015

Written Submissions : 21.08.2015

Decided On : 09.11.2015

H.N.J.Perera, J.

The accused-appellants were indicted before the High Court of Anuradhapura for committing the offence of Gang rape on Ranhamige Kamalawathi on 22.11.1998 punishable under section 364 2 (g) of the Penal Code. After trial the accused-appellants were convicted and each was sentenced to a term of 12 years R.I with a fine of Rs. 25,000/-carrying a default sentence of 6 months and each accused-appellant was ordered to pay compensation on a sum of Rs.50,000/- carrying a sentence of 1 year. Being aggrieved by the said conviction and sentence the accused-appellants had preferred this appeal to this court. Learned Counsel for the accused-appellants urged five grounds of appeal as militating against the maintenance of the conviction.

(1) That the charge was not read out to the accused-appellants and therefore that the totality of this appeal is a missed trial which has to be sent back for re-trial.

(2) That the Learned High Court Judge has misdirected himself on the burden of proof which invariably clouded his thinking, which in turn was prejudicial to the appellants.

(3) The Learned High Court Judge failed to appreciate that a charge of rape cannot be maintained where the evidence of the prosecutrix is not corroborated by some independent and reliable evidence.

(4) The Learned High Court Judge misdirected himself in considering the medical evidence and totally misinterpreted the medical evidence.

(5) That the learned Trial Judge failed to consider and give due weightage to the fact that the identity of the accused was not in accordance with law.

As regards the first ground of appeal it is to be noted that the accused¬appellants in their Petition of Appeal in paragraph three, had very categorically stated that the said case was taken up for trial before the High Court after they had pleaded not guilty to the said charges. In the case of Martin Appu V. The King 52 N.L.R 119 it was held that the Court of Criminal Appeal may take into consideration statements made by the appellant in his notice of appeal although such statements refer to matters outside the evidence given at the trial. In considering the accused-appellants appeal, therefore, this court cannot ignore the effect of the aforesaid admission.

According to the prosecution the prosecutrix with the other two witnesses namely Jayaratne had been travelling in the three wheeler belonging to the witness Sampath on 22.11.1998 from Anuradhapura town towards Rathnamali Pilgrims Rest at about 7.30 p.m and was stopped near the Army check point near the Siddhalepa Hospital. The witness Jayaratna and the three wheel driver Sampath was ordered to get off the vehicle and were made to kneel down. According to the prosecutrix she was not allowed to get off the vehicle and the army officers assaulted both the witness Jayaratne and the three wheel driver Sampath. Thereafter the other two witnesses were chased away and the prosecutrix was made to come out of the three wheeler and was taken towards the back yard of the army bunker and was raped by the four accused-appellants.

It has been clearly established that the first complaint about this incident has been made by the other two witnesses to the Army police /military police. The witness Major Ajith Lansakkara had testified to the effect that he was the First Lieutenant attached to Anuradhapura Army camp. The first complaint about an incident of kidnapping had been made to the army police and he was informed by sergeant Gamini about it over the phone. The said message had been received by the army on the night of 22.11.1998. According to the said witness Major Ajith Lansakkara he had accordingly informed about the incident to his superior Officer and was instructed to proceed to the said bunker and to make necessary investigations. He has accordingly arrived at the said bunker situated near the Siddhalepa hospital and found the four suspects to be drunk and he produced them before the doctor and kept them in custody till the following day morning. This witness further testified that on the following day morning the three witnesses arrived and that they identified the four accused and he recorded the statements and produced the four accused at the police station. The witness Sampath and Jayaratna both had corroborated the prosecutrix's evidence and state that they were all travelling

in the said three wheeler when they were stopped by the Army personnel near the army bunker near Siddhalepa Hospital. Both had testified to the effect that they were ordered to step out of the said vehicle and was asked to kneel down and was assaulted by the four accused-appellants.

In the instant case the prosecution story to that extent is admitted by the accused-appellants in their dock statements made to the court. It was their position that the driver of the three wheeler did not stop the vehicle when he was asked to, and the said two witnesses were made to kneel down before them for some time. The four accused-appellants denied taking the prosecutrix behind the bunker and raping her.

I.P Thennakoon had testified that in 1998 he served at the Anuradhpura police station and that he received a complaint by First Lieuitenant Lansakkara on 23.11.1998 at about 2.30 p.m. and that the prosecutrix too arrived at the police station and that he proceeded to record her statement and also visited and inspected the place where the incident had taken place and the prosecutrix has been hospitalized thereafter.

The main issue in this case is that whether the prosecutrix was raped by the accused-appellants as alleged by her on the night of 22.11.1998.

There is no eye witnesses to prove the alleged acts of rape said to have been committed by the accused-appellants. The prosecutrix has stated in her evidence that all four accused-appellants raped her that night. In her testimony she has stated that all her clothes were removed and the accused-appellants committed the said offence on her on the ground.

Our law does not require the prosecution to call a number of witnesses to prove a case against an accused. Evidence given by one witness is sufficient. It is the quality of the evidence given by the said witness that matters.

In Sumanasena V. Attorney General (1999] 3 SrLL.R 137 it was held that evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law.

Thus the court could have acted on the evidence of the victim provided the trial Judge was convinced that she was giving cogent, inspiring and truthful testimony in court.

In Bhoginbhai Hirjibhai V. State of Gujarat (1983) AIR S.C 753 Indian Supreme Court stated thus:-
"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury."

However in Gurcharan Singh V. State of Haryana AIR 1972 S.C 2661 the Indian Supreme Court held:-
"As a rule of prudence, however, court normally looks for some corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not

been falsely implicated."
In Premasiri V. The Queen 77 N.L.R 85 Court of Criminal Appeal held:-

"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such character as to convince the Jury that she is speaking the truth."

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In Sunil and another V. The Attorney General 1986 1 SLR 230 it was held that :-

"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

Therefore it is very clear that an accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth.

The prosecutrix had clearly testified that the 3rd and the 4th accused¬appellants did not allow her to alight from the vehicle and thereafter the 1st accused-appellant who she referred to as Corporal dragged her from her hands towards the Malwathu Oya and the 2nd accused-appellant too accompanied them. The 1st accused-appellant ordered her to remove her clothes but she did not do so and thereafter he removed all her clothes by force. She has stated that he thereafter gave her clothes to the 2nd accused-appellant and told him to keep her clothes and the 2nd accused-appellant tried to hide her clothes. She testified that the 1st accused-appellant put her on the ground on the grass and inserted his male organ inside her female organ, It was her position that the 2nd accused-appellant watched when she was raped by the 1st accused-appellant and thereafter the 2nd accused-appellant too raped her the same way. She has further stated that the 2nd accused-appellant raped her and whistled and the 3rd and the 4th accused-appellants too arrived and proceeded to rape her in the same manner. She further testified that she informed them that she was pregnant but they said that they don't have sisters and continued to rape her. She further stated that at that point some officers from the Army arrived and the 1st accused threw the clothes on to her body and threatened her not come beyond that point.

The prosecutrix had very clearly stated that the all four accused¬appellants raped her. She had stated that she was able to identify them as there was light around that place. She has further stated that the army officers who came took all the accused-appellants with them and on the next day morning when she went into the army camp to make a statement she saw the accused-appellants and identified them.

In the instant case the prosecution had clearly established that the three wheel driver Sampath and Jayaratne had made a prompt complaint to the army and accordingly almost immediately after the said complaint the 1 to 4 accused-appellants had been taken into custody by the witness Major Ajith Lansakkara. The witness Major Lansakkara had testified that at that time he was serving as a First lieutenant attached to Army camp Anuradhapura and was in charge of disciplinary matters and that upon receiving the said information on the instructions of his superior officer he had proceeded to the bunker near the Siddhalepa Hospital and apprehended the four accused-appellants who was on duty that night. He found them to be drunk and therefore produced them before the doctor and kept them

in custody till the following morning. The following morning the prosecutrix and the other two witnesses had arrived at the camp and he proceeded to record their statements and later produced the accused-appellants at the Anuradhapura police station. There is no doubt what so ever that the 1 to 4 accused-appellants had been on duty at thebunker near the Siddhalepa Hospital on the day of the incident and that they were taken into custody by the witness Major Lansakkara soon after the incident on the very same day. In fact the prosecutrix has stated that the Army personnel arrived after about half an hour and that they were taken to the army camp soon thereafter.

It is to be noted that the first information was to the effect that the officers at the said check point had kidnapped a woman. The witness Jayaratna has very clearly stated that he was assaulted by the army officers at the check point and was made to kneel down. He also had clearly identified the four accused-appellants and further had stated that he had seen them before in the town. He has further testified that he was assaulted and chased away by the said four accused-appellants and that he noticed then taking the prosecutrix behind the bunker.

In the instant case therefore there is no doubt that the said four accused-appellants were on duty at the said army bunker on the said day and that the prosecutrix and the other two witness who was travelling in a three wheeler was stopped by the accused-appellants and the two witnesses Sampath and Jayaratne was assaulted and made to kneel down on the said day. The prosecutrix's story is corroborated by the said two witness to that extent. Thereafter a complaint had been made by the said two witnesses to the Army and the witness Major Ajith lansakkara had arrived at the scene and taken the four accused-appellants in to custody and taken back to the Army camp. The accused-appellants too had made dock statements and had admitted the fact that the prosecutrix with the other two witnesses arrived in a three wheeler and that they were stopped and the men were made to kneel down near the bunker. It was the accused-appellants position that the prosecutrix went towards the playground. It was the position of the accused-appellant that a false allegation has been made against them to the effect that they have raped the prosecutrix over this incident.

An accused facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth.

Here in the instant case the Doctor's evidence does not corroborate the evidence of the prosecutrix. The case for the prosecution was that the accused-appellants raped her when she was lying on the ground. And the prosecutrix was raped when she was fully naked. If the prosecutrix was raped on a surface of this nature after removing her clothes, apart from that one has to expect injuries on the posterior side of her body. Apart from that according to her evidence the 1st accused-appellant had bit her. This is not a case where one person has raped the victim but the allegation is that she was raped by four Army personnel. In fact she admitted that she gave evidence before the magistrate's court and stated that she was dragged in to the jungle behind the Buddu Ge and that she was put on the ground and raped. But no injuries what so ever had been observed by the J.M.O.Anuradhapura Dr. H.Karunathilake who examined her. No injuries were observed in any part of her body by the Dr. Karunathilake who examined her on the following day at about 8.30 p.m. The Doctor states that the prosecutrix was 20 weeks pregnant and no injuries were found either in her vaginal area or any other part of her body. He also categorically states that there would have been injuries in the genital area if

there was any resistance on her part, but that there was no injuries found. The Dr. Karunathilake also had stated that there was no sperms found in her vaginal area and that there was no evidence of penetration. This too raises a serious doubt in the truthfulness of the victim's evidence.The prosecutrix evidence in my view does not satisfy the test of probability.

It is very clear from the evidence given by the prosecutrix that she was not interested in making a prompt complaint to the police. She has clearly stated that the witness Sampath made a complaint to the police that night but that she did not go with him to the police but avoided going to the police. Therefore it is very clear that she was fully aware that the said witness Sampath went to make a complaint. But she has categorically stated that she avoided going to the police station to make a complaint. The witness Sampath has said that they were assaulted and chased away by the four accused-appellants and he did not see the prosecutrix at that time. Again she has stated that she saw a vehicle coming and saw some army officers taking the four accused-appellants with them. Hereto the prosecutrix did not come forward to complain to the witness Major Ajith Lansakkara about her being raped by the four accused-appellants. Witness Jayaratna had stated that on the following day morning witness Sampath and the prosecutrix came and met him and they all went to the Army camp thereafter. The evidence led in this case indicate that on the following day morning the prosecutrix had gone to the army camp with the other two witnesses and made a statement to the army and also to the police thereafter. It is therefore very clear from the evidence led by the prosecution in this case that the prosecutrix did not make a prompt complaint to the army or to the police and that she in fact admitted that she avoided going to the police to make complaint with the witness Sampath. She also failed to make a complaint at the very next opportunity she got when the witness Major Ajith lansakkara came to investigate the matter on the night of 22nd November. The prosecutrix has not stated as to what she did that night after the four accused-appellants were taken into custody by the witness Major Ajith lankassara. She has not stated clearly whether she met the witness Sampath later that night or where she stayed during the night.The prosecutrix later admitted that she was a married woman with two children residing at Eppawala and on the day of the incident came to Anuradhapura to go to the Clinique on the next day. She also admitted that she was not legally married to Sampath. Witness Sampath has referred to the prosecutrix as a prostitute. When we consider the above material we are of the opinion that victim is not a credible witness and it is not safe to act on the evidence of the victim.

The function of an appellate court in dealing with a judgment mainly on the facts from court which saw and heard witnesses has been specified as follows by Macdonell C.J. in the King V. Guneratne 14 Ceylon Law Recorder 174:-

"1 have to apply these tests as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact :-

(1) Was the verdict of the Judge unreasonably against the weight of the evidence,
(2) Was there misdirection either on the law or the evidence;
(3) Has the court of trial drawn the wrong inferences from the matters in evidence.

Similarly Wijewardena, J.stated in Martin Fernando V. Inspector of police, Minuwangoda 46 N.l.R

210, that:-

"An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight "where "a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."

For the above reasons, we hold that the evidence given by the prosecutrix is not convincing and that it is unsafe to convict on the uncorroborated evidence of the prosecutrix. We therefore hold that it is unsafe to allow the conviction to stand. For the reason stated above we are of the opinion that the prosecution has failed to prove the case beyond reasonable doubt. We, therefore, set aside the conviction and sentence and acquit the accused-appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hapugodage Jagath Perera Petitioner

PETITIONER

SC/FR 1006/2009

Vs

1. Gothami Ranasinghe
   Inspector of Police,
   Officer-in-Charge of the Minor Crime
   Branch, Police Station, Mirigama.
2. Milla Vitharana alias Millavithanachchi
   Inspector of Police,
   Officer-in-Charge of the
   Traffic Branch, Police Station,
   Mirigama.
3. Milinda Premanath Karunaratne,
   Sub Inspector of Police,
   Police Station, Mirigama.
4. Inspector General of Police,
   Police Head Quarters, Colombo1.
5. Hon. Attorney-General
   Attorney General's Department
   Colombo 12.

RESPONDENTS

Before : K.W. Sripavan CJ
Eva Wanasundera PC J
Sisira J de Abrew J

Counsel : P K Prince Perera with Asanka Dissanayake for the Petitioner.
K G Jinasena with K Anurangi for the 1st, 2nd and 3rd Respondents.
Yohan Abeywickrama SSC for the 4th and 5th Respondents.

Argued on : 29.9.2015

Decided on : 15.12.2015

Sisira J De Abrew J.

The Petitioner, by his petition dated 29.12.2009, seeks a declaration that his fundamental rights guaranteed by Articles 11,12(1),13(1) and13(2) of the Constitution of the Republic have been violated by the 1 st 2nd 3rd Respondents. The lst Respondent who is an Inspector of Police is the Officer-in-Charge of Minor Crimes Branch of Mirigama Police Station. The 2nd Respondent who also an Inspector of Police is the Officer-in Charge (OIC) of the Traffic Branch of Mirigama Police .On 19.11.2009 he acted as acting OIC of Mirigama Police Station. The 3rd Respondent is a Sub Inspector of Police attached to Mirigama Police Station. This Court, by its order dated 17.3.2010, granted leave to proceed for the alleged violation of the petitioner's fundamental rights guaranteed by Articles 11,13(1) and13(2) of the Constitution.

The Petitioner, inter alia, complains the following matters.

The Petitioner who is running a business called Ranga Sweet has employed several employees one of whom is Asanka Sanjaya Kumara. On 17.11.2009 he accompanied Asanka Sanjaya Kumara to Mirigama Police Station as the said person had been noticed to appear at the Police Station for an inquiry on a complaint made by the wife of Asanka Sanjaya Kumara who was living in separation from her husband. It has to be noted here that the Petitioner had not been noticed by Mirigama Police Station but he went to the Police Station only to offer his assistance to his employee. In the course of the inquiry, the 1 st Respondent who was conducting the inquiry instructed the said Asanka Sanjaya Kumara to hand over the dowry property to his wife who was working as a Home Guard at the Mirigama Police Station. At this stage the Petitioner requested the 1st Respondent to advise the parties to lead a peaceful marriage life as the future life of the child of the parties would be destroyed by the separation of the parties. At this stage the 1st Respondent left the inquiry room and brought the 2nd Respondent who questioned the Petitioner about the purpose for which he came. When the Petitioner started leaving the inquiry room, the 2nd Respondent took him inside the Police Station building and assaulted him as a result of which he fractured his teeth. In fact one tooth fell on the ground. Thereafter the Petitioner was put inside police cell. When Asanka Sanjaya Kumara came near the police cell, the Petitioner told him that the 2nd Respondent assaulted him and broke his teeth. Around 4.00 p.m. the Petitioner was produced before the Magistrate on a B report. The Petitioner complained to the Magistrate that the 2nd Respondent (Millavithana) assaulted and broke his teeth. The Magistrate remanded him and ordered the Superintendant of Prisons to produce him before the Prison Doctor and submit a report. The vehicle of the Petitioner which had been parked outside the Police Station was taken to the Police Station and parked inside premises of the Police Station by the 3rd Respondent. However the vehicle was later released to the wife of the Petitioner. The Petitioner was released on bail on 26.11.2009. The Petitioner states that no sooner he was released on bail he got himself admitted to Ragama Hospital and was discharged on 2.12.2009. Asanka Sanjaya Kumara has filed an affidavit in this Court marked P16 confirming the facts stated by the Petitioner.

The 1st, 2nd and 3rd Respondents in their statement of objections, inter alia, state the following matters. On 19.11.2009 around 11.30.a.m, whilst the 1st Respondent was conducting an inquiry at the Mirigama Police Station on a complaint made by the wife of Asanka Sanjaya Kumara (Niluka

Chathurangi who is a Home Guard attached to the Police Station) the Petitioner without permission appeared before the 1st Respondent and demanded not to conduct the inquiry. When the 1st Respondent requested the Petitioner to leave the inquiry room, he refused to do so and started scolding the 1st Respondent in high voice. Having heard the commotion the 2nd Respondent approached the place where the inquiry was being conducted and ordered the Petitioner to leave the Police Station. However the Petitioner who did not obey the said order went up to the Traffic Branch of the Police Station and abused the 2nd Respondent in obscene language pulling from the uniform. In the circumstances the 2nd Respondent controlled the Petitioner using minimum force and as a result, he fell on the ground damaging his teeth. The 2nd Respondent further states that his left hand ring finger was bitten by the Petitioner during the incident. This was the story narrated by the 1st, 2nd and 3rd Respondents in their Statement of objections. The Respondents in their objections further states that the petition of the Petitioner has not been filed within one month of the alleged violation of fundamental rights and therefore the petitioner he cannot maintain his petition. Learned counsel who appeared for the 1st, 2nd and 3rd Respondents did not however support this objection at the hearing. However, it is noted that soon after the Petitioner was discharged on bail on 26.11.2009, he got himself admitted to Ragama Hospital and was discharged only on 2.12.2009. It appears that before 2.12.2009 he was not in a fit condition to instruct his lawyers to file this petition. The petition was filed on 29.12.2009. When I consider these matters, I am of the view that there is no merit in the said objection.

I will now consider whether I can accept the position taken up by the 1st, 2nd and 3rd Respondents. Their position is that the Petitioner fractured his teeth as he fell on the ground when minimum force was being used. Have the Respondents taken up this position when 1st B report was filed on 19.11.2009? The answer is in the negative. If the position taken up by the 1st 2nd and 3rd Respondents is true, the 2nd Respondent who filed the B report should have stated it in the B report. Failure to mention the above facts in the B report shows that said position is untrue. Part of the story of the Respondents is that when the Petitioner was ordered to leave the Police Station, he without obeying the command went to Traffic Branch and abused the 2nd Respondent by pulling from his uniform. Can this story be believed? There is no evidence to suggest that the Petitioner has a criminal record. In my view this story is fraught with falsehood. I therefore, hold that the position taken up by the 1st, 2nd and 3rd Respondents is not true and cannot be accepted. Assuming without conceding that the position taken up by the Respondents is true, what flows from it. Then the 1st, 2nd and 3rd Respondents admit that the Petitioner fractured his teeth as a result of his fall. How did he fall? He fell on the ground as a result of the minimum force used by the 2nd Respondent. In a Police Station where there is a platoon of police officers, a Police Officer does not have to use such a high force to control an unarmed man. This observation suggests that the 2nd Respondent when using the so called minimum force had severely assaulted the petitioner. When I consider all the above matters, I arrive at a conclusion that 1st, 2nd and 3rd Respondents have, indirectly, admitted in their statement of objection that the petitioner sustained injuries in his teeth as a result of the assault launched by the 2nd Respondent to the petitioner. I will now consider whether the position taken up by the petitioner can be accepted or not. Soon after the alleged assault by the 2nd Respondent, the petitioner, inside the police cell itself, told Asanka Sanjaya Kumara that the 2nd Respondent assaulted him and broke his teeth. Asanka Sanjaya Kumara in his affidavit marked P16, inter alia, admits that the petitioner who was bleeding from his mouth told the above incident to him. He further states that he observed blood on the petitioner's shirt. Asanka Sanjaya Kumara further, in his affidavit, states that before the assault when the petitioner was leaving the inquiry room, the 2nd Respondent, ordering him to stop, forcibly took the petitioner inside the Police Station.

When the petitioner was produced before the learned Magistrate on 19.11.2009, he told the learned Magistrate that the 2nd Respondent assaulted him and broke his teeth. The learned Magistrate, in the B Report, made a note confirming the above facts. The learned Magistrate further ordered the Superintendant of Prisons to produce him before the Prison Doctor. The Prison Doctor, in his report dated 20.11.2009, confirms that the petitioner's teeth were fractured. This Court, before granting leave to proceed, called for the Medico Legal Report (MLR) of the petitioner from the Judicial Medical Officer (JMO) of Ragama Hospital. The JMO in his report confirms that the petitioner had suffered a fracture in his teeth. Therefore, without any hesitation I conclude that the position taken up by the petitioner is true and can be accepted. The petitioner, in his petition, states that as a result of the above incident he was in severe mental and physical pain. When I consider all the above matters, I hold that the petitioner had suffered mental and physical torture and was subjected to cruel and inhuman treatment by the 2nd Respondent. At this stage I would like to consider a judicial decision of this court.

The petitioner in Amal Sudath Silva Vs Kodituwakku Inspector of Police and others [1987] 2 SLR 119 complained that he was arrested by the police on 9.10.1986 on suspicion of having committed theft of side mirrors from several motor vehicles; that he was thereafter, taken to the Panadura police station and kept in custody for 5 nights without being produced before a Magistrate; that during this period of 5 days he was severely beaten up by the 4 respondents with batons; that he was hung to a beam at the police station by his hands tied to a rope; that his penis was crushed as a result of it being put into a drawer and closed causing him unbearable pain and suffering and that when he asked for water he was given water mixed with chili powder which he was forced to drink.

Atukorale J (with Sharvananda CJ and LH de Alwis J agreeing) at page 126 and 127 held thus: "Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torture some, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its, fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion. This court cannot, in the discharge of its constitutional duty, countenance any attempt by, any police officer however high or low, to conceal or distort the truth induced perhaps, by a false sense of police solidarity. The facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can, only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity particularly at the present time when every endeavour is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and

barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set up, it is essential that he be not denied the protection guaranteed by our Constitution."

It is the duty of the police to maintain law and order in the country. The police must take every step to instill confidence in the minds of the people in their day to day operation.

I have earlier held that the position taken up by the 1st, 2nd and 3rd Respondents was not true and could not be accepted. They state that the petitioner was arrested due to the acts committed by him at the Police Station. I have earlier rejected the stand taken up by them. Considering the totality of the circumstances, I hold the view that there were no reasonable grounds for the 2nd Respondent to arrest the petitioner and the arrest was illegal.

Applying the principles laid down in the above judicial decision and considering the facts of this case, I hold that the petitioner's fundamental rights guaranteed by Article 11 and 12(1) of the Constitution have been violated by the 2nd Respondent. But there is no material to conclude that the 1st Respondent has violated the fundamental rights of the petitioner. The allegation levelled against the 3rd Respondent is that he brought the petitioner's vehicle which had been parked outside the Police Station to the premises of the Police Station. This material is not sufficient to conclude that the 3rd Respondent had violated the fundamental rights of the petitioner. For the above reasons I hold that the 1st and 3rd Respondent are not guilty of violating the fundamental rights of the petitioner. There is no material before court to conclude that the petitioner's fundamental rights guaranteed by Article 13(2) of the Constitution have been violated.

The 2nd Respondent is now dead. The question that remains for consideration is whether the State should pay compensation to the petitioner for the violation of his fundamental rights by the 2nd Respondent. The 2nd Respondent violated the fundamental rights of the petitioner when he was functioning as a Police Officer in the course of his official duties. I therefore hold that the State should pay compensation ordered by this Court. The petitioner has suffered permanent damages as he has lost his teeth. When I consider all the aforesaid matters, I hold that the petitioner is entitled to receive a sum of Rs.500,000/- from the State as compensation. I order that the State should pay this amount. I direct the Inspector General of Police (the 4th Respondent) to take steps to ensure the payment of this amount to the petitioner.

JUDGE OF THE SUPREME COURT

K.W. Sripavan CJ. I agree.

Chief Justice

CHIEF JUSTICE OF THE HIGH COURT

Eva Wwanasundera PC J

I agree.

JUDGE OF THE SUPREME COURT

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Revision against the Order of the High Court of the Southern Province Holden in Matara dated 3Ist October 2012 in terms of Article 138 and Article I54P (3) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provisions of Section 11 (1) of the High Court of the Provinces (Special Provinces) Act as amended and Rule 2 (1) of the Court of Appeal (Procedures for Appeals from High Court) Rules.

Court of Appeal
Case No. CA/PHC/APN 25/2013

High Court Matara
Case No. Rev173/2010

Magistrate's Court Matara
Case No. 95184

Urban Development Authority
No. 27, D.R. Wijewardene
Colombo 10.

PETITIONER

Vs.

K.B. Sumedha Ajith Priyankara
'Rasangi '
Jayabodhi Junction Road, Gandhara
Devinuwara.

RESPONDENT

AND
K.B. Sumedha Ajith Priyankara
'Rasangi'
Jayabodhi Junction Road,
Gandhara Devinuwara.

RESPONDENT - PETITIONER

Vs.

Urban Development Authority
No. 27, D.R. Wijewardene Mawatha
Colombo 10.

PETITIONER - RESPONDENT

And Now Between

K.B. Sumedha Ajith Priyankara
'Rasangi'
Jayabodhi Junction Road,
Gandhara Devinuwara.

RESPONDENT-PETITIONER-PETITIONER

Vs.

Urban Development Authority
No. 27, D.R. Wijewardene Mawatha
Colombo 10.

RESPONDENT-RESPONDENT

Before : W.M.M.Malanie Gunarathne, J
P.R.Walgama, J

Counsel : Anura Meddegode with Andrea Ranasinghe for the Respondent - Petitioner Petitioner.
Respondent is absent and unrepresented.

Argued on : 16.11.2015

Decided on : 04.12.2015

P.R. Walgama, J

The Respondent- Petitioner (in short the Petitioner) by his petition has assailed the order of the Learned High Court Judge dated 31st of October 2012 and the order of the learned Magistrate dated 26th of May 2010.

The shortly stated facts in the above petition are as follows;
That the Petitioner- Respondent (in short the Respondent) ,the Urban Development Authority, instituted action against the Petitioner, in the Magistrate Court of Matara in the case bearing No. 95184, for constructing an unauthorised structure without a valid permit, In terms of Section 28 A(3) of Urban Development Authority Act No. 41 of 1978 as amended by Act Nos. 4 and 44 of 1982, and sought an order to demolish the subject premises.

The Learned Magistrate after considering the facts placed before Court, by his order dated 26th May 2010 made order issumg a Decree authorising the demolition of the said premises.

Being aggrieved by the said order the Petitioner filed an application in Revision to have the said impugned order set aside. The Learned High Court Judge by his order dated 31st October 2012, dismissed the Petitioner's application and affirmed the order of the Learned Magistrate dated 26th May 2010.
Being aggrieved by the said order, the Petitioner came by way of a Revision to this Court to have the said order of the High Court Judge be set aside or vacate.

It is salient to note, that the argument was taken in the absence of the Respondent, as such this Court had the opportunity to hear only the argument of the Petitioner.
The facts emerged from the instant petition is fundamentally based on the ground that the learned Magistrate and the learned High Court Judge has made said impugned orders without considering the legal concepts in the correct perspective as stated below;
That the learned Magistrate and the Learned High Court Judge had failed to consider the building permit marked as X2 and the document marked X4, which is the decision of the Devinuwara Pradeshiya Sabha , further the Certificate of Conformity marked as X5, issued by the Urban Develop Authority dated 25th December 2010.

It is also contended by the Petitioner that the Urban Development Authority has imposed taxes on the alleged building, although it is alleged by the Respondent that the said premises in suit is an unauthorised structure.

Besides it is the position of the Petitioner that the Respondent has no locus standi to institute action in the Magistrate Court as the premises in suit does not come within the development area and more fully it is stated that the Respondent has violated the Section 13(4) of the Urban Development Authority Act as the Legal Officer has instituted the action against the Petitioner in the Magistrate Court without proper authorisation by the Director of the Urban Development Authority.

The Petitioner has adverted Court with many decided cases to buttress his position as to why this Court should exercise Revisionary Jurisdiction to grant reliefs as prayed for in the petition.

It is a salutary principle that the Revisionary Jurisdiction is an extraordinary power that the Appellate Court will exercise only in a situation where a irreparable damage or grave miscarriage of justice has occurred. The above principle was observed in the case of MARIAM BEEBEE Vs. SYED MOHAMMED- 68 NLR- 36.

In the instant Revision application the Petitioner has adverted court to the documents marked X2 which is the Building Permit, X4 decision of the Pradesiya Sabha of Devinuwara and Certificate of Conformity marked as X5. The above documents substantiate the legality of the procedure that was followed by the Petitioner in constructing the alleged premises. Therefore any order to demolish such building will be illegal and pervese.

The Counsel for the Petitioner has referred to plathora of decided cases that was given weight in the legal parlance.
In the case of ATTORNEY GENERAL . VS. PODISINGHO (51.NLR-385) stated thus;

"in exercising its powers of revision, this Court is not trammelled by technical rules of pleadings and other procedure".
In the case of POTMAN .VS. IP DODANGODA [71 .NLR. 115] it was held "that the powers of revision are so wide that revision is available even after the appeal has been disposed of .... "

In the case of BISO MANIKA Vs. CYRIL DE ALWIS[1982 SLR- 368] it was observed by Sharvananda J. That "when the Court has examined the record and satisfied, that the order complained of is manifestly erroneous or without jurisdiction, the Court be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay unless there are very extraordinary reasons to justify such rejection".

Hence in the afore said legal and factual matrix this Court is of the view that the said impugned orders of the Learned High Court Judge and the order of the Learned Magistrate should be set aside forthwith.

Accordingly Petitioner's application is allowed. We order no costs.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malinie Gunarathne, J
I agree,

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

High Court (Colombo)
Case No: HC 101/99

C.A. Case No: 210/2012

COMPLAINANT

Vs.

Rapiyal Jayaseelan Fernando
No 132/01, Vivekananda Hill,
Colombo 13.

ACCUSED

and now between

Rapiyal Jayaseelan Fernando
(Presently at Welikada Prison)

ACCUSED APPELLANT

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

Before : H.N.J. Perera, J
P.W.D.C. Jayathilake, J

Counsel : Nihal Gunasinghe for the Accused Appellant.
Kapila Waidyaratne ASG for the Respondent.

Argued on : 07.07.2014

Decided on : 30.04.2015

P.W.D.C. Jayathilake, J

Rapiel Jayaseelan Fernando, the Accused Appellant was charged under Sec. 54A (d) of dangerous drugs and opium ordinance No. 13 of 1984 for having 1006g of heroin in his possession in Pettah on 14th December in 1998. He was convicted after trial and sentenced to life imprisonment. Being dissatisfied with the conviction and the sentence, the Accused Appellant has appealed to this court.

The Police Inspector, Amarajth of Narcotic Bureau had organized a raid on some information received about a deal of heroin near the fish market in Pettah. Inspector Amarajth with several other police officers walked towards the bus stop near the Kochchikade Fish market, after parking the vehicle near the said fish market. They caught the Accused Appelant who was walking towards the bus stop on showing him by the spy. The Accused Appellant was then, wearing a pair of shorts and carrying a big shopping bag. Inspector Amarajith found several parcels of heroin in that shopping bag and he arrested the Accused Appellant at that time, that is at 10.10 hours.

The Accused Appellant was a fish monger who ran a fish stall No.54 at St. John fish market. His postal address was No.132/l, Viwekananda Road, Colombo 13. The team of police officers had gone to the Fish Market by 10.15 after the arrest of the Accused Appellant. They had not found any illegal thing there. Then the said team had gone to a house of a relative of the Accused Appellant namely, Francis Saviour in Wattala and searched it. After that they had returned to a place, in the Main Street, Pettah to look for a person on a bit of information given by the Accused Appellant, but such a person had not been found. Finally, they had gone to the Accused Appellant's place at the above address and searched the house, but nothing had been found there too. Next, the said team had arrived at the Narcotic Bereau at 13.15 hours.

The content of the stuff in the bag taken into custody was 2kg and 344g 196mg of heroin. However, Inspector Amarajith had not given evidence as he was away from the Island during the period of trial. The prosecution had led evidence of two police officers who had assisted Inspector Amarajith in the raid. The leading of the evidence of the prosecution had ended on 09.02.2010. No mention about the concluding of the evidence of the prosecution case and calling for the defence. In the trial, what is mentioned next is commencing the defence case. The Accused Appellant had been called to give evidence for his defence. He starting giving evidence has stated the following matters.

His job was selling fish renting a stall at the fish market. During that period' he was residing at 132/2, Viwekananda Hill, Kotahena. He was married and had two children a son and a daughter. On 14.12.1998 he came to the fish stall at 3.30 in the morning and finished selling fish by 9.30 and remained at his fish stall.

At this stage, the learned trial judge had interfered and cautioned the Defence Counsel not to lead evidence to say that the Accused Appellant had not been arrested near the bus stand as stated in the prosecution evidence. The opinion of the trial judge was that if evidence had been led in that way, it would have become defence of alibi and at that stage the Accused Appellant couldn't have taken up the defence of alibi since he had not followed the requirements of Sec. 126A (i) of the Code of Criminal Procedure (amendment) Act No.14 of 2005.

The said Section is as follows.

126A. (1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has

(a) Stated such fact to the police at the time of making his statement during the investigation; or

(b) Stated such fact at any time during the preliminary inquiry; or

(c) Raised such defence, after indictment has been served, with notice to the Attorney General at any time prior to fourteen days of the date of commencement of the trial

Provided however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.

The defence counsel had submitted the court that he had, in no way, the idea of adducing evidence in support of the defence of an alibi. Even though this matter has been raised by the trial judge on his own, the learned state counsel who conducted the prosecution too, had taken up the view that Accused Appellant should not be allowed to state before the court that he was arrested in another place, not in the place stated by the police. He has submitted that if evidence of such nature was led through the Accused Appellant, it becomes evidence in support of the defence of an alibi under Section II of the Evidence Ordinance.

Section II of the Evidence Ordinance is as follows.

Facts not otherwise relevant are relevant-

(a) If they are inconsistent with any fact in issue or relevant fact:

(b) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustration (a) of Section II clearly states what defence of alibi is Illustration (a) is as follows.

(a) The question is, whether A committed a crime at Colombo on a certain day.

The fact on that day A was at Galle is relevant. The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

In the instant case the Accused Appellant has committed the offence in Pettah according to the charge described in the indictment.

When the items of evidence of Sergeant Gunaratna and Sergeant Sumanadasa are considered as a whole it gives the idea that all the activities related to the arrest of the Accused Appellant had taken place within one particular area. The police team had left Narcotic Bureau at 9.15 hours and reached the Wimaladharma Clock Tower at 9.35 hours. From the Clock Tower up to the bus stop near the fish market, they had walked at 9.45 hours. Evidence reveals that it is 5 minutes' walk between the said bus stop and the Fish Market. Hence the fact that the arrest of the Accused Appellant had been made in the fish market is not something very impossible. According to the illustration (a) of Section II if a person who is alleged to have committed an offence at a certain time in Colombo is capable of proving that he was in Galle at that particular time, said person's committing of the said offence is absolutely impossible. Similarly, arresting a person who is alleged to have committed an offence somewhere in Pettah being arrested elsewhere in Pettah itself is not something impossible. It is a question of fact which is to be decided on evidence.

Accordingly, I am of the opinion that the latter cannot be counted as evidence in support of the defence of alibi. However, the trial judge has ruled out the application of the defence counsel to lead evidence of the Accused Appellant for Accused Appellant's defence that he was arrested at his fish stall in the fish market and not near the bus stop.

I see another point with regard to the trial judge's ruling out of the said application. The learned State Counsel who appeared in the trial court has submitted that the defence was attempting to lead evidence astonishing the complainant and the court that the Accused Appellant was arrested in the fish market. What is astonishing is not the said point, but that both the trial judge and the State Counsel had forgotten all about the defence counsel's stating several times in his cross examination that the Accused Appellant was arrested in the fish market. At any time making the said suggestion, either the trial judge or the State Counsel has not responded against it. However, as a result of the said ruling of the trial judge, the Accused Appellant who stood up in the witness box has had to restrict his evidence to a mere denial. The prosecution had not needed to ask one single question in the cross examination.

Yet another matter to be considered is the activities of the police team subsequent to the arrest of the Accused Appellant. They had gone to a place in Wattala and searched a house which was said to belong to a relative of the Accused Appellant. After that the police team had returned to a place in the Main Street and had waited expecting a suspected person. This might cause a reasonable doubt in someone why they look for another suspected person while they had already caught the wanted person with the illegal stuff.

It is the opinion of this court that under these circumstances a prejudice has been caused to the Accused Appellant by the court's act of gagging his mouth. It must be noted that the judges must not be gagged as well as the others must not be gagged by the judges.

The fair trial is a fundamental right of an accused. It appears that the said fundamental right of the Accused Appellant has been deprived of in this case.

J.A.N. de Silva J in the judgment of Attorney General V. Aponso*has referred to that,

"The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognized in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments."

His Lordship has laid down some of the qualities of a fair trial as follows.

1. The equality of all persons before the court.
2. A fair and public hearing by a competent independent and impartial / tribunal established by law.
3. **Presumption of innocence until guilt is proven according to law.**
4. The right of an accused person to be informed of promptly and in detail in a language he understands of the nature and cause of the charge against him.
5. The right of an accused to have time and facilities for preparation for the trial.
6. The right to have a counsel and to communicate with him.
7. The right of an accused to be tried without much delay.
8. The right of an accused to be tried in his presence to defend himself or through counsel.
9. The accused has a right to be informed of his rights.
10. If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.
11. **The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.**
12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter.
13. The right of an accused not to be compelled to testify against himself or to confess guilty.

In my judgment I would like to add the following to the idea of the item 11 above. The right of an accused to give and call for evidence for their defence without any kind of prevention and/or disturbance and/or harassment shall be safeguarded.

The learned trial judge has referred to several examples to show that some people are used to adopting various strategies in order to earn money while taking a risk. It seems that his opinion is that no mercy should be shown to them. Even though that the judge shall not show mercy on accused judge must perform the duties not only without fear or favour but also without affection or ill-will.

However, our law has been built on the basis that the innocent shall not be made the convicted. Even the person convicted shall be satisfied that they were convicted through a fair trial. Therefore, this court has no alternative but to send this case back for a re-trial. As such, we set aside the conviction and imposed sentence on the Accused Appellant and order the re-trial on the same indictment.

Conviction set aside and re-trial ordered.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera, J

I agree

JUDGE OF THE COURT OF APPEAL

Notes