THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 15**

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gone to draw an adverse inference under section 114(f) of the

Evidence Ordinance.

On behalf of the 4th Appellant learned counsel submitted

that the prosecution failed to prove the charge against the 4th

Appellant beyond reasonable doubt.

Learned counsel for the 5th Appellant submitted that:

• The learned trial judge failed to evaluate the

evidence that could be considered as in favour of the 5th

Appellant.

• The learned trial judge erred in law by the erroneous

application of the Ellenborough Principle.

• The learned trial judge failed to address whether the

ingredients of the offence set out in count 4 had been

proved beyond reasonable doubt.

The learned counsel for the 6th Appellant submitted

that:

• The learned trial judge misdirected himself in failing

to consider failure of the prosecution to establish

the essential prerequisite of an agreement between

18.04.2001 and 21.04.2006 among the 4th 5th and 6th

accused to commit alleged crime.

• The learned trial judge erred in law by convicting all

the accused on all counts without considering each

count separately against each accused.

• The learned trial judge failed to consider that the

prosecution witnesses did not identify the 6th Appel-

lant on 18th April 2001 at the time the alleged vessel

was about to sail away from Sri Lanka.

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• The failure of the prosecution to prove beyond

reasonable doubt that the 6th Appellant was aboard

the alleged vessel at the time the substance was

unloaded.

• The failure of the prosecution to place before courts

the fact that the alleged vessel was not under the

surveillance of police from the time it left the Negombo

lagoon until it was subsequently apprehended by the

police.

It is common ground that the 4th 5th and the 6th Appel-

lants were taken into custody on the Ave Maria boat at deep

sea. The prosecution has proved the fact that two parcels of

heroin were unloaded from Ave Maria boat and was taken to

the Suzuki jeep by the 1st 2nd and 3rd Appellants. It was also

in evidence that at the time the 1st 2nd and the 3rd Appellants

were taken into custody the Ave Maria boat had taken her

way to deep sea. Thereafter, according to the evidence of the

prosecution, the police party who were waiting at sea had

chased the vessel and taken it into custody. The vessel had

been stopped at gun point. At the time the Ave Maria trawler

was taken into custody the 4th 5th and the 6th Appellants were

in the vessel. The police team has searched the vessel and

has recovered an unused fshing net in packing and a few

provisions. There was no ice in the cold room of the vessel.

Also the police party did not fnd fsh in the vessel.

In the said premise the 4th Appellant made only a dock

statement and the 5th and the 6th Appellants remained silent.

No witnesses were called on behalf of them. The 4th Appellant

in his dock statement took up the position that he was

arrested on the boat whilst he was going fshing. The 4th

Appellant in his dock statement stated that on 20.04.2001

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they left for the job carrying food, fuel, water, ice, rice and

coconut. Whilst they were proceeding for their job they were

taken into custody and brought to Colombo. Thereafter they

were incarcerated. His very short dock statement does not

reveal anything other than that. The question now arisen

for consideration is that whether the said dock statement is

suffcient to create a doubt in the evidence of the case for

the prosecution. As I stated earlier except the unused fshing

net in packing and a few provisions the police could not fnd

anything in the boat. It is important to note that there was

no ice or fsh in the boat. It is also important to note that the

fshing net which was found in the boat was an unused one

in packing.

When I consider the said evidence in the light of the said

circumstances I am of the view that the position taken up

by the 4th appellant is fallacious and misleading. Therefore

I am of the view that the learned trial judge has correctly

analyzed the evidence and has reached a right conclusion.

As I stated hereinbefore so long as the learned trial judge has

exercised his discretion judicially the Court of Appeal will not

lightly disturb and interfere with such a judgment.

On behalf of the 5th and the 6th Appellants the learned

counsel submitted that the learned trial judge has erred

in law in applying the Ellenborough dictum against the 5th

and the 6th Appellants. As I stated above the 5th and the 6th

Appellants remained silent on the dock and did not call

any witnesses on behalf of them. There were no contradic-

tions marked or omissions highlighted in the evidence of the

prosecution. It was in evidence that the 5th and the 6th

Appellants were taken into custody on the Ave Maria boat.

The two parcels of heroin were unloaded from the Ave Maria

boat. According to the evidence of the prosecution the Ave

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Maria boat has sailed to India from Negombo lagoon at about

4pm on 18.04.2001. At that time the 1st and the 2nd Appel-

lants also were seen going to the boat and coming back. The

boat had returned to Negombo lagoon on 20th night 2001 and

the unloading of two parcels of heroin had taken place there-

after. At the time the 1st 2nd and 3rd Appellants were taken

in to custody the Ave Maria boat has started sailing to deep

sea. The boat had been stopped at gun point at deep sea. The

4th 5th and 6th Appellants who were in the boat at that time

were taken in to custody. The police has recovered an unused

fshing net in packing from the boat. There had been no ice in

the cold room of the boat and no fsh found in the boat. With

all this strong incriminating evidence against the Appellants

with the charges of importation, traffcking and conspiracy to

import the 5th and 6th Appellants did not offer any explanation

with regard to any of the matters referred to above.

In the case of *R. Vs. Lord Cochrane and others* (4) the Lord

Ellenborough held that “No person accused of crime is bound

to offer any explanation of his conduct or of circumstanc-

es of suspicion which attach to him; but, nevertheless, if he

refuses to do so, where a strong prima facie case has been

made out, and when it is in his own power to offer evidence, if

such exist, in explanation of such suspicious circumstances

which would show them to be fallacious and explicable

consistently with his innocence, it is a reasonable and

justifable conclusion that he refrains from doing so only

from the conviction that the evidence so suppressed or not

adduced would operate adversely to his interest.”

Abbot J. in *Rex vs. Burdett*(5) at 162 observed that “No

person is to be required to explain or contradict until enough

has been proved to warrant a reasonable and just conclusion

against him, in the absence of explanation or contradiction;

but when such proof has been given, and the nature of the

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case is such as to admit of explanation or contradiction, if

the conclusion to which the prima facie case tends to be true,

and the accused offers no explanation or contradiction, can

human reason do otherwise than adopt the conclusion to

which proof tends.”

In the case of *Rajapaksha Devaga Somarathne*

*Rajapaksha and others vs. Attorney General* (7) Justice

Bandaranayake observed that “With all this damning

evidence against the Appellants with the charges including

murder and rape the Appellants did not offer any explana-

tion with regard to any of the matters referred to above. Al-

though there cannot be a direction that the accused person

must explain each and every circumstances relied on by the

prosecution and the fundamental principle being that no

person accused of a crime is bound to offer any explana-

tion 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.”

When I consider the evidence of the case in the light of

the aforesaid judicial pronouncements I am of the view that

the learned trial judge has correctly applied the *Ellenborough*

*dictim*. Therefore I reject the submissions of the learned coun-

sels.

In the circumstances I see no merit and substance in the

submissions advanced by the learned counsel for the Appel-

lants. Therefore I affrm the convictions and the sentences

of the 1st 2nd 3rd 4th 5th and 6th Appellants and dismiss the

appeals of the Appellants without costs.

**Ranjith Silva, j.** – I agree.

*Appeal dismissed.*

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**DFCC BANk LTD vS. SEYLAN BANk LTD AND FIvE OTHERS**

CourT of AppeAl

BASNAyAkE. J.

ChITrASIrI J.

CAlA 132/2006

DC COLOMBO 171/CO

JuNe 17, 2008

JANuAry 15, 2010

***Companies Act No. 17 of 1982 Section 260, 261, 352 Companies***

***Act 7 of 2007 - Section 532 (1) – Recovery of Loans Act of 1990 –***

***Bank passing a resolution to parate execute property – Winding up***

***application fled – Can the Bank proceed to parate execute the***

***property - Civil Prcedure Code - Section 227.***

**held:**

(1) The application to wind up X company had been made by the

respondent Seylan Bank on 1.10.2009. The D.f.C.C. Bank, the

petitioner had passed a resolution to parate execute the property

in terms of Act No. 4 of 1990 in the month of March 2004. The

intention to public auction the property was published on

12.3.2005 in the Daily News papers.

 It is evident that the circumstances of the property in question and

may be even the passing of the resolution by the DfCC Bank was

made known to the public only after the winding up application

had been fled.

(2) The previous Companies Act No.17 of 1982 was repealed. until the

impugned order was made, it is the repealed Act that was in force.

The new Companies Act No. 7 of 2007 came into effect in May 2007.

Section 532 (1) of the new Act permits to continue with the matters

in which winding up has commenced. Issue at hand should be

looked into giving effect to the provisions of the repealed Act.

(3) Section 269, 261 of the Companies Act should be considered as

substantive law and it does not prescribe mere procedure. The

purpose of enacting the Act No. 4 of 1990 is to have a speedy procedure

to recover the monies lent by Banks without violating or allowing

to override the provisions of other enactments, such as the

Companies Act.

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per Chitrasiri, J.

 “If one creditor is allowed to take the beneft by selling a particular

property belonging to the company sought to be wound up, it

would defnitely cause grave and irremediable loss and damage to

other creditors. Therefore it is my view that Sections 260, 261 of

the Companies Act should prevail over the provisions contained in

Act No. 4 of 1990”.

(4) Merely because the words ‘special provisions’ are found in the title

to an Act, provisions of such an Act cannot have effect over the

other enactments unless clear provisions are found to that effect

in the subsequent law.

(5) Mere passing of a resolution to parate execute the mortgaged

property by the Bank cannot be considered as seizure of property.

Moreover the passing of the resolution had been published in the

News Papers only on 12.3.2005 – whereas the application to wind

up had been made on 1.10.2004.

per Chitrasiri, J.

 “Unless steps referred to in those sections of the Civil Procedure

Code as to the seizure are followed, seizure of property is not

completed and it may be considered as a voidable act. If the

adoption of a resolution is considered as seizure of the proper-

ty in question it may amount to a decision that has been taken

disregarding the said provisions found in the Civil Procedure

Code.”

**application** for leave to appeal from an order of the District Court of

Colombo.

**cases referred to:-**

*1. J. K. Fastener Lanka Pvt. Ltd vs. Seylan Bank Ltd 2000 –* Sri LR 155

at 159

*2. Bowkett vs. Fullers United Electric Works –* 1923 1 KB 160 at 164

*3. Re Lines Bro Ltd –* 1983 Ch 1at 13

*4. Re Robert Wood & Shingle Co –* 1984 – 30 Can lT 353 at 356

*5. LM Apparels Pvt Ltd vs. E.H. Cooray & Sons Ltd and others –* CA

584/93 – BASL News 4/4/94

*6. DFCC & Bank of Ceylon vs. Deputy Commissioner of Inland Revenue*

– BALJ – 1983 Vol 1 – Part 11

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*7. Blackpool Corporation vs. Starr Estate Company Ltd* 1922 1 Al 26

at 39

*Nihal Fernando PC* with *Rohan Dunuwille* for creditor – respondent –

appellant

*Romesh de Silva PC* with *Prasanna Jayawardena* for 4th supporting

creditor respondent

*P. Wickremasekera* with *dilshani Gurusinghe* for 5th supporting creditor

respondent.

July 15th 2010

**chitRaSiRi j.**

This is an application to set aside the order of the learned

District Judge of Colombo dated 20th March 2006. learned

District Judge, by the said order, allowed an application

made in the petition dated 22nd March 2005 fled by Akzo

Nobel Coating India (Pvt) Limited (creditor petitioner respon-

dent to this application) in a winding up application. This

winding up application was made in the District Court of

Colombo by a petition fled by Seylan Bank limited to wind

up Amico Industries (Ceylon) Limited [Petitioner – Respon-

dent – Respondent in this application]

In the said impugned order dated 20th March 2006,

learned Judge decided that the DfCC Bank cannot proceed

to *parate execute* the property mortgaged to it, in terms of

the Recovery of Loans by Banks (Special Provisions) Act No.

4 of 1990 when there is an application under the Companies

Act No. 17 of 1982 to wind up the company which had mort-

gaged the property in question. As a result, Creditor respon-

dent Appellant, namely the DfCC Bank ltd. (hereinafter re-

ferred to as the DfCC Bank) was prevented from proceeding

with *parate execution* of the property mortgaged to it by the

company sought to be wound up namely Amico Industries

(Ceylon) Ltd.

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Admittedly, the application to wind up Amico Industries

(Ceylon) Ltd had been made by Seylan Bank by its petition

dated 01st October 2004 being a creditor of the company

sought to be wound up. Before the said petition was fled,

DfCC Bank had passed a resolution in the month of March

2004 to *parate execute* the said property in terms of the Act

No. 04 of 1990. however, its intention to sell the property

by public auction, pursuant to the resolution was published

only on 12th March 2005 in the daily news papers. Therefore,

it is evident that the auctioning of the property in question

and may be even the passing of resolution by the Board

Members of the DfCC Bank was made known to the public

only after the winding up application had been fled in the

District Court.

Accordingly, the question arose: could the DfCC Bank

proceed with *parate execution* of the property when the

company which had mortgaged the said property is being

wound up by Court. As mentioned before, the decision of the

learned District Judge on the issue was that the mortgagee

namely the DfCC Bank cannot proceed to *parate execute*

the property when the company that mortgaged the property

is under liquidation. No clear provision is found both in the

Companies Act and in the Recovery of Loans by Banks Act

No. 4 of 1990 as to the applicable law in such a situation.

Therefore, this court is required to interpret the provisions of

the two enactments referred to above in order to decide the

issue at hand.

At the outset, it is pertinent to decide the applicable

Companies Act in this instance, since the previous

Companies Act No. 17 of 1982 is now been repealed. Until

the impugned order is made in this regard, it is the repealed

Act that was in force. New Companies Act No. 07 of 2007

came in to effect in May 2007. Section 532(1) of the new Act

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permits to continue with the matters, in which the winding

up has commenced, in terms of the provisions of the repealed

Act No. 17 of 1982. This new Section reads thus:

 *“523 (1) Subject to the provisions of subsection (2), the*

*provisions of this Act with respect to winding up shall*

*not apply to any company of which the winding up has*

*commenced before the appointed date. Every such*

*company shall be wound up in the same manner and*

*with the same incidents, as if this Act had not been*

*enacted, and for the purpose of the winding up, the*

*written law under which the winding up commenced shall*

*be deemed to remain in full force. .”*

Therefore, the issue at hand should be looked into giving

effect to the provisions of the repealed Act No. 17 of 1982. In

fact, this position has not been disputed by any party to the

action.

I will turn on to the main issue now. As mentioned

hereinbefore, the main issue in this instance is whether the

DfCC Bank could proceed to auction the property of the

Company sought to be wound up in terms of the Recovery of

Loans by Banks (Special Provisions) Act No. 4 of 1990 while

an application to wind up the said company sought to be

wound up namely Amico Industries (Ceylon) ltd, is pending.

Section 260 and 261 of the Companies Act prevents

disposition of the property of a company sought to be wound

up when that company is under liquidation. These two

sections are re-produced herein below for easy reference:-

***Section 260 –*** *“In a winding up by the Court, any*

*disposition of the property of the*

*company, including things in action, and*

*any transfer of shares, or alteration in*

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*the status of the members of the com-*

*pany, made after the commencement of*

*the winding up, shall, unless, the court*

*otherwise orders, be void.”*

***Section 261*** *“Where any company is being wound*

*up by the court, any attachment, se-*

*questration, distress, or execution put in*

*force against the estate or effects of the*

*company after the commencement of the*

*winding up shall be void to all intents”.*

however, the provisions of the Act No. 4 of 1990 has

made no reference to the aforesaid sections in the Companies

Act and therefore it is argued that there is no prohibition

to *parate execute* the property owned by a company, though

that company is subjected to wind up.

In the circumstances, it is seen that the provisions of the

two enactments namely, the recovery of loans by Banks (Spe-

cial Provisions) Act No. 4 of 1990 and the Companies Act No.

17 of 1982 cannot be given effect to simultaneously. hence,

this court should determine which provisions are applicable

in a situation such as this. Before coming to a conclusion of

the issue, it is necessary to consider the object of the legisla-

ture when enacting those two statutes. following authorities

would be helpful in deciding the object of the legislature of

having Sections 260 and 261 in the Companies Act.

In the case of *T.K. Fastener Lanka (Pvt) Ltd vs. Seylan*

*Bank Ltd* (1) at 159, it is stated “the policy seems to be pro-

tection of the interest of the creditors and to ensure that the

free assets of the company at the commencement of winding

up proceeding will be available for distribution of its credi-

tors and also to avoid multiplicity of actions to prevent the

company funds being wasted.”

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In the case of *Bowkett vs. Fuller’s United Electric works*(2)

at 164 per Scrutton lJ. It was held that “it is with the object

of preventing the scramble of assets which would otherwise

ensue’ that the law (i.e. section 261) ‘expressly declares void

any attachments, sequestration, distress or execution put in

force against the estate or effects of the company after the

commencement of the winding up.”

Also in the case of *Re Lines Bros Ltd*(3) it had been held

that “it must be remembered that liquidation is a collective

proceeding whereby the creditors accept a collective en-

forcement procedure and a distribution of company assets

according to a statutory scheme; the creditors surrender their

rights to enforce their claims for a share in the assets of the

company as administered by the liquidator.”

In the case of *Re Robert Wood & Shingle Co.* (4) at 356, it

had been held that “It must be kept in view that the intention

of the Winding up Act and of all legislation respecting

insolvency is to get within the control of the court all the

estate of the insolvent company, to settle all the claims of

debt, privilege, mortgage, lien, or right of property upon, in or

to any effects or property of such company in the simplest

and least expensive way, and to distribute its assets among

its creditors in the most expeditious manner possible and

not to have the proceedings of the winding up court or the

distribution of the assets delayed or impeded by or dependent

upon outside or expensive litigation in other courts.”

The above mentioned authorities show that grave and

irremediable loss and damage would be caused to the rest

of the creditors of a company sought to be wound up, if one

creditor is permitted to dispose of the property of the com-

pany after the winding up proceedings had begun. further-

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more, the object of having section 260 and 261 of the Compa-

nies Act is to ensure the distribution of assets of a company

sought to be wound up on an equal basis according to the

respective entitlements of the creditors.

on the other hand, recovery of loans by Banks

(Special Provisions) Act No. 4 of 1990 was enacted basically

to ensure speedy recovery of monies given by Banks with-

out recourse to adjudication by court. Moreover, provisions

of this Act can be invoked only by the Banks registered with

the Central Bank and not by each and every lending institu-

tion. Therefore, it is, clear that the intention of the legislature

when enacting the Act No. 4 of 1990 was to relieve, the Banks

registered with the Central Bank, of the trouble of resorting

to court procedures when they are to recover dues from the

borrowers. Therefore, it is my view that the purpose of enacting

the Act No. 4 of 1990 is to have a speedy procedure to

recover the monies lent by Banks without violating or allow-

ing to override the provisions of the other enactments such

as the Companies Act.

Moreover, Section 260 and 261 of the Companies Act

should be considered as substantive law and it does not

prescribe mere procedure. Those two provisions in the

Companies Act describe the way in which the distribution

of assets of a company sought to be wound up should be

made. Such matter cannot be suppressed by procedural law.

furthermore, if one creditor is allowed to take the beneft by

selling a particular property belonging to the company sought

to be wound up, it would defnitely cause grave and irreme-

diable loss and damage to the other creditors. Therefore, it

is my view that Section 260 and 261 of the Companies Act

should prevail over the provisions contained in the Recovery

of Loans by Banks (Special Provisions) Act No. 4 of 1990.

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Learned counsel for the Petitioner has taken up the

position that the provisions contained in Act No. 4 of 1990,

being a Special Act, should prevail over the Companies Act.

In support of his contention he has cited *L.M. Apparels*

*(pvt) Limited vs. E. H. Cooray & Sons Limited and others*(5).

however, BASl News for the month of April 1994 does not

carry such a decision. In any event, according to the sub-

missions of the learned Counsel, the issue in that case

arose after the sale of the property had been completed.

Therefore, the said decision cited by the learned Counsel

cannot be considered as a decision applicable to the issue at

hand.

He has also referred to the case of *DFCC & Bank of*

*Ceylon vs Deputy Commissioner of Inland Revenue* (6). In that

too, the issue was in relation to the matters that should get

priority over statutory debts. Therefore, both the authori-

ties cited by the learned Counsel for the DfCC Bank are not

applicable to the dispute in this instance.

however, merely because the words “Special provisions”

are found in the title to an Act, provisions of such an Act

cannot have the effect over the other enactments unless clear

provisions are found to that effect in the subsequent law.

This proposition has been discussed in the cases of *Blackpool*

*Corporation vs. Starr Estate Company Ltd*(7) at 37. In that, it

is stated “We are bound. . . . to apply a rule of construction

which has been repeatedly laid down and is frmly estab-

lished. It is that wherever Parliament in an earlier statute

had directed its attention to an individual case and has made

provision for it unambiguously, there arises a presumption

that if in a subsequent statute the Legislature lays down a

general principle, that general principle is not to be taken

as meant to rip up what the Legislature has provided for

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individually, unless an intention to do so is specially

declared”.

Even in **Maxwell on the interpretation of Statutes,**

**12th Edition** this position has been accepted by referring to

the aforesaid decision. **(at page 196)** Since there is no clear

provision in the subsequent Act namely Act No. 4 of 1990 to

negate the provisions in the Companies Act, it is my opinion

that the said Act No. 4 of 1990, although it was enacted

subsequently will not override, repeal or alter the provisions

of the Companies Act.

Learned Counsel for the Petitioner also has submitted

that adoption of a Board Resolution by the Board of Directors

in the DfCC Bank amounts to completion of the seizure of

the mortgaged property. Therefore, his argument is that the

property in dispute in the instant case shall not be included

as the goods or lands of a company referred to in section

352 of the Companies Act. Section 352 of the Companies Act

does not empower a company under liquidation to retain the

property that has been seized for the purpose of execution.

The contention of the learned Counsel for the petitioner is

that the passing of resolution by the Board of Directors of

a Bank amounts to seizure of the property, and therefore it

should not be included into the assets of the company.

Before coming to a conclusion of the said argument, it

is pertinent to refer to the provisions contained in the Civil

procedure Code as to the way in which seizure is made. These

provisions commence from Section 227 onwards in the Civil

Procedure Code.

Unless the steps referred to in those Sections of the Civil

procedure Code as to the seizure are followed, seizure of

property is not completed and it may be considered as a

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voidable act. Moreover, if the adoption of a resolution is

considered as seizure of the property in question, it may

amount to a decision that has been taken disregarding the

said provisions found in the Civil procedure Code. Therefore,

mere passing of a resolution by the Board of directors cannot

be considered as seizure of property.

Moreover, as mentioned before, the passing of reso-

lution had been published in the news papers only on the

12th of March 2005, whereas the application to wind up the

company had been made on the 1st of october 2004. There-

fore, the parties who are affected in this instance were made

aware of the adoption of resolution only after the applica-

tion to wind up the company had been made. hence, it is

seen that no adequate notice had been given to the affected

parties to the resolution before the winding up application

was made.

In the circumstances, I am not inclined to accept the

contention of the learned Counsel for the Petitioner and to

decide that the adoption of the resolution by the Board of

Directors amount to seizure of the property.

for the aforesaid reasons, it is my considered view that

the property belonging to the company sought to be wound

up is not liable to be auctioned in term of the Recovery of

Loans by Banks (Special Provisions) Act No. 4 of 1990 and

the section 260 and 261 of the Companies Act No. 17 of 1982

should apply in this regard.

Accordingly, I dismiss the petition of the petitioner DfCC

Bank with costs.

**ERic BaSnayakE, j.** – I agree.

*Appeal dismissed.*

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SC 409

**ATTORNEY GENERAL v. DEvUNDERAGE NIHAL**

SupreMe CourT

J. A.N. De SIlvA, C.J.,

MArSoof, J. AND

SureSh ChANDrA, J.

S.C. APPEAL NO. 154/10

C.A. APPEAL NO. 125/08

h.C. GAlle No. 2136

MARCH 21ST 2011

***Poisons, Opium and Dangerous Drugs Act – Section 54(a)(c) –***

***Illegal possession of heroin, drug related offence – Evidence***

***Ordinance – Section 134 – No particular number of witnesses shall***

***in any case be required for the proof of any fact***

The Accused was indicted in the high Court under Section 54(a)(c) of

the poisons, opium, and Dangerous Drugs Act for being in unlawful

possession of 9.91 grams of heroin. He was found guilty and was

convicted and sentenced to life imprisonment by the High Court.

The Accused appealed against the conviction and sentence to the Court

of Appeal and the Court of Appeal set aside the conviction and acquitted

the Accused on the ground that only one witness who took part in the

raid where the Accused was arrested had given evidence.

The Attorney General fled an application for Special leave to Appeal

against the judgment of the Court of Appeal and the Supreme Court

granted leave.

The observation made by the Court of Appeal was on the premise that

in a drug related offence arising from a raid by the police, the prosecu-

tion has to corroborate the evidence of any member of the raiding party

in order to bring about a conviction.

**held:**

(1) There is no requirement in law that a particular number of

witnesses shall in any case be required for the proof of any fact.

Unlike in a case where an accomplice or a decoy is concerned, in

any other case there is no requirement in law that the evidence of

a police offcer who conducted an investigation or raid resulting

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in the arrest of an offender need to be corroborated on material

particulars.

(2) however, caution must be exercised by a trial Judge in evaluating

such evidence and arriving at a conclusion against an offender. It

cannot be stated as a rule of thumb that the evidence of a Police

witness in a drug related offence must be corroborated in material

particulars where police offcers are the key witnesses.

**cases referred to:**

(1) *A.G. v. Mohamed Saheeb Mohamed Ismath* – C.A. 87/97 C.A.M

13.07.1999

(2) *Muulluwa v. State of Madhya Pradesh* – AIr 1976 S.C. 198

(3) *Wallimunige John v. The State* – 76 Nlr 488

(4) *King v. N.S.A. Fernando* – 46 Nlr 255

(5) *Gunasekera v. A.G.* – 79 NLR 348

(6) *King v. Chalo Singho* – 42 Nlr 269

(7) *King v. Seneviratne* – 38 NLR 221

(8) *Ajith Fernando and others v. Attorney General* – (2004) 1 Sri L.R.

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(9) *Beddewela v. Albert* – 42 Nlr 136

(10) *Lyris Silva v. Karunaratne* – 48 NLR 110

(11) *Ariyaratne v. Food & Price Control Inspector –* 74 NLR 19

(12) *Wickramadasa v. The Food and Price Controller* – 78 NLR 3

**appEal** from a judgment of the Court of Appeal

*Jayantha Jayasuriya DSG,* with *Shanaka Wijesinghe S.S.C.,* for

Complainant – Respondent – Appellant

Accused –Appellant-Respondent absent and unrepresented.

May 12th 2011

**R.k.S. SuRESh chandRa j.**

This is an appeal from the judgment of the Court of

Appeal. The accused was indicted in the high Court of Galle

under Section 54(a)(c) of the poisons, opium, and Dangerous

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Drugs Act for being in unlawful possession of 9.91 grams of

heroin which offence was committed on or about the 27th of

January 2000. He was found guilty of the offence and was

convicted and sentenced to life imprisonment.

The Accused appealed against the said conviction and

sentence to the Court of Appeal and the Court of Appeal set

aside the conviction and sentence and acquitted him on the

ground that only one witness who took part in the raid where

the accused was arrested had given evidence. The Attorney

General fled an application for Special leave to Appeal

against the judgment of the Court of Appeal and this Court

on 28th October 2010 granted leave on the following questions

of law when the application was supported after notice of the

accused who was absent and unrepresented:

7. (a) Is the judgment of the Court of Appeal contrary to law

and to the weight of evidence led in the case?

(b) Did the Court of Appeal unnecessarily burden the

prosecution by holding that in drug related offences

where raids are conducted by trained offcers, it is

fair to require corroboration?

(c) Did the Court of Appeal err in holding that “where the

raids are conducted by trained offcers, corroboration

is required as it is only then that the defence would

have the opportunity to challenge the veracity or the

credibility of the prosecution witnesses to contradict

the version of the prosecution?

(d) Did the Court of Appeal misdirect itself and adduce

an extra burden on the prosecution by holding that

“the prosecution should provide the defense with the

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opportunity to contradict the version of the prosecu-

tion”?

(e) Has the Court of Appeal drawn an adverse inference

and thereby misdirected itself by holding that “the

offcials conducting raids are more often than not

resourceful in strategy and inevitably experienced

with lot of ingenuity and cunning.”?

(f) Is the view expressed by the Court of Appeal that

“a witness may bear the stamp of innocence yet he

may turn out to be a calculated liar especially so

when such witness happens to be a trained senior

police offcer” a misconception when facts in the

instance case are not supportive of such a conception

and a contention?

(g) Did the Court of Appeal misdirect itself by holding

that “it was a little diffcult to understand how the

trial judge could be satisfed with the evidence of only

one of the main witnesses who really took part in

the arrest of the appellant especially in drug related

offences where police offcers are the key witnesses”?

The prosecution led the evidence of Ip Jayamanne who

had led the raid. They had proceeded to the location where

the accused had been and the accused on seeing the Police

approaching him and attempted to run away whereupon IP

Jayamanne and PS Punchisoma had chased the accused and

apprehended him and on being searched IP Jayamanne had

found a parcel containing 18.6 grams of substance which

on subsequent analysis by the Government Analyst had

revealed the presence of 9.91 grams of heroin. PC Ranasinghe

who had been in the team led by IP Jayamanne also gave

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evidence. The Accused made a dock statement where he

admitted being arrested by the police offcers but denied

having in his possession a parcel which contained heroin.

No material contradictions or omissions were marked in the

evidence of the prosecution.

Since the Accused admitted the arrest by the Police

offcers the only question at issue was as to whether he was

in possession of a substance containing heroin which was

denied by him in his dock statement. The learned high Court

Judge was satisfed with the evidence led by the prosecution

and found the accused guilty and convicted him.

In the appeal before the Court of Appeal, the Court of

Appeal did not fault the judgment of the high Court on any

substantive matter as far as the judgment of the high Court

was concerned, as regards the analysis of the evidence and

assessment of the evidence, but stated that “It is diffcult

to understand how a trial judge could be satisfed with the

evidence of only one of the main witnesses who really took

part in the arrest of the appellant especially in drug related

offences where police offcers are the key witnesses.”

This observation would be on the premise that in a drug

related offence arising from a raid by the police, the prosecu-

tion has to corroborate the evidence of any member of the raid-

ing party in order to bring about a conviction. In the present

case IP Jayamanne who led the raid and who was mainly

responsible in arresting the accused and found heroin in

his possession had given evidence and the other Police Of-

fcer, punchisoma, who assisted him in arresting the accused

had not been called to give evidence, though he was listed

as a witness. This would bring about a situation where in a

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drug related offence the prosecution has to corroborate the

evidence of the main witness or any witness which leads to

the arrest of the accused in possession of drugs.

It is a well established principle that the prosecution is

not required to lead the evidence of a number of witnesses

to prove its case. In a similar case as the present

instance, Jayasuriya J in *A.G. v. Mohamed Saheeb Mohamed*

*Ismath*(1) Decided on 13.7.1999 stated that “There is no

requirement in law that evidence of a police offcer who has

conducted an investigation into a charge of illegal posses-

sion of heroin, should be corroborated in regard to material

particulars emanating from an independent source. Section

134 of the Evidence Ordinance states that *“No particular*

*number of witnesses shall in any case be required for the*

*proof of any fact*. The principle had been applied in the In-

dian Supreme Court where the conviction rested solely on the

evidence of a solitary witness who gave circumstantial

evidence in regard to the accused’s liability. The privy Council

upheld the conviction entered by the trial Judge and adopted the

Judgment of the Supreme Court in *Muulluwa v State of*

*Madhya Pradesh*(2). This principle has been adopted with

approval and applied in the judgment of G.p.S. Silva J. in

*Wallimunige John v The State*(3). *King v. N. SA Fernando*(4). The

principle affrmed is that testimony must be weighed and not

counted. Justice Vaithylingam dealing with a bribery charge laid

down for the future legal fraternity the principle that even in a

bribery case, that there is no legal requirement for a sole

witness’s evidence to be corroborated. No evidence even of a

police offcer who conducted a raid upon a bribery charge is

required by law to be corroborated. *Gunasekera v. A.G.*(5).

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In *Walimunige John v. State (Supra)*, it was stated that “the

question whether the failure of the prosecution to call a

witness on the back of the indictment could be made the

subject of adverse comment by the defense and whether a

trial Judge should direct the jury that they are free to draw an

adverse inference from the failure to call such a witness are

allied questions which are also inextricably bound up with

the discretion exercisable to a prosecutor to decide which of

the available witnesses he should call for a proper presenta-

tion of the case. These two identical questions came up for

consideration during the very formative years, as it were, of

this Court before Soertsz J associated with keuneman J and

de kretser J in the case of *King v Chalo Singho*(6). In a char-

acteristically illuminating judgment Soertsz J has examined

section 114(f) of the Evidence Ordinance as well as a large

number of Indian and English commentaries and decisions

on the question and has laid down with clarity and preci-

sion the answers to these questions. This decision has in-

deed facilitated our task in deciding on the correct approach

to this question. It would appear that different Judges had,

prior to the establishment of the Court of Criminal Appeal,

taken somewhat divergent views as to whether a prosecu-

tion should call every witness on the back of the indictment

or at least tender for cross-examination those whom he did

not call. Consequently, an appropriate occasion arose in this

case to review the entire position.

On the question whether a prosecutor is obliged to

call all the witnesses on the back of the indictment or at

least to tender those not called for cross-examination, that

court decided to follow the principle enunciated in *King v.*

*Seneviratne*(7) and summed up the decision as follows: “It

must, therefore, be regarded as well-established now, that

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a prosecutor is not bound to call all the witnesses on the

back of the indictment, or to render them for cross-exami-

nation. That is a matter in his discretion, but in exceptional

circumstances, a Judge might interfere to ask him to call a

witness, or to call a witness as a witness of the court. It must,

however, be said to the credit of prosecuting counsel today,

that if they err at all in this matter, they err on the side of

fairness.”

The above principle was approved and adopted by the

full Bench of the Supreme Court in *Ajith Fernando and*

*others v the Attorney General*(8).

It would be relevant to consider the position of the

evidence given by an accomplice, where according to section

114(b) of the evidence ordinance, such evidence is unworthy

of credit, unless he is corroborated on material points. In

*Beddewela v. Albert* (9) it was held that a decoy or a spy is on

a different footing from an accomplice so far as the rule of

practice regarding corroboration is concerned, but that their

evidence should be probed and examined with great care. This

principle has been followed in *Lyris Silva v. Karunaratne*(10),

*Ariyaratne v. Food & Prince Control Inspecto*r(11), *Wickrama-*

*dasa v. The Food and Price Controller*(12).

Therefore it is quite clear that unlike in the case where

an accomplice or a decoy is concerned in any other case there

is no requirement in law that the evidence of a police offcer

who conducted an investigation or raid resulting in the arrest

of an offender need to be corroborated in material particu-

lars. however, caution must be exercised by a trial Judge in

evaluating such evidence and arriving at a conclusion against

an offender. It cannot be stated as a rule of thumb that the

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evidence of a police witness in a drug related offence must be

corroborated in material particulars where police offcers are

the key witnesses. If such a proposition were to be accepted

it would impose an added burden on the prosecution to call

more than one witness on the back of the indictment to prove

its case in a drug related offence however satisfactory the

evidence of the main police witness would be.

In my view the Court of Appeal erred in setting aside

the conviction and sentence of the accused and that of the

questions of law 7(a) to (g) referred to above, on which leave

was granted by this Court, answering question 7(g) in the

affrmative would suffce to dispose of this appeal as the said

question encompasses the main issue that was argued in

appeal.

In the above circumstances the Judgment of the Court

of Appeal is set aside and the judgment of the high Court

of convicting the accused and sentencing him for life is

affrmed. The high Court is directed to summon the accused

and take appropriate steps regarding the said conviction and

sentence.

**j.a.n. dE Silva cj** – I agree.

**MaRSoof j.** – I agree.

*Judgment of the Court of Appeal set aside and the judgment of*

*the High Court convicting the Accused and sentencing him for*

*life affrmed.*

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**NANDANA vS. SADDASENA**

CourT of AppeAl

ERIC BASNAyAkE J.

K. T. ChITrASIrI J.

CAlA 454/2006

DC BAlApITIyA 519/T

8Th of SepTeMBer 2008

***Civil Procedure Code Section 714 (3) – Testamentary Action -***

***Probate holder seeking an injunction preventing the cutting of***

***trees? - Permissibility?***

The probate holder fled petition and affdavit and sought an interim

injunction preventing the respondent – petitioner from cutting down

trees and leveling the property described in the Inventory. The District

Judge issued the injunction prayed for.

**held:-**

(1) The probate holder was out of possession more than 6 years. The

petitioner had been in possession for more than 6 years and he

claims the property independently and on prescription. In such

a situation the probate holder should fle a separate action to

vindicate title.

(2) When the Executor presents a petition under Section 712 of the

Code to claim property belonging to the estate from the Respon-

dent who has possession, when the respondent put in an affdavit

swearing she was the owner as soon as the affdavit was presented

the only thing the court had to do was to dismiss the petition

[Section 714(3)].

**application** for leave to appeal for an order of District Court of

Balapitiya.

**case referred to:**

In *Re Cornelis* – 2 NLR 252

*J. C. Boange* for Respondent – Petitioner

*Nandana vs. Saddasena*

CA *(Eric Basnayake J.)* 419

*N.R.M. Daluwatta P.C.* with *Sajivi Siriwardena* for Petitioner –

Respondent.

June 02nd 2009

**ERic BaSnayakE j.**

The petitioner - respondent (probate holder) was issued

with probate in respect of the estate of H. Baron Silva who

died on 23.10.1981. on 15.5.2006 the probate holder fled a

petition and an affdavit seeking an interim injunction and an

enjoining order against the respondent-petitioner (petitioner)

preventing him from cutting down trees and leveling the

property described in the inventory under items Nos. 3 & 4.

The learned District Judge by his order dated 30.10.2006

issued an interim injunction as prayed for in the petition. The

petitioner is seeking to have this order set aside.

The petitioner claimed this property independently and

on prescription. It is conceded on behalf of the probate holder

that the petitioner began disputing the title of these properties

from about the year 2000 (written submissions of the probate

holder in paragraphs 2; 4 & 5). On a complaint made by the

probate holder to the police, proceedings were instituted in

the Magistrate’s Court of Balapitiya in case No. 28310 under

section 66 of the primary Court procedure Act. The learned

Magistrate had after inquiry advised the parties to resolve the

dispute in a civil action (these proceedings are not found in

the docket). Thus it is apparent that the probate holder was

out of possession for more than six years. The petitioner had

been in possession of this property for more than six years at

the time of the injunctive application. In such a situation the

probate holder should fle a separate action to vindicate title.

Section 714 (3) states thus “In case the person cited is put

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in an affdavit that he is the owner of any of the ….. property

or is entitled to the possession thereof by virtue of any lien

thereon, the proceedings. . . shall be dismissed”.

In *Re-Cornelis*(1) the Executors of a will presented a

petition under section 712 of the Civil Procedure Code to

claim some property belonging to the estate from the respon-

dent who has possession. The respondent put in an affdavit

swearing that she was the owner. Bonser C.J. held that “as

soon as the affdavit was presented, the only thing the court

had to do was to dismiss the petition”.

I am of the view that the learned Judge had erred in

granting an interim injunction in the testamentary case to

restrain the petitioner from cutting down trees etc. without

dismissing the petition. Hence the order of the learned

District Judge of 30.10.2006 is set aside. leave to appeal as

well as the appeal is therefore allowed with costs.

**k. t. chitRaSiRi j.** – I agree.