THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2013] 1 SRI L.R. - PART 4

PAGES 85 - 112

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

Page

On 14.03.2009 two police officers came to the temple and met the 1st Petitioner and requested the Petitioner to accompany them to the police station to get a statement recorded. The 1st Petitioner informed the police officers that he was not a party to the alleged incident. At that time the 2nd Petitioner was not at the temple premises. Thereafter the police officer contacted some senior officer over the phone and obtained instructions. At about 9.00 a.m. about 15 police officers came in a police truck and entered the Meda Maluwa. The police officers were armed. The sub-inspector in-charge wanted the 1st Petitioner to come to the Police Station. The 1st Petitioner had informed the Sub-Inspector that he is wiling to make a statement to the police without going to the Police Station. He had informed the Police Officer that he had previously made a statement to the Magistrate in MC Anuradapura 2357/8 implicating senior police officers and certain politicians in relation to the attack and destruction of the house and property belonging to Dr. Raja Johnpulle and due to that fact some police officers are ill-disposed towards him.

The 1st Petitioner states that due to the insistence of the police officer he was able to contact the 2nd Petitioner who was in the premises and decided to send the 2nd Petitioner to the Police Station. At about 12.00 noon the 2nd Petitioner accompanied by an Attorney-at-Law went to the Police station to make a statement. At about 12.30 the Attorney-at-Law informed him that the 1st Respondent the officer in –charge of the police station had told him that the 1st and the 2nd Petitioners are required to be present at the police station only for the purpose of recording their statements. They could leave after the recording of the statements. Thereafter the 1st Petitioner went to the police station and entered the office of the 1st Respondent where both the 2nd Petitioner and the Attor-

ney-at-Law were present. To his utter surprise 1st Respondent ordered an officer in plain clothes to arrest and detain them. The Attorney-at-Law then inquired from the 1st Respondent as to why they were arrested to which the 1st Respondent did not respond and detained the Petitioners. The Attorney-at-Law had inquired from the 1st Respondent whether police bail could be given. However this was refused.

After the arrest, statements were recorded from 1st and 2nd Petitioners. The 2nd Petitioner's statement revealed that the 1st Petitioner was not involved in the incident and he acted on his own to defend himself to prevent the 2nd Respondent's possible attack on him by using a spray can which he believed it to contain toxic substance. If his version is correct the 2nd Petitioner had acted in defence of his person and thereby no offence was committed by him.

The 1st Petitioner in his statement had stated that he has no knowledge of the incident as he was at the main office at the time of the alleged incident. The Petitioners state that at about 2.30 p.m. they were taken to the Acting Magistrate's residence by two police officers. The Petitioners were produced before the Acting Magistrate and they were remanded till 18.03.2009 (Wednesday) as the police objected to granting of bail. The Petitioners state that they verily believe that they were arrested on a Saturday and produced before an Acting Magistrate to get them remanded till 18.03.2009 which is the day the cases from Mihintale Police Station are taken up in the Magistrate Court of Anuradhapura. However, consequent to a motion filed on their behalf the case was called on 16.03.2009 (Monday) before the Permanent Magistrate who granted bail after hearing the submissions made by parties. Witness Kapilaratne who was with the 2nd Respondent at the time of the incident submitted an affidavit to the court affirm-

ing that the 1st Petitioner was not involved in the incident and that the police have incorrectly recorded in his statement that the 1st Petitioner was also involved. He submitted that though he signed the statement it was not read over to him by the police. The Petitioners alleged that their fundamental rights guaranteed under Article 12, 13(1) and 13(2) were violated.

The 1st Respondent, the officer in charge of the Mihintale Police Station filed objections and along with the objections had annexed the IB extracts and the initial B reports filed in this case. Other Respondents did not file objections. Although the 2nd Respondent was hospitalized the medical reports were not tendered along with the objections. The fact that the 2nd Respondent was hospitalized was a fact that influenced the Acting Magistrate to remand the Petitioner. The medical reports are relevant for the determination of this case. An adverse inference could be drawn against the Respondents due to their failure to produce the medical reports.

The 1st Respondent in his objections affirmed that the 2nd Respondent in his statement had stated that the 2nd Petitioner attacked him with a club as a result he fell on the ground and the 1st Petitioner kicked him on the abdomen. The 2nd Respondent was admitted to the Mihintale hospital. He justified the arrest and detention of the Petitioners.

The 1st Petitioner filed a counter affidavit controverting the version given by the 1st Respondent. He reiterated that the 2nd Respondent was never subject to an attack as alleged and there is no medical evidence whatsoever to suggest that there were any injuries due to the purported attack. He further stated that consequent to a complaint made by him to the Human Rights Commission an inquiry was held and

the Commission found that the 1st Respondent is guilty of violating the fundamental rights of the 1st Petitioner guaranteed under article 12(1) and 13(1) of the Constitution. The 1st Respondent was ordered to pay Rs 10,000/= to the 1st Petitioner as compensation. Report of the Human Rights Commission was produced as P8.

The question that arises is whether arrest and detention of the Petitioners are in accordance with the procedure established by law. In other words whether it was in accordance with provisions of the Code of Criminal Procedure Act No. 15 of 1979. The Petitioners alleged that the arrest and detention was made arbitrarily, mala-fide and for collateral purpose. As this arrest and detention was made without a warrant it is necessary to examine section 32(1) of the Code of Criminal Procedure Act which empowers a police officer to arrest a person without a warrant. Relevant section of the Criminal Procedure Code reads thus:

"32(1) Any peace officer may without an order from a Magistrate and without a warrant arrest any person –

(a) who in his presence commits any breach of the peace"

This sub section permits a peace officer to arrest a person without a complaint or receiving of information. This is due to the reason that the police officer had seen the commission of the offence and he has first hand information regarding the commission of the offence. This is the only section that permits a peace officer to arrest a person without a complaint or receipt of information. This subsection is not relevant to this application.

The relevant subsection of section 32(1) which is applicable to this application reads as follows:

"Who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned."

In order to arrest a person under this subsection there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. Police Officer upon receipt of a complaint or information is required to commence investigations and ascertain whether the complaint is a reasonable complaint, the information is credible or the suspicion is reasonable before proceeding to arrest a person.

In *Muttusamy vs.Kannangara* [1] it was held that 'A peace officer is not entitled to arrest a person on suspicion under 32 (1) (b) of the Criminal Procedure Code, except on grounds which justify the entertainment of a reasonable suspicion.'

In *Corea vs The Queen* [2] it was held that "the arrest must be made upon reasonable ground of suspicion. There must be circumstances objectively regarded – the subjective satisfaction of the officer making the arrest is not enough....."

This principle equally applies to complaints and information. The fact that a complaint was made is not itself a ground to arrest a person. Anyone can falsely implicate another person. Peace officer should be satisfied that it is a reasonable complaint.

In this case the Police commenced investigations consequent to a complaint made on 12-3-2009 by Chandana Waduge a site guide in Mihintale area. The question is whether it is a reasonable complaint or not. He implicated both

Petitioners. Thereafter on 14-3-2009 the Petitioners appeared at the police station and made statements. The 1st Petitioner denied that he was involved in the incident and that he was elsewhere. (a plea of an alibi) The 2nd Petitioner stated that he acted in self defence and has given the names of several persons who were present at the time of the incident. If he had acted in self defence, there is no offence committed by him. According to section 89 of the Penal Code *'Nothing is an offence which is done in the exercise of the right of private defence'*. In the light of the statements made by the Petitioners serious doubts will be cast on the complaint made by the 2nd Respondent. In the circumstances further investigations are required to verify the version given by 2nd Respondent. The Police have to ascertain the credibility of the complaint and the information received before rushing to arrest and produce the Petitioners in court. On the contrary police produced the Petitioners before the Acting Magistrate and moved for the remand of the Petitioners. The report filed by the police stated that the Petitioners had committed offences under section 314 and 316 of the Penal Code. In the report it was stated that the complainant was hospitalized without informing the nature of injuries. Complainant was admitted to the hospital on the 12th and the Petitioners were produced on the 14th. Police had sufficient time to find out the condition of the 2nd Respondent. It may be that the Complainant was feigning illness or got himself admitted to make matters worse for the petitioners.

The next question that arises is as to why the 1st respondent did not consider granting police bail. The alleged offences are bailable offences and included in the category of cases that should be referred to the Mediation Board. Further the 1st Respondent should have considered the fact that the Petitioners are not persons of criminal disposition and there

are no grounds to believe that they will abscond or there is a likelihood of committing further offences or interfere with the witnesses.

It appears that the virtual complainant (2nd Respondent) is a person of criminal disposition. He is a suspect in the arson case. 1st Petitioner had implicated him in that case. Due to this reason he has a motive to falsely implicate the 1st Petitioner. The Officer in Charge (1st Respondent) should have considered these facts before effecting the arrest.

The Acting Magistrate and the 1st Respondent had disregarded the provisions of the Bail Act No. 30 of 1997. Section 2 of the Bail Act states that *'Subject to the exceptions as herein after provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.'*

Granting of bail is the guiding principle of the Bail Act. If this principle is followed it could avoid incarceration of suspects pending trial unless the gravity of the offence or the other circumstances warrants the remanding of suspects. This will reduce the congestion in remand prisons. It is the intention of the legislature to minimize the pre trial detention of suspects.

Section 6 of the Bail Act states *that a police officer inquiring into a bailable offence shall not be required to forward the suspect under its custody but instead release the person on a written undertaking and order the suspect to appear before the magistrate on a given date.* Only exception being the public reaction to the offence under investigation likely to give rise to a breach of the peace. This section is meant to prevent unnecessary hardships faced by the persons suspected or

accused of committing trivial offences and also to save time and expense involved in producing suspects before the nearest magistrate.

It appears from the facts of this case and from the sequence of events the motive of the 1st Respondent is to arrest and produce Petitioners before the Magistrate and get them remanded. This is apparent from the application made to the Magistrate. In the report filed on 14-3-2009 when producing the Petitioners the 1st Respondent moved the Acting Magistrate to remand the Petitioners till 18-3-2009 and also to direct the prison authorities to produce the suspects on that date. OIC had virtually dictated the order and the Acting Magistrate had allowed the application. The Acting Magistrate had failed to exercise his discretion in a judicial manner. He had failed to give reasons for refusal of bail under section 16 of the Bail Act.

It is regrettable to mention that though the Bail Act was passed in 1997, the police as a rule continue to produce suspects in the Magistrate Court in bailable offences and move for the remand of the suspects and there are numerous instances where Magistrates without considering the facts and circumstances of the cases had remanded the suspects contrary to the guiding principle of the Bail Act.

The crucial issue in this case is whether it is lawful for the 1st Respondent to arrest the Petitioner without conducting further investigations and verifying their version. The conduct of the 1st Respondent and the sequence of events establish that instead of objectively deciding whether the complaint was a reasonable complaint or not, the 1st Respondent arrested and produced the Petitioners in court and got them

remanded. It is apparent that the remanding of the suspects was the main object of the 1st Respondent.

In *Corea vs. The Queen (supra)*, the suspect in that case changed his mind to accompany the police to the police station. This annoyed the inspector who ordered the suspect to be arrested in order to "teach him a lesson". It was held that the arrest or attempted arrest in the particular circumstances was illegal.

In *Muttusamy vs. Kannangara (supra)*, Gratiaen J said "I have pointed out, that the actions of police officers who seek to search private homes or to arrest private citizens without a warrant should be jealously scrutinized by their senior officers and above all by the courts".

I hold that the arrest and detention of the Petitioners in these particular circumstances is a violation of their fundamental rights guaranteed under Article 13(1) of the Constitution.

The Human Rights Commission also inquired into the complaint made by the 1st Petitioner and found the 1st Respondent guilty of violating the fundamental rights of the 1st Petitioner and the 1st Respondent was ordered to pay Rs. 10,000/= as compensation.

I order the 1st Respondent to pay Rs. 25,000/= each to the Petitioners as compensation.

MARSOOF, P.C. J. – I agree.

EKANAYAKE, J. – I agree

1st Respondent ordered to pay Rs. 25,000/- each to the Petitioners as compensation.

Application allowed.

SOMAWATHIE AND OTHERS VS. ILLANGAKOON

SUPREME COURT
GAMINI AMARATUNGA, J.
IMAM, J.
SURESHCHANDRA, J.
SC 140/2009
SC HCCA/LA 26/2009
CP/HCCA/231/02 (F)
DC HATTON 102/L
OCTOBER 5TH, 2011

Definition of boundaries – Rei Vindicatio action – Difference – Ingredients necessary for an action finium regundorim – No averments - Fatal?

The plaintiffs claiming to be co-owners of the land instituted action against the defendant for the demarcation of the boundaries and eviction of the defendant. The defendant claimed title on prescription. The trial Court held with the plaintiff. In appeal the High Court [Civil Appeal] dismissed the plaintiff's action setting aside the judgment on the ground that, the action filed was a *rei vindicatio* action and not an action for the definition of boundaries.

Held:

(1) It is clear from the plaint and the relief claimed therein, that the plaintiffs presented their case as a case for definition of boundaries.

(2) Action for definition of boundaries, known to the Roman Dutch Law as *Actio finium regundorim* lies whenever the boundaries between the lands of adjacent owners have become uncertain either by chance or by the act of adjoining owners or of a third party.

(3) Common law remedy of an action for the definition of boundaries presupposes the prior existence of a common boundary which has been obliterated by subsequent events.

(4) In an action for the definition of boundaries plaintiff has to aver [1] that an ascertainable common boundary previously existed physically on the ground [2] that such common boundary has been obliterated subsequently.

(5) In the plaint there is no averment that a common boundary existed and that boundary got obliterated.

It is clear that the plaintiffs were attempting to vindicate their title to the portion occupied by the defendants through an action disguised as an action for the definition of boundaries.

Per Gamini Amaratunga, J.

"In the plaint, there was no prayer for a declaration of title – the first prayer to the plaint was for the demarcation of the boundaries, since the plaintiffs have not averred in their plaint the ingredients necessary to institute an action for the definition of boundaries, their action was misconceived in law and Court should not have proceeded with the action in the form it was presented to Court"

APPEAL from the judgment of the High Court [Civil Appeal], Central Province.

Cases referred to:

(1) *Ponna vs. Muthuwa* – 52 NLR 59

(2) *Deeman Silva vs. Silva* – 1997 2 Sri LR 382

Dr. Sunil Cooray for plaintiff-respondent-appellant.

P. Peramunagama for defendant-appellant-respondent.

July 2, 2012

GAMINI AMARATUNGA J.

This is an appeal, with leave to appeal granted by this Court, against the judgment of the High Court of the Central Province exercising civil appellate jurisdiction, (hereinafter

referred to as the High Court) allowing the appeal of the defendant and setting aside the judgment of the learned District Judge and dismissing the plaint filed by the plaintiffs in the District Court of Hatton.

Five plaintiffs claiming to be co-owners of the land described in the schedule to the plaint filed action against the defendant alleging that the latter who was in possession of a land adjoining their land forcibly entered the southern portion of their (the plaintiffs') land and prepared the ground to construct a building. In their plaint they have pleaded that in view of the said act of the defendant a cause of action has accrued to them to sue the defendant for the demarcation of the boundaries of their land and to eject the defendant therefrom and to recover damages.

In the prayer the plaint, the plaintiffs have prayed for an order demarcating the boundaries of their land, ejectment of the defendant from that land and for damages as quantified in prayer 'C' of the plaint.

The position taken up by the defendant in her answer was that she and her predecessors in title had possessed the portion of the land (alleged to have been the land to which she forcibly entered) for over 47 years and as such she had acquired prescriptive title to the said portion of the land.

After trial, the learned District Judge gave judgment for the plaintiffs holding that the plaintiffs have proved their title to the property but the defendant has failed to establish her prescriptive title.

The defendant appealed to the High Court (Civil Appellate). After hearing the appeal of the defendant, the learned

Judges of the High Court, having considered the averments in the plaint, the relief claimed by the plaintiffs in their prayer to the plaint and previous judicial decisions which highlight the matters to be averred in the plaint in an action for definition of boundaries, have come to the conclusion that the plaintiffs' action was not an action for definition of boundaries. The learned High Court Judges have also observed that the plaintiffs have filed this action to vindicate their title to the portion of land alleged to have been forcibly occupied and appropriated by the defendant but the plaintiffs have not prayed for a declaration of their title to that portion of land. It was the conclusion of the learned High Court Judges that since the plaintiffs' case lacked the facts and evidence necessary to maintain an action for definition of boundaries the plaintiffs had no right to maintain this action against the defendant as an action for definition of boundaries. Accordingly the learned High Court Judges have set aside the judgment given by the learned District Judge in favour of the plaintiffs and dismissed the plaintiffs plaints with costs.

The plaintiffs sought leave to appeal from this Court against the judgment of the High Court and leave to appeal was granted on the following question of law.

> "Have the learned Judges of the High Court erred by holding that this is an action for definition of boundaries and not a *rei vindicatio* action?

The learned Counsel for the defendant respondent suggested the following question and it was accepted by Court.

> "Have the learned High Court Judges erred in law in not considering the merits of the case presented by the parties?"

I shall first deal with the first question of law formulated by the learned Counsel for the plaintiff-appellants. According to the plaint the plaintiffs owned and possessed the land depicted in plan No. 6074 dated 9-1-1932 made by J. C. Misso, licensed Surveyor, marked X1. On or about 17.12.1988 the defendant forcibly entered the southern portion of that land and prepared a building site for the construction of a building. The first plaintiff then filed a private information in the Primary Court of Hatton under section 66 of the Primary Courts Procedure Act against the said forcible dispossession by the defendant. Having set out those facts the plaintiffs in paragraph 6 of their plaint had averred that " a cause of action has accrued to the plaintiffs to sue the defendant for the demarcation of the boundaries of the said land and premises, the ejectment of the defendant therefrom and for recovery of damages."

The prayer (a) to the plaint is that the plaintiffs pray "for a demarcation of the boundaries of the said land and premises described in the schedule hereto."

The second relief prayed for in the prayer to the plaint is that the defendant be ejected from the said land. So the granting of the relief of ejectment depends on the granting of relief claimed in paragraph (a) of the prayer to the plaint, namely demarcation of boundaries of the plaintiffs' land.

It is clear from the plaint and the relief claimed therein, that the plaintiffs presented their case as a case for definition of boundaries. In view of this it is necessary to examine the circumstances in which an owner of land can bring an action against the owner of an adjacent land for the definition of boundaries between their lands.

The action for definition of boundaries, known to the Roman Dutch Law as *actio finium regundorum* lies whenever the boundaries between the lands of adjacent owners have become uncertain either by chance or by the act of adjoining owners or of a third party. (Voet's Pandects, Book 1o Title 1 Section 1(a)) In the case of *Ponna vs. Muthuwa*[1], it was held that the common law remedy of an action for the definition of boundaries presupposes the prior existence of a common boundary which has been obliterated by subsequent events.

In an action for the definition of the boundaries plaintiff has to aver (i) that an ascertainable common boundary previously existed physically on the ground and (ii) that such common boundary had been obliterated subsequently. *Deeman Silva vs. Silva*[2].

In the plaint there was no averment that a common boundary existed between the land of the plaintiffs and the defendant and that boundary has got obliterated. The plaintiffs' complaint was that the defendant forcibly entered into a portion of their land and dispossessed them. This is clear from document X3, the affidavit filed by the 1st plaintiff along with her private information filed in the Primary Court of Hatton in respect of the same forcible dispossession. Thus it is clear that the plaintiffs were attempting to vindicate their title to the portion of land forcibly occupied by the defendant through an action designated as an action for the definition of boundaries. The proper remedy for them would have been an action for declaration of title to the disputed portion of land. As already stated the first prayer of the plaint was for the demarcation of the boundaries of the said land and premises described in schedule to the plaint. Granting of all other reliefs prayed for in the plaint depended on the definition of the boundaries of the plaintiffs' land.

Since the plaintiffs had not averred in their plaint the ingredients necessary to constitute an action for the definition of boundaries, their action was misconceived in law and the court should not have proceeded with the action in the form it was presented to Court.

At the time of framing issues, plaintiffs have framed issues to convert their case into a *rei vindicatio* action. The gist of the issues framed by the plaintiffs are as follows:

1. Whether the plaintiffs are the owners of the land described in the schedule to the plaint?

2. Whether the defendant, without any right or title to the said land forcibly entered into a portion of that land and is in possession thereof?

3. Whether the portion of land in unlawful possession of the defendant is depicted as lot 6 in the plan No. 4139A dated 6.10.1994 made by C. Gnanapragasam, Licensed Surveyor?

4. If so, is the said lot No. 6 a part of the land described in the schedule to the plaint?

5. If one or more of the above issues are decided in favour of the plaintiffs are they entitled to the relief claimed in the plaint?

The question to be considered is even if issues 1 – 4 are answered in favour of the plaintiffs, can the Court grant the relief prayed for in the plaint?

As I have already stated the relief claimed in prayer (A) to the plaint is demarcation of the boundaries of the land described in the schedule to the plaint. Even if issues 1 – 4

are decided in favour of the plaintiffs, still in the absence of averments in the plaint necessary to properly constitute an action for the demarcation of the boundaries and the evidence necessary to sustain a case for the demarcation of the boundaries the Court cannot grant the relief prayed for in paragraph (a) of the plaint. If the Court cannot in law grant that relief it necessarily follows that the Court cannot grant any other reliefs which are consequential reliefs which depend on the relief sought in prayer (a) to the plaint. Accordingly the trial Judge could not have answered the plaintiffs issue No. 5 in the affirmative.

For the reasons set out above I answer the first question of law in the negative and affirm the learned High Court Judges' decision allowing the appeal and dismissing the plaintiffs plaint. Accordingly this appeal is dismissed without cost. In view of this conclusion it is not necessary to consider the question of law raised on behalf of the defendant-appellant-respondent.

IMAM, J.- I agree.

SURESH CHANDRA J. – I agree.

Appeal dismissed.

ANURUDDHA SAMARANAYAKE AND FOUR OTHERS VS. ATTORNEY GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
ABDUS SALAM, J.
CA 36-40/2007
HC COLOMBO 11/2000
APRIL 29, 2009
JULY 13, 2009
SEPTEMBER 30, 2009
NOVEMBER 18, 23, 2009
FEBRUARY, 10, 2010
MARCH 8, 2010
JULY 8, 2010
NOVEMBER 29, 2010
DECEMBER 6, 2010
FEBRUARY 2, 3, 8, 2011
MARCH 7, 2011

Penal Code – Section 113 (f) 162, 140, 146, 300 – Murder, unlawful assembly – Robbery – Evidence Ordinance Section 8, Section 27, Section 113, 114 – Absence of proved motive – Proved absence of motive – Dock statement – Subsequent conduct of accused – Burden of proof – Judicature Act – Section 48 – Trial de novo – Same Counsel appearing for all accused – Inferences? Constitution Article 138 (1) – Criminal Procedure Code – Section 190 (5) – Section 338

The five accused –appellants along with the 6th accused [he was acquitted] were indicted on several counts – Conspiracy to murder one N – murder of one S – [wife of N] – being members of an unlawful assembly- Robbery.

In appeal it was contended that identification by a single witness unaccompanied by other evidence does not warrant a conviction – that motive was not established – that the trial Judge has misapplied the burden of proof – that the trial Judge failed to consider Section 114 [f] of the Evidence Ordinance – and the charges were not proved beyond reasonable doubt.

Held

(1) It is not right on the part of the trial Court to convict a possessor of alleged stolen property on the sole ground of recovery of it from him though the Court can draw a presumption under Section 114 of the Evidence Ordinance, simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. The culpability of this offence will depend on the other circumstantial evidence if any.

Per Abdus Salam, J.

"The case for the prosecution against the 1st accused is not a mere probability on a strong suspicion but goes beyond that degree".

(2) The learned High Court Judge has seriously misdirected himself with regard to law when he stated that the 1st accused was obliged to explain that the intruders did not have his co-operation to enter the house, by this erroneous finding and unsubstantiated observation the trial Judge has misapplied the burden of proof and thus failed to appreciate the well-recognized concept of burden of proof and evidential burden.

(3) In criminal proceedings, the prosecution is not bound to assign or establish motive behind a criminal act. In terms of Section 8 of the Evidence Ordinance, any fact which shows or constitutes a motive or preparation for the commission of a crime is relevant. Although the prosecution is not required to establish a motive once a cogent and intelligent motive is established, that fact considerably advances and strengthens the prosecution case.

(4) It is well settled law that the prosecution is not required to call all the witnesses whose names appear in the indictment as witnesses for the prosecution. Under the Evidence Ordinance to presume that a particular witness was not called because his evidence would be adverse to the prosecution is a presumption of fact and discretionary in nature. To draw this presumption an

important qualification is to satisfy the trial Judge that the witness concerned is necessary to unfold the narrative that is withheld by the prosecution and the failure to call such a witness is a vital missing link in the prosecution case.

Per Abdus Salam, J.

"The prosecution has invited us to take notice of the unusual arrangement made to represent the accused by one single Counsel as a relevant fact against them as well in determining their degree of responsibility in the commission of the crimes considering the extreme unusual conduct of the 1st accused and others I am of the opinion that it constitutes strong incriminatory evidence falling into the category of subsequent conduct – the joint representation entered by a single Counsel applies to the 3rd, 4th and 5th accused *vice versa*".

APPEALS from the judgment of the High Court of Colombo.

Cases referred to:-

(1) *Wijesena Silva vs. Attorney General* 1998 3 Sri LR 309

(2) *Q vs. Don Hemapala* 64 NLR 1

(3) *A. G. vs. Viraj Aponso* SC 24/2008 525/2008, SC 79A/2007

(4) *R vs. William Perera and Etin* 45 NLR 433

(5) *Sanwant Khan vs. State of Rajasthan* 1956 AIR – SC 54 – 1956 Cr LJ 150

(6) *Cassim vs. Udayar* 44 NLR 519

(7) *Rex vs. Ellwood*

(8) *Q. vs. Kularatne* 71 NLR 529 at 534

Tilak Marapana P. C. for 1st accused-appellant.

Shanaka Ranasinghe for 2nd accused-appellant.

Dr. Ranjit Fernando for 2nd accused-appellant.

Ruwan Unawala for 4th and 5th accused-appellants.

Yasantha Kodagoda DSG for respondent.

March 25, 2011

ABDUS SALAM, J.

The five Accused-Appellants (1st to 5th accused) along with the 6th accused stood indicted by the Attorney General on the following counts.

1. Conspiracy to murder Nimal Samarasinghe punishable under section 300 read with sections 113 (b) and 102 of the Penal Code.
2. Being members of an unlawful assembly to murder Deepthi Champa Samarasinghe, an offence punishable under section 140 of the Penal Code.
3. Being members of unlawful assembly committed the murder of Deepthi Champa Samarasinghe an offence punishable under section 296 read with section 146.
4. Being a member of the said unlawful assembly attempted to murder Nimal Samarasinghe an offence punishable under section 300 read with section 146.
5. Being several members of the said unlawful assembly committed the offence of robbery an offence punishable under section 380 read with section 146.
6. Being members of the said unlawful assembly to commit the offence of robbery entered the house of . . . an offence punishable under section 443 read with section 146.
7. Being members of the unlawful assembly to commit the offence of attempted murder of . . . an offence punishable under section 445 read with section 146.
8. Committed the murder of Deepthi Champa Samarasinghe an offence punishable under section 296 of the Penal Code read with section 32.

9. Caused injury to Nimal Perera Samarasinghe with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, an offence punishable under section 300 read with section 32.

10. Committed the offence of robbery of cash amounting to Rs 70,000/- and thereby committed the offence of robbery punishable under section 380 read with section 32.

11. To commit the offence of robbery entered the house of Nimal Perera Samarasinghe an offence punishable under section 443 read with section 32.

12. To commit the offence of attempted murder of Nimal Perera Samarasinghe entered the house of . . an offence punishable under section 445 read with section 146.

13. At the time of committing robbery the 3rd accused used a pistol and thereby committed an offence punishable under section 383.

14. At the time of committing robbery the 4th accused used a pistol and thereby committed an offence punishable under section 383.

15. At the time of committing robbery the 5th accused used a knife and thereby committed an offence punishable under section 383.

After a non-jury trial, the 1st to 5th accused were found guilty and convicted of all the charges while the 6th accused was acquitted for insufficiency of evidence.

This concerns the several appeals preferred by the 1st to 5th accused against their convictions and sentences.

Dr. Ranjith Fernando took up a preliminary issue, at the hearing of this appeal on the ground that the learned trial judge who started the trial ceased to hear the case midway and on the request of the appellants the incoming judge ordered a fresh trial without giving the jury option and cited the judgment in *Wijesena Silva vs. Attorney General*[1] and *Queen vs. Don Hemapala*[2] in support of his argument as to the implementation of section 190 (5) (e) (e) of the Code of Criminal Procedure. The preliminary issue thus raised was ruled out by my brother W. L. Ranjith Silva J with whom I respectfully concurred. For purpose of convenience the relevant portion of the ruling of Ranjith Silva, J dated 01.04.2010 is reproduced below. . . .

"We are mindful of the judgment (Hon Attorney General vs. Goniyamalige Kamal Viraj Aponso[3]*. The Judgment of His Lordship Justice Asoka de Silva (as he was then) wherein his Lordship held that not giving the jury option is not a mere irregularity but is an an illegality that vitiates all proceedings. It was brought to the notice of this court by the learned Deputy Solicitor General that section 48 of the Judicature Act, does not speak about a trial de novo. I hold that the dicta in the two cases above referred to namely Wijesena Silva and Attorney General, (supra) Queen vs. Aluthge Don Hempala Silva (supra) are not applicable to section 48, even before it was amended it talks about, the re-summoning of the witnesses is the first step and the word afresh stated in proviso to section 48 would not tantamount to a de novo trial in the proper sense. This is further consolidated by the proviso to section 48. The proviso to section 48, as it stands amended, states that on the application of the accused in a prosecution, the judge shall re-summon the witnesses and re-hear the case. The proviso does not contemplate of a trial de novo proper" Per Ranjith Silva J.*

Both Nimal and Deepthi along with their infant daughter lived at their house bearing No. 172, Sri Vajiragnana Mawatha, Maharagama. The 1st accused (Anuruddha) is a brother of Nimal. He also lived with his wife in the same premises Buwaneka Karunaratna and his wife who are the maternal uncle and aunt respectively of both brothers also resided under the same roof. The deceased Deepthi Champa Samarasinghe was a dentist by profession, a mother of an infant girl and was carrying a foetus of 5½ months gestation. Nimal Perera Samarasinghe (virtual complainant and witness No 1 on the list of witnesses for the prosecution) is her husband.

For purpose of convenience, I propose to begin with the appeal of the 2nd accused. He was arrested 18 days after the incident. While he was in police custody and consequent upon his information, certain items of jewellary were recovered from the refrigerator in his house.

Although the 2nd accused denied the recovery of the articles, the learned High Court Judge (HCJ) rejected the dock statement of the 2nd accused which formed part of the evidence in the case and convicted him for murder, attempted murder, robbery, housebreaking, conspiracy and for being a member of an unlawful assembly and sentenced him accordingly. The circumstantial evidence as referred to by the learned HCJ against him was his acquaintance with the 1st accused and possession of stolen property.

It is common ground that the 2nd accused was known to the virtual complainant and that he did not participate in the commission of the offence. The learned HCJ has failed to address his mind to the evidence relating to the 1st

accused not being seen at or around the place during the commission of the offence, before he extended the application of the presumption to murder, attempted murder, robbery etc. It appears that the learned High Court Judge has failed to appreciate that illustration A to section 114 of the Evidence Ordinance leaves to his discretion to presume a fact or call for confirmatory evidence of it as the circumstances of the case may require. One of the purposes of the inference is that if no fact would thus be ascertained by the inference in a court of law, very few offenders could be brought to punishment. A tremendous body of case law deals with this presumption that stands for the position that if an accused has exclusive possession of the property shortly after a crime is perpetrated and there are other circumstances such as the absence of explanation of his possession, a negative inference may be drawn. That inference is that the accused knew that the property he or she possessed was stolen.

However it is not right on the part of the trial court to convict a possessor of such property on the sole ground of recovery of it from him. Though the court can draw a presumption under Section 114 of the Evidence Ordinance, simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. The culpability of the offence will depend on other circumstantial evidence, if any.

Further the presumption permitted to be drawn under Section 114 must be read along with the time factor. If the articles recovered are found in possession of a person soon after the murder, a presumption of guilt may be rightly permitted. On the other hand a presumption cannot be permit-

ted after a considerable interval. On this aspect of the matter one has to be also mindful of the distance between the place where the offence in respect of the articles was committed and the place where they were later found.

It is settled law that the presumption concerned, is not confined to charges of theft alone, but extends to every offence including murder. This principle has been clearly illustrated in *Rex vs. William Perera & Etin*[4], where it was held that possession by a person of property recently stolen from a house in the course of housebreaking and theft gives rise to the presumption that the possessor was either concerned in the housebreaking or possessed them with the knowledge of them being stolen.

It was held in *Sanwat Khan vs. State of Rajastan*[5] that the presumption cannot be drawn in the absence of any other evidence connecting the accused in the commission of murder even though the possession is recent and unaccounted for.

A long line of authorities both in Sri Lanka and India favour the extension of the application of the presumption to offences other than retention of stolen property, only after exercise of great care, particularly when direct evidence clearly exonerates the possessor of stolen articles, from having participated in the commission of the principal offence.

In the case of *Cassim vs. Udayar*[6], the maxim relating to this presumption, was enunciated by Wijeyewardene J in his own lucid style in a case where the lower court convicted the accused for housebreaking by night, theft and retention of stolen property. The case for the prosecution there was devoid of participatory evidence in the commission of house break-

ing and theft by the accused. Some of the goods burgled in Manner were discovered at Anuradhapura in the possession of the accused eight days after the commission of the offence. The Magistrate convicted the accused for house breaking by night and theft. Setting aside the conviction for housebreaking and theft Wijewardena, J stated that the accused is a hawker of goods and there is no evidence whatever to show that he was seen near the burgled house or even in Mannar at or about the time of the burglary. His Lordship considered it as being unsafe in the circumstances of the case to base a conviction for housebreaking and theft on the isolated fact of retention of stolen property, eight days later.

The case of the 2nd accused in the instant matter is much stronger than the facts in *Cassim vs. Udayar(supra).* In the instant matter, the articles that were robbed at Maharagama were recovered at Dehiwala 18 days after the robbery. Besides, no exclusive possession on the part of the 2nd accused has been proved by the prosecution. Admittedly, it has been recovered from inside a refrigerator placed in the kitchen of the house of the 2nd accused. It has not been kept under lock and key. Everyone in the household had free and unrestricted access to the refrigerator. As has been explained by the 2nd accused in the dock statement his two children had liberal access to it.

As such, I am of the opinion that the learned High Court Judge had erred in law, when he convicted the 2nd accused for the charges preferred in the indictment. It is my considered view that the evidence against the 2nd accused which I took the precaution to examine carefully and anxiously, does not prove with that certainty which is necessary in order to justify a verdict of guilty for any of the charges in the indict-

ment, or for a lessor count and therefore the 2nd accused is entitled to be acquitted on all the charges.

The 3rd accused was sentenced to death and rigorous imprisonment ranging up to 15 years. The evidence against the 3rd accused was his identification at a parade and joint representation by Counsel. The 3rd accused is said to have worn a facemask during the commission of the offences and the virtual complainant claims to have identified him when the 3rd accused had occasionally removed/lifted the mask. In any event his identification alone by a single witness unaccompanied by other evidence does not warrant a conviction on the charges; as such evidence is insufficient to convict him on the charges. For these reasons, I am satisfied that the verdict against the 3rd accused was unreasonable and against the weight of the evidence, and that a verdict of acquittal should be entered in his case. Hence, I feel constrained to think that the convictions of the 3rd accused and sentences passed on him should be set aside and the 3rd accused be acquitted on all the charges.

As far as the 5th accused is concerned, the evidence against him is almost the same as in the case of the 3rd accused. As such I feel that in order to meet out justice and to give meaningful effect to the presumption of innocence, the 5th accused also should be acquitted on all the charges.

The case against the 4th accused mainly depended on the evidence relating to the identification parade, dock identification and section 27 discovery of the firearms and an opinion expressed by a ballistic expert regarding the use of the firearms in the commission of the offences. The conviction of the 5th accused was based on mere identification, at a parade followed by dock identification. The Counsel for the