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Learned Counsel for the appellants therefore contended that the Trial at Bar erred thereby and the resulting position being if the confessions are ruled inadmissible, there is no judicial evaluation of any other evidence available and hence there cannot be a conviction of the appellants.

Circumstantial evidence is evidence of facts where the principal or the disputed fact, or *fuctum probandum* could be inferred. In *Chakuna Orang v. State of Assam* (17) describing circumstantial evidence it was stated that,

> "Evidence which proves or tends to prove the *factum probandum* indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other *'facts probantia'* it is called circumstantial evidence."

On a consideration of the judgments of the Trial at Bar, it is not correct for the learned Counsel for the appellants to have submitted that the circumstantial evidence has not been judicially analysed and evaluated by the Trial at Bar.

The President of the Trial at Bar, in his judgment from pg. 17 to pg. 25 has considered the items of circumstantial evidence. Similarly the other two members of the Court have evaluated the circumstantial evidence in their separate judgments (Judgment No. II pg. 26 – 49 and 52 – 77, Judgment No. III pg. 135 – 157). Consequently, independent of the confessions of the appellants made to the Military Policy, the following items were considered as circumstantial evidence.

Witness Samarawickrama (RPC 34102), was on duty at Chemmuni Security Point No. 2 which was about half a kilometer away from the Chemmuni Security Check point

where the 1st, 2nd, 3rd and 4th appellants were assigned for duty on 07.09.1996. Samarawickrama was conversant in Tamil. Around 2.00 p.m. on the day in question, the 1st appellant had sent a message informing him that it was necessary to question a LTTE suspect who spoke in Tamil. Therefore when he visited the Chemmuni Check point a girl in her school uniform was seated on a chair. Her hands, legs and mouth were tied. The 1st and 4th appellants were also present at the check point at that time. On being questioned, the girl identified herself as Krishanthi Kumaraswamy studying at Chundukuli College. On the instructions of the 1st appellant, when she was asked as to whether she has any connections with the LTTE, she had stated that she obtained seven Distinctions at her ordinary Level Examination and had queried, as follows:

'why are you treating me like this? We came here trusting you all.'

Thereafter the girl had started shouting and the 1st appellant had informed Samarawickrama to leave. A photograph of the deceased was shown to the witness Samarawickrama which he identified as the person with whom he had spoken to on 07.09.1996 at the Chemmuni Check Point. Around 3.00 p.m. on the same day a middle aged woman with two men had come to check point No. 2 in search of a girl. The woman had told Samarawickrama that her daughter who went to school had not returned and inquired whether a school girl had been arrested at the check point. When Samarawickrama denied such an arrest. She thanked him and left the place with the other two persons. Saarawickrama had identified the photographs marked as P2, P3 and P4 which were the photographs of Pranavan, Kirubamoorthi and Rasamma respectively as the persons who had inquired from inquired from him about the missing school girl.

About 6.00 p.m. on the same day Samarawickrama heard that the three persons whom he had met in the early afternoon that day were detained at the Chemmuni Security Check Point. On hearing this Samarawickrama has sent a message to one Corporal Ajith Asoka who was in charge of the Check Point No. 3 which was about half a kilometer away from the Check Point No. 2 to intervene and rescue the persons who were detained at Chemmuni Check Point. According to Samarawickrama Corporal Ajith Asoka was senior in rank to the 1st appellant.

When the request was made to hand over the persons who were looking for a missing girl both by Asoka and Samarawickrama the 1st appellant had turned down their requests. The 1st appellant had further stated that the Military Police had also learnt about the said people detained and therefore he would look after them. Samarawickrama's version had been corroborated by Corporal Asoka.

In consequence of the information provided by the 1st, 2nd, 3rd, and 4th appellants bodies of the four deceased persons with their clothing were recovered by Inspector Senarath. According to Inspector Senarath, four appellants had separately shown the places where the bodies were buried This exercise was carried out in the presence of the Magistrate, Jaffna.

The body of the deceased Rasamma was identified by her sister and brother on the basis of a surgical scar that was found immediately below her navel. The saree worn by Rasamma on that fateful day was also identified by her sister as belonging to Rasamma. A gold chain which was with the 1st appellant was taken by the Prison Authorities and had given it to his brother who had later given it to his sister

Rohini who had pawned the same at the Mawathagama Rural Bank. The brother and the sister of 1st appellant identified the chain marked P11 as the chain that was given to them by the prison Authorities. The sister of Rasamma identified this chain as the chain that belonged to the deceased Rasamma. According to her Rasamma always wore this chain. The 1st appellant had given no explanation at to how this chain which was 'regularly worn' by the deceased Resamma came into his possession.

Nagendra Sashideran who gave evidence in this case had stated the Pranavan has fixed a badge which had the letters to read as "HONDA" in his cycle. Pranavan was last seen searching for his sister and at that time he was on this cycle.

A bicycle chain case with a Honda Badge was found at a point close to the place of the incident. Sashideran in his evidence had stated that he had seen such a badge at a cycle repair shop at Ariyal and had informed his uncle about it. This was corroborated by the evidence of Sashideran's uncle Kodeswaran. Sashideran had specifically stated in his evidence that this particular badge was fixed on to the cycle by both of them about 2 – 3 months before Pranavan's disappearance. This badge was fixed using 'mechanical screws' which are generally used to fix children's toys. Pranavan's clothes were also identified by this witness Nagandra Sashideran.

The wife of Kirubamoorthi, Kamaleswari identified the clothes of her husband which was confirmed by the laundry mark that appeared on the clothing.

In *R v. Gunaratne* (18) the Court of Criminal Appeal cited with approval the following quote which suggested that

despite certain weaknesses, circumstantial evidence would afford sufficient proof of the facts in issue. It was stated that,

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several chords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

It is to be noted that the following main items of circumstantial evidence were led at the trial in this case.

(1) All the appellants involved were either from the Chemmuni Security Check Point or from the check point No. 2 which was about 50 meters away from the Chemmuni Security Check Point. Due to the close proximity to one another, all appellants would have been in a position to be aware of the events that took place on the day of the incident.

(2) According to the evidence of Samarawickrama and Asoka, Krishanthi Kumaraswamy was last seen detained in a bunker by the 1st appellant around 2.35 p.m. on the day of the incident. At that time the 4th appellant also had been present at the bunker. The evidence of Samarawickrama and Asoka has not been challenged and remained unimpugned.

(3) The bodies of the 4 deceased persons and their clothes were found buried and the place they were buried were shown separately by the 1st, 2nd, 3rd and 4th appellants.

(4) The Honda Badge which was attached to Pranavan's cycle on which he was last seen going in search of his

sister Krishanthi, was found in a place close to the security check points.

(5) A gold chain belonging to Rasamma was found in the possession of the 1st appellant.

With all this damning evidence against the appellants with the charges including murder and rape, the appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound of offer any explanation of his conduct, there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him. As pointed out in *Queen v. Santin Singho*(19) if a strong case has been made out against the accused, and if he declines to offer an explanation although it is in his power to offer one, it is a reasonable conclusion that the accused is not doing so, because the evidence suppressed would operate adversely on him. The dictum of Lord Ellenborough in *R v. Lord Cochrane*(20) which has been followed by our Courts *R v. Seeder de Silva* (21) *Q v. Santin Singho(supra) Premathilake v. The Republic of Sri Lanka*(22), *Richard v. The State* (23) *Illangantillake v. The Republic of Sri Lanka*(24) described this position in very clear terms.

> "No person accused of a crime is bound to offer any explanation of his conduct or of circumstance of suspicion which attach to him; but, nevertheless if he refused to do so, where a strong prime facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearance

which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest. . .”

On a consideration of the totality of the evidence that was placed before the Trial at Bar and the judicial evaluation of such evidence made by the Judges, the appellants have not been able to establish any kind of misdirection, mistake of law or misreception of evidence. In such circumstances, taking into consideration the position that there is no principle in the law of evidence which precludes a conviction in a criminal case being based entirely on circumstantial evidence and the fact that the appellants, decided not to offer any explanations regarding the vital items of circumstantial evidence led to establish the serious charges against them, I am of the view that the Trial at Bar has not erred in coming to a finding of guilt against the appellants.

Ground 6

The Trial at Bar erred in law by rejecting the Dock Statement made by the appellants on the basis of a consideration of the contents of the confessions admitted in evidence.

Learned Counsel for the appellants submitted that inadequate consideration was given to the dock statements made by the appellants.

The 1st appellant had not made any dock statement and the 2nd, 3rd, 4th and 5th appellants stated that they are totally innocent of the Crimes they were accused of committing. Their position was that the statements were not

made voluntarily by them and that they were forced to sign some documents.

On a consideration of the judgments of the Trial at Bar, I find it difficult to agree with the submission of the learned Counsel for the appellants that inadequate consideration was given to dock the statements as it would appear that due consideration has been given to them.

Ground 7

The Trial at Bar erred in law by the addition of a change of rape following an amendment to the indictment which was illegal and therefore vitiated the entire proceedings.

Learned President's Counsel for the 1st appellant took up the position that the Trial at Bar did not have the legal competency to have tried the rape charge as it was not an offence in respect of which His Lordship the Chief Justice made order on 24.06.1997 for the holding of the Trial at Bar in terms of Section 450(2) of the Code of Criminal Procedure, Act as amended At Act No. 21 of 1988. Learned President's Counsel submitted that the procedure of a Trial at Bar is an extraordinary method of trial which could be invoked only in terms of Section 450 of the Code as amended. According to learned President's Counsel, Section 450(1) specified the offences which could be tried before a Trial at Bar, but none of the offences charged in the instant case would come within that category.

Therefore his submission is that, action in this matter had to be taken in terms of section 450(2) where the Hon. Chief Justice is empowered to make a specific order 'under his hand' directing that,

"the trial of any person for that offence be held before the High Court at Bar by three Judges without a jury."

The contention of the learned President's Counsel was that before making an order in terms of Section 450(2) of the Code of Criminal Procedure Act, the Hon. The Chief Justice is required to take into consideration 'the nature of the offence' or the circumstances relating to the 'commission of the offence'. Based on the letter sent by the Hon. Attorney General dated 13.06.1997, requesting the nomination of three Judges of the High Court to constitute a Trial at Bar on the charges contained in the information sent to the High Court, the Hon The Chief Justice had appointed a Trial at Bar and that information contained 11 charges on which His Lordship the Chief Justice's determination was based. Learned President's Counsel further submitted that the offence of Rape was not specified in the information sent by the Hon. The Attorney General and the charge of rape was included in the indictment later before the three Judges at the Trial at Bar on a motion of the prosecuting Counsel. His position is that although Section 167(3) of the Code of Criminal Procedure Act permits the addition of a new charge 'to an indictment', there is no reference to an amendment of the 'information', which was the method of instituting the case before the Trial at Bar. Accordingly learned President's Counsel submitted that such an addition would constitute an unwarranted variation of the specific mandate of the Hon. Chief Justice who is the only legally competed authority to constitute a Trial at Bar in respect of any given offence.

In terms of Section 450(2) of the Code of Criminal Procedure Act (as amended), only the Hon. Chief Justice is empowered to constitute a Trial at Bar taking into

consideration the nature of the offence and circumstances relating to the commission of such offence. However, Section 450 (3) specifically provides that such proceedings would be based either on an indictment or information furnished by the Hon. Attorney General. Furthermore Section 450 (5) provides that the Trial at Bar shall proceed as nearly as possible in the manner provided for trials before the High Court without a Jury. In all trials before the High Court without a Jury the Hon. Attorney General is entitled to amend an indictment before the judgment is pronounced in terms of Section 167 of the Code of Criminal Procedure Act. None of the provisions stipulated in the Amending Act No. 21 of 1988, indicate that the right given under Section 167 to alter any indictment or charge either expressly or by implication in cases before a Trial at Bar has been taken away. In fact a careful examination of Section 450(2), which provides for the Hon. Chief Justice to decide that a Trial at Bar should be commenced considering the nature of the offence and the circumstances relating to the commission of such offence indicate no requirement for the Hon. Chief Justice to decide on the charges or the indictment.

Section 160(3) of the Code of Criminal Procedure Act provides that the Hon. Attorney General has the power to substitute or include in the indictment any charge in respect of any offence, which is disclosed in evidence. In such circumstances, considering the aforementioned provisions in Section 450, it would be absurd to contend that the Attorney General has no authority to amend an indictment.

For the aforementioned reason I am of the view that there is no merit in any of the grounds urged by learned Counsel on behalf of the appellants except the ground relating to

the admissibility of the confessions made to the Military Police Officer. After leaving out the confessions, the evidence referred to above established beyond reasonable doubt that the appellants are guilty of the offences with which they have been convicted. In the circumstances I affirm the conviction and the sentences imposed on the appellants and dismiss this appeal.

EDUSSURIYA, J. – I agree.

YAPA, J. – I agree.

J. A. N. DE SILVA, J. – I agree.

JAYASINGHE, J. – I agree.

appeal dismissed.

LUKSHMAN VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J
UPALY ABEYRATNE. J
CA 17/2005
27, 28, 29, 30 MARCH 2009

Penal Code – Murder – Dying declaration – When Could it be admitted? Presumption of Innocence – Ellenborough principle

The accused–appellant was convicted and sentenced to death – for the murder of one F. In appeal it was contended that, the dying declaration should not have been accepted since the Police witness has failed to produce the piece of paper in which he noted the dying declaration and that the accused did not offer an explanation.

Held

(1) Where a dying statement is produced three questions arise for the Court. Firstly whether it is authentic. Secondly if it is authentic whether it is admissible in whole or in part. Thirdly the value of the whole or part that is admitted.

(2) Sgt-Sirisena's evidence was corroborated by the evidence of others. There were no contradictions or omissions marked from the evidence of Sirisena – He is a truthful witness where evidence can be accepted.

Per Upaly Abeyratne, J.

> "After the conclusion of the case for the prosecution the appellant exercising his legal rights remained silent in the dock, therefore the High Court Judge may have considered the applicability laid down in R vs. Lord Cochrane and others".

APPEAL from the judgment of the High Court of Gampaha.

Cases referred to:-

1. *Dharmawansa Silva and another vs. Republic of Sri Lanka* – 1981 – 2 Sri LR 439
2. *R vs. Cochrane and others* -1814 Gurneys Report – 479
3. *Rajapaksha Devage Somaratne Rajapaksa and others vs. A.G.* – 2010 - 2 Sri LR 113

Tirantha Walalliadda PC with *Indica Mallawaratchi* for accused-appellants.

S. Thurairajah DSG for respondent.

June 23rd 2009

UPALY ABEYRATHNE, J.

This is an appeal preferred against the conviction and sentence imposed upon the Accused Appellant (hereinafter referred to as the Appellant) by the learned High Court Judge of Gampaha date 24.02.2005. The Appellant in this case was indicted in the High Court of Gampaha for having committed murder of a woman named Abdul Hannan Nabisha alias Farthima. After trial the Appellant was found guilty for the said offence and sentenced to death. Being aggrieved by the said conviction and sentence the Appellant preferred the instant appeal to this court.

At the hearing of this appeal, the learned President's Counsel for the Appellant submitted that the dying declaration of the deceased cannot be accepted since the witness sergeant Sirisena has failed to produce the piece of paper in which he noted the dying declaration.

I now deal with the said submission. According to the evidence of Mohomad Safi Mohomed Jifry, who was an eye witness to the incident, the deceased who was his mother's sister (aunt) had a vegetable stall near his house. On

21.01.2000, at about 9.30 a.m. while the witness was in his shop he heard a family voice. He recognised that voice as his aunt's voice. On his way to inquire about the voice he again heard the same voice. He saw the appellant was pulling out some object from his aunt's abdominal area. At that time the witness was about 3 feet away from the place of the incident. He identified the person who attacked his aunt as Sarath Luxman (the appellant). Therefore the appellant got on to a motor cycle, raised his hand with the object he attacked the deceased and said "එකෙකුට ඇන්නා තව එකෙක් ඉන්නවා." Thereafter he left the place of the incident. The witness noticed the object which was in the appellant's hand as of a knife. The witness instantly attended to his aunt, put her in to a three-wheeler and rushed to the police station. On their way to the police station the deceased said to the witness that "Locki stabbed me with a knife."

When they reached the police station sergeant Sirisena came to the three-wheeler. Then the deceased said to sergeant Sirisena that "මාපිටිගම සල්ලි පොලියට දෙන ලකී පිහියෙන් ඇන්නා" Thereafter the deceased was admitted to the hospital. She succumbed to the injuries inflicted to her chest and abdomen.

The prosecution is mainly based on the dying declaration of the deceased. Sergeant Sirisena in his evidence testified that he went to the three wheeler and questioned the deceased. She said "මාපිටිගම සල්ලි පොලියට දෙන ලකී පිහියෙන් ඇන්නා" He took down what the deceased said in a piece of paper and entered them in the crime book (CNB). The CNB was produced before court and has been subjected to cross examination. Paragraph 113 contained the said dying declaration. It was further revealed from the evidence that while the three-wheeler was halted in the police station, sergeant Sirisena upon the instruction of the OIC went to

the three-wheeler and questioned the deceased as to what happened. Then the deceased made the said dying declaration and he proceeded to take it down. Thereafter sergeant Sirisene advised the persons who accompanied the deceased to admit the deceased to hospital.

Hence it is understandable from the said evidence that sergeant Sirisena's said visit was not made in order to record the dying declaration of the deceased. At the cross examination sergeant Sirisena said that since the deceased was in a critical condition with heavy bleeding he promptly proceeded to take down the dying declaration in a piece of paper and thereafter he entered the dying declaration in the CNB. In the aforesaid circumstances I do not find any irregularity caused in the course of the recording of the dying declaration which would be prejudicial to the substantial rights of the Appellant. When the authenticity of the dying declaration is not blameworthy it is admissible evidence against the Appellant.

In the case of *Dharmawansa Silva and Another vs. The Republic of Sri Lanka*[1] The evidence of the only two alleged eye witnesses being contradictory and unreliable, the prosecution case really rested on a dying declaration of the deceased recorded by a police sergeant in which the two appellants were named as the assailants and as motive was mentioned a previous clash at the temple. It was held that "When a dying statement is produced, three questions arise for the court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or in part. Thirdly the value of the whole or part that is admitted."

Sergeant Sirisena's evidence was corroborated by the evidence of Mohamad Jifry. There were no contradictions or omissions marked from the evidence of sergeant Sirisena.

Hence it can be concluded that sergeant Sirisena is a truthful witness whose evidence can be accepted.

The Learned President's counsel submitted that the following passage in the judgment is in violation of the presumption of innocence of the accused appellant. Namely;

> "සාක්ෂි කැඳවීම, සාක්ෂි දීම හෝ ප්‍රකාශයක් නොකර සිටීමට විත්තිකරුට අයිතියක් ඇත. එසේ වුවද, විත්තිකරු නියත වශයෙන්ම නිර්දෝෂී වූවානම්, සාක්ෂි කැඳවීම, සාක්ෂි දීම හා විත්ති කූඩුවේ සිට ප්‍රකාශයක් කිරීම සලකා බැලිය හැකිව තිබුණි. එහෙත් විත්තිකරු එසේ ක්‍රියා කර නැත."

I regret to note that I cannot agree with the said submission. The said passage in my view does not indicate any inference which would be prejudicial to the substantial rights of the Appellant. First sentence of the passage clearly denotes that the learned High Court Judge was possessed of the presumption of innocence. It is to be noted that after the conclusion of the case for the prosecution the Appellant exercising his legal rights remained silent in the dock. Therefore the learned High Court Judge may have considered the applicability of the dictum laid down in the case of *R vs. Lord Cochrase and other*[2]. There Lord Ellenborough held that "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

In the case of *Rajapaksha Devage Somarathna Rajapaksha And Others vs. Attorney General*[3] Justice Bandaranayake observed that "With all this damning evidence against the Appellants with the charges including murder and rape the Appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstances relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitations in which it would be necessary for suspect to explain the circumstances of suspicion which are attach to him."

Hence in the light to the judicial decisions I hold that the said passage in the judgment has not caused any prejudice to the substantial right of the Appellant.

The learned High Court Judge in coming to his conclusion has properly evaluated the evidence having considered, the contradictions marked and the omissions highlighted at the trial. I am of the view that there is no necessity to interfere with the conviction of the Appellant. I therefore affirm the conviction and the sentence imposed upon the Appellants.

The appeal of the Appellant is dismissed.

SISIRA DE ABREW, J. – I agree.

Appeal dismissed.

CHUTIMALLI AND ANOTHER VS. STATE

COURT OF APPEAL
SISIRA DE ABREW. J
ABEYRATNE. J
CA 100/2005
H.C. HAMBANTOTA 66/2001

Penal Code – Murder – Convicted – Contradictions marked – Is the prosecution or defence entitled in re-examination to mark the other portions of the statement to remove wrong impression? Reasonable doubt as to identity?

The two accused - appellant were convicted of the murder of one D and were sentenced to death.

In appeal it was contended that the wife of the decease failed to identify the two accused.

Held

(1) Where, however a witness has been contradicted by certain parts of his former statement the prosecution or the defence as the case may be is entitled in re-examination to put to him other portions of his statement which have not been put to him, in order to rebut the inferences likely to be drawn and thereby indirectly to corroborate him.

(2) Contradiction gives the impression that the witness has not mentioned the names of two accused persons in her statement made to the Police, if the witness has mentioned the names of the two accused persons in a statement prosecuting Counsel becomes entitled to mark the said portion of the statement when the above contradiction is marked - when V3 is considered it creates a reasonable doubt in the identity of the accused-appellant.

APPLICATION from the judgment of the High Court of Hambantota.

Cases referred to:-

1. *Fox vs. General Medical Council* – 1960 1 WLR 1017 at 1025
2. *R vs. Roberts* -1942 - 28 Cr. A.R. 102
3. *R. vs. Bengamin* - 1918 - 8 Cr. A.R. 146

Ranil Samarasuriya for 1st accused-appellant.

Chatura Galena for 2nd accused-appellant.

S. Thurairajah DSG for AG.

December 04th 2008

SISIRA DE ABREW, J.

Heard both Counsel in support of their respective cases.

The two accused-appellants were convicted of the murder of a man named Kodituwakku Kankanamlage Dharmasena and were sentenced to death.

Both Counsel for the accused-appellants take-up the position that the identity of the both accused-appellants has not been established beyond reasonable doubt. In substantiating the arguments they draw our attention to contradiction marked 'V3' at page 92 where, Indrani, the wife of the deceased, had told the Police that, at the time of the incident, two people ran away from the scene of offence.

According to the prosecution case two accused-appellants came near the bed of the deceased and attacked the deceased with weapons and thereafter they ran away from the bed room of the deceased.

Learned Counsel for the 1st accused-appellant, harping on the said contradiction, is trying to contend that the witness Indrani, the wife of the deceased, failed to identify the

two accused. Although the learned defence counsel marked the said contradiction he has failed to mark an omission that witness Indrani failed to mention the two names of the accused-appellants in her statement made to the Police. This suggests that the two names had been mentioned by witness indrani in her statement. But, unfortunately learned prosecuting State Counsel, failed to draw the attention of the trial Court to the other parts of her statement. Contradiction V3 gives the impression that the witness has not mentioned the names of two accused persons in her statement made to the Police. If the witness has mentioned the names of the two accused persons in her statement, prosecuting State Counsel becomes entitled to make the said portions of the statement when the above contradiction is marked.

This view is supported by the following legal literature. "Where, however, a witness has been contradicted by certain parts of his former statement, the prosecution or the defence as the case may be, is entitled in re-examination to put to him other portions of his statement which have not been put to him, in order to rebut the inferences likely to be drawn nd thereby indirectly to corroborate him. This represents the invariable practice of our Courts and is based of fair play and justice, since the contradictions only paint a part of the true picture". See *Fox vs. General Medical Counsel* [1] at 1025, *Rex vs. Roberts*[2] and Law of Evidence by E.R.S.R. Coomaraswamy volume 2 book 2 page 773.

Applying the principles laid down in the above legal literature, I hold that when a contradiction is marked with a former statement of a witness, the prosecution or the defence as the case may be, is entitled in re-examination to mark the other portions of his statement to remove the wrong impression created by the contradiction. But the prosecution

or the defence can't adopt this procedure to corroborate the witness with his former statement.

Considering all these matters, I am of the view that the learned Prosecuting State Counsel should have marked the order portions of the statement to remove the wrong impression created by the contradiction.

In my opinion, there is evidence that should be considered by a trial Court. However, the Prosecuting State Counsel has failed to do his duty as stated above. When 'V3' is considered, it creates a reasonable doubt in the identity of the accused-appellants. Therefore, we are unable to permit the conviction to stand.

In these circumstances, we set aside the conviction and the death sentence and order a re-trial.

Since the offence is alleged to have been committed in the year of 1998, we direct the learned High Court Judge of Hambantota to expeditiously hear and conclude this case.

UPALY ABEYRATHNE, J. - I agree.

appeal allowed.

Trial de Novo ordered.

YOGA VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 55/06
HC KANDY 352/06

Penal Code Section 365 (B) – grave sexual abuse – Sexual gratification – Burden of proof? – Test of probability

The accused-appellant was convicted for committing the offence of grave sexual abuse on a girl-one M and was convicted and sentenced. On appeal

Held

(1) To establish a charge under section 365 (B) of the Penal Code the prosecution must establish that the alleged act was done with the intention of having sexual gratification. This aspect must be proved beyond reasonable doubt. Prosecution case does not satisfy the test of probability.

APPEAL from the judgement of the High Court of Kandy.

Dr. Ranjit Fernando for accused-appellant.

Rohantha Abeysuriya SSC for respondent.

February 24th 2009

SISIRA DE ABREW, J.

Head both counsel in support of their respective cases. The accused-appellant in this case was convicted for committing the offence of grave sexual abuse on a girl named Dulanjalie Madushani and was sentenced to a term of 10 years R.I and to pay a fine of Rs. 5000/- carrying a default

sentence of one year R.I. In addition to the above sentence, the accused-appellant was ordered to pay a sum of Rs. 50,000/- as compensation to the victim carrying a default sentence of 02 years R.I.

This appeal is against the said conviction and the sentence. The facts of this case according to the prosecution case may be summarized as follows. On the day of the incident around 9 a.m, when the victim who was playing, came near the accused who was in the compound of the victim's house, he (the accused) pulled the victim and as a result of this act, the victim fell into his lap. The mother of the victim who was inside the house saw the accused-appellant putting his hand thorough the underpants of the girl. When she ran to the said place, the victim on being questioned, informed the mother that the accused-appellant touched her vagina. The mother did not see the accused-appellant touching the vagina of the victim. Suggestion made by the learned defence counsel that she only suspected this incident and such an incident did not take place was admitted by the mother of the victim – vide page 54 of the brief.

The accused-appellant in his dock statement stated that the victim who was playing threw saw dust at him and thereupon he pulled her and she fell into his lap. He further stated that when the child was falling, he pulled the child's underpants. When the evidence of both sides is considered, we have to consider whether the story of the prosecution satisfied the test of probability. The time was 9 in the morning and the incident took place in the compound of the victim. There were people living in the neighbourhood. Under these circumstances one should consider whether the accused person with the intention of having sexual gratification would indulge in a sexual act. This question has to be answered in

the negative. I therefore hold that the prosecution case does not satisfy the test of probability.

The other thing that the Court must consider is whether the accused did the alleged act with the intention of having sexual gratification.

To establish a charge under section 365 B of the Penal Code, the prosecution must establish that the alleged act was done with the intention of having sexual gratification. This aspect must be proved beyond reasonable doubt.

When we consider the evidence, we doubt whether the act, alleged to have been committed, was done with the intention of having sexual gratification. This shows that the mental element envisaged in section 365B of the Penal Code was not proved beyond reasonable doubt. In these circumstances, we hold that the conviction of the accused-appellant cannot be permitted to stand. For the aforementioned reasons we hold that the prosecution has failed to establish the charge that has been leveled against the accused beyond reasonable doubt. In these circumstances, we set aside the conviction and the sentence and acquit the accused of the charge leveled against him.

ABEYRATHNE, J. – I agree.

Appeal allowed.

NAVARATNE MANIKE VS. PADMASENA AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH. J.
CA 1082/2003 (REV)
DC KURUNEGALA 4530/P
JUNE 20, 2007

Partition Law – Section 19(3) – Section 24, Section 25(2) – Section 48 – Failure to file statement of claim – Failure to register address and tender costs – Mandatory? Due diligence – Dose Revision lie?

The defendant-petitioner a claimant before the Surveyor was made a party – but did not file a statement of claim. He was absent on the trial dates, and judgment was entered.

It was contended that, court has failed to follow the mandatory provisions of Section 24 – which provides that Court shall give notice in writing the date of trial to all parties by registered post.

Held

Per Sriskandarajah, J.

> "Petitioner when complaining that the mandatory provisions of Section 24 is not complied with he should have satisfied this Court that he has furnished a registered address and tendered the costs of such notice as provided by Section 19 (3) – as he has not shown that he has furnished a registered address and tendered the costs of notice he is not entitled to claim that he was not noticed under Section 24".

APPLICATION in Revision from an order of the District Court of Kurunegala.

Cases referred to:-

(1) Somawathie vs Madaw*ela* – 1982 Sri LR 15

(2) Perera and other vs. Adline and others – 2000 3 Sri LR 93

Lakshman *Perera for petitioner.*

Kapila Perera for respondent.

June 20th 2009

SRISKANDARAJAH. J.

The above Partition action was instituted by the Plaintiff of partition the land called 'Munhena' described in the schedule to the plaint of the said Partition action. According to the said plaint the Plaintiff had been allotted ½ share and 1st Defendant has been allotted ½ share of the land described in the schedule. The plaint has described the 2nd Defendant Respondent as a person who was in forceful occupation of a portion of the land sought to be partitioned. The court issued a commission on K. Wijerathna L.C. for the preliminary survey. The surveyor has submitted to court the preliminary plan No. 173 dated 06.10.1997 and the report. The 3rd Defendant Petitioner (hereinafter referred to as the Petitioner) was a claimant at the said survey and was made a party to the said case on 07.01.1998. On that date the Petitioner obtained a date to file a statement of claim. But the perusal of the journal entries shows that the Petitioner did not file any statement of claim.

On the 1st date of trial i.e. the 30th of July 2002 and the 2nd date of trial i.e. 5th September 2002, the 2nd Defendant Respondent and the 3rd Defendant Petitioner were absent and unrepresented. As the said 2nd Defendant Respondent and the 3rd Defendant Petitioner are absent and unrepresented on the trial dates and as they have not filed a statement of claim the learned trial judge has correctly observed in his judgment that the said 2nd Defendant Respondent and the 3rd Defendant Petitioner are not contesting parties in this action.

Section 25(2) of the Partition Law Provides:

25(2). If a defendant shall fail to file a statement of claim on the due date the trial may proceed ex parte as

against such party in default, who shall not be entitled, without the leave of court, to raise any contest or dispute the claim of any other party to the action at the trial.

The 3rd Defendant Petitioner's allegation that the lie pendens has not been duly registered was not substantiated. The Land Registry extracts marked P6 shows that the lie pendens has been duly registered.

The 3rd Defendant Petitioner contended that the court has failed to follow the mandatory provisions of Section 24 which provides that the court shall give notice in writing the date of trial to all parties by registered post. The 3rd defendant Petitioner when complaining to this court that the mandatory provisions of Section 24 is not complied with, he should have satisfied this court that he has furnished a registered address and tendered the costs of such notice as provided by subsection(3) of section 19. As he has not shown that he has furnished a registered address and tendered the costs of notice he is not entitled to claim that he was not noticed under Section 24 of the said Law.

The learned District Judge after considering the evidence of the substituted Plaintiff Respondent and the 1(b) Substituted Defendant Respondent and after satisfying himself with the title of the said parties and the identity of the land to be partitioned has delivered the judgement and entered the Interlocutory Decree. In *Somawathie v. Madawela and others*[1] the court held; although Section 48 invests interlocutory and final decrees entered under the Partition Action with finality the reversionary powers of the Appeal Court are left unaffected. The position is the same under the Partition Law. In the same case the Court held the Court

of Appeal can intervene by way of revision, to prevent a miscarriage of justice. In this case the 3rd Defendant Petitioner has failed to show any ground that would have caused miscarriage of justice.

In *Perera and Others v. Adline and Others*(2) Jayawickrema, J. held:

> "Although in an appropriate case this Court has jurisdiction to act in Revision and restitution-in-integrum, but where a party has deliberately not shown due diligence even after he was notified by the Surveyor to appear in Court and fails to apply to be added as a party, this Court will not exercise its jurisdiction in his favour."

In this instant case the 3rd Defendant Petitioner has not shown due diligence even after he was added as a party to the action, under these circumstances the 3rd Defendant Petitioner is not entitled to invoke the reversionary jurisdiction of this court. For the aforesaid reasons this court dismisses this application without costs.

application dismissed.