SOMARATNE RAJAPAKSE OTHERS V. HON. ATTORNEY GENERAL (KRISHANTHI KUMARASWAMY RAPE CASE)

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J.,
EDUSSURIYA, J.,
YAPA, J.,
J.A.N. DE SILVA, J. AND
JAYASINGHE, J.
S.C. APPEAL NO. 2/2002 (TAB)
H.C. COLOMBO NO. 8778/97
NOVEMBER 12TH, 17TH, 27TH AND 28TH 2003

Penal Code - Section 293 - Culpable homicide - Section 294 - Murder - Section 298 - Punishment for murder - Section 32 - Liability for act done by several persons in furtherance of common intention - Section 357 - Kidnapping or abducting a woman to compel or force her to have illicit intercourse or seduce to illicit intercourse - Section 364 - Code of Criminal Procedure Act - Section 241 - Trial may be held in the absence of accused - Section 450 - Trial at Bar - Evidence Ordinance - Section 25 - Confession made to a police officer not to be proved against an accused person - Section 27 - How much of information received from accused may be proved; a fact discovered by reason of such information - Army Act - Military Law.

This is an appeal filed in terms of Section 451 (3) of the Code of Criminal Procedure Act against the conviction and sentences imposed by the judgment of the Trial-at-Bar on the Accused – Appellants [Appellants].

The 1st to 5th Appellants had made confessions to the Military Police accepting their culpability to the offences in question. In addition, the Appellants did not offer any explanation as to how they came to know independently of one another, the exact location of where the bodies of the four deceased persons and where their clothing were buried.

At the hearing, the Appellants took up the following seven grounds of appeal;

(1) Three Judges of the Trial-at-Bar gave three separate Judgments independent of each other without any indication on record that there was concurrence or agreement. Accordingly, there was no valid Judgment.

(2) The Trial-at-Bar erred in law by admitting the confessions made by the Appellants to the Officers of the Military Police when in fact they were obnoxious to Section 25 of the Evidence Ordinance.

(3) The Trial-at-Bar erred in law by effectively inferring guilt of the Appellants from recoveries made in terms of section 27 of the Evidence Ordinance.

(4) The Trial-at-Bar erred in law by placing reliance on photographic evidence to establish identity of the victims.

(5) The Trial-at-Bar erred in law by failing to judicially evaluate the items of circumstantial evidence.

(6) The Trial-at-Bar erred in law by rejecting the Dock Statements made by the Appellants on the basis of a consideration of the contents of the confessions admitted in evidence.

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

Held:

(1) Notwithstanding there were three separate Judgments by the three Judges, all of them have come to the same conclusion after considering the material individually and collectively. It cannot be accepted that there was no valid judgment merely because the Trial-at-Bar delivered three separate Judgments.

(2) Considering the powers and the authority the Military Police Officers have over the persons in their custody, combined with the gravity of the charges, the detention incommunicado, and the inaccessibility to lawyers to practice the rights of such persons in their custody would be paramount necessity to include a Military Police Officer also into the definition of "Police Officer" in terms of Section 25 of the Evidence Ordinance.

Accordingly the confessions made to Military Policy Officers by the Appellants are inadmissible and therefore cannot be used against the Appellants.

(3) A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery.

The Judges of the Trial-at-Bar had correctly selected the portion of the statement which is distinctly related to the discovery of the bodies of the four persons and their clothing and had deleted the other parts of the statements made by the Appellants.

(4) Taking into consideration the position that there is no principle in the law of evidence which precludes a conviction in a criminal case being based entirely on circumstantial evidence and the fact that the Appellants decided not to offer any explanations regarding the vital items of circumstantial evidence led to establish the serious charges against them, the Trial-at-Bar has not erred in coming to a finding of guilt against the Appellants.

Per Dr. Shirani Bandaranayake, J., -

"Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct, there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him."

(5) On consideration of the Judgments of the Trial-at-Bar, it would appear that due consideration has been given to the dock statements made by the Appellants.

(6) Section 160 (3) of the Code of Criminal Procedure Act provides that the Attorney General has the power to substitute or include in the indictment any charge in respect of any offence, which is disclosed in evidence.

(7) The evidence considered established beyond reasonable doubt that the Appellants are guilty of the offences with which they have been convicted.

Cases referred to:

1. *R. v.Ireland* – [1970] 44 A.L.J.R. 263
2. *Lake v. Lake* – [1955] 1 AER 538
3. *Rose v. Fernando* – (1927) 29 N.L.R. 45
4. *Raj Ram Jaiswal v. State of Bihar* – AIR (1964) S.C. 828
5. *Jothi Savant v. State of Mysore* – AIR (1976) S. C. 1746
6. *Balakrisnan v. State of Maharastra* – AIR (1981) S.C. 379
7. *Illias v. Collector of Customs* – AIR (1970) S.C. 1065
8. *Nuge Kanny v. Pables Perera* – (1908) 1 Thambiah Raports 25
9. *Videne Arachchi of Kalupe v. Appu Sinno* – (1921) 22 N.L.R. 412
10. *Queen v. Rev. H. Gnanaseeha Thero and 21 others* – (1969) 73 N.L.R. 154
11. *Colombe v. State of Connecticut* - (367) US 568
12. *Murugan v. Ramasamy* – (1964) 68 N.L.R. 265
13. *R. v. Babu Lal* – ILR 6A 509
14. *Thurtell v. Hunt* – (1825) Notable British Trials, 145
15. *Piyadasa v. The queen* – (1967) 72 N.L.R. 434
16. *Kottaya v. Emperor* – (1947) AIR (P.C.) 70
17. *Chakuna Orang v. State of Assam* – (1981) Cri. L. J. 166
18. *R. V. Gunaratne* – (1946) 47 N.L.R. 145
19. *Queen v. Santin Singho* – (1962) 65 N.L.R. 445
20. *R. V. Lord Cochrane* – (Gurney's Reports 479)
21. *R. V. Seedar de Silva* – (1940) 41 N.L.R. 337
22. *Premathilake v. The Republic of Sri Lanka* –(1972) 75 N.L.R. 506

23. *Richard v. The State* – (1973) 76 N.L.R. 534

24. *Illangantillke v. The Republic of Sri Lanka* – (1984) 2 Sri L.R. 38

APPEAL against the conviction and sentences imposed by the judgment of the Trial-at-Bar.

Ranjith Abeysuriya, P.C., with Thanuja Redrigo for the 1st Accused – Appellant.

Dr. Ranjith Fernando with *Hashini Gunawardene* and *Himalee Kularatne* for the 2nd, 3rd, 4th and 5th Accused- Appellants.

C. R. de Silva, Solicitor General, P.C., with *Sarath Janamanne,* S.S.C. for the Attorney-General.

Cur.adv.vult.

February 03rd 2004

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal filed in terms of Section 451 (3) of the Code of Criminal Procedure Act, as amended by Act No. 21 of 1988 against the conviction and sentences imposed by the judgment of the Trial at Bar on the accused-appellants (here-inafter referred to as appellants).

Originally nine accused were indicated on 18 Counts. Of the 18 Counts in the indictment 1st to 7th Counts were unlawful assembly Counts for committing abduction, rape and murder and all the accused-appellants were acquitted on those Counts. Therefore the counts that would be material for the purpose of this appeal are the counts numbers 8 to 18. They are as follows:-

Count No. 8 – The accused-appellants abducted Krishanthi Kumaraswamy, an offence punishable under Section 357 read with Section 32 of the Penal Code.

Count No. 9 – That the 1st accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 10 – That 2nd accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 11 – That the 3rd accused-appellant committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 12 – That 4th accused-appellant committed rape on Krishathi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 13 – That 7th accused –appellant (the 5th appellant in this appeal) committed rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 of the Penal Code.

Count No. 14 –The 8th accused-appellant attempted rape on Krishanthi Kumaraswamy, an offence punishable under Section 364 read with Section 490 of the Penal Code.

Count No. 15 – That they caused the death of Krishanthi Kumaraswamy, an offence punishable under Section 296 read with Section 32 of the Penal Code.

Count No. 16 – that they caused the death of Rasamma Kumaraswamy, an offence punishable under Section 296 read with Section 32 of the Penal Code.

Count No. 17 – That they caused the death of Pranavan Kumaraswamy, an offence punishable under Section 296 read with Section 32 of the Penal Code.

Count No. 18 – That they caused the death of Kirubamoorthi, an offence punishable under Section 296 read with Section 32 of the Penal Code.

One accused, namely, W.S.V. Alwis died during the course of the trial, accused D.G.Muthubanda was acquitted at the end of the prosecution case and accused A.P. Nishantha was acquitted at the end of the trial. The 8th accused, namely, one D.V. Indrajith Kumara was absconding during the course of the trial and therefore the trial against him proceeded in absentia, in terms of Section 241 of the Code of Criminal Procedure Act, No. 15 of 1979. The 18 counts on which accused were indicted related to charges of unlawful assembly and common intention in respect of the offences of abduction, rape and murder. These charges related to the abduction, rape and murder of Krishanthi Kumaraswamy, murder of Rasamma Kumaraswamy, murder of Pranavan Kumaraswamy and murder of Kirubamoorthi. Rasamma Kumaraswamy and Pranavan Kumaraswamy were the mother and the brother respectively of Krishanthi Kumaraswamy and Kirubamoorthi was a neighbour as well as a friend of Kumaraswamy family.

At the conclusion of the Trial at Bar, the 1st appellant was found guilty of charges relating to abduction (Krishanthi), rape (Krishanthi) and murder (Krishanthi, Rasamma, Pranavan and Kirubamoorthi) and was sentenced to 10 years rigorous imprisonment on the abduction charge and a fine of Rs. 50,000/- with a default term of 2 years rigorous imprisonment (Court 8), 20 years rigorous imprisonment on the rape charge (Count 9) and the death sentence on the murder charges (Counts 15, 16, 17 and 18).

The 2nd appellant was found guilty of charges relating to rape (Krishanthi) and murder (Krishanthi, Pranavan and Kirubamoorthi) and was sentenced to 20 years rigorous

imprisonment on the rape charge (Count 10) and the death sentence on the murder charges (Counts 15, 17 and18).

The 3rd appellant was found guilty of charges relating to abduction (Krishanthi), rape (Krishanthi) and murder (Krishanthi) and was sentenced to 10 years rigorous imprisonment on the abduction charge and a fine of Rs. 50,000/- with a default term of 2 years rigorous imprisonment (Count 8), 20 years rigorous imprisonment on the rape charge (Count 11) and the death sentence on the murder charge (Count 15).

The 4th appellant was found guilty of charges relating to abduction (Krishanthi) rape (Krishanthi) and murder (Pranavan and Kirubamoorthi) and was sentenced to 10 years rigorous imprisonment on the abduction charge and a fine of Rs. 50,000/-with a default term of 2 years rigorous imprisonment (Court 8), 20 years rigorous imprisonment on the rape charge (Count 12) and the death sentence on the murder charges (Counts 17 and 18).

The 5th appellant was found guilty of charges relating to rape (Krishanthi) and murder (Rasamma, Pranavan and Kirubamoorthi) and was sentenced to 20 years rigorous imprisonment on the rape charge (Count 13) and the death sentence on the murder charges (Courts 16, 17 and 18).

The 1st appellant was a Lance Corporal attached to the Sri Lanka Army serving in Jaffna. On the day of the incident, viz., 07.09.1996, he was assigned to the Chemmuni Security Check Point. The 2nd and 4th appellants were soldiers of the Sri Lanka Army who had been assigned duties at the Chemmuni Security Check Point whereas the 3rd appellant was a Reserve Constable who had been assigned duties at

the said check point. The 5th appellant was a Corporal of the Sri Lanka Army who had been assigned to the Forward Defence Line which was situated about 50 meters away from the Chemmuni Security Check point.

At the time of the incident which took place in 1996, Krishanthi Kumaraswamy was eighteen years old and was sitting her General Certificate of Education (Advanced Level) Examination from Chundikuli College, Jaffna. She has lost her father in 1984 and lived with her mother Rasamma and younger brother Pranavan in Kaithadi South. Her elder sister, Prashanthi, was resident in Colombo. Krishanthi had been decribed as an intelligent student who had obtained seven Distinctions and one Credit Pass at the General Certificate of Education (Ordinary Level) Examination.

Rasamma Kumaraswamy was 59 years of age at the time of her death. She was a Graduate and a former Principal of Kaithadi Muthukumaraswamy Maha Vidyalaya and was teaching at Kaithadi Maha Vidyalaya at the time of her death.

At the time this incident took place, Pranavan was a bright student aged sixteen years and studying at St. John's College, Jaffna.

Siddambaram Kirubamoorthi was a close friend of the Kumaraswamy family who had assisted them and was working at the Co-operative Stores.

(A) The case for the prosecution

On the day of the incident, viz., 7th September 1996, Krishanthi left home on her bicycle to sit for her Chemistry Multiple Choice question paper at Chundikuli College. She

was dressed in her white school uniform, red tie with socks and shoes. After handing over her answer script to the Supervisor sometime after 11.30 a.m., she had left the Examination Hall. Thereafter Krishanthi, with her classmate and friend Sundaram Gautami, went on their bicycles to the house of a deceased colleague to pay their last respects. These two girls had left the said funeral house around 12.30 p.m. and had parted company at a junction. Krishanthi was last seen cycling towards Kaithadi along the road where she had to pass the Chemmuni Check Point. When Krishanthi was cycling past the Chemmuni Security Check Point, she was ordered by the 1st appellant to stop on the pretext of wanting to question her. On obeying his orders, she alighted from her bicycle and then Krishanthi was taken inside a bunker, and a piece of cloth was tied around her mouth.

Due to the delay in her daughter's return after the examination, her mother Rasamma left home around 2.30 p.m. in search of her, after making inquiries from the neighbours. Pranavan and Kirubamoorthi accompanied her. They had left on two bicycles, one being Pranavan's black bicycle, which had a chain case with a special badge commonly known as 'the Honda badge'. They had arrived at the Chemmuni Security check point and inquired from the military personnel about Krishanthi. However, the 1st appellant had denied any knowledge of Krishanthi's whereabouts.

At that time Rasamma, Pranavan and Kirubamoorthi insisted on finding Krishanthi. The 1st appellant who did not want the matter being reported to higher authorities had taken the three of them inside a bunker and detained them forcibly. In the night, the appellant had strangled the two men (Pranavan and Kirubamoorthy) with a rope and buried

the two bodies behind the Security Check Point. Their clothes were buried in a separate pit. Rasamma was also murdered and buried in the same manner. Krishanthi was raped continuously by the appellants and murdered in the same way as was done with the other three. Her body was put in a pit behind the Security Check Point.

Sometime later the Army Authorities had received an anonymous petition regarding four missing civilians. Thereafter an inquiry commenced and the persons who were assigned to Chemmuni Security Check Point were interrogated and consequently four decomposed bodies together with items of clothing were exhumed from a point close to the said Chemmuni Security check Point.

The 1st, 2nd, 3rd, 4th and 5th appellants had made confessions to the Military Police accepting their culpability to the offences in question. In addition the appellants did not offer any explanation as to how they came to know independently of one another the exact location of where the bodies of those four persons and their clothing were buried.

At the hearing of this appeal, seven grounds of appeal were taken on behalf of the appellants. They are as follows:-

1. Three Judges of the Trial at Bar gave separate judgments independent of each other without any indication on record that there was concurrence or agreement and therefore there was no valid judgment of the Trial at Bar.

2. Trial at Bar erred in law by admitting the confessions made by the appellants to the Officers of the Military Police when in fact they were obnoxious to Section 25 of the Evidence Ordinance.

3. The Trial at Bar erred in law by effectively inferring guilt of the appellants from recoveries made in terms of Section 27 of the Evidence Ordinance.
4. The Trial at Bar erred in law by placing reliance on photographic evidence to establish identity of the victims.
5. The Trial at Bar erred in law by failing to judicially evaluate the items of circumstantial evidence.
6. The Trial at Bar erred in law by rejecting the Dock Statements made by the appellants on the basis of a consideration of the contents of the confessions admitted in evidence.
7. The Trial at Bar erred in law by the addition of a charge of rape following an amendment to the indictment which was illegal and therefore vitiated the entire proceedings.

It was contended that if the appellants were successful on the first ground of appeal, the trial would stand vitiated and the trial would have to be taken de novo. In respect of the other grounds, it was contended that if the appellants were successful, the convictions and sentences against the appellants should be set aside and they be acquitted.

Ground 1

Three Judges of the Trial at Bar gave three separate judgments independent of each other without any indication on record that there was concurrence or agreement and therefore there was no valid judgment of the Trial at Bar.

The appellants contended that they expected the three Judges of the Trial at Bar sitting together 'to jointly hear, consider and evaluate the evidence led', and to come to a

finding jointly. It was submitted that in this case the three Judges of the Trial at Bar have written three separate judgments totally independent of one another and had signed separately even making reference to their respective High Court stations in their judgments. Learned Counsel for the appellants further submitted that although the final findings in respect of the guilt of the appellants are the same in each judgment, on an interpretation of strict legal principles, it is not a valid and proper judgment of the Trial at Bar in respect of the appellants an therefore this case should be sent back for a trial de novo.

Halsbury's Laws of England (Vol, 26 -4th Edition pg. 237) defines the meaning of a judgment as 'any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court.' In *R v. Ireland*[1] it was stated that,

> "In a proper use of terms the only judgment given by a Court is the order it makes. The reasons for judgment are not themselves judgments though they may furnish the Court's reason for decision and thus form a precedent."

Discussing the reserved judgments in the House of Lords, Michael Zander (The Law Making Process, 4th edition, Butterworths pg. 283) point out that there could be a single judgment or separate judgments where there are disagreements. However, he has clearly pointed out that even when the Judges wholly or mainly agree with both the result and reasons still they write their own separate judgments.

The decision in *Lake v Lake* [2] again referred to the judgment or order as one which means the final judgment or order which is drawn up and not the reasons given by

the judge for the conclusion at which he arrives. Stroud's Judicial Dictionary of words and phrases described a 'judgment' as the sentence of the law pronounced by the Court upon the matter contained in the record. (5th Edition, Volume III, pg. 1374).

In this case three Judges of the Trial at Bar had arrived at the same conclusion for different reasons. It would appear that they had individual and different approaches when they considered the evidence individually and had evaluated various issues that arose in the course of the trial. Although there were there separate judgments written by the three Judges, all of them have come to the same conclusion, after considering the material individually and collectively. Therefore on a close examination of the three judgments it would not be a fair assessment to say that the three Judges have given three judgments in isolation without any indication on record that there was concurrence and agreement.

Further considering the legality of a judgment based on the aforementioned authorities it cannot be accepted that there was no valid judgment merely because the Trial at Bar had delivered three separate judgments.

Ground 2:

Trial at Bar erred in law by admitting the confessions made by the appellants to the Officers of the Military Police when in fact they were obnoxious to Section 25 of the Evidence Ordinance.

The contention of the learned Counsel for the appellants is that certain statements made by the appellants to the personnel of the Military Police have been admitted in evidence and acted upon by the Trial at Bar, holding that

a Military Police Officer would not come within the scope of the definition of a Police Officer in terms of Section 25 of the Evidence Ordinance.

It is not disputed that the confessionary statements of the appellants were recorded in the presence of Military Police Officers under the supervision of Major Podiralahamy and Lt. Col. Kalinga Gunaratne.

Section 25 of the Evidence Ordinance is in the following terms:

"No confession made to a Police Officer shall be proved as against a person accused of any offence."

It is to be noted that the Evidence Ordinance does not define the term Police Officer. The Police Ordinance defines the terms to mean a member of the regular Police Force and includes all persons enlisted under that Ordinance. On the other hand the Code of Criminal Procedure Act, No. 15 of 1979 refers to a Police Officer to mean a member of an established Police Force and includes Police Reservists. Learned Solicitor General for the Attorney General Contended that a public Officer empowered with certain police powers does not, by that fact alone, become a Police Officer within the meaning of Section 25 of the Evidence Ordinance. He relied on the decision in *Rose v. Fernando* [3] Learned Solicitor General also drew our attention to the provisions in the Army Act and submitted that a Military Police Officer, who for the purpose of the Army act is an Army Officer who enjoys no more powers than those enjoyed by excise and customs officers. The contention of the learned Solicitor General was that the Military Police is a unit in the Army established for the purpose of performing certain administrative and

disciplinary functions within the Army. His position was that under the Army Act there is no distinction between military police officers and other Army Officers as all the powers enjoyed by the Officers of the Military Police are the powers that have been conferred in general on all Army personnel. Learned Solicitor General cited an example where in terms of the Army Act and Regulations made under that Act, a Military Officer arresting a person subjected to the Army Act would do so on the general powers that have been conferred to the Army personnel. He also submitted that a Military Police Officer does not have the authority that an ordinary Police Officer would exercise in a criminal investigation.

It was also contended by the learned Solicitor General that if the legislature intended to expand the meaning of 'Police Officer' in terms of Section 25 of the Evidence Ordinance to include Public Officers conferred with limited powers with regard to arrest, detention and search, that could have been done under Section 25(2) of the Evidence Ordinance in the same manner where confessions made to Excise Officers and Forest Officers become inadmissible. Therefore he submitted that the Courts should be mindful of the manifest intention on the part of the Legislature to restrict the unqualified expansion of the term Police Officer and therefore, the Court must give a narrow interpretation to this terms. In support of this contention learned Solicitor General cited several Indian Authorities (*Raj Ram Jaiswal v. State of Bihar*[4], *Jothi Savant v. State of Mysore*[5], *Balakrisnan v. State of Maharastra*[6], *Illias v. Collector of Customs*[7].

It was also the submission of the learned Solicitor General that the Army Act was enacted after the decision in *Rose v. Fernando (Supra)* and that the amendment to Section 25 of the Evidence Ordinance does not provide for

the exclusion of confessions made to an Officer of the Military police or any other Army Officer exercising authority over a person making a confession. He drew our attention to Part X1 of the Army Act, which deals with the rules of evidence applicable to a Court Marshal. His position is that this part does not directly or indirectly equate a Military Police Officer or any other Army Officer to a Police Officer for the purpose of Section 25 of the Evidence Ordinance. The contention of the learned Solicitor General is that at the time the Army Act was enacted in 1949, if the legislature intended to exclude confessions made to Military Police Officers and other Army Officers in authority, the legislature would have included an exclusionary provision in Part X1 of the Army Act. Therefore such a deliberate omission clearly demonstrates the intention of the legislature to permit the admissibility of confessions made to Military Police Officers at a Court Marshal.

On the other hand learned Counsel for the appellants contended that the legislature did not define the term 'Police Officer' in the Evidence Ordinance advisedly to enable the Courts to give broader interpretations with a view to enhancing the liberty of a suspect. Several decisions of the Supreme Court were cited where this rationale was accepted. In *Nuge Kanny v Pables Perera* [(8)] and in *Vidane Arachchi of Kalupe v Appu Sinno* [(9)] it was held that a confession to a Mudaliyar, who held an inquiry, was a Police Officer. It is of interest to note that in *Nuge Kanny v Pables Perera (supra)* the Mudaliyar had held the departmental inquiry against a Police Vidane. In this case, in the course of the judgement, Wood Rention, J. stated that,

> " It is of great moment that both the spirit and the letter of that section should be maintained, and I think it applies to headmen of all grades as well as Police Officers within the strict meaning of the term".

In *Rose v Fernando (Supra)* although it was held that a confession made to an Excise Officer was inadmissible, Schneider, J. was categorical that the expression 'Police Officer' in the Evidence Ordinance should be construed not in any technical sense, but giving it a more comprehensive significance. A similar view was expressed by Gavin J. in *Rose v Fernando (Supra)* where he stated that,

> "The term 'Police Officer' ordinarily means a member of an established Police Force; as used in Section 25 of the Evidence Act it may legitimately be applied to officers of Government who are authorized generally to act as Police Officers and are charged with performance of the duties and armed with the powers of a Police Officer. In short, who are, as my Lord has said in his Judgement, Police Officers in everything but name."

A similar view has been taken by the Indian Courts, with regard to Section 25 of the Indian Evidence Ordinance which was the model Ordinance for our Evidence Ordinance enacted in 1895. For instance, in *Raj Ram Jaiswal v State of Bihar (supra)*, Mudholkar, J. was of the view that, the test for determining whether a person is a public officer in terms of Section 25 of the Evidence Ordinance would be whether the power of a Police Officer is conferred on him or whether he is in a position to exercise such power. In *Raj Ram's* case he went on to state that,

> "In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant

for consideration where the powers of a Police Officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession."

A close analysis of the Sri Lanka cases including *Rose v Fernando (supra)* would show that the line of thinking of the contents of Section 25 of the Sri Lanka Evidence Ordinance does not differ much from the test propounded by Mudholker, J. in *Raj Ram's Jaiswal v State of Bihar (Supra).*

In the light of the above it would now be appropriate to consider the rationale for excluding statements made to Police Officers. This has been clearly explained and set out in our case law.

In *Queen v Rev. H. Gnanaseeha Thero and 21 others* [10] the Court considered the evidence in regard to the circumstances under which the accused made their statements to the Police. The decision of Frankfurtur, J. in *Colombe v. State of Conncticut* [11] where it was stated that,

> "The prisoner knows this - knows that no friendly or disinterested witness is present - and the knowledge may itself induce fear. But, in any case, the risk is great that the Police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with the ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.
>
> In the Police Station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows

and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures - of every variety. In such an atmosphere, questioning that is long continued - even if it is only repeated at intervals, never protracted to the point of physical exhaustion - inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of this questioners, he has every reason to believe that he will be held and interrogated until he speaks."

In *Murugan Ramaswamy* [12] Viscount Radcliffe delivering the opinion of the Judicial Committee of the Privy Council referred to the policy in excluding in evidence confessions made to Police Officers. He observed that,

"There can be no doubt as to what is the general purpose of Sections 25 and 26. It is to recognize the dangers of giving credence to self - incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and these two Sections recognize and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying."

The appellants, as pointed out earlier had made certain statements which were confessions by their nature to the Military Police Officers in the Army were admitted in

evidence in the Trial at Bar. Learned Counsel for the appellants had raised objections regarding the admissibility of the confessions to Military Officials on the ground that they cannot be admitted as evidence in violation of Section 25 of the Evidence Ordinance. The Trial at Bar made order that those statements made to the Military Police Officers were admissible if they were made 'freely and voluntarily' in terms of Section 24 of the Evidence Ordinance. Consequently a voir - dire inquiry was held in view of the objections taken by the appellants regarding the admissibility of the confessions made by the appellants. The Trial at Bar held that confessions made to the Military Police Officers are admissible as the Military Police Officer would not come within the definition of a Police Officer in terms of Section 25 of the Evidence Ordinance.

The Army Act in Part VII defines persons subject to Military Law and Section 34 states that,

"For the purpose of this Act, 'person subject to Military Law' means a person who belongs to any of the following classes of persons:-

(a) all officers and soldiers of the Regular Force;

(b) all such officers and soldiers of the Regular Reserve, volunteer Force, or Volunteer Reserve, as are deemed to be officers and soldiers of the Regular Force under subsection (3) of Section 3."

Section 35 of the Army Act refers to custody of the persons who are subject to Military Law and the description of the. custodians are given in Section 37. According to Section 35 of the Army Act, if a person subject to Military Law has committed any military or civil offence he may be

taken into military custody. It is to be noted that the Code of Criminal Procedure Act, which deals with the procedure regarding arrest has provided for more restricted powers in arresting a person by defining the offence into cognizable and non-cognizable offences. Provision has also being made that in order to arrest a person in certain circumstances, it is necessary to obtain a warrant from a Judicial Officer thereby necessitating the intervention of the Judiciary. An examination of the provisions of the Army Act reveals that on a comparison with the provisions of the Code of Criminal Procedure Act, there are no such restrictions with regard to the power of Military Police Officers to arrest persons. Accordingly it appears that the Military Police have more power over arrests than the regular police officers.

Moreover it is also to be noted that when a Military Police Officer has arrested a person subject to the Military Law the commanding officer of that Military Police Officers shall without unnecessary delay investigate the charge on which the person is in such custody. According to Section 39 of the Army Act, the Military Police could keep a person under the Millitary Law in detention up to a period of seven days, whereas a Police Officer could only keep a suspect in custody for a maximum period of 24 hours prior to producing him before the nearest Magistrate.

The effect of all these provisions under the Army Act is that the Military Police Officers have far greater powers in respect of the persons arrested under the Millitary Law than the powers vested in Police Officers with regard to persons kept in their custody.

It was disclosed that the confessionary statements of the appellants were recorded in the presence of Military Police

Officers in charge and under the supervision of Major Podiralahamy and Lt. Col. Kalinga Gunaratne. An examination of the evidence reveals that the appellants had been questioned for an hour and at the time when the appellants were interrogated, they were ordered to remove their caps and belts. Learned Counsel for the appellants regarded this as the usual practice of a 'symbolic stripping of power and authority of the person before interrogation.'

Section 25 of the Evidence Ordinance in my view is a broadly worded section and it absolutely excludes from evidence a confession made by an accused to a Police Officer while in his custody. The circumstances in which such a confession was made is irrelevant for this purpose. Mohomood, J. in *R v Babu Lal*[13] stated that,

> "The legislature had in view the mal-practices of Police Officers in extorting confessions from accused persons in order to gain credit by securing convictions and those mal-practices went to the length of positive torture."

These observations as well as the observations made by Frankfurtur, J. in *Colombe v State of Connecticut (Supra)* highlights the desirability in excluding statements made to Police Officers or Officers who have certain powers and authority over accused persons in their custody. Considering the powers and the authority the Military Police Officers have over the persons in their custody, combined with the gravity of the changes, the detention incommunicado, and the inaccessibility to lawyers to practice the rights of such persons in their custody would be a paramount necessity to include a Military Police Officer also into the definition of 'Police Officer' in terms of Section 25 of the Evidence Ordinance.

Accordingly the confessions made to Military Police Officers by the appellants in this case are inadmissible and therefore cannot be used against the appellants.

Ground 3

The Trial at Bar erred in law by effectively inferring guilt of the appellants from recoveries made in terms of Section 27 of the Evidence Ordinance.

Learned Counsel for the appellants contended that there was inadequate application of the principles of law relating to the concept of admissibility of a statement made in terms of Section 27 of the Evidence Ordinance by the Trial at Bar. According to the learned Counsel it is necessary to observe certain basic criteria before there is an admission of a statement under Section 27 of the Evidence Ordinance. One such criteria would be that, a recovery or a discovery is not a relevant fact and would not be admissible under Section 27 of the Evidence Ordinance, if such recovery or discovery had been shown by another person on a previous occasion and therefore the place in question was known to the Police previously. It was also contended that in the Judgment (Vol. I), President of the Trial at Bar had correctly stated that the only interference that could be drawn from the Section 27 statement as to where the bodies were buried is the 'knowledge' of the whereabouts of the deceased. Later the president of the Trial at Bar, according to the learned Counsel for the appellant, had gone on to say that recoveries based on Section 27 statement is an important factor in dealing with the guilt or the innocence of the accused and that the murderous intent of the accused is clearly established by the recoveries made in term of Section 27.

Learned Counsel for the appellants also strenuously argued that when one of the appellants were taken to the place in question to show where the bodies were buried, the same place had already been shown earlier by another appellant.

Section 27 of the Evidence Ordinance, which comes under the caption admissions and confessions deals with how much of such information received from accused may be proved against them and is in the following terms:

"27(1) Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The rationale underlying the proviso contained is Section 27 of the Evidence Ordinance was analysed is *Thurtell v. Hunt* [14] by Baron Parke where he made the following observation:

"A confession obtained by saying to the party, 'you had better confess or it will be the worse for you' is not legal evidence. But, though such a confession is not legal evidence, it is everyday practice that if, in the course of such confession, that party states where stolen goods or a body may be found and they are found accordingly, this is evidence, because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him."

A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and

that the accused had the knowledge of the existence and the whereabouts of the actual discovery. Therefore as has been adopted by T. S. Fernando, J. in *Piyadasa v. The Queen*[15] following the Indian decision in *Kottaya v. Emperor*[16] that 'if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true'. It was therefore held that such information could be 'safely allowed to be given in evidence'.

A 'fact' has been defined is Section 3 of the Evidence Ordinance to mean and includes'

(a) anything, state of things or relation of things capable of being perceived by the senses; and

(b) any mental condition of which any person is conscious.

This indicates that the definition given to the term 'fact' is of extensive scope and would embrace both material and psychological facts.

Considering the evidence that was admitted by the Judges of the Trial at Bar, it is clear that there had been no such misdirection in dealing with the evidence pertaining to the discovery in terms of Section 27 of the Evidence Ordinance.

The President of the Trial at Bar had identified as item No. 5 the recovery of bodies and the clothes of the deceased persons which were recovered on the basis of the statements made by the 1st, 2nd, 3rd and 4th appellants. He has very correctly pointed out that the statements of the appellants can be used only for the purpose of showing that the appellants had only the knowledge of the existence and whereabouts of such items. The President of the Trial at Bar had categorically stated that the relevant statements cannot be used for any

other purpose. The other Judges too refer to the statements made by the appellants leading to the discovery of the bodies of the four persons and stated that the appellants had only the knowledge as to where the four bodies were buried.

A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted on evidence. It is well settled law that there should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. Also it would be necessary to select the portion of the statement which is distinctly related to the discovery of a relevant fact. Discussing these distinct issues Prof. G. L. Peiris had stated that, (Law of Evidence, pg. 179).

> "The issue of admissibility necessitates selection of that portion of the statement which is distinctly related to the discovery of a relevant fact, and the deletion of all other parts of the statement made by the accused. This was the problem with which the Court was confronted in a case like *Justin Perera (supra)* and *Albert (supra)* where the accused states, for example, that he raped the girl and threw the sarong containing blood and seminal stains into a ditch where the item of clothing was subsequently discovered, only the portion of the statement dealing with the throwing of the sarong into the ditch, and not the first half of the statement which contains a confession that the accused committed rape, may be admitted against him in terms of Section 27."

The three Judges of the Trial at Bar, it should be noted, had quite correctly selected the portion of the statement which is distinctly related to the discovery of the bodies of

the four persons and their clothing. Moreover, the judgments are clear on the fact that they have deleted the other parts of the statements made by the appellants and considered only the relevant portion. In such circumstances it would not be correct to say that Trial at Bar erred in dealing with the evidence pertaining to discovery made under Section 27 of the Evidence Ordinance.

Ground 4

The Trial at Bar erred in law by placing reliance on photographic evidence to establish identity of the victims.

At the out set learned Counsel for the appellants raised this point as one of the grounds on which he was challenging the decision of the Trial at Bar. However, subsequently he informed Court that he is not pursuing this objection. In the circumstances, I am of the view that it is unnecessary to examine this ground of appeal any further.

Ground 5

The Trial at Bar erred in law by failing to judicially evaluate the items of circumstantial evidence.

Learned Counsel for the appellants contended that the Trial at Bar has not indulged in the necessary exercise of a judicial evaluation of the items of circumstantial evidence independent of the confessions to ascertain whether such items of circumstantial evidence would be sufficient to establish the culpability or the guilt of the appellants beyond reasonable doubt. His position is that the Judges had evaluated the items of circumstantial evidence in relation to the confessions made to the Military Police.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground 6

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

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

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

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

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

Ground 7

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

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

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

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

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

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

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

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

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

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

EDUSSURIYA, J. – I agree.

YAPA, J. – I agree.

J. A. N. DE SILVA, J. – I agree.

JAYASINGHE, J. – I agree.

appeal dismissed.