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Page

The Court also took notice of the fact that the appellant had filed applications before the Court of Appeal regarding the order made in the revisionary application and before this Court on the basis of the High Court in the exercise of its appellate jurisdiction. At that stage, learned Senior State Counsel had brought to the notice of this Court the necessity to avoid multiplication of proceedings, as the appeal before the Court of Appeal could also come up for consideration in the Supreme Court by way of appeal. Accordingly, learned Counsel for the appellant had given an undertaking to withdraw the application filed in the Court of Appeal regarding the order of the Provincial High Court on the basis of the revision application (HCA/113/2005).

Thereafter special leave to appeal had been granted by this Court on the basis of the order made by the Provincial High Court in the exercise of its appellate jurisdiction (HCA/131/2005).

The facts of this appeal were not disputed and it was common ground that the Beliatta Police had instituted proceedings in the Magistrate's Court of Tangalle against the 3rd, 4th and 5th respondents for transporting 63 logs of satinwood timber *(Burutha)* valued at Rs. 39,691.65 on 05.08.2001 without a lawful permit and thereby committing an offence punishable in terms of section 24(1)b read with sections 25(2) and 40 of the Forest Ordinance, No. 16 of 1907, as amended.

Section 40 of the Forest Ordinance, as amended by Act Nos. 13 of 1966, 56 of 1979, 13 of 1982 and 23 of 1955 states as follows:

"(1) Upon the conviction of any person for a forest offence –

(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and

(b) all tools, boats, carts, cattle and motor vehicles, trailers, rafts, tugs or any other mode of transport motorised or otherwise and all implements and machines used in committing such offence whether such tools, boats, carts, cattle, motor vehicles, trailers, rafts, tugs, or other modes of transport motorized or otherwise are owned by such person or not.

shall, by reason of such conviction be forfeited to the State.

(2) Any property forfeited to the State under sub-section (1) shall –

(a) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires;

(b) if an appeal has been preferred to the Court of appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.

In this sub-section 'relevant conviction' means the conviction in consequence of which any property is forfeited to the State under sub-section (1)".

Learned Magistrate had considered the provisions laid down in section 40 of the Forest Ordinance as amended and

had come to the conclusion that the Court has a discretion to confiscate a vehicle after an inquiry, on the basis that the registered owner had given his consent for the offence which had been committed and that the registered owner had the knowledge of such an offence. In considering the provisions of section 40 of the Forest Ordinance and the decided cases, the learned Magistrate had been of the view that the absolute owner had not been able to take every possible step to prevent the committing of the offence in question.

It is common ground that the absolute owner is a Finance Company and that the registered owner had purchased the lorry in question on a Hire Purchase Scheme.

In *Manawadu v. Attorney – General*[1] Sharvananda, CJ., had considered the applicability of sections 24(1)(b), 25(1) and section 40 of the Forest Ordinance, in a matter where a load of rubber timber was transported in a lorry without a permit from an authorized officer. After sentencing the accused, who had pleaded guilty, the learned Magistrate in that matter had ordered the confiscation of the lorry in which the timber was alleged to have been transported. In considering the confiscation of the said lorry used for the transport of illicit timber, in view of section 7 of the Act, No. 13 of 1982, by which section 40 of the Forest Ordinance was amended, Sharvananda, CJ., in *Manawadu v. Attorney-General (supra)* had held that,

> "By section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic

on the conviction of the accused. The amended sub-section 40 does not exclude by necessary implication the rule of *'audi alteram partem'* The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him."

Sharvananda, C.J., in *Manawadu v. Attorney-General (supra)* had considered several decisions pertaining to the matter in question. Reference was made to the decision in *Inspector Fernando v. Marther*[2], where Akbar, J., in construing section 51 of the Excise Ordinance that corresponds to section 40 of the Forest Ordinance had quoted with approval a statement by Schneider, J., in *Sinnetamby v. Ramalingam*[3], which was in the following terms:

"Where an offence has been committed under the Excise Ordinance, no order of confiscation should be made under section 51 of the Ordinance as regards the conveyance used to commit the offence, e.g. a boat or motor car unless two things occur.

(1) That the owner should be given an opportunity of being heard against it; and

(2) Where the owner himself is not covicted of the offence, no order should be made against the owner, unless he is implicated in the offence which render the thing liable to confiscation.

In *Inspector Fernando v. Marther (supra)* the vehicle in question did not belong to the accused, but was a vehicle, which was hired under a Hire Purchase Agreement. It was held by Akbar, J., in *Inspector Fernando v. Marther (supra)* that since the registered owner was not implicated in the commission of the offence, no order confiscating the car could be made.

In *Mudankotuwa v. Attorney-General*[4] the Court of Appeal had referred to the decision in *Manawadu v. Attorney-General (supra)* with approval and had stated that the owner of the vehicle, who is not a party to the case is entitled to be heard on the question of forfeiture of the vehicle and if he satisfies the Court that the accused committed the offence without his knowledge or participation, then his vehicle will not be liable to forfeiture. Refernce was also made in *Mudankotuwa v. Attorney-General (supra)* to the decision in *Nizer v. I.P. Wattegama* [5] and *Faris v. OIC, Police Station, Galenbindunuwewa* [6].

In *Nizer v. I.P. Wattegama (supra)* Vythyalingam, J., considered the implications of the proviso to section 3A of the Animals Act, No. 29 of 1958 as amended. Section 3A of the Animals Act states of follows:

> *"Where any person is convicted of an offence under this Part or any regulations made there under, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate, to confiscation:*

Provided however, that in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle or that the vehicle has been used without his knowledge for the commission of the offence."

Vythyalingam, J., had observed that in view of the proviso, an order for confiscation could be made only if the owner was present at the time of the detection or there was evidence suggesting that the owner was privy to the said offence. This decision was referred to with approval in *Faris v. OIC, Police Station, Galenbindunuwewa (supra)*, where it was stated that in terms of the proviso to section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of the following:

(a) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence;

(b) that the vehicle had been used for the commission of the offence without his knowledge.

It is also worthy of note that in **Faris,** it was categorically stated that, in terms of the proviso to section 3A of the Animals Act, if the owner established any one of the above matters on a balance of probability, an order for confiscation should not be made.

In *Rasiah v. Thambiraj*[7], the Court had considered the applicability of section 40 of the Forest Ordinance with regard to an order made by a Magistrate in the confiscation of a cart. Referring to the issue of confiscation, Nagalingam, J., in *Rasiah v. Thambiraj (supra)* had stated thus:

> "In these cases where the accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without the previous inquiry would be tantamount to depriving the person of his property without an opportunity being given to him to show cause against the order being made."

In *Manawadu v. Attorney-General (Supra)*, Sharvanda, C.J., referring to the decisions by Justice Akbar and Justice Nagalingam in *Fernando v. Marther (supra)* and *Rasiah v. Thambiraj (supra)* respectively, had come to the conclusion that the owner of the vehicle would only have to show that the offence was committed without his knowledge and without his participation.

> "Justice Akbar and Justice Nagalingam founded their decision on fundamental principles of constitutional importance and not on the narrow ground 'shall be liable to confiscation'. **They emphasised that where the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree, justice demanded that he should be restored his property"** (emphasis added).

Sharvananda, C.J., in *Manawadu v. Attorney-General (supra)* had finally expressed the view that,

> "But if the owner had no role to play in the commission of the offence and is innocent, then forfeiture of his vehicle will not be penalty, but would amount to arbitrary expropriation since he was not a party to the commission of any offence."

The appellant, as referred to earlier, is the absolute owner of the vehicle in question. The appellant had leased it to the 1st respondent on a Hire Purchase Agreement. Section 433A

of the Code of Criminal Procedure Act, as amended, deals with possession of property, which is the subject of a Hire Purchase Agreement. This section reads as follows:

> *"(1) In the case of a vehicle let under a hire purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter.*
>
> *(2) In the event of more than one person being registered as the absolute owner of any vehicle referred to in sub-section (1), the person who has been so registered first in point of time in respect of such vehicle shall be deemed to be the person entitled to possession of such vehicle for the purposes of this Chapter."*

The scope of section 433A of the Code of Criminal Procedure Act was considered in *Mercantile Investments Ltd. v. Mohamed Mauloom and others*[8], where it was stated that in terms of the said section 433A, an absolute owner is entitled to possession of the vehicle, even though the respondent had been given its possession on the Lease Agreement.

On a consideration of the *ratio decidendi* of all the aforementioned decisions, it is abundantly clear that in terms of section 40 of the Forest Ordinance, as amended, if the owner of the vehicle in question was a third party, no order of confiscation shall be made if that owner had proved to the satisfaction of the Court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence. The *ratio decidendi* of all the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability.

It is common ground that the learned Magistrate had held a confiscation inquiry in respect of the lorry in question in terms of Chapter XXXVIII of the Code of Criminal Procedure Act. It is also common ground that the learned Magistrate had given an opportunity for the representation of the appellant, being the absolute owner, to give evidence at the said inquiry and to tender to Court any relevant documents. At that inquiry, although the representative of the appellant had taken the position that the vehicle in question was given to the 1st respondent on a Hire Purchase Agreement, he had not tendered the said agreement to Court. Accordingly no steps were taken to mark the said document.

Learned Counsel for the appellant contended that the appellant, being the absolute owner had neither participated nor had any knowledge of the commission of the offence in which the vehicle was confiscated. Learned Counsel for the appellant referred to the evidence given by witness Percy Weeraratne, Assistant Manager (Matara Branch) of the appellant Company. The said Assistant Manager had stated that the appellant Company had no knowledge of the use of the vehicle and that the vehicle was in the Urubokka area and not within the control of the appellant.

"මෙම වාහනය නීති විරෝධී ක්‍රියාවකට පාවිච්චි කිරීමට අනුමැතිය දීල තිබුණේ නැහැ.

ප්‍ර. මෙම මූල්‍ය ආයතනයට මෙම නීති විරෝධී දෑව ප්‍රවාහනය සම්බන්ධයෙන් යම්කිසි දැනීමක් තිබුණද?

උ: නැහැ.

මෙම නීති විරෝධී ක්‍රියාවට මෙම මණ්ඩලය අනුමැතිය දුන්නේ නැහැ. මෙම සමාගමෙන් අනුබලයක් දීලා නැහැ. මෙම වාහනය මගේ පාලනය යටතේ තිබුණේ නැහැ. මෙම වාහනය තිබුණේ උරුබොක්ක ප්‍රදේශයේ. එම නිසා මෙම රියදුරු විසින් කරන ක්‍රියාවක් ගැන දන්නේ නැහැ."

Considering the provisions laid down in section 40(a) read with section 25(2) of the Forest Ordinance, would it be sufficient to merely state that the vehicle in question was not under the control of the representative of the appellant? The answer to this question is purely in the negative for several reasons.

As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence.

Several measures could have been taken in this regard. For instance, there could have been a clause to that effect in the agreement between the appellant and the 1st respondent. Similarly if the 1st respondent had authorised others to use the said vehicle, he too could have had a written agreement inclusive of specified conditions. It is therefore quite clear that it would be necessary for the owner to show that he has taken all possible precautions to prevent the use of the vehicle for the commission of the offence.

Learned Counsel for the appellant submitted that the burden is only on the registered owner to satisfy Court that the accused has committed the offence without his knowledge or participation and this will not be applicable to an absolute owner.

As stated earlier, in *Mercantile Investments Ltd. v. Mohamed Mauloom and others (supra),* consideration was given to the rights of the absolute owner as well as the registered owner. In that matter the learned Magistrate had

not given an opportunity to the absolute owner to show cause before he made the order to confiscate the vehicle. On a consideration of the said question, the Court of Appeal had held that it is not only the registered owner, but the absolute owner also should be given notice on the inquiry in relation to the confiscation of the vehicle.

It is therefore apparent that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privilleges offered to an absolute owner, such as a Finance Company in terms of the applicable law in the country. Accordingly, it would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge

On a consideration of the aforementioned it is evident that the learned Magistrate had not erred when he held that the appellant had not satisfied Court that he had taken every possible step to prevent the commission of the offence. As stated earlier, the High Court had affirmed the order made by the learned Magistrate.

For the reasons aforesaid the question on which special leave to appeal was granted is answered in the negative.

The judgement of the High Court dated 30.06.2008 is therefore affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

AMARATUNGA, J. - I agree

EKANAYAKE, J. - I agree.

appeal dismised.

SAMANTHA VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 138/2005
HC KALUTARA 178/02

Penal Code - Murder - Establishing a case on circumstantial evidence - Duty of Judge - Inference of guilt - Beyond reasonable doubt?

The accused-appellant was convicted of the murder of one W and sentenced to death. It was contended by the accused that the prosecution failed to prove the case beyond reasonable doubt.

Held

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

(2) 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.

APPEAL from the judgment of the High Court of Kalutara.

Cases referred to:-

(1) K vs. Abeywickrema 44 NLR

(2) K vs. Appuhamy 46 NLR

(3) Podi Singho vs. K - 53 NLR 49

Razick Zarook PC with *Rohana Deshapirya* for accused-appellant.

Jayantha Jayasooriya DSG for respondent.

February 20th 2009

SISIRA DE ABREW, J.

The accused-appellant has not been produced by the Prison Authorities. Mr. Razick Zarook President's Counsel appears for the accused-appellant. Heard both Counsel in support of their respective cases. The accused in this case was convicted for the murder of a man named Nanayakkarage Don Weerasingho and was sentenced to death. This appeal is against the said conviction and the sentence. The prosecution relied upon the following items of evidence to prove the case:

1. A pair of slippers alleged to have been given by one Sujeewa to the accused was found near the dead body.

2. A torch belonging to the deceased and a knife were recovered in-consequence of a statement made by the accused.

3. In the night where the deceased went missing, the accused put his arm round the shoulder of the daughter of the deceased who was going home.

4. In the night where the deceased went missing, the accused - appellant went to one Jayasiri's house and asked a knife to cut a leaf called *Habarala* which is normally used as an umbrella to prevent from being wet in the rain.

According to the prosecution case on 28th June 1992 the accused-appellant took a pair of slippers from one Sujeewa. The prosecution tried to prove that this pair of slippers was found near the dead body of the deceased. At page 97 of the brief Sujeewa could not identify the pair of

slippers produced at the trial as the pair that was removed by the accused-appellant about 6 years ago. We therefore hold the identification of the pair of slippers was not proved beyond reasonable doubt and that the same cannot be considered as an incriminating item of evidence against the accused.

According to the prosecution case the deceased person used to carry a torch and an umbrella when he went to pick up the daughter. This umbrella was never found throughout the investigation at any place relevant to the case. The investigating police officer in his evidence stated that he recovered a torch in consequence of a statement made by the accused-appellant. But this torch was not properly identified by Siriyawathie, the wife of the deceased and Sumitra, the daughter of the deceased. According to Siriyawathie, the colour of the torch is red, vide at page 73 of the brief, but according to Sumitra the colour of the torch is green. Jayasiri in his evidence says that on the fateful night he met the deceased around 7.00 p.m. and he noticed the deceased carrying a torch in red colour. In view of the serious contradiction with regard to the colour of the torch, we are of the opinion that the identification of the torch has not been proved beyond reasonable doubt and therefore the same cannot be considered as an incriminating item of evidence against the accused. According to Kapuge Don Dayasiri around 8.00 p.m. on the fateful day the accused came and asked for a knife to cut a *Habarala* leaf. The prosecution case is that the Police Officer recovered a knife in consequence of a statement made by the accused. Prosecution, by this item of evidence, tried to establish that in the night of 9th of October 1998 the accused-appellant was armed with a knife. If the accused-appellant was armed with a knife why did he ask for a knife from Dayasiri to cut a

Hubarala leaf. This question remains unanswered throughout the trial. This too creates a reasonable doubt in the prosecution case.

According to the investigating Police Officer he observed stains like blood on the blade of the Knife. But he failed to send this knife to the Government Analyst. This knife according to the Police Officer was found on a heap of timber in the accused's house. If there were stains like blood on the blade of the knife would he have kept the same on the said heap of timber to be seen by the others. This too raises a doubt in the prosecution case. In our view the prosecution has failed to prove the case beyond reasonable doubt. The prosecution tried to establish the case on circumstantial evidence. In a case of circumstantial evidence if an inference of guilt is to be drawn against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime. This view is supported by the following judicial decisions. In the case of *King vs. Abeywickrema* (1) 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 his innocence."

In *King vs. Appuhamy*(2) 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 than that of his guilt."

In *Podisngho vs. King*[3] Dias J. held 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.

From the evidence led at the trial I am unable to conclude that the accused committed the offence of murder. The Learned Deputy Solicitor General who appears for the Attorney General, upholding the best tradition of the Attorney General's Department, submitted to this Court that he is unable to support the conviction in view of the evidence led at the trial. We are pleased with this submission. For the aforementioned reasons. we are of the opinion that the accused should not have been convicted of the offence of murder. For these reasons we acquit and discharge the accused-appellant of the charge leveled against him.

The Prison Authorities are not entitled to keep the accused in their custody once they receive a copy of the judgment of this Court. We direct the Registrar of this Court to forward a copy of this judgment to the Commissioner General Prisons.

ABEYRATHNE, J. - I agree.

Appeal Allowed.

DHARMASIRI VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
BASNAYAKE, J.
CA 17/04
HC HAMBANTOTA 44/99
JUNE 17, 2008

Penal Code – Section 296 – Murder – Identification of accused beyond reasonable doubt? Information Book – Is it for the Judge to peruse same? In what circumstances? – Credibility of a witness – Matter for trial Judge – Belated witness – Could the Court act on a belated witness?

Three accused were indicted for murder. After trial the 1st and 2nd accused were convicted of the offence of murder. The 3rd was acquitted.

In appeal it was contended that the identity of the accused-appellant was not proved beyond reasonable doubt and it was further contended that witness M was a unreliable witness, and invited Court to compare his evidence with his statement made to the Police and to reject his evidence on the basis of certain omissions which had not been brought to the notice of Court.

Held

(1) The Appellate Court has no authority to peruse statement of witness recorded by the Police in the course of their investigation (statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise Section 122 (3) of the Criminal Procedure Code which enables such statements to be sent for to aid a Court is applicable only to Court of Inquiry or trial.

Per Sisira de Abrew, J.

> "Court of Appeal has power to peruse the Information Book only when contradiction or omission was brought to the notice of the trial Court, and this power too should be exercised in order to

check the correctness of the omission of contradiction marked at the trial and not to come to a conclusion with regard to his credibility upon the contents of this statement made to the Police."

(2) Credibility of a witness is mainly a matter for the trial Judge, Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the credibility of a witness unless such findings of trial Judge are manifestly wrong.

(3) Because the witness is a 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 the belated witness.

APPEAL from a judgment of the High Court of Hambantota.

Cases referred to :-

1. *Keerthi Bandara vs. Attorney General* – 2000 – 2 Sri LA 249 at 258
2. *Muniratne and others vs. The State 2001* – 2 Sri LR 382
3. *Punchi Mahathaya vs. The State* 76 NLR 567 (SC)
4. *Fradd vs. Brown & Company Ltd* – 20 NLR 282
5. *Alwis vs. Piyasena Fernando* – 1993 – 1 Sri LR 119
6. *Sumarasena vs. A. G.* - 1999 - 3 SLR 137

Ranjith Abeysuriya PC with Thanuja Rodrigo for accused-appellant.
Gihan Kularatne SSC for respondent.

June 17th 2008

SISIRA DE ABREW J.

Three accused were indicted for the murder of a woman named Arabuda Gamage Nandawathie and after trial the 3rd accused was acquitted of the charge but the 1st and 2nd accused were convicted of the offence of murder. The 2nd accused died in prison. The present appeal is in respect of the appeal filed by the 1st accused.

The facts of this case may be briefly summarized as follows:-

On the day of the incident around 9.00 p.m. when the deceased, her son Maduranga, her mother Kusumawathe and another relation were at home, the 1st accused, 2nd accused and another person entered the house of the deceased and the 2nd accused fired a shot at the deceased and thereafter the 1st accused fired another shot at the deceased. This incident was witnessed by Kusumawathe and Maduranga.

Learned President's Counsel on behalf of the 1st accused-appellant submitted that the identity of the accused-appellant has not been proved beyond reasonable doubt. Learned President's Counsel submitted that Maduranga was an unreliable witness. He invites this court to compare Maduranga's evidence with his statement made to the police and to reject Maduranga's evidence on the basis of certain omissions which had not been brought to the notice of the trial Court. In support of his argument he cites the case of *Keerthi Bandara vs. the Attorney General* (1) at 258 His Lordship Justice Jayasuriya observed thus:

"We lay it down that 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. When defence Counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is vital omission or not and his discretion on the law in this respect is binding on the members of the jury. Thus

when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether illegal and inadmissible opinion expressed orally by police officer (who are not experts but lay witnesses) in the witness box on this point".

It is therefore seen from the said judgment that the trial Court is given power to read the contents of the statements recorded in the Information Book only when a contradiction or omission is brought to the notice of Court. If an omission or contradiction was marked at the trial then, the Court of Appeal, according to the said judgment, will have the same power to read the contents of the statements recorded in the Police Information Book. This power has been given to the trial Court, according to the said judgment, in order to test the correctness of the contradiction or omission that was brought to the notice of court. Therefore if no contradiction or no omission was marked, according to the said judgment, Court of Appeal will not be entitled to peruse the Information Book.

Learned President's Counsel in the course of his submission also brought to the notice of court the judgment of *Muniratne and others vs. The State* [(2)]. He also brought to the notice of Court page 395 and contended that the Court of Appeal has the right to examine the police information book.

When we consider the argument of the learned President's Counsel, it is also relevant to cite the judgment in the case of *Punchimahaththaya vs. The State*[3], His Lordship Justice Fernando (Samarawickrama, J. and Siva Supramaniam J. agreeing but Sirimane, J. dissenting) held thus:

> "That the Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statement of witnesses recorded by the police in the course of their investigation (i.e. statement in the information book) other than those properly admitted in evidence by way of contradiction or otherwise. Section 122 (3) Criminal Procedure Code which enables such statements to be sent for to aid a Court is applicable only to Court of Inquiry or trial."

This judgment was not brought to the notice of their Lordships who decided the above two cases. We consider *Punchimahaththaya's case (Supra)* to be binding on us.

Considering these judicial decisions, I hold that the Court of Appeal has power to peruse the information book only when contradiction or omission was brought to the trial Court, and this power too should be exercised in order to check the correctness of the omission or contradiction marked at the trial and not to come to a conclusion with regard to his credibility upon the contents of his statement made to the police.

Learned President's Counsel invites this court to compare the evidence of witness Maduranga with his statement made to the police and decide his credibility. In short he invites this Court to come to an adverse finding against the witness by adopting the said procedure. Learned President's

counsel contends that there are omissions between his evidence and his statement made to the police, but he too admits that these omissions were not brought to the notice of the trial court. In my view it is unfair for this Court to adopt the above procedure and come to an adverse finding against the credibility of the witness since the witness had not been given an opportunity to explain the purported omissions.

Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness. This view is strengthened by the following judicial decisions.

In *Fraad vs. Brown & Company Limited*[4] Privy Counsel stated thus:

> "It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because the Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over rule a Judge of first instance."

In *Alwis vs. Piyasena Fernando*[5]. His Lordship Justice G.P.S. de Silva C.J. stated thus:

> "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

Considering all these matters I hold that the Court of Appeal should not decide the credibility of a witness on the basis of omission or contradictions not marked at the trial. Thus, the invitation of the learned President's Counsel to peruse the Police Information Book to test the credibility of the witness Maduranga is untenable. For the above reasons, I reject the contention of the learned President's Counsel.

Learned President's Counsel contends that the trial Judge should have rejected Maduranga's evidence on the ground of delay. Maduranga made a statement to the police three weeks after the incident. He therefore contends Maduranga is not a reliable witness. Should the evidence of the witness be rejected on the ground of delay?

It this connection I would like to consider the judgment in the case *Sumanasena vs. Attorney General*[6], wherein His Lordship Justice Jayasuriya stated thus:

> "just because the witness is a 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 belated witness."

On a consideration of the principles laid down in the above judicial decision, I hold that the evidence of the witness should not be rejected on the ground of delay itself if the delay has been reasonably explained.

I must consider in the present case whether the delay has been reasonably explained. Kusumawathie, at page 51 of the brief, says that after both accused shot the deceased, the 1st accused aimed the gun at Kusumawathie and threatened to kill her if she would divulge the incident to the police.

At page 58 of the brief Kusumawathie says after the incident Maduranga kept his ears closed until 8.00 a.m. on the following day. He was apparently traumatized for witnessing the tragic death of his mother. His father was killed in 1989. Maduranga was at that time a nine year old boy. Considering all these matters, I hold the delay in making a statement to the police by Maduranga has been well explained. I therefore hold that the Maduranga's evidence cannot be rejected on the ground of delay. For the above reasons I reject the argument of the learned President's Counsel. I have gone through the evidence of the Maduranga and I see no reasons to reject Maduranga's evidence. In my view, the conviction of the 1st accused-appellant can be affirmed only on the evidence of Maduranga.

Learned President's Counsel contends that Kusumawatie is an unreliable witness. He contends that the identification parade, in this case, was held 410 days after the incident.

The 1st accused-appellant according to Kusumawathie was living in her neighbourhood and as such she knew the accused-appellant prior to the incident. Therefore, in my view, there was no necessity to hold an identification parade in this case. Learned President's Counsel contends that witness Kusumawathie failed to mention the 1st accused-appellant's name in the statement. She also failed to mention that second shot being fired at the deceased. In these circumstances he contends Kusumawathie to be an unreliable witness. I shall now consider why she failed to mention the 1st accused-appellant's name in the statement. As I pointed out earlier, at page 51 of the brief, Kusumawathie says that 1st accused aimed his gun and told her not to divulge the incident to the police. At page 55 of the brief, again

Kusumawathie says that the 1st accused-appellant aimed the gun at her and threatened to kill her if she would divulge the incident to the police. The deceased's husband had earlier been killed on 2nd of July 1989. Vide page 42 of the brief. After she made a statement to the police she left the village. Vide page 81 of the brief. Considering all these matters, it appears that Kusumawathie entertained fear of death instilled by the 1st accused-appellant. Considering all these matters, failure to mention the 1st accused's name in her statement is, in my view, justified. Learned President's Counsel contends that Kusumawathie did not tell the names of the assailants to Ranjanie who went to the police station in that night. He therefore contends that Kusumawathie had not seen the incident. At page 76 Kusumawathie said Ranjani was a school going child at that time. At page 53 of the brief, she says that the person who went to the police station with Ranjani was killed prior to the commencement of the trial. Thus, failure on the part of Kusumawathie to mention assailant's name to Ranjani who was a school going child at that time is understandable. She failed to mention the second shot being fired. This failure will not rander her evidence unreliable in view of the fact that her evidence was corroborated by Maduranga.

Learned President's Counsel drawing our attention to page 148 of the brief (the doctor's evidence) contends that only one shot was fired. But when we consider the evidence in page 141 and 149, it is very clear that the doctor categorically stated that two shots had been fired at the deceased. When I consider the evidence of the doctor and the post mortem report it is clear that two shots had been fired. I therefore reject the said contention of the learned President's Counsel. Learned President's Counsel also contends that learned

Trial Judge, at page 225 of the brief, came to the conclusion that the accused-appellant was absconding in this case. This appears to be a mistake. The incident in this case took place on 31st March 1993. The 1st accused-appellant surrendered to the police on 1st of August 1994. Vide page 154 of the brief. Conviction of the 1st accused-appellant was not based on this point. It was based on the evidence led at the trial. Considering all these matters the mistake made by the learned trial Judge has not caused any prejudice to the 1st accused-appellant. Learned President's Counsel also brought to the notice of Court the observation made by the learned trial Judge at page 215 of the judgment. Learned trial Judge came to the conclusion that Nuegegawa Lokumahaththaya (නුගේගාව ලොකු මහත්තයා) is the 1st accused in this case. This appears to be a mistake Nugegawa Lokumahaththaya (නුගේගාව ලොකු මහත්තයා) is the 2nd accused in this case. This mistake is apparent from the observation again made by the learned trial Judge at the same page. Learned trial at page 215 (last two lines) observed that Nugegawa Lokumahaththaya (නුගේගාව ලොකු මහත්තයා) is the 2nd accused in this case. I therefore hold that this mistake has not caused any prejudice to the 1st accused-appellant. Considering all these matters I am unable to agree with the submissions made by the learned President's Counsel and I proceed to reject the said submissions.

For the reasons stated above, I find that the trial Court, after due consideration of the evidence led at the trial, has rightly found the 1st accused-appellant guilty of the charge of murder and hence I dismiss the appeal as devoid of merits.

ERIC BASNAYAKE, J. - I agree.

Appeal dismissed.

VIRAJ PERERA VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 155/2004
HC COLOMBO 1947
SEPTEMBER 1, 2, 3, 8, 2009

Penal Code - Section 356 - Section 359 - Evidence of witness rejected on a certain point - Can his evidence be accepted to establish another point? - Falsus in uno - Falsus in Omnibus - Delay in making statement? Admissibility - Ingredients to prove a charge under Section 359? Abduction by Police?

The 1st - 6th accused were charged for abducting three persons with intention of secretly and wrongfully confining them (Section 356), the 7th accused - appellant the OIC of the Police Station was charged for wrongfully keeping in confinement the said persons (Section 359). The 7th accused was convicted of the offences leveled against him. The High court held that the three persons were detained at the Police Station but did not fall into the category of arrested persons - but abducted persons.

In appeal it was contended that once the evidence of a witness was rejected on a certain point his evidence cannot be accepted to establish another point and that the evidence of witness 'J' should not be accepted in view of the delay in making his statement.

Held

(1) The maxim 'falsus in uno falsus in omnibus' is not applicable in the instant case. The maxim cannot be considered as the absolute rule and that the Judge in deciding whether or not he should apply the maxim must consider the entirety of the evidence of the witness and the entire evidence led at the trial

(2) The delay in making a statement to the Police has not shaken the credibility of the witness.

Per Sisira de Abrew, J.

> "The appellant was the OIC of the Police Station. It was his duty to maintain the detention and the diet register. The appellant had admitted to witness J, that three persons would be released after recording their evidence, the appellant knew that these persons were abducted persons - failure on the part of the appellant to enter their names in the detention register or the diet register proves that he wrongfully kept them in confinement".

(3) To prove a charge under Section 359 the prosecution must prove the following ingredients:-

(i) Person against whom the offence was committed is a person who was kidnapped or abducted

(ii) The accused knew that the said person is a person who was either kidnapped or abducted

(iii) The accused concealed or kept the said person in confinement

(iv) When the accused concealed or kept the said person in confinement, he did so wrongfully.

APPEAL from the Judgment of the High Court of Colombo.

Cases referred to :-

(1) *Q vs. Vellasamy* - 63 NLR 265

(2) *Q vs Jubis* - 65 NLR 505

(3) *R. P. Kendict vs. Sl Police Norton Bridge* - 66 NLR 424

(4) *Francis Appuhamy vs. Q* - 68 NLR 437

(5) *Mohamed Faiz Ballish vs. Q* - 1958 Al 167

(6) *Samaraweera vs. AG* - 1990 - 1 Sri LR 256

Rienzi Arsakularatne for accused - appellant.
Sarath Jayamanne DSG for AG.

Octomber 15th 2009

SISIRA DE ABREW J.

First to sixth accused in this case were charged for abducting Bandula, Padumasena, and Jayantha with the intention of secretly and wrongfully confining them,