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(3) In a trial by jury, the question whether the evidence of a witness should be accepted or rejected is a question of fact which should be left to the jury.

Per Sisira de Abrew, J.

> "A Judge must not in the course of his summing up use language, the cumulative effect of which would remove from the consideration of the jury what are essentially questions of facts for their determination.

Held further

Per Sisira de Abrew, J.

> "Since the defence taken up by the accused is a false defence and is not capable of creating a reasonable doubt in the prosecution case and also considering the story. Items of evidence led, I am of the opinion that the Court is justified in applying the provisions to Section 334 of the Code".

Per Sisira de Abrew, J.

> "When I consider the evidence in the instant case, I cannot conclude that the verdict of the jury is unreasonable or cannot be supported on the evidence. I cannot conclude that it was a wrong decision or the misduties which I have stated above have caused a miscarriage of justice – jury could not have brought any other verdict other than the verdict of murder".

APPEAL from the judgment of the High Court of Ratnapura.

1. *Albert Singho vs. Queen* – 74 NLR 360
2. *L. N. Fernando vs. A.G.* – 1998 – 2 Sri LR 329 (SC)
3. *M. H. M. Lefeer vs. Queen* – 74 NLR 246 at 248
4. *Manner Mannan vs. Republic of Sri Lanka* – 1990 – 1 Sri LR 280

Niranjan Jayasinghe for 1st accused – appellant

Nimal Mutukumara for 2nd accused-appellant

V. K. Malalgoda DSG for AG

August 08th 2008

SISIRA DE ABRAW, J.

Heard both Counsel in support of their respective cases.

The accused-appellants were tried by a Jury before the High Court Judge, Ratnapura.

The accused-appellants in the case by the unanimous verdict of the Jury were convicted of the murder of a man named Kuttapitiye Gedera Justin Wijenayake and were sentenced to death.

On behalf of the 1st accused-appellant, learned counsel urged following grounds as militating against the maintenance of the conviction.

(1) mis–directions and non-directions in the summing–up regarding the murder and the culpable homicide not amounting to murder based on intention;

(2) the learned High Court Judge had come to the findings on facts regarding the grave and sudden provocation and as such consideration of the plea of grave and sudden provocation was withdrawn from the jury;

(3) the comments made by the learned trial Judge regarding the evidence of the prosecution and defence witnesses had prejudiced the minds of the jury.

On behalf of the 2nd accused-appellant, the learned counsel urged the following ground as militating against the maintenance of the conviction of the 2nd accused-appellant.

The 2nd accused did not entertain any criminal intention.

Facts of this case may be briefly summarized as follows:

On the day of the incident the 1st and 2nd accused went near the house of the deceased. While the 1st accused was waiting in front of the house, the 2nd accused called the deceased. The deceased came out of the house. The 1st accused at this stage stabbed the deceased. The knife which got entangled in the stomach of the deceased was removed by the 2nd accused-appellant. This incident was witnessed by Pushpakumara. There was no reason to doubt his evidence.

Both accused-appellants gave evidence in this case. According to the 1st accused's evidence, he and the 2nd accused went near the house of the deceased. He was under the impression that he was going to see a girl. The deceased came from the house dressed like a woman. The 1st accused who got provoked over this stabbed the deceased. The 2nd accused too says both of them went near the house. The 2nd accused admits that he took a knife hidden in his waist when he was going to the deceased's house. When both of them went near the deceased's house, the 2nd accused went inside the house of the deceased and thereafter the deceased came dressed like a woman. At this stage, the 1st accused took the knife from the 2nd accused's waist and stabbed the deceased. This was the summary of the evidence of the 2nd accused. Although both accused took up the position in their evidence that the deceased was dressed like a woman, this position appears to be incorrect.

The doctor who performed the post-mortem examination did not find any frock or a skirt or any women's clothing dressed on the body of the deceased. The 1st accused in his evidence say that the deceased was wearing a skirt and a T-shirt, but this position was contradicted by the 2nd accused who said that the deceased was wearing a frock. From this evidence it is reasonable to conclude that the defence taken

up by the accused is false. Therefore, in my view, the jury was justified in rejecting this defence.

I shall now deal with the 1st ground urged by the learned counsel for the accused-appellant. The learned Judge, at page 208, explaining the offence of culpable homicide not amounting to murder told the jury that in the offence of culpable homicide not amounting to murder, the offender did not entertain the murderous intention. This gives the impression to the jury that the accused could not be convicted of the offence of culpable homicide not amounting to murder if he entertains murderous intention. In our view this is a mis-direction on law.

On a perusal of section 284 and it's exceptions, it is clear that an accused person who is charged with the offence of murder can be convicted of the offence of culpable homicide not amounting to murder even if he entertains murderous intention, if the accused caused the death of the deceased whilst acting under one of the exceptions to section 294 of the Penal Code. Therefore we hold that the above direction constitutes a mis-direction on law.

I shall now deal with the second ground urged by the learned counsel for the accused-appellant. The learned judge discussing the facts relating the plea of grave and sudden provocation told the jury that he did not think that the accused would get provoked within the meaning of provocating in the Penal Code. The learned Judge by this direction, created the impression in the minds of the jury that the accused, in his opinion, is not entitled to the plea of grave and sudden provocation. Vide page 301 of the brief.

The learned judge at page 315 also gave the same impression. In our view, the learned judge, by doing this has,

withdrawn the plea to grave and sudden provocation from the consideration of the jury. Whether or not the accused is entitled to the plea of grave and sudden provocation is a question of fact which should be decided by the jury. Therefore, this direction too in our view, is a mis-direction.

I shall now turn to the ground No. 3 urged by the learned counsel for the 1st accused-appellant. The learned judge, at page 283 of the brief, told the jury that there were no grounds to reject Pushpakumara's evidence. In our view learned trial Judge should have avoided this language. In support of the gorund No. 3, the learned counsel for the 1st accused-appellant cited *W. A. Albert Singho vs. The Queen*(1) wherein His Lordship Justice Alles stated thus: *"A Judge must not, in the course of his summing-up use language, the cumulative effect of which would remove from the consideration of the jury what are essentially questions of fact for their determination."* In a trial by a jury, the question whether the evidence of a witness should be accepted or rejected is a question fact which should be left to the jury. Therefore, in my view, learned Judge, by the said direction, committed a misdirection. Now the question must be considered is in view of these mis-directions whether the jury would have returned any other verdict other than the verdict that they returned.

As I have pointed out earlier the defence taken up by the accused is a false defence. In my view it does not create any reasonable doubt in the prosecution case.

When the evidence led on behalf of the prosecution is considered, Court must consider whether the court should apply proviso to section 334 of the Criminal Procedure Code which reads as follows:

"Provided that the court may, notwithstanding that is of opinion that the point raised in the appeal might be decided in

favour of the appellant, dismiss the appeal, if it considers that no substantial miscarriage of justice actually occurred."

Since the defence taken up by the accused is a false defence and is not capable of creating a reasonable doubt in the prosecution case, and also considering the strong items of evidence led on behalf of the prosecution, I am of the opinion that this court is justified in applying the proviso to section 334 of the Criminal Procedure Code.

This view is supported by the following the judicial decisions:

In *L. N. Fernando vs. Attorney General*[2] Supreme Court observed thus: *"The appellants were convicted of the offences of conspirary and murder on the basis of common intention. It was urged on behalf of the appellants that the High Court Judge had failed to give the adequate directions to the jury regarding common intention and conspiracy. Held: Even though the points raised on behalf of the appellants might be decided in their favour, yet no miscarriage of justice has actually occurred; hence the appeal should be dismissed."*

In *M. H. M. Lafeer vs The Queen* [3] at 248, His Lordship H. N. G. Fernando CJ states thus: *"There was thus both mis-direction and non-direction on matters concerning the standard of proof. Nevertheless, we are of the opinion having regard to the cogent and uncontradicted evidence that the jury properly directed, could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

In *Mannar Mannan vs. Republic of Sri Lanka*[4] Supreme Court remarked thus, *"In a trial on a charge of murder two eye witnesses testified to seeing the accused-appellant fire*

one shot with a gun at the deceased at night. The Accused in a statement from the dock denied he was anywhere in the vicinity of the shooting. The trial Judge failed to direct the jury that it was sufficient for the appellant to secure an acquittal if the statement from the dock raised a reasonable doubt in regard to the allegation of the prosecution that it was the appellant who shot the deceased."

Held: The enacting part of sub-section (1) of Section 334 mandates the court to allow the appeal where:

(a) the verdict is unreasonable or cannot be supported having regard to the evidence; or

(b) there is a wrong decision or any question of law; or

(c) there is a miscarriage of justice on any ground."

When I consider the evidence in the instant case, I cannot conclude that the verdict of the jury is unreasonable or cannot be supported on the evidence. I cannot conclude that it was a wrong decision or the mis-directions which I have stated above have caused a miscarriage of justice.

Having regard to the evidence led at the trial I am of the opinion that the jury could not have brought any other verdict other than the verdict of murder.

I shall now turn to the said ground urged on behalf of the 2nd accused-appellant. The learned counsel contends that the 2nd accused did not entertain any murderous intention or any criminal intention. The 2nd accused in his evidence took up the position that since he was a watcher he was in the habit of carrying a knife with him. But he himself admitted, in evidence, that he did not go to work on that day. He himself admitted that he carried the knife in his waist. He admitted that the1st accused was aware of the fact that the knife was with him.

According to the evidence of Pushpakumara, the 2nd accused encouraged the 1st accused to go to the scene of offence. While going, the 1st accused spoke some words giving the impression that he would stab the deceased. The 1st accused waited in front of the deceased's house and thereupon the 2nd accused called the deceased. Considering all these matters, I hold that the 2nd accused had entertained the murderous intention and they had a pre-plan to stab the deceased.

I am, therefore, unable to agree with the submission made by the learned counsel for the 2nd accused-appellant.

Considering all these matters, I hold the view that I should not interfere with the verdict of the jury with regard to the 2nd accused-appellant as well.

For the reasons stated above, we upholding the verdict of the jury and the sentence imposed on the appellants, dismiss this appeal.

Conviction and the death sentence are affirmed and the appeal is dismissed.

BASNAYAKE. J. – I agree.

Appeal dismissed.

PREMAWANSHA V. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 173/2005
HC KEGALLE 1576/2007
FEBRUARY 16, 17, 2009

Penal Code – Murder – Robbery – Evidence of Doctor not challenged? Evidence should be accepted? Absence of cross examination – inferences? Judicial evaluation of circumstantial evidence? – Evidence - Section 27 - Code of Criminal Procedure - Section 334 - Constitution – Article 138

The accused-appellant was convicted for the murder of one J and for the robbery of a watch – necklace and ear stud. He was sentenced to death on count 1. 10 yrs R.I. on count 2.

Held

(1) Absence of cross examination of prosecution witness of certain facts leads to inference of admission of that fact.

Per Sisira de Abrew, J.

> "I hold that whenever evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent subject however to the qualification that he or she is a reliable witness. The Doctor who conducted the post mortem is a reliable witness".

(2) In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence.

Per Sisira de Abrew, J.

> "Although there was no judicial evaluation of evidence learned trial Judge on the evidence led at the trial could not have arrived at any other conclusion other than the conclusion reached by him.

APPEAL from the judgment of the High Court of Kegalle.

Cases referred to :-

(1) *Sarwan Singh vs. State of Punjab 2002 AIR* (iii) 3652 at 3655 and 3656

(2) *Bobby Mathew vs. State of Karnataka 2004* – 3 Cri LJ 3003

(3) *Himachal Pradesh vs. Thakur Dassa* – 1983 2 Cr LJ 1694 at 1701

(4) *Motilal vs. State of Madhya Predesh* – 1990 – Cr LJ NOL 125 MP

(5) *Ariyasinghe vs. A.G.* – 2004 – 2 SRI LR 257 at 258

(6) *K vs. Abeywickrema* – 44 NLR 254

(7) *K vs. Appuhamy* – 46 NLR 128

(8) *Podi Singho vs. K* – 53 NLR 49

Dr. Ranjith Fernando for accused-appellant

Sarath Jayamanne DSG for the A. G.

March 19th 2009

SISIRA DE ABREW J.

The accused appellant in this case was convicted for the murder of a woman named Prema Jayasundara and for the robbery of a watch, gold necklace and ear stud from her possession. He was on count No. 1 sentenced to death and on count No. 2 to a term of ten years rigorous imprisonment. This appeal is against the said conviction and the sentence.

The facts of this case may be summarized as follows:

Around 5.00 p.m. on 22.11.97 Chaminda who was engaged in catching fish with his fishing rod in a stream called wee oya had to walk up on the bank of the stream since be was not successful in his attempts. He then saw the accused in the stream but could not see his hands as the water level was up to his neck level. When the accused appellant raised

his hands the body of the deceased, with the flow of water, fell from a rock in the stream. Thereafter the body of the deceased got washed away due to current of the water. The mother of the deceased, who arrived at this place on hearing a commotion, took the body, which was floating, to the shore. At this time the accused appellant, who came from the stream, went away showing the body of the deceased to the mother.

Dr. Abeysiriwardene who examined the accused appellant on 25th of November found several abrasions all over his body. There were vertically placed ten abrasions on his cheeks. He found abrasions on both sides of the neck, both hands, left buttocks, both legs and loin. According to the doctor these injuries could be caused by nails of another person during a struggle. The question whether these injuries could be caused while running in a jungle was answered in the negative by the doctor. The evidence of the doctor was not challenged by the learned defence counsel. When this evidence is not challenged can it be said that such evidence is accepted by the opposing party. In finding an answer to this question I would like to consider certain judicial decisions. In the case of *Sarwan Singh vs. State of Purjab*(1) at 3655 and 3656 Indian Supreme Court held: "It is rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted. " This judgment was cited with approval in the case of *Bobby Mathew vs. State of Karanataka*(2)

In the case of *Himachal Pradesh vs. Thakur Dass*(3) at 1701 V. D. Misra CJ held; "Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."

Absence of cross examination of prosecution witness of certain facts leads to interence of admission of that fact." *Vide Morilal vs State of Madhaya Predesh*[4]

On a consideration of the principles laid down in the above judicial decisions, I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject however to the qualification that he or she is a reliable witness. Doctor who conducted the Post Mortem is a reliable witness. There is no dispute on this. Applying the principles laid down in the above judicial decisions, I hold that the evidence given by Dr. Abeysiriwardene was accepted by the accused. Thus the accused appellant has accepted that abrasions found on his body were caused by human nails of another person. This is very strong item of circumstantial evidence against the accused appellant.

The investigating officer who went in search of the accused in the same night did not find the accused in his house. But he found a wet pair of shorts in the house of the accused and further observed a recent tear on the back of it. At this stage it is relevant to note that the accused appellant had abrasions which could have been caused by human nails of another person on his buttocks. The investigating officer recovered an ear stud, a broken chain and a ladies' watch near a rubber tree in a rubber estate. These were recovered in consequence of a statement made by the accused who at 1.05 a.m. pointed out these items to the investigating officer. In *Ariyasinghe vs. AG* [5] at 386 court considered three ways in which an accused person could gain knowledge of a thing recovered in consequence of a statement made by him. They are as follows:

1. The accused himself hid the item
2. The accused saw another person concealing the item
3. A person who had seen another person concealing the item in a certain place has told the accused about it.

Learned DSG contended since the items were found near a rubber tree in a rubber estate at 1.05 a.m. if the accused witnessed somebody concealing the items or somebody told him the place where the items were hidden, the accused could not have pointed out them. He therefore contended that it was the accused person who concealed the items. I shall now consider this contention. If the accused witnessed the concealment of the items by someone, how could he find this place at 1.05 in the morning near one particular rubber tree when there were so many rubber trees? Same contention applies to the aforementioned third position. If somebody told him the place where the items were concealed it is impossible for him to find this place when one considers the location and the time they were recovered. Thus it has to be concluded that it was the accused person who concealed these items at this place. For these reasons I hold that the conclusion reached by the learned trial judge that it was the accused who concealed the items cannot be found fault with. Therefore, the second ground urged by the learned counsel i.e. "there was an erroneous approach to the Section 27 recovery" has no merit. I therefore reject it.

It has to be mentioned here that the police officers did not recover both ear studs. He recovered only one ear stud. The other ear stud was in one of the ear lobes of the deceased. The mother identified the ear studs recovered in consequence of the accused's statement as the other ear stud in the pair. This shows that this ear stud has been snatched from the

deceased. The necklace was broken and the strap of the watch was broken. This shows that they had been snatched from the deceased. In view of the above conclusion reached that is to say, that it was the accused who kept these items near the rubber tree and considering the above observations, court can conclude beyond reasonable doubt that it was the accused who robbed the above three items from the deceased.

I shall now consider the first ground urged by the learned counsel which is as follows:

"Learned trial judge erred on matters of facts relating to the vital areas of evidence". Learned trial judge at page 184 observed that the accused is the husband of the deceased. This appears to be a mistake and it has not caused any prejudice to the accused. At page 192, learned trial judge, referring to Chaminda's evidence, stated that the accused was keeping his hands under the dead body. There was no such evidence. At page 193, learned trial judge concluded that the deceased woman was killed and dumped into the stream. There was no such evidence. But in view of the strong evidence led by the prosecution, I hold that these mistakes have not caused prejudice to the accused. Therefore applying the proviso to Article 138 of the Constitution and the proviso to Section 334 of the Criminal Procedure Code, I reject the aforementioned ground of appeal. According to the evidence of Chaminda no sooner the accused raised his hands the dead body fell from a rock in the stream. Learned trial judge concluded that in view of the evidence the accused was doing something to the dead body. One should not forget that at this particular time the accused was in the stream and the water level was up to his neck. When the evidence of Chaminda is considered, I am of the opinion that the above conclusion reached by the learned trial judge is correct.

I shall now consider the third ground urged by learned counsel which is as follows: "There was no judicial evaluation of the items of circumstantial evidence as required by law." Although there was no judicial evaluation of evidence, learned trial judge, on the evidence led at the trial, could not have arrived at any other conclusion other than the conclusion reached by him.

The case for the prosecution depended on circumstantial evidence. Therefore it is necessary to consider the principles governing cases of circumstantial evidence. In *King vs. Abeywickeame*[6] Soertsz J remarked thus: "In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of the innocence."

In *King vs. Appuhamy*[7] Keuneman J held thus: "In order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis the that of his guilt."

In *Podisingho vs. King*[8] Dias J remarked thus: "That in a 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."

Having regard to the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence, if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence. When

the evidence adduced at the trial is considered, the one and only irresistible and inescapable conclusion that can be arrived at is that the accused committed the murder of Prema Jayawardene and robbed her ear stud, necklace and her watch.

For the above reasons, I upholding the judgment, conviction and the sentence of the learned trial judge dismiss this appeal as devoid of merit.

ABEYRATHNE J. – I agree.

Appeal dismissed.

KARUNARATNE V. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 123/2004
HC COLOMBO B 1401/2002
MAY 5, 6, 2009

Bribery Act – Section 26 – Conviction – Dock statement – No reasons given for rejection – Fatal? – Guidelines to be followed in evaluation dock statement – Constitution Art 128 and Criminal Procedure Code – Section 334 – applicability

The accused-appellant was convicted for soliciting and accepted a bribe of Rs. 4000/- and sentenced.

It was contended that, the dock statement has not been subjected to the necessary test to ascertain whether it is sufficient to raise a doubt, that the trial Judge failed to state whether he rejected the dock statement and had not given reasons for the rejection of same.

Held

(1) The trial Judge in evaluating the dock statement must follow the following rules:

  (1) If the dock statement is believed it must be acted upon.

  (2) It the dock statement creates a reasonable doubt the accused is entitled to succeed.

  (3) Dock statement of one accused should not be used against the other.

(2) Consideration of the third principle does not arise since there is only one accused. Failure to observe first and the second principles has not caused any prejudice to the accused as no reliance can be placed on the dock statement.

APPEAL from the judgment of the High Court of Colombo.

Cases referred to:-

(1) *Kularatne vs. Q* 71 NLR 529

(2) *Dharmawardane vs. Director General Commission to Investigate Allegation of Bribery and Corruption* – 2003 – 1 Sri LR 64

Ranjith Abeysuriya PC with *Thanuja Rodrigo* for accused-appellant

Dilan Ratnayake SSC for A.G.

June 11th 2009

SISIRA DE ABREW J.

The accused appellant (the appellant) in this case was convicted for soliciting and accepting a bribe of Rs. 4,000/-. On the solicitation count he was sentenced to a term of three years rigorous imprisonment (R1) and to pay a fine Rs. 5,000/- carrying a default sentence of two years simple imprisonment. On the acceptance court he was sentenced to a term of three years R1. Learned trial judge directed that both terms of imprisonment should run concurrently. In addition to the above punishment he was ordered to pay a penalty of Rs. 4,000/- under Section 26 of the Bribery Act. According to the facts of this case, the appellant a development officer attached to the Divisional Secretary's Office at Yatiyantota solicited a sum of Rs. 4000/- from Jayasinghe, the complainant in this case, to attend to a problem pertaining to his land. After complaining to the Bribery Commissioner's Department, a trap was organized and Jayasinghe gave Rs. 4,000/- to the appellant in the presence of the decoy. Soon thereafter the officers attached to Bribery Commissioner's Deparment came and arrested the appellant.

Learn President's Counsel for the appellant raised the following grounds of appeal as militating against the maintenance of the conviction.

1. Dock statement of the appellant has not been subjected to the necessary test namely whether it is sufficient to raise a doubt in the prosecution case.

2. The learned trial Judge failed to state whether he rejected the dock statement.

3. The learned trial Judge has not given reasons for the rejection of the dock statement.

I shall now consider the dock statement of the appellant. According to his dock statement, in the morning of the day of the incident, when he was working in his office Jayasinghe and another person come to his office, offered him money and requested to attend to his land matter. He refused to attend to the matter as the area in which the particular land is situated was not within his purview. He did not accept money. Later, on several occasions Jayasinghe and the other person came to meet him. Around 12.30 p.m. when he was going to have his lunch Jayasinghe came and gave an envelope. At this time an officer came and arrested him saying that he had taken a bride. He said due to political reasons he was falsely implicated in this case.

When the appellant refused to accept money offered by Jayasinghe in the morning, he should have known that it was a bribe. Then why did he allow Jayasinghe to come back to his office on several occasions on the dame day. This observation shows the falsity of the dock statement. When I consider the dock statement and the above observation I hold that no reliance can be placed on the dock statement and it does not create a reasonable doubt in the prosecution case. The trial Judge in evaluating the dock statement must follow the following rules.

1. If the dock statement is believed it must be acted upon.

2. If the dock statement creates a reasonable doubt in the prosecution case the accused is entitled to succeed in his defence.

3. Dock statement of one accused should not be used against the other accused. *Vide Kularathne vs. Queen* (1)

In the instant case consideration of the third principle set out above does not arise since there is only one accused. Failure to observe first and the second principles above has not caused any prejudice to the accused as no reliance can be placed on the dock statement. This view is supported by the following judicial decision of the Supreme Court. *Dharmawardene vs. Director General, Commission to investigate allegations of Bribery and Corruption* (2). In this case a clerk attached to District Court of Matale was convicted for soliciting and accepting a gratification of Rs. 400/-. In appeal High Court Judge affirmed the conviction but observed that the Magistrate should have given more consideration to the evidence of the accused. It was contended that the High Court Judge should not have upheld the conviction in view of the culpable failure on the part of the Magistrate to have adequately and impartially examined the evidence of the accused. His Lordship Justice Gunasekare (with whom Justice Wigneswaran and Justice Weerasekare agreed) held: "On a careful analysis of the accused's evidence no reliance whatsoever could have given to the evidence of the accused. Accordingly conviction of the accused should be affirmed."

I have earlier held that the failure on the part of the learned trial Judge to observe the 1st and 2nd principles

above had not caused prejudice to the appellant. I therefore applying the provisos to Article 138 of the Constitution and Section 334 of the Criminal Procedure Code reject the grounds of appeal urged by the learned President's Counsel.

For the aforementioned reasons, I affirm the conviction and the sentence and dismiss this appeal.

ABEYRATHNE, J. – I agree.

Appeal dismissed.

NANDAWATHIE AND ANOTHER V. MAHINDASENA

COURT OF APPEAL
RANJIT SILVA. J
SALAM, J.
CA (PHC) 242/2006
HC AVISSAWELLA (REV) 67/2004
MC AVISSAWELLA 66148 (66)
JANUARY 15TH, 2009
MAY 4TH, 2009

Primary Court Ordinance Sections 68, 69, 74 (2), 78 – Relief granted – Moved High Court in revision – Application allowed – Appeal lodged – Can the writ be executed while the appeal is pending? – Is there an automatic stay of proceedings? Civil Procedure Code Sections 754, 757 (2), 761, 630 – Amended by Act No. 38 of 1998 – Judicature Act – Section 23 – High Court of the Provinces (Spl Prov) Act No.19 of 1990 – Constitution 154 P 13th amendment – Supreme Court Rules 1940 – Industrial Disputes Amendment Act No. 32 of 1990 – Maintenance Act No. 34 of 1990 – Section 14 – Criminal Procedure Code No.15 of 1979 Section 323 – Bail Act – Section 19 – Constitution Article 138 – Examined – Compared. – Obiter dicta.

Held

(1) When an order of a Primary Court Judge is challenged by way of revision in the High Court the High Court can examine only the legality of that order and not the corrections of that order.

(2) On appeal to the Court of Appeal the Court of Appeal should not under the guise of the appeal attempt to re-hear or re-evaluate the evidence led and decide on the facts which are entirely and exclusively falling within the domain of the jurisdiction of the Primary Court.

(3) Orders given by the Primary Court should be executed or implemented expeditiously as possible without undue delay unless there is a stay order currently in operation there should be no

automatic stay of proceedings for whatever reason otherwise that would negate and frustrate the very purpose for which that provisions were enacted.

Per Ranjith Silva J.

"I am of the opinion that this particular right of appeal in the circumstances should not be taken as an appeal in the true sense but in fact an application to examine the correctness, legality or the propriety of the order made by the High Court Judge in the exercise of revisionary powers. The Court of Appeal should not under the guise of an appeal attempt to rehear or re-evaluate the evidence led in the main case."

Per Ranjith Silva. J.

"General laws, concepts and general principles whether they have been there from time immemorial should not be applied mechanically to new situations which were never in contemplation when those laws, principles or concepts came into being, extraordinary situations demand extraordinary remedies. It is the duty of Court of law to give effect to the laws to meet new situations, by brushing aside technicalities, the so called rules and concepts which cannot be reconciled should not be allowed to stand in the way of the administration of justice causing hindrance impeding the very relief the legislature wanted to enact".

Per Ranjith Silva, J.

"The decision in *R. A. Kusum Kanthilatha and others v. Indrani Wimalaratne*[1] *and two others* placing reliance on the dictum in *Edward v. Silva*[2] as authority for the proposition that once an appeal is taken against a judgment of a final order pronounced by a High Court in the exercise of its revisionary jurisdiction *ipso facto* stays the execution of the judgment or order is clearly erroneous. Lodging of an appeal does *ipso facto* stay execution. Something more has to be done by the aggrieved party and something more has to be shown, to stay the execution of the judgment or order – it is not automatic".

Cases referred to:-

1. *R. A. Kusum Kathilatha and others v. Indrani Wimalaratne and two others* – 2005 1 Sri LR 411 (not followed)
2. *Edward v. de Silva* – 46 NLR 343 (distinguished)

3. *AG v. Silem* – 11 Eng. Reports at 1208.
4. *Sokkalal ram Sart v. Nadar* – 34 NLR 89
5. *Charlotte Perera v. Thambiah* 1983 – 1 Sri LR at 352
6. *Brooke Bond (Ceylon) Ltd., v. Gunasekera* – 1990 1 LR 71
7. *Nayar v. Thaseek Ameen* – 2000 3 Sri LR at 103
8. *Kulatunga v. Perera* – 2002 – 1 Sri LR at 357

APPLICATION in revision from an order of the High Court of Avissawella.

W. Dayaratne for petitioners

Rohan Sahabandu for respondent.

Cur.adv.vult

November 11th, 2009

RANJITH SILVA, J.

The Petitioners Respondents Petitioners, who shall hereafter be referred to as the Petitioners, filed an information by affidavit regarding a dispute over a right of way between the Petitioners and the Respondent, in the Primary Court of Avissawella on 25th March 2004 under and in terms of Section 66(1)(b) of the Primary Court Procedure Act No.44 of 1979.

The Learned Magistrate (learned Primary Court Judge) by his order dated 1st of July 2004 granted the roadway as prayed for by the Petitioners in their petition and thereafter the said order was executed by the fiscal and accordingly the use and enjoyment of the said roadway was granted over to the 1st Petitioner.

Being dissatisfied with the said order of the Learned Primary Court Judge, dated 01.07.2004, the Respondent moved the High Court of Avissawella in revision.

The Learned High Court Judge on 16.03.2006 allowed the application for revision filed by the Respondent and set aside the order of the learned Primary Court Judge, dated 1st July 2004.

Aggrieved by the said order of learned High Court Judge dated 16.03.2006 the Petitioners, have preferred an appeal to this Court on 29th March 2006, which is pending before another division of this Court.

Thereafter the Respondent filed a motion in the High Court and made an application to obtain an order to close the road which was opened in accordance with the order made by the learned Primary Court Judge and the said application of the Respondent was allowed by the learned High Court Judge on 29.03.2006, the same day the petition of appeal against the order of the learned High Court Judge, was lodged and accepted. The petition of appeal was accepted by the registrar of the High Court at 3.15 p.m. on 29.03.2006. The Petitioners lodged the appeal 13 days after the final order in the application for revision, was made by the High Court. Thus it appears that the appeal was lodged within the appealable period namely within 14 days of the date of the final order.

On 30th of May 2006 on a motion filed by the Respondent, learned High Court Judge affirmed both the orders dated 16th March 2006 and 29th March 2006. Consequently the learned Primary Court Judge ordered the execution of the final order made by the learned High Court Judge restoring the Respondent to possession of the land over which the said right of way is claimed by the petitioners

Being aggrieved by the said orders of the learned High Court Judge dated 29th of March 2006 and 30th May 2006 the

Petitioners have filed this application in this Court seeking to revise/set-aside the orders of the learned High Court Judge dated 29th of March 2006 and 30th May 2006 and the order for execution of the writ made by the learned Magistrate while the appeal is pending and to restore the Petitioner to possession of the land over which the said right of way is claimed by the petitioner's.

It was virtually the main and only contention of the Counsel for the petitioners that the learned High Court Judge (the learned Primary Court Judge) had no jurisdiction to execute the orders after an appeal was taken to the Court of Appeal in that there aren't any provisions to execute a writ while the appeal is pending in the Court of Appeal as such power is given only under Section 761 and 763 of Civil Procedure Code which have no effect, relevance or bearing at all to the instant case. In support of his contention the Counsel for the petitioners cited the judgment delivered by His Lordship Justice Gamini Amaratunga, in *R.A. Kusum Kanthiltha and Others v. Indrani Wimalaratne and Two others*(1)

In the said case His Lordship Justice Gamini Amaratunga, citing *Edward v. De Silva*(2) at 343, held as follows;

"As stated above, a party dissatisfied with an order made by the High Court in a revision application has a right of appeal to this Court against such order. In terms of the Court of Appeal (procedure for appeals from the High Courts) rules of 1988, such an appeal has to be filed in the High Court within 14 days from the order appealed against. Once an appeal is filed, the High Court has to forward its record together with the petition of appeal to the Court of Appeal. In the meantime, as has happened in this case, the party who is successful in the High Court may make an application to

the original Court supported by a certified copy of the order of the High Court, to execute the order of the High Court. Several revision applications which have come before this Court indicate that in such situations, some of the original Court Judges have taken the view that in the absence of a direction from the Court of Appeal directing the stay of execution pending appeal, the order appealed against is an executable order. With respect, this is an erroneous view. It appears that the learned Magistrate in this case has fallen into the same error when the order was made to execute the order of the High Court pending the receipt of an order from the Court of Appeal. There is no provision or necessity for issuing a direction to stay execution. The filling of an appeal *ipso facto* operate to suspend the jurisdiction of the original Court to execute the order appealed against.

There is a practical difficulty faced by the original Courts when an application to execute the order of the High Court is made. The appeal is filed in the High Court and it is then transmitted to the Court of Appeal. There is no provision to officially intimate the original Court that an appeal has been filed, In such situations it is the duty of the party resisting execution on the basis of the pending appeal to furnish proof by way of a certified copy of the petition of appeal to satisfy the original Court that an appeal has been made. When such proof is tendered, the original Court should stay its hand until the appeal is finally disposed of."

Counsel for the Respondent argued to the contrary and submitted that the judgment of Justice Gamini Amaratunga *in Kanthiltha's case(supra)* is wrongly decided. (Decided *per incuriam*) for the reason that their Lordships in that case have not considered the statutes and the relevant authorities referred to in that judgment and also for the reason that their

Lordships have followed the decision in *Edward v. De Silva (supra)* to arrive at the conclusion it arrived at, since the Judges who decided the case decided that case, relying on the Judgment in *AG v. Sillem*[3] at 1208. It is quite significant to note that *AG v. Sillem (supra)* is a criminal case, to be precise a case dealing with breach of statutory provisions.

AG v. Sillem (Supra) relied on by their Lordships in arriving at their decision in *Edward v. De Silva (supra)* is a criminal case. In Criminal matters, the normal practice and the rule is that once an appeal is taken from a Judgment of an inferior Court the jurisdiction of the inferior Court with regard to the execution of the judgment and sentence, in respect of that case, is suspended.

In *Edward v. De Silva (Supra)* the *ratio decidendi* was that in an application for execution of decree after an appeal has been filed by the judgment debtor it is the duty of the Judgment creditor to make the Judgment debtor a party respondent. The failure to comply with this requirement stipulated in Section 763 of the Civil Procedure Code would result in a failure of jurisdiction of the Court to act and would render anything done or any order made thereafter devoid of legal consequences. The observations made by their Lordships in the said case, regarding the suspension of the jurisdiction of a lower Court after the lodging of an appeal was *an obiter dictum* as that was never the issue that had to be decided in the case.

Proceedings under Section 66 of the Primary Court Procedure Act, are generally considered as quasi criminal in nature, yet matters with regard to execution of orders of a Primary Court Judge are very much civil in nature. The particular section dealing with *casus omissus* secures this position beyond any doubt.