FONSEKA
V.
CANDAPPA

SUPREME COURT
RANASINGE C.J. TAMBIAH J AND
SENEVIRATNE J.
S. C. APPEAL NO. 6/86
C.A. NO. 35/75 (F)
D.C.COLOMBO No. 25217/T.
MAY 19 AND JUNE 01, 02, 03, 06, 07 AND 10, 1988.

Last Will + Revocation of Last Will by tearing it under duress — Is it a revocation? —Does it revive earlier Will ?

Interpretation—What is a question of law.

A duress had not been established in the tearing up of a Last Will revocation animo revocandi by the deceased testratrix has been proved. The tearing up of the Will will not serve to revive an earlier Will made by the said testatrix. The devolution then will be as on intestacy.

It becomes a question of law where relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or the conclusions rest mainly on erroneous considerations or is not supported by sufficient evidence.

The failure to consider the material evidence of a witness is a substantial question of law.

Cases referred to

1. *Collettes* v. *Bank of Ceylon* (S.C. Ref. 6/82 — S.C. Minutes of 05.11.1982)
2. *Collettes Ltd.* v. *Bank of Ceylon* (1984) 2 Sri L R 253, 264, 265
3. *Flower* v. *Abbw Vale Steel, Iron and Coal Co.* 1936 A. C. 206
4. *Sri Lanka Ports Authority* v. *Peiris* 1981 1 Sri LR 101, 108

Appeal from Judgment of the Court of Appeal

H. L. de Silva P.C. with *S. C. Crosette Tambiah* and *Miss L. N. A. de Silva* for appellant.
Dr. H. W. Jayewardene Q.C. with *D. A. E. Thevarapperuma* for 8th A and 11th respondents. *M. I. H. M. Sally* with *M. Nassim* for 10th respondent.

Cur. adv. vult.

July 18, 1988

TAMBIAH, J.

The following facts are not in issue. The properties which are the subject matter of this testamentary case belonged to one Herbert Luke Fonseka. Herbert first married Janet, a sister of the deceased Virginia Fonseka, and had one child, Mervyn Fonseka, the petitioner-appellant's father. Janet died when Mervyn was 3 years old and Herbert then married Virginia. Mervyn was brought up by Virginia. Mervyn married Brightie Holmes and they had 5 children, the appellant Ranjith, Nelun, Nirmala, Brightie and Lakmal. Herbert died on 19.7.1943, and on his death, half-share of the property devolved on his widow Virginia and the balance half came to Mervyn. the main properties left by Herbert consisted of the premises and business known as Hotel Du Roi situated at Borella and residential premises

No. 16, Dickman's Road, Bambalapitiya, called "King's Royal". There were also other properties situated at Galle Road, Bambalapitiya. In 1960 there was an amicable division of the properties between Mervyn and Virginia, and Virginia got the properties which are the subject matter of these proceedings. In regard to the main properties, as a result of the amicable division, she got a half-share of the Hotel and the entirety of "King's Royal". It was also agreed that Mervyn should pay Virginia Rs. 1,000/- per month from the profits of the Hotel. Mervyn died on 27.5.1968 intestate. The half-share that was owned by Mervyn devolved on his widow Brightie and the 5 children.

Virginia died on 10.12.1969. During her life time, she had executed 4 Last Wills:

(a) Last Will No. 731 dated 11.9.1957 (P1), attested by Mrs. Muriel Gunawardene.

(b) Last Will No. 785 dated 25.5.1960 (P2) attested by Mrs. Muriel Gunawardena.

(c) Last Will No. 6790 dated 21.5.1962 (P3) attested by H. V. Ram Iswara.

(d) Last Will No. 1027 dated 11.7.1968 attested by Mrs. Muriel Gunawardena.

Each Will contained a clause revoking all previous Wills. By Last Will (P1), Virginia devised a half-share of Hotel Du Roi and a half-share of King's Royal to the appellant, reserving a life interest to Mervyn, a half-share of premises No. 29/1, and 21, Galle Road, Bambalapitiya, to Nelun, reserving a life interest to Mervyn, a half-share of premises No. 29/2, and 35, Galle Road, Bambalapitiya, to Nirmala, reserving a life interest to Mervyn, and a half-share of premises 29/3, and 33, Galle Road, Bambalapitiya, to Brightie reserving a life interest to Mervyn. The residue was bequeathed to Mervyn. Mervyn was appointed Executor.

By Last Will (P2), the devise in regard to Hotel Du Roi was the same. She devised the entirety of King's Royal to the appellant with life interest to Mervyn. Premises 35 Galle Road,

Bambalapitiya, was bequeathed to the appellant reserving a life interest to Brightie, his mother. Mervyn was appointed executor, and the residue was bequeathed to him.

In Last Will (P3) the provisions with regard to Hotel Du Roi and "King's Royal" were the same as in Last Wills P1 and P2; the only change effected was that premises No. 35 was bequeathed to Nelun, Nirmala and Brightie, reserving a life interest to Mervyn. The residue was given to Mervyn and he was also retained as executor.

Then came the final Will (P4). It revoked all former Wills. Virginia appointed one Drupada Fonseka to be the executor, as by this time, Mervyn was dead. Drupada Fonseka is Mervyn's paternal uncle's son. At the date of the Last Will (P4), the appellant was a minor. The entirety of "King's Royal" and a half-share of Hotel Du Roi were devised to the appellant. The residue was also bequeathed to the appellant. In the event of the appellant dying unmarried and without issue, the properties were to devolve on his 3 sisters, Nelun, Nirmala and Brightie equally. It would appear from Mrs. Gunawardena's evidence that by this time one of the Bambalapitiya properties was sold by Virginia and the balance was given to the appellant's sisters.

It is common ground that Virginia entered hospital in November 1969 and died on 10.12.1969. Other than Janet and Mabel who predeceased her, Virginia left behind 2 sisters, Lilian (9th respondent), Winifred (10th respondent) and 2 brothers, Wilfred Peiris (8th respondent) and Justin Peiris (11th respondent). On 9.1.1970, the 11th respondent Justin Peiris filed papers in Testamentary Case No. 25214, D. C., Colombo, on the basis that Virginia died intestate and that her intestate heirs are entitled to succeed to her property as intestate heirs.

On 10.1.1970, the appellant filed petition through Mrs. Muriel Gunawardena and claimed letters of administration with the Last Will (P3) annexed to the Estate of Virginia. No reference was made at all to the subsequent Last Will (P4). On 28.2.1971, the 8th, 10th and 11th respondents filed their statements of objections and averred, inter alia:—

Para 1 - that Last Will (P3) was revoked by a subsequent Last Will, No. 1037 dated 17th October, 1968, and attested by Muriel Gunawardena and that Justin Peiris was a witness to Last Will (P3).

Para 2 - that "the petitioner Ranjith Luke Fonseka, some time prior to her death, harassed and ill-treated the deceased and threatened to kill her. Her last illness was attributed to this constant fear and threats of violence caused by the petitioner."

Para 3 - that "in or about November, 1969, in consequence of the said harassment, ill-treatment and threats, the deceased in the presence of the said Muriel Gunawardena, Notary Public, who attested the said Last Will, destroyed completely the said Last Will, No. 1037, and died shortly after on the 10th of December, 1969, without executing another Will and thereby died intestate."

They prayed that the petitioner's application be dismissed and for a declaration that the deceased died intestate and that the intestate heirs be declared entitled to succeed to her property.

At the proceedings had before the District Court on 14th of June, 1972, it is recorded that learned Queen's Counsel for the appellant pointed out that the "respondents did not know the correct number of the Last Will that has been destroyed. However, the resulting position remains the same, whether the Will bears No. 1037 or 1027, the later Will has been destroyed and therefore the earlier Will is in force. The later Will states that she revokes the earlier Will but the revocation must be animo revocandi. If the later Will has been destroyed by duress, then No. 1027 still speaks. The destruction of the Will, No. 1027, was not done animo revocandi and the Will that speaks is 1027. For all practical purposes the Will 6790 and the later Will that was destroyed are substantially the same and in that situation, the revocation by destruction of the later Will 1027 merely as a fact of revoking the earlier Will 6790 does not affect his case."

Learned Counsel for the 8th and 10th respondents then moved to amend the statement of objections by deleting the words "No. 1037 dated 17th October 1968" in para 1 and the words "said Last Will 1037" in para 3, and substituting thereof the words "said Last Will No. 1027."

Learned Queen's Counsel for the appellant objected to the amendment and said he had come prepared to go to inquiry on the basis that the objections referred to a Will No. 1037 and that it will be necessary for him to amend his petition.

The case was taken off the inquiry roll to enable the appellent to amend his original petition.

The amended petition was filed on 28.7.1972 by the appellant through Muriel Gunawardena and he averred, inter alia:—

(a) that the Last Will 6790 (P3) has already been filed in these proceedings in the wrong belief that such Will alone may be admitted to probate.

(b) that "subsequently Virginia made Last Will No. 1027 on 11.6.1968 attested by Muriel Gunawardena, a copy of which is annexed, marked "B".

(c) about a month before she died the Last Will No. 1027 marked "B" was torn with the assent of the deceased as a result of the duress of W. Justin Peiris (referred to in paragraph 9) and in his presence and on his insistence by Muriel Gunawardena, N. P. The deceased did not intend to revoke such Will but intended and believed that such forced destruction would only result in reviving and restoring the Last Will No. 6790 marked "A". The deceased openly expressed her belief and state of mind the very next day to Muriel Gunawardena. The deceased was certain that in the event of death, she the deceased would die testate and not intestate."

He prayed that letters be granted to him with Will 1027 annexed, or in the alternative with both Wills 6790 and 1027 annexed.

The affidavit of Mrs Muriel Gunawardena dated 26.7.1972 was also filed and she repeated word to word the contents of para (c) above. On 23.12.1972, she filed her 2nd affidavit and deposed to, inter alia,

(a) "About 2 weeks before the deceased entered hospital, in view of the threats of personal violence to the deceased by Justin Peiris made at my flat and in view of his threatening attitude towards me, the deceased told me to tear up the Will."

(b) "The deceased saw me the next day and told me amongst other things that Justin might do her some personal harm and that is why she asked me to tear up her Will."

(c) "She referred to an earlier Will, also, the testatrix and I believed that the earlier Will was revived."

(d) "In the course of conversation she gave me other instructions which I carried out."

(e) "She went to the Wycherley Nursing Home about 10 days later."

(f) "Before her instructions could be finalised, she died about 15 days after admission to the Nursing Home."

The 2 crucial issues raised by learned Counsel for the appellant and for the respondents were as follows:—

2. Was the Last Will P4 destroyed as a result of the duress of Justin Peiris in that about two weeks prior to the deceased entering hospital and approximately about a month before she died, the said Justin Peiris threatened personal violence on the deceased at Mrs. Muriel Gunawardena's flat at No. 2, Gregory's Road and in view of the threatening attitude adopted by the said Justin Peiris towards Mrs Muriel Gunawardena ?

20. Had Ranjith Fonseka the petitioner in this case, prior to the aforesaid revocation, harassad, ill-treated and threatened to kill the deceased. ?

Learned Queen's Counsel for the appellant also raised the following issues:—

4 (a) Is there any clear inconsistency between Last Will No. 1027 attested by Mrs Muriel Gunawardena and the Last Will 6790 of 21st May 1962 attested by Mr. H. V. Ram Iswara ?

4 (b) If there is no real inconsistency, does the Last Will 1027 operate to revoke the Last Will 6790 ?

4 (c) If Last Will 1027 does not operate to revoke Last Will 6790 is the Last Will 6790 valid and entitled to be admitted to probate ?

5. At all events did the deceased, at the time of destruction of the Last Will 1027, intend and believe that such destruction would only revive and restore Last Will 6790 ?

6. If so, is Will 1027 entitled to be admitted to probate or in the alternative is Will 6790 entitled to be admitted to probate or are both Wills entitled to be admitted to probate ?

On the 2 crucial issues, there were only 2 witnesses who gave evidence—

Mrs Muriel Gunawardena for the appellant and Justin Peiris for the respondents.

It is common ground that about the middle of November 1969, Virginia and Justin visited Muriel Gunawardena at her flat at No. 2, Gregory's Road, Colombo 7, in the afternoon. As to why they went is only spoken to by Justin. According to him, Virginia came to his flat at about 3.00 p.m. and told him that the appellent is harassing her, threatening her with bodily harm and that even on that day he had come with some thugs

and threatened her. She did not want to give any of her properties to the appellant as he is harassing her and wanted all her properties including the car to be transferred to him immediately. He was an ungrateful chap. She asked him what to do about it. He then asked her "Have you left the properties to him ?" She replied "Yes, by a Will drawn by Mrs Gunawardena." He advised her to see Mrs Muriel Gunawardena and she wanted him to accompany her. He denied that he took Virginia to the flat by force. He was a younger brother of Virginia and his relationship with her was very good.

Under cross-examiniation, he stated that this was the only occassion he had accompanied Virginia to Mrs Gunawardena's flat. He admitted that Mrs. Gunawardena was related to Virginia's husband, that the 2 ladies were very friendly and know each other well, and there was no need for Virginia to take him to see Mrs. Gunawardena. The purpose for which he accompanied Virginia was to get Mrs. Gunawardena's advice as to how to cancel the Will attested by her.

It was Mrs. Gunwardena's evidence that she and Virginia visited each other, were very close to each other and Virginia had confidence in her.

As to what exactly happened in the flat has been testified to by both Mrs Gunawardena and Justin Peiris and they have given sharply conflicting versions.

According to Mrs. Gunawardena, Virginia came to her flat with Justin Peiris at about 2.00 p.m. Virginia knocked at her door and she came down and opened the door. Both came in and sat down. She too sat down. Then Justin Peiris started scolding Virginia and said her step-grandson was ungrateful and does not deserve that she should leave all her properties to him. Virginia looked terrified. She did not speak a word. Justin Peiris asked her where the Will was. She did not speak. He told Virginia to ask her where the Will was. She said she has it. Justin insisted that

Virginia ask her to bring it. She went into her room and brought the Will and sat down. Again, Justin started scolding Virginia and said that the boy does not deserve any properties because he is ungrateful, wicked, and disgraceful to the family. All the while Virginia looked terrified, but said nothing. Then he asked Virginia to tell her to tear the Will. Even then Virginia did not talk. Then Justin got up in an angry mood and asked Virginia, "Are you not telling her to tear the Will?" Virginia also got up. He almost pushed her aside and she was terrified and asked her to tear the Will and accordingly the Will was torn. The Will was at her place because Virginia was afraid to take it home. After the Will was torn, the wickedness in Justin's face was gone and he took Virginia away.

Under cross-examination, she stated that Justin and Virginia left her flat at about 3.00 p.m. She had a telephone in her flat. Justin looked like a devil. Virginia's face and hands showed that she was terrified. She was sweating.

She had kept the Will in a safe place in the almirah on a shelf, the door of which was locked. The almirah was in her bed room. She unlocked the almirah and returned to the verandah with the Will and sat on a chair and had the Will on her lap. Then Justin started scolding Ranjith again and said he was ungrateful with no love for the grand-mother and she should not give him anything. Justin then commanded her to tear the Will. Virginia did not talk. Then Justin got up in a threatening manner and Virginia also got up. She too got up and Justin came forward in a threatening manner and she thought he was going to push Virginia. She too took a step forward and then Virginia asked her to tear the Will. After the Will was torn, Justin took Virginia by the hand, pulled her along and left.

She stated that she was Virginia's Lawyer and Virginia regularly came to her for advice. They were also related. She admitted that in that dual capacity, she had a duty to protect Virginia's interests. When questioned as to why she did not take preventive action to protect the Will and the interests of Virginia, and run

into her room and lock the door, her answer was threefold—"You can easily make another Will, if the client asked for the Will, I have to give it", and if she did so "then he would have assaulted her, I did not want to because her life was more precious."

The Will, according to her, consisted of 4 pages of thick paper, typed on 3 sheets of paper and the 4th page was blank. It was folded longitudinally and nobody could see the typing of the inside pages. She did not read out the Will to Virginia or Justin. She admitted that if she brought another piece of paper, both of them would not have known what the document was. She was shown the Will (P3) and she said the Will (P4) was the same sort of paper and when asked "You could have cheerfully torn the document if they did not know what its contents were", she answered—"Justin knew what a Will was, it is written on thick paper, I had no other thick paper"

Mrs Gunawardena admitted that she was annoyed and incensed at what had happened and that she considered the conduct of Justin Peiris unfair and unjust, and that he was almost guilty of assault on that occasion; that about 6.00 p.m. Virginia sent her car to fetch her and on her way to Virginia's house and on the way back, she passed the Cinnamon Garden Police Station; that she made no complaint to the police or any person in authority; that soon after the alleged incident or even subsequently, she made no record of what happened on that day in her flat.

Mrs. Gunawardena was 60 years when she gave evidence in November, 1973, and at the time of the alleged incident in November, 1969, she was 64 years of age. She described Virginia as huge, fat and bulky, about double her size and about 5' 4" in height. She took Virginia to Wycherley Nursing Home in November, 1969, as she said she was ill; she died on 10.12.1969 of a heart attack.

Mrs Gunawardena's attention was also drawn to Justin's appearance (who was in Court) and asked whether he looked allright now and her answer was that he looked better than he was on that day.

Learned Queen's Counsel for the 11th respondent before concluding his cross-examination stated that he was putting his defence to the witness lest it be said later that she had not been given an opportunity to answer them:—

Q. I want to put to you what really happened on that day. I am putting it to you that Virginia came along with Justin to your house that day in the evening?

A. Yes.

Q. I am putting it to you that Virginia told you the way in which she had been treated by Ranjith?

A. No, she did not talk a word.

Q. I am putting it to you that Virginia told you that Ranjith was causing her a lot of trouble?

A. No.

Q. I am putting it to you that Virginia told you that Ranjith had even threatened her with bodily harm?

A. No, not on that occasion.

Q. I am putting it to you that Virginia told you that she had been even threatened with murder by Ranjith?

A. No, she did not speak a word.

Q. I am putting it to you that she asked you for advice as to what she should do?

A. On that occassion, no she did not talk a word.

Q. You were of course the person whom she had earlier asked advice on many matters?

A. Yes.

Q. I am putting it to you that you then told her to cancel her Last Will?

A. Certainly not.

Q. And you said that it was to be done by tearing the Will?

A. I did not say that. she did not talk.

Q. I am putting it to you that you then went into your room?

A. When Virginia asked for the Will I went into the room.

Q. Admittedly you went into the room on that day?

A. Yes.

Q. Admittedly according to you, you went in order to bring the Will?

A. Yes.

Q. I am putting it to you that you did so of your own volition?

A. No.

Q. Admittedly you returned with that Last Will on to the verandah?

A. Yes.

Q. I am putting it to you that you destroyed that Will yourself?

A. Yes.

Q. I am putting it to you that when you did it you said that the Last Will was thus revoked?

A. I did not say anything.

Q. I am putting it to you further that you stated on that occassion that thereby in the event of her death she will die intestate?

A. No.

Q. I am putting it to you that thereafter these parties left, that Virginia and the brother left the house?

A. No.

On the other hand Justin Peiris' version of what happened in the flat was entirely different. He was 58 years when he gave evidence on 28.10.1974. According to him, when they reached the upstair flat, Viriginia went ahead and he followed her. She knocked at the door and Mrs Gunawardena came out. Virginia told her how Ranjith is harassing her and threatening her with bodily harm and as such, she does not want to give any of her properties to this boy but to leave them to her brothers and sisters and wanted to know how to get about it. Mrs Gunawardena said that the only thing to do is to cancel the Will. Virginia asked her how to get about it, and she said to tear the Will. Virginia said "alright we will do it". Then Mrs Gunawardena went to her bed room and brought some paper and destroyed it. Virginia then asked her whether everything was all right and she replied "Yes, and that everything will now go to her brothers and sisters." After that, they left the place. He denied that he dragged her or pulled her against her will; she came of her own free will.

Under cross-examination, he stated that Virginia told Mrs Gunawardena on the day the Will was torn "even today Ranjith came to assault me" and he had mentioned this to his Counsel. He said that Mrs Gunawardena's evidence that he looked like a devil and Virginia was frightened are "deliberate lies". When asked why Mrs Gunawardena should utter lies, his reply was that "she is making money by way of fees in this case." Mrs Gunawardena told Virginia that the destruction of the Will did not revive the old Will and this too he mentioned to his lawyers. Mrs Gunawardena asked Virginia to tear up the Will and Virginia said "you tear it."

Mrs Gunawardena was questioned as to why she failed to mention the Last Will (P4) and that it was torn as a result of the duress of Justin in the 1st application for letters of administration dated 10.1.1970. In her principal examiniation she was asked:—

Q. Why did you seek to prove that Will (P3) first?

A. Because I was advised to do so.

Q. Later on what did you do?

A. I sought to prove the torn Will.

Q. Also on advice?

A. Yes.

In cross-examination she was asked—

Q. Did you consult anybody before you filed those papers?

A. Yes.

Q. Whom did you consult?

A. Counsel.

Q. Is it Junior Counsel or Senior Counsel?

A. Senior Counsel.

Q. Have you any objection to divulging his name?

A. No. (The witness then mentioned the name of the appellant's Senior Counsel who was in Court).

Q. Did you consult him with Junior Counsel?

A. With Junior Counsel.

Q. Who was the Junior Counsel?

A. Miss Chinniah.

Q. How long prior to your filing the papers, did you consult them?

A. About a week or two before.

Q. You made them perfectly aware of all the facts of this case?

A. Yes.

Q. You did not suppress anything from them?

A. No.

Q. Did you tell them everything that you told the Court in evidence-in-chief, on the very first day you met them?

A. Yes.

Q. Who drafted the first set of papers filed in this case on 10.1.70?

A. Counsel.

Q. Your second set of papers was filed on 28.7.72?

A. Yes.

Q. Who drafted those papers?

A. Counsel.

She also stated that though she prepared her affidavit dated 26.7.72, it was whetted by Senior Counsel.

In the course of his address what was submitted by learned Queen's Counsel for the appellant is recorded as follows:—

"In regard to the evidence of Mrs Muriel Gunawardena, when Counsel leads her evidence and the witness says that she did this with the consent of Counsel mistakenly and the Counsel keeps quiet", learned Queen's Counsel asks the Court to say to itself that no Counsel worthy of his position would accept the position as stated by the witness unless it were true." But learned Queen's Counsel states that he is not relying on it.

In this case the original papers were filed on 10th January 1970 seeking probate of Mr Ram Iswara's Will P3. Mrs Gunawardena tells the court that she thought the revocation of the Will P4 revived the earlier Will P3, that she discussed the matter with her junior counsel and that thereafter both of them discussed with senior Counsel who advised her to go ahead. Mrs Gunawardene now says so on oath." Learned Queen's Counsel states that when the Last Will P4 was destroyed and the earlier Will P3 was in the safe intact, in taking action on that Will P3, he (Counsel) has been in error. However, the function of the court is not to worry about the mistakes that Counsel make but to determine the question as to how the properties of Virginia Clara Fonseka should devolve, and nothing that Counsel says or does would hurt a dead person or affect the devolution of her Estate."

Learned Counsel for the 11th respondent in the course of his address, stated that the Will P4 stated "I hereby revoke all my former Wills", and pointed out that the revival of a Last Will must take place in the manner set out in s. 8 of the Prevention of Frauds Ordinance-by re-execution or by a codicil.

The judgments of both the trial Court and the Court of Appeal quite correctly did not make any reference to the statement from the Bar made by the learned Queen's Counsel for the appellant. The judgment of a trial Judge must be based "upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise" (s. 184 (1) of the Civil Procedure Code). Sections 167 and 168 require that the evidence of witnesses shall be given orally on oath or affirmation in open Court in the presence and under the personal direction and superintendence of the Judge. S. 58 of the Evidence Ordinance declares, inter alia, that admissions at the trial may be made by the parties or their agents or where, before the hearing, they agree to admit a fact by any writing under their hands. The term "agents" would include proctors and Counsel. But, evidence in the case cannot be supplemented by statements made by Counsel from the Bar.

It is the further evidence of Mrs Gunawardena that after the Will was torn, that very evening Virginia telephoned her and said that she will send the car and that she should come and see her. She did so and Virginia said she was afraid of her brothers Wilfred and Justin and that Justin is more wicked. She then asked Virginia, "What are we going to do, shall we write another Will?" She said "there is an old Will in the iron safe also, you had better not write any more Wills. I will leave all the properties to my grandson subject to my life interest. You had better prepare the deeds for it." Virginia sent her the old deeds from which she took the schedule and prepared the deeds. Ten days after that, Virginia entered the Nursing Home. She prepared the deeds and told both Virginia and the appellant that the deeds were ready. Virginia asked her to come with the appellant and the stamps to sign the deeds. She asked the appellant to bring the money of the stamps

which amounted to Rs. 10,000/-. The appellant asked for the copies of the deeds saying that he wanted to show them to somebody before he signs. He took the deeds and never came back. Later, she got the deeds back from the appellent, but, in the meantime Virginia died.

On the face of them, the draft deeds were prepared in November, 1969.

When learned Queen's Counsel sought to produce the deeds P5 to P8, learned Queen's Counsel for the 11th respondent stated that none of the documents were listed and the learned trial Judge indicated to him that he would be given an opportunity of examining the documents and cross-examining the witness on them. Learned Counsel for the 8th and 10th respondents also objected to the production of the documents and asked that he be given an opportunity to file an additional list of witnesses and documents to prove what the deceased's instructions were.

When cross-examined she stated that she wanted to transfer the properties to the appellant so that her 2 brothers cannot meddle with it. She had been enrolled as a Proctor in 1945, been 33 years in practice, was an experienced notary and attested about 1200 deeds. She never maintained an "Instructions Book". In regard to instructions pertaining to a deed, she would take them down on a sheet of paper. Once the original deed and duplicate are prepared, the instructions are thrown away. Once the deed is signed, it is not necessary to preserve the instructions. Virginia gave her verbal instructions and she has no documentary evidence to show that Virginia gave her instructions.

Learned Counsel for the 8th and 10th respondents questioned Mrs Gunawardena in regard to her affidavit and she stated that in that affidavit filed by her, she had not deposed to the fact that she went the same evening to Virginia's house and to the alleged conversation they had.

When cross-examined by learned Queen's Counsel for the 11th respondent, Mrs Gunawardena stated that the 2nd affidavit was prepared by Mrs Chinniah on her instructions,

was brought to her for her perusal and she perused and approved of it and signed it. She filed the 2nd affidavit as she had forgotten to state the place where the duress occurred in her 1st affidavit.

Justin Peiris stated that he visited Virginia at the Nursing Home and she told him that even at the Nursing Home she was not allowed to rest and the appellent was harassing her to have the deeds immediately written in his name but she did not want to write any deeds.

Mrs Gunawardena also stated that on about 4 occasions she visited her in the Nursing Home. Her visits were between 3.00 p.m. and 4.00 p.m. She appeared to be all right while she was in the Nursing Home. She had never met Justin Peiris in the Nursing Home. At the Nursing Home, she had met Ranjith twice. She admitted that Virginia was a rich lady and in possession of a considerable income and that Hotel Du Roi brought in considerable income and that the appellant gets a good income.

In the course of his address, learned Counsel for the 11th respondent stated that the deeds are consistent with Virginia destroying the Will animo revocandi, that he does not accept the position that they were drafts prepared at Virginia's instructions.

Both witnesses also testified as to the state of relationship between Virginia and the appellant and Virginia and her 2 brothers, Wilfred and Justin. According to Mrs Gunawardena, after marriage Mervyn and Brightie Holmes lived with Virginia and the appellant was born at King's Royal. Even after his parents moved out of Virginia's house, the appellant continued to stay with Virginia during his boyhood days, and attended school from there. Mervyn died on 27.5.68 in England. The appellant attained majority on 24.11.69. When Mervyn was away in England, Virginia went to the Hotel along with the appellent. For about 1 year before Virginia's death, the appellant was running the Hotel and Virginia got a half-share of the profits. Virginia never told her

that she had no peace from the appellant and never found fault with him. The appellant met her medical and Nursing Home expenses. The Benz car was used by both Virginia and the appellant and when she was ill, the appellant was using it.

She admitted that at a carnival at Dehiwela, the appellant was involved in a row and got a blow on his ear that caused deafness in one ear; that one day, between 6.30 and 7.00 p.m. Virginia sent her car to fetch her. Virginia told her that the appellant had come drunk to her house with a pistol in his hand and threatened her and that the uncles had made him drunk and had given him the revolver to point at her. He was so drunk that he did not know what he was doing. The appellant was not there when she went. She did not find fault with the appellant over this incident.

In the course of his address, the appellant's own Counsel submitted— "It is true that there was evidence that Ranjith was a difficult boy. But, in any family you find boys like that."

As regards Wilfred and Justin, Mrs Gunawardena's evidence was that the 2 brothers had tormented her. She personally knew about complaints made by Virginia against her two brothers. The trial Judge disallowed the police complaints P9 to P15. The complaints were against Wilfred only. The Court of Appeal, however, correctly held that the trial Judge was in error when he rejected the documents P9 to P15 as they show the state of relations between Virginia and Wilfred. But the Court of Appeal took the view that the complaints do not carry the case for the appellant much further, as the complaints were made several months prior to the date P4 was torn and were against Wilfred only.

Mrs Gunawardena further stated that neither Justin nor Wilfred did anything at any time in regard to Virginia's illness. Both brothers tormented Virginia.

According to Justin Peiris 2 or 3 days after the Will was torn, Virginia summoned him late in the night and told him that the appellant had assaulted her servant boy Gunapala and

dislocated some of his teeth. He took the boy to the Bambalapitiya police station and he lodged a complaint. The police inquired into the matter and sent the boy to the hospital. When Virginia was in the Nursing Home practically every day Virginia would telephone him and ask him to come. He never induced the appellant to drink and put him up to threaten Virginia.

Justin Peiris further stated that Virginia was fond of Mervyn and the appellant until Mervyn started creating trouble for her. The appellant visited Virginia at the Nursing Home when she was ill. Since his father's death, the appellant was creating trouble for her. The appellant was running the Hotel for a year since his father's death up to date and giving Virginia her share and there was no protest from her. He paid all the doctor's bills when she was in the Nursing Home. The appellant may have opened her safe in the house. The appellant used the car whenever he wanted to and Virginia did not object. Until a month before she died, Virginia was very fond of the appellant. Neither he nor Wilfred threatened Virginia with physical violence. She never made complaints against him to the police. He never made any complaints against the appellant to the police. He denied that he and Wilfred made life a hell for Virginia, and threatened to give her trouble in her home.

It would appear that Wilfred was occupying an annexe in Virginia's house. The police complaints, P9 to P15, cover a period from May 1968 to April, 1969, all made by Virginia against her brother Wilfred making allegations of assaults on her servant girl, of attempts to extract money from her, of threats to shoot her and throw bombs at her house and that she fears for her life, of damage to her house and of abuse in filthy language.

Attempts were made by Counsel on both sides to damage the credibility of both witnessess.

Mrs Gunawardena was enrolled as a Proctor in 1945 and in August 1973 when she gave evidence she had been 33 years

in practice. According to her, she had a wide and varied practice. She had practised in the Magistrate's Court, was an experienced Notary and also given evidence as a witness many times. She admitted that she was being sued in D.C. Colombo Case No. 69930/M. for Rs. 50,000/- as damages for fraudulently representing to the plaintiff in that case that she was the owner of certain premises and depriving him of possession of the premises. That case was pending and she was under cross-examination. She admitted that Dr Douglas Flamer Caldera had sued her in connection with Rs. 20,000/-that he had given her to be given out on interest, that ex-parte judgment was obtained against her about 30 years ago. She was examined under s. 219; she disclosed no assets and even now she has no assets. Rs. 20,000/- had still not been paid up.

A long time ago, she had also filed a private plaint in the Colombo South Magistrate's Court charging two persons with misappropriation of Rs. 41,000/- given by Dr Caldera and Dr Curuswamy for the supply of whisky to them. They neither supplied the whisky nor returned the money. She did not pursue with the case as her brother and sister did not allow her to do so and the accused were acquitted. Dr Caldera had given Rs. 20,000/- for supply of whisky and filed action stating that he gave Rs. 20,000/- to be given out on interest.

In her own divorce case, No. 4252, D.C., Colombo, her evidence was believed and she was granted a separation and awarded alimony.

Justin Peiris admitted that he was charged by the Bambalapitiya Police for having assaulted his brother-in-law one Marcus Fernando. He admitted that one Dyson had charged him on a private plaint for issuing a cheque without funds but said that he paid the money and the case was withdrawn and he was warned and discharged. He admitted that he had been charged in the Magistrate's Court along with 3 persons with having gone into various shops in Ja-ela and Kuliyapitiya and by fraud getting money on cheques issued without funds, but stated that they

were all acquitted. He admitted that his brother-in-law filed action against him claiming Rs. 10,000/- in a transaction where he had got his brother-in-law to endorse a cheque to enable him to get money from Medonsa. The trial Judge disbelieved him but stated that the case is in appeal. He admitted that he never paid income tax and is not possessed of any property.

According to the witness Jinadasa, who signed the Will P3 as a witness and worked under the late Ram Iswara as his Clerk, he knew Justin Peiris well and he frequently visited Ram Iswara's office in connection with land transactions and earned commissions from buyers. He was a broker who introduced customers to the proctor.

The learned trial Judge after a recital of evidence, both oral and documentary, posed the correct question for his decision— "The main matter for determination is whether the Will was destroyed as a result of duress exercised by the 11th respondent on Virginia as stated by Mrs Gunawardena or whether the Will was voluntarily destroyed by Virginia in the circumstances as set out by the 11th respondent." Thereafter, the first matter he adverted to was the failure of the appellant to disclose the existence of the Will P4 and that the said Will was destroyed on account of duress exercised by the 11th respondent, in his 1st application for letters of administration, and stated — "If Will 1027 was in fact destroyed as a result of duress exercised by the 11th respondent, this was a matter which could not have escaped the attention of Mrs Gunawardena who is a senior and experienced lawyer. Nor could she have failed to mention this fact to Counsel, when Counsel prepared the original application for letters of administration on behalf of the petitioner. To my mind, the probabilities are that if this Last Will 1027 (P4) had been destroyed as a result of duress exercised by the 11th respondent, these matters would have been brought to the notice of Court when the petitioner first filed papers for letters of administration." The learned trial Judge concluded — "The probabilities are that such matters were not brought to the notice of Court, for, there was no incident in which Will 1027 was destroyed as a result of any duress exercised by the 11th

respondent." This is the first reason given for rejecting Mrs Gunawardena's evidence.

Thereafter, the learned trial Judge gave 6 other reasons for rejecting the evidence of Mrs Gunawardena—

(1) If Justin Peiris was taking Virginia for the purpose of revoking the Last Will P4, it is unlikely that he would have travelled with her in her car.

(2) It seems strange that Justin Peiris who had accompanied Virginia should suddenly scold her with regard to dispositions made by her in favour of the appellant, in the presence of Mrs Gunawardena.

(3) There is no evidence of any threats made on Virginia.

(4) Mrs Gunawardena could well have informed the Police or looked up the Will in her safe and refused to give it back. She, however took no such action.

(5) Virginia could not have left the flat in the same car with the 11th respondent who had exercised the duress.

(6) Virginia had informed Mrs. Gunawardena that the appellant had come to her home, armed with a revolver and threatened her with bodily harm. Virginia must necessarily have been disgusted with the appellant over this incident. Mrs Gunawardena's assertion that Virginia told her that the uncles had got the appellant drunk and induced him to threaten Virginia is not supported by evidence and is without foundation.

Having set out the above reasons, the learned trial Judge stated — "I prefer to accept the evidence of the 11th respondent that Virginia saw Mrs Gunawardena on the day in question with the view to revoke the Will P4 in favour of the petitioner as she was disgusted with the petitioner who had threatened her with bodily injury with a revolver."

The learned trial Judge next considered the deeds P5 to P8 and stated that he was not impressed with the

reason adduced by Mrs Guanwardena that the deeds were not executed as the stamp fees were not forthcoming. He added — "Although Mrs Gunawardena has not been cross-examined on the draft deeds as containing the instructions given by the deceased, I am unable to accept her evidence that these draft deeds were prepared on Virginia's instructions."

The learned trial Judge concluded — "Mrs Gunawardena's evidence is totally unacceptable and I regret I have to reject her evidence. I prefer to accept the evidence of the 11th respondent. I am satisfied that Virginia Fonseka had on her own free will, in the presence of Justin Peiris, requested the Notary Gunawardena, as she lawfully might, to destroy the Last Will P4, for the reason given by Justin Peiris in his evidence, namely, that she did not want to leave any property to Ranjith, the petitioner." He held that both Wills P3 and P4 have been validly revoked by Virginia animo revocandi, and that the estate of the deceased will be administered as on an intestacy.

The learned trial Judge answered issue 2 in the negative, issue 20 in the affirmative, issues 4 (a), (c) and 5 and 6, in the negative, and 4 (b) in the affirmative. The appellant's application was dismissed.

The appellant preferred an appeal to the Court of Appeal. The Court of Appeal held that the first reason given by the trial Judge for rejecting the evidence was not tenable as this reason was consequent on a "serious misdirection on the evidence." The Court of Appeal said— "Mrs Gunawardena in her evidence made it clear that the reason for the failure to mention the fact that P4 was destroyed and the circumstances in which P4 came to be destroyed was on the advice of senior Counsel appearing for the petitioner. In fact she mentioned the name of the senior Counsel in the course of her evidence and at that time the Counsel was present in Court. Counsel remained silent. The trial Judge overlooked the explanation given by Mrs Gunawardena and nowhere in his judgment has he considered Mrs Gunawardena's evidence that she acted on Counsel's advice at the stage when the

original application for letters of administration with the Will P3 annexed was filed in the District Court. In these circumstances I am of the view that the failure of Mrs Gunawardena to bring to the notice of Court the existence of P4 and its subsequent destruction by reason of duress is not a tenable ground upon which her evidence could have been rejected by the trial Judge."

The Court of Appeal affirmed and highlighted the 4th reason given by the learned trial Judge for the rejection of Gunawardena's evidence and said that the trial Judge has addressed his mind to a very relevant matter, namely, the conduct of Mrs Gunawardena both before and after the destruction of the Will, in that, she had failed to take steps to safeguard the document P4 which was attested by her and given to her for safe-keeping and prevent its destruction against Virginia's wishes, and had failed to make a police statement though she went past the Cinnamon Gardens police station that very evening. The Court of Appeal asked "would not common prudence require her to place on record the circumstances in which the Will was destroyed which she had attested and which was handed over to her by the testatrix for safe-keeping? and concluded that Mrs Gunawardena's conduct both before and after the alleged duress leaves much to be desired, and lends no credence to her story of duress."

The Court of Appeal then adverted to 5 attendant circumstances, which the learned trial Judge had overlooked, which according to the petitioner supported his plea of duress—

(1) No provision was made for Virginia's brothers and sisters and her intestate heirs in any one of the Wills P1 to P4.

(2) Virginia's properties belonged to her late husband Herbert Fonseka. Mervyn and his children are the legitimate heirs Herbert's property. Virginia's brothers and sisters were strangers.

(3) There was no need for Virginia to ask Justin to accompany her. Her relationship to Mrs Gunawardena was so close that she could have gone along alone or got down Mrs Gunawardena to her home.

(4) Virginia knew how to revoke a Will. She could have written another Will without resorting to the device of intestacy.

(5) Virginia had made 4 Wills. It was unnatural for her to die intestate.

The Court of Appeal regarded these as relevant circumstances, but, went on to give 2 additional reasons for affirming the judgment of the trial Judge—

(1) Having regard to the statement of objections of the respondents, Issue No. 20, Mrs Gunawardena's evidence about the pistol incident and Justin Peiris' denial that he induced the appellant to drink and then threaten Virginia with a pistol, the appellant's conduct was a live issue throughout the proceedings. He was in the best position to speak to the actual state of feelings between him and Virginia at or about the time of the destruction of the Will. "It is difficult to resist the conclusion that the petitioner's failure to get into the witness box tells heavily against him". The appellant could have also corroborated Mrs Gunawardena's evidence that he took the deeds away and that they could not be executed as Rs. 10,000/- for stamp fees was not available.

(2) Mrs Gunawardena was 64 years old, a senior and experienced lawyer who practised both in the civil and criminal Courts and had been a litigant as well. Was she the kind of person who would meekly bring out the Will and tear it on account of the abuse and threats of Justin Peiris? The personal impression formed by the trial Judge who had the undoubted advantage of listening to her and observing her for several days in the witness box cannot be easily discounted.

The Court of Appeal held that the learned trial Judge had not erred in answering the crucial issues, No. 2 and 20, and dismissed the appeal.

Thereupon, the appellant made an application to the Court of Appeal for leave to appeal to the Supreme Court under Article 128 (1) of the Constitution and obtained leave ex-parte on 23.1.86. In granting leave, the Court of Appeal stated —"We are of the view that the matters set out in para 9 of the petition constituted substantial questions of law". I reproduce para 9 below :—

9 (a) Whether the Court of Appeal having found that the initial rejection of the evidence of Mrs Muriel Gunawardena by the trial Judge was consequent on a serious misdirection and based upon an untenable ground, failed to appreciate that this cardinal factor coloured the entire approach of the trial Judge on the question of her credibility and thus erred in law in nevertheless drawing upon the trial Judge's views as to her credibility and in making this the basis of its own conclusion on the issue of duress:

(b) Whether the Court of Appeal erred in law in confirming the trial Judge's view that the petitioner had prior to the revocation of the said Last Will, harassed, ill-treated and threatened to kill the deceased, without a proper consideration of the evidence of Justin Peiris who was himself not an eye witness to any of these allegations and who did not depose to any personal knowledge of such facts; and also especially because the deceased had at no time made any complaints to the Police against the petitioner whereas she had on several occasions made such complaints against her brother Wilfred and his wife:

(c) Whether the Court of Appeal having found serious misdirection in the evaluation of the evidence in this case by the trial Judge, in addressing itself afresh to the task of assessing the evidence on the issue of duress, itself committed a substantial error of law by wholly omitting to consider the several infirmities in the evidence of Justin Peiris, the respondent's only witness, such as for instance the following:—

i. Justin is a witness with an obvious interest in lying because he stood to gain as an intestate heir one sixth (1/6th) of the deceased's very valuable estate if his version of the destruction of the said last Will was believed.

ii. Justin was a person who did not have an unblemished character in that he admitted (a) that the Bambalapitiya Police had charged him with having assaulted his brother-in-law Marcus Fernando, (b) that he had been warned and discharged in a criminal case where one Dyson complained that Justin had cheated him by issuing a cheque without funds, (c) that he had been charged in the Magistrate's Court of Negombo and Gampaha with having gone into various shops at Ja-ela and Kuliyapitiaya and defrauded them by obtaining money on cheque issued without funds.

iii. Justin's version of the incident of the destruction of the said Last Will was improbable and incredible in several particulars such as for instance the following. (a) what he stated in evidence was not put to Muriel when she was cross-examined, namely that the deceased had expressly declared her intention to benefit her brothers and sisters in the presence of Muriel and that after tearing the Will Muriel had herself declared aloud that everything will now go to the deceased's brothers and sisters, (b) the deceased had made no provision for any of her brothers and sisters in any one of the four Wills executed by her in her lifetime and in the said Last Will she had even provided for alternate heirs to the petitioner in the event of his dying unmarried and without issue, (c) as proved conclusively by the deceased's police statements marked P9 to P15 there was one brother whom the deceased would never have wanted to benefit by dying intestate namely her brother Wilfred, who is an intestate heir to one sixth (1/6th) of the estate;

iv. Justin's allegation of the deceased's animosity towards the petitioner rested entirely on what he claimed was told to him by the deceased, but the most important of these allegations which if true would have provided the proximate cause for the destruction of the said Last Will was never put to Muriel during her cross-examination, namely, that on the very day when the deceased went to Muriel's flat with Justin she told Muriel "even today Ranjith came to assault me."

d. Whether by such a failure and uncritical acceptance of Justin's evidence, the Court of Appeal failed to consider the whole case upon a preponderance of probabilities which was the applicable standard of proof and instead considered the issue of duress as though it was a charge in a criminal case and thereby committed a substantial error of law.

In the written submissions filed in this Court on behalf of 8th, 10th and 11th respondents, the point has been made that "there has been no mistake of law on the part of the trial Judge or in the judgment of the Court of Appeal to permit the appellant to appeal to the Supreme Court on the point of law."

Learned Queen's Counsel for the 11th respondent submitted that we must reject the appeal as, leave alone substantial questions of law, there is no question of law involved at all. What is involved is a straightforward question of fact - belief or disbelief of witnesses which is a pure question of fact based on the credibility of witnesses. There is no mistake of law in the judgment of the Court of Appeal. The appellate jurisdiction of this Court has been invoked under Article 128(1) of the Constitution. If the Court of Appeal grants leave to appeal, it must be on a substantial question of law. If no substantial question of law is involved, then, despite the leave granted by the Court of Appeal, this Court will not hear the appeal.

Learned Queen's Counsel further submitted that there are concurrent findings by the trial Judge and the Court of Appeal and as such, this Court will not interfere.

Learned President's Counsel, on the other hand, submitted that as regards the order of the Court of Appeal granting leave, there were 2 courses open to the respondents—(1) they could have applied to the Court of Appeal for leave to appeal to the Supreme Court from the order of 23.1.86, (2) in the event of the Court refusing leave to appeal, they should have applied to the Supreme Court for special leave to appeal within 21 days of the refusal to grant leave. The respondents cannot raise the matter at hearing of the appeal. This Court has no jurisdiction to decide whether the order of 23.1.86 is valid or not.

Learned President's Counsel further submitted that the matter raised in para 9 of the application for special leave involves substantially questions of law.

It is unnecessary for me to decide whether it is now open to this Court to decide the validity of the order of 23.1.86.

In *Collettes v. Bank of Ceylon (1)* the Court of Appeal referred to the Supreme Court for determination, inter alia, as to what constitutes a "question of law" within the meaning of Article 128(1) of the Constitution, and as to when does a question of law become a "substantial" question of law, within the meaning of the said Article. Sharvananda, J. (as he then was) determined, inter alia, with 4 other Judges concurring, thus:— "The question whether the Tribunal has failed to take into account relevant considerations is a question of law . . . . The proper test whether a question of law raised in the case is substantial would be . . . . . whether it directly or substantially affects the rights of parties."

When one examines the contents of para 9 of the application for special leave, it seems to me that the gravamen of the appellant's complaint is that the Court of Appeal has not properly considered and evaluated the evidence of Justin Peiris.

It has failed to consider relevant matters set out in subpara c.i-iv of para 9 and the infirmities in his evidence. If these matters were considered by the Court of Appeal, the conclusion of the Court of Appeal might have been different.

It seems to me, that this is a point of law. Further, it is a substantial question of law, for, the belief or disbelief of either Mrs• Gunawardena or Justin Peiris would directly and substantially affect the rights of parties. If Mrs Gunawardena is believed, then the appellant would inherit the entirety of "King's Royal" and half-share of Hotel Du Roi and the residual estate. If Justin Peiris is believed, then, the estate devolves on intestacy and the brothers and sisters of Virginia would get a 1/6th share and the appellant also as an intestate heir would receive a much reduced share as a grandson of Janet, Virginia's deceased sister.

In regard to concurrent findings, in *Collettes Ltd. v. Bank of Ceylon (2)* Sharvananda, J. (as he then was) said:

> "Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings."

In *Flower v. Ebbw Vale Steel, Iron and Coal Co. (3)* the trial Judge found that the workman was guilty of contributory negligence in that he disobeyed the orders of his employer and dismissed his claim for damages for personal injury sustained by him while cleaning the machine. The Court of Appeal affirmed

the judgment of the trial Judge. The House of Lords allowed the appeal of the workman and awarded him damages. Lord Wright (at 220 & 221) said:

> "It is further objected that there are here concurrent findings of fact. That would not be a relevant consideration if the case were one in which there was no evidence at all that any such specific instructions as were relied on were brought home to the appellant's mind. I do not feel it necessary to say whether I am so satisfied, but I am quite clear that there is no sufficient evidence."

It is not the appellant's complaint that there is no evidence or insufficient evidence to support the conclusion arrived at by the trial Judge which has been affirmed by the Court of Appeal. The complaint of the appellant is that in reaching the conclusion, both the learned trial Judge and the Court of Appeal have failed to consider and evaluate the evidence of Justin Peiris and if this was done, the conclusion might well have been different. In short, that relevant evidence has not been considered. So, I propose to consider Justin Peiris' evidence.

Justin Peiris described himself as a Land Sales Commission Agent. He received commissions for putting through land transactions. He admitted that he never paid income tax and was not possessed of any property. As an intestate heir of Virginia, he stood to gain a 1/6th share of her estate if his version of the destruction of the Will was believed. But, on the other hand, there is Jinadasa's evidence that Justin Peiris came regularly to Mr Ram Iswara's office regarding land transactions and had put through several transactions through Mr Ram Iswara. He was therefore well known to Mr Ram Iswara who attested Last Will P3. Justin Peiris had signed (P3) as a witness. It is his evidence that Virginia took the Will P2 on the occassion she met Mr Ram Iswara and had a discussion with the Proctor and gave instructions in his presence. If so, Justin Peiris would have known that the appellant was going to be the sole beneficiary under P4 and that Virginia was not going to benefit her own brothers and

sisters. If Justin Peiris took offence and was disappointed, it is unlikely he would have signed as a witness. And for a period of a little over 6 years, the Will P3 stood and there is no evidence that Justin Peiris created any trouble for Virginia for not making any provision for her own brother and sisters.

As to why they went to Mrs Gunawardena's flat is spoken to only by Justin Peiris — that he went along at the instance of Virginia. There is no evidence that Justin Peiris took her by force and against her will. Of course, he admits that having regard to the close relationship between the two ladies, there was no need for Virginia to take him along. Virgina could have even telephoned Mrs Gunawardena, sent her car, and got her down to her own house. But, if Virginia had decided to disinherit the appellant and was afraid of the appellant, of her two brothers, it would be to Justin Peiris she would look for advice and support. Clearly she was on bad terms with Wilfred. Justin Peiris said his relationship with Virginia up to the time of her death was cordial. Though Mrs Gunawardena's position was that the two brothers had tormented Virginia and that she personally knew about complaints by Virginia against them, and though it was put to Justin Peiris by the appellant's Counsel that he made life a hell for her, the police complaints reveal that they were against Wilfred only. It was Mrs Gunawardena who had attested the Wills P1, P2 and P4. Why did Virginia go to Mr Ram Iswara for the execution of the Will P4? Brightie Holmes, Mervyn's wife was given a life interest in premises No. 35, Galle Road, by P2. Mrs Gunawardena gave a reason for omitting Brightie in P3 —Mervyn had filed action to divorce her and the case was pending. Did Virginia seek advice from Justin Peiris and on his advice go to Mr Ram Iswara to consult and execute P3? Mr Ram Iswara was well known to Justin. If so, Justin would be the person she would seek advice from again in case she wanted to disinherit the appellant if she was disgusted with his conduct.

In the statement of objections, the position of Justin Peiris was that sometime prior to her death, the appellant harassed and ill-treated Virginia and threatened to kill her and in

consequence of the said harassment, ill-treatment and threats, the deceased destroyed the Will in the presence of Mrs Gunawardena. Issue 20 is to the effect that the appellant prior to the revocation, harassed, ill-treated and threatened to kill Virginia. The defence version that was put to Mrs Gunawardena was that Virginia told her that the appellant was causing her a lot of trouble, threatened her with bodily harm and even with murder. Justin Peiris' evidence is that prior to going to Mrs Gunawardena, Virginia told him that the appellant is harassing her, threatening her with bodily harm and that even on that day, he had come with thugs and threatened; that in the flat, Virginia told Mrs Gunawardena that even today, the appellant had come to assault her, and he had mentioned this fact too to his Counsel. This portion of his evidence was not put to Mrs Gunewardena. The further evidence of Justin Peiris that Mrs Gurawardena told Virginia that the destruction of P4 will not revive P3 was also not put to Mrs Gunawardena.

In this case we have 2 sharply conflicting oral versions of how the Will came to be torn. The Court of Appeal was of the view that the personal impression formed by the trial Judge who had the undoubted advantage of listening to Mrs Guanawardena and observing her for several days in the witness box cannot be easily discounted. True that the trial Judge has had the "priceless advantage" of seeing her and observing her demeanour in the witness box. The question is, has he used this advantage of seeing and observing her demeanour and consider it a material element in considering whether she is a truthful witness or not? Nowhere in the judgment has the trial Judge made any reference to the demeanour of Mrs Gunawardena in the witness box and of any impression left in his mind. The disbelief of Mrs Gunawardena is not based even partly upon her demeanour; on the contrary, the trial Judge has given reasons for rejecting her evidence. However, the conduct of Mrs Gunawardena and Justin Peiris before the Will was torn has an important bearing on the question as to who should be believed. The Court of Appeal rightly considered the conduct of Mrs Gunawardena both before and after the alleged duress and concluded that it leaves much

to be desired. As regards the conduct of Mrs Gunawardena prior to the destruction of the Will, learned President's Counsel submitted that there were 2 courses of action open to Mrs Gunawardena — refuse to part with P4 and risk a confrontation with Justin Peiris or tear up P4 and later take corrective action to safeguard her client Virginia's interests; that in fact this is what she did in preparing the draft deeds, the terms of which are substantially the same as P4. This submission, in my view, loses its force as the evidence is that later in the evening, the idea of executing deeds was conceived by Virginia who instructed Mrs Gunawardena to prepare the draft deeds.

In regard to Justin Peiris' conduct there is one important aspect which stands out prominently in his favour. According to Mrs Gunawardena, the last page of P4 was blank and she brought it out from her almirah folded longitudinally. She did not read out the contents of P4 and neither Virginia nor Justin Peiris would have known the contents of the document she tore. It is Justin Peiris' evidence that Mrs Gunawardena brought "some paper" from her bed room and destroyed it. P4 bears the number 1027 dated 11.7.68. In the statement of objections of the respondents filed on 28.2.71, the number and date P4 were given as No. 1037 dated 17.10.68 and both particulars were wrong. Mr Chellappah moved to amend and insert the correct number and date, only after learned Queen's Counsel for the appellant pointed out the error on 14.6.72. Even as at June 1972, Justin Peiris did not know the correct date and number of P4. According to the appellant's case, Justin Peiris set out on a mission — to destory Will P4. In the flat, he overwhelmed both women by his threats and devilish appearance. He could then well have demanded to see P4 to ensure that the correct document was being torn, and yet he did not. The man who went on a calculated mission made no attempt to make certain that his mission was not to be in vain. This conduct of Justin Peiris could only be explained on the basis, as put by his Counsel to Mrs Gunawardena that Justin Peiris had "X'ray eyes" which penetrated through a folded document and saw its contents.

It stands to the credit of Justin Peiris that he got into the witness box and faced the search light of cross-examination. The appellant did not. The Court of Appeal was of opinion that the appellant ought to have given evidence in regard to two matters — the pistol incident and that the non-execution of the deeds for want of money to meet the stamp fees — and that his failure to do so told heavily against him.

In regard to the pistol incident, Mrs Gunawardena who testified to what Virginia told her, also stated that Virginia told her that the appellant's uncles had got him drunk and given him a revolver to point at her. She did not find fault with him over this incident. Justin Peiris, however, denied that he induced the appellant to drink and put him up to threaten Virginia with a pistol. Justin Peiris also in his evidence stated that the appellant was running Hotel Du Roi for about a year before Virginia's death and was giving Virginia her share; that he visited the Nursing Home and paid Virginia's medical and Nursing Home expenses, used her car without objection and until a month before she died, Virginia was fond of the appellant. The appellant's Counsel therefore submitted that this being the state of evidence, the appellant need not have given evidence, as despite the pistol incident, Virginia's fondness for the appellant remained undiminished. The appellant had no case to meet. I cannot agree with this submission.

According to learned President's Counsel, the draft deeds were produced to show that Virginia had no intention of disinheriting the appellant, that the Will was not destroyed animo revocandi, and that it was a cogent circumstance which supported Mrs Gunawardena's version that P4 was destroyed under duress by Justin Peiris. If Virginia was fond of the appellant until her dying day despite the pistol incident, why were the draft deeds not executed? The reason given by Mrs Gunawardena was that the appellant could not find Rs. 10,000/- for stamp fees. According to Justin Peiris, Virginia told him at the Nursing Home that the appellant was harassing her to have deeds written in his name and that she did not want to do so.

Virginia died on 10.12.69. According to Mrs Gunawardena's 2nd affidavit, she died about 15 days after admission to the Nursing Home and that 2 weeks before entering the Nursing Home, the Will P4 was torn. The Will therefore was torn about the 11th of November. There was about a month for the deeds to be executed. Mrs Gunawardena stated that she and the appellant visited Virginia at the Nursing Home and that Virginia appeared to be all right. It is not her position that Virginia was physically and mentally disabled and was therefore not in a fit condition to execute the deeds. She has further stated that Virginia was a rich lady and had considerable income, and that the appellant is in receipt of a good income from Hotel Du Roi. Then, why were the deeds not executed despite the fact that the appellants was forgiven over the pistol incident and he was in receipt of a good income? If he did not have ready money, could he not have raised the money by other means, considering the valuable property and business he was getting? These are questions that called for answers from the appellant and he has failed to do so to his detriment.

The appellant's Counsel sought to attack the credibility of Justin Peiris on the ground that he had issued cheques without funds. But I find from the evidence that in one case he had honoured the dishonoured cheque and he had been warned and discharged. In the second case he was acquitted and the third case is in appeal and is sub judice.

Before I conclude, I must advert to another submission made by learned Queen's Counsel. In *Sri Lanka Ports Authority v. Peiris (4)* Sharvananda, J. (as he then was) said:

> "Article 127 spells the appellate jurisdiction of this Court. This appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any Court of first instance. On reading Articles 127 and 128 together, it would appear that once leave to appeal is granted by the Supreme Court or the Court of Appeal and this Court is seized of the appeal, the jurisdiction of this Court to correct all errors in fact or in law

which had been committed by the Court of Appeal or Court of first instance is not limited but is exhaustive. Leave to appeal is the key which unlocks the door into the Supreme Court, and once the litigant has passed through the door, he is free to invoke the appellate jurisdiction "of this Court" for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any Court of first instance."

This view, Sharvananda J. reiterated in *Collettes Ltd. v. Bank of Ceylon (supra)*. It was learned Queen's Counsel's submission that this is an erroneous view because the appellate jurisdiction of this Court is spelt out in Article 128 (1) and the power to act within a given jurisdiction is spelt out in Article 127(1); that Article 128 (1) controls the powers of this Court under Article 127(1); and therefore when dealing with an appeal that comes to this Court under Article 128 (1), this Court must confine itself to substantial questions of law and cannot review the whole case under Article 127(1). It is unnecessary for me to decide whether Sharvananda, J. (as he then was) was correct or not in the view he had taken, as, in my opinion, the failure to consider Justin Peiris' evidence is a substantial question of law.'

I am not inclined to reverse the findings of the learned trial Judge on issues Nos. 2 and 20 and which have been affirmed by the Court of Appeal. I affirm the judgments of the learned trial Judge and the Court of Appeal and dismiss the appeal with costs.

RANASINGHE, C.J., — I agree.

SENEVIRATNE, J. — I agree.

Appeal dismissed.