

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] 2 SRI L.R. - PART 2**

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CA 29

**JAYASEkERA VS. PERERA**

Court of AppeAl

ekAnAyAke, J.

GoonerAtne, J.

CA 311/95 (f)

DC Colombo 14588/p

mAy 7, 2007

***Partition Law – Section 26 (2) (d) – Judgment not in compliance***

***with Section 187 of the Civil Procedure Code – Amicable division –***

***Family arrangement – Should it be accepted? Testamentary case***

***– Section 545 of the Code – property in dispute not in the inven-***

***tory – Fatal? Who is an heir? – Constitution Article 138(1)***

In the partition action, the defendants relied on an amicable divi-

sion. the plaintiff contended that the said document has not been

notarially executed and as such invalid – and that the other co-own-

ers had not signed same. It was also contended that, the corpus was

not included in the testamentary case of the father of the plaintiff-

respondent and it is a bar to a subsequent partition action. It was

contended by the defendants – appellants that, the requirements in

Section 187 of the Civil Procedure Code had not been satisfed.

**Held**

per Anil Gooneratne, J.

“Considering the totality of the evidence although there is no strict

compliance with Section 187. I hold that the District Court is not

in error in entering judgment for the plaintiff since no failure of

justice has prejudiced the defendant.”

(1) the fact that the inventory does not include the land in question

should not be a bar to a subsequent partition action. A mere lapse

in the inventory of not including a property should not deprive the

plaintiff’s real entitlement to succession. the plaintiff is entitled to

her legal entitlement on the death of her mother.

(2) Heir is a person who succeeds by descent to an estate of inheri-

tance on the death of a person his estate in the absence of will

passes at once by operation of law to his heirs and that dominium

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vests in them. once it is so vested they cannot be divested of it

except by several well known modes recognized by law.

(3) there is no proper deed or notarially executed document produced

in the trial to prove an amicable arrangement. the document

appears to be a proposal and not signed by all – as such no reli-

ance could be placed on the document.

(4) Long possession may not be suffcient to prove ouster although

one could argue that inference of ouster could be drawn from such

possession.

**AppeAl** from the judgment of the District Court of Colombo.

**Cases referred to:-**

1. *Dona Lucihamy vs. Ciciliyanahamy* – 59 nl 214

2. *Warnakula vs. Ramani Jayawardena* – 1990 – 1 Sri lr 206

3. *Ceylon Transport Board vs. Ceylon Transport Workers’ Union* – 71

nlr 158

4. *Fernand vs. Dabarera* – 77 nlr 127

5. *Hassen Hanjiar v. Levane Marikkar* 15 nlr 275

6. *Perera vs. Kriekenbeck* – 10 nlr 119

7. *Wijewardena vs. Abdul Hamid* – 12 nlr 243

8. *Silva vs. Silva* – 10 nlr 242

9. *Appuhamy vs. Premalal* – 1984 – 1 Sri lr 209

10. *Maria Perera vs. Albert Perera* – 1982 2 Sri lr 399

*Gamini Marapana PC* with *Navin Marapana* and *T. Palliyaguruge*

for appellant.

*Nihal Jayamanne PC* with *Ajit Munasinghe* and *Dilhara de Silva*

for respondent.

may 07th 2007

**Anil GoonerAtne J.**

this was a partition action instituted in the District Court

of Colombo in December 1986 to partition a land called

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‘poththewela owita’ in extent of 2 roods 3.4 perches. the

prayer to the plaint seeks an order in terms of Section 26(2) (d)

of the partition law. the plaintiff claims an undivided half

share of the land in question, and the relief sought is to

demarcate the half share according to the said section.

the 1st and 2nd Defendants in their statement of claims

disclosed two other parties. the Defendants in their statement

of claims had prayed for a dismissal of plaintiff’s action and

claimed shares in the entire corpus in the manner set out in

the respective statement of claims fled by them.

At the trial held on 18.6.91 before the District Judge

paragraphs 1 to 5 of the plaint were admitted and thirteen

points of contests were raised. the proceedings of 2.10.91

indicates that points of contest nos. 4 to 13 were corrected.

the admissions recorded in paragraphs 3 and 4 gives an

indication as to how the property in question devolved from

the original owner b. m. edward Walter perera. the property

of said b. m. edward Walter perera devolved on his daughter

Vivien leelawathie perera and his second wife mary pinto,

(after the demise of his frst wife) in equal share. At the hearing

of this appeal the learned president’s Counsel for the Defen-

dant Appellant submitted that the plaintiff claims title through

the above named Vivien leelawathie perera. He also submit-

ted inter alia that there was an arrangement for an amicable

division between the above named Vivien leelawathie perera

and the said mary pinto. (2nd wife of b. m. edward perera). on

or about 1948 as a result of this arrangement the said Vivien

leelawathie perera gave up her rights to the half share which

devolved (earlier) on her from the property in question and

instead possessed, and owned three other properties, namely

pellangahawatta pellangaha owita and bandiya Godallawatta.

In fact this is the case of the Defendant Appellant and it was

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strenuously argued by the said president’s Counsel regarding

the above points and that the judgment delivered in the

District Court is also not a judgment in compliance with

Section 187 of the Civil procedure Code and submitted that

this court should order a re-trial. He relied on the authorities

referred to in *Dona Lucyhamy v. Ceciliyanahamu*(1), *Warnakula*

*v. Ramani Jayawardena*(2) and *Ceylon Transport Board vs.*

*Ceylon Transport Workers Union*(3) to support the view that

the judgment of the District Court does not satisfy Section

187 of the Civil procedure Code.

the president’s Counsel who appeared for the plaintiff

respondent submitted to this court that the arrangement

referred to above for an amicable division relied upon by

document marked ‘D2” is not notarially executed and as such

invalid. He also stressed that the other co-owners have not

signed ‘D2’ and if at all it is only a proposal. learned presi-

dent’s Counsel also referred to a portion of the judgment and

emphasized the fact that the learned District Judge’s fnd-

ings on the above amicable division is that such arrangement

within the family has not been proved, and invited this court

to accept this position. further evidence of the 3rd Defendant

was also highlighted by counsel at pgs. 433 & 434 of the brief

to support the position that after the 1948 arrangement there

was a further transfer and after 1948 the 3rd Defendant is

unable to state the ownership of the property.

the attention of this court was also drawn to the 1st

Defendant’s evidence at pgs 542 and 543 of the brief where

it is stated that paragraph 5 of the statement of claim of the

Defendants is incorrect and rejected the amicable division

and the witness stated that Vivian leelawathie perera never

owned the lands described as pellangahawatta and pellan-

gaha owita.

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the plaintiff according to paragraph 6 of the plaint

is the daughter of the said Vivian leelawathie perera. the

admission of paragraph 5 of the plaint indicates that all

the properties of the said Vivien leelawathie perera on her

death in 1958 devolved on francis Joseph boteju by last will

(p 6) which was proved in testamentary case 18728/t (p7).

In 14.6.1975 by last will 2601 of 30.7.72 the properties were

bequeathed by francis J. boteju to the plaintiff by last will

2601 which was proved in testamentary case 1005/po

paragraph 6 of the plaint has been denied.

the Appellant further fortify the argument that the above

mentioned testamentary Case no. 18728/t where last will

p6 was proved and the properties of leelawathie Vivian

perera devolving on francis Joseph boteju, did not include

the property in question in the inventory fled in the said case

no. 18728/t. the inventory is at pgs. 660-663 of the brief

(‘D1’).

Issue no. 10 seems to have been suggested on this basis

on a perusal of the inventory, it appears that the inventory

does not include the land in question. the other point raised

by the Appellant is that ‘p11’ deed, which was produced by

the plaintiff which was executed by francis Joseph boteju

refer to the family arrangement and renouncing of rights to

the property referred to in the 1st schedule only of the Deed.

this property is called millagahawatta alias kelirihenalanse-

watta in talangama. the plaint described the land in ques-

tion as pottewalaowita in extent of 2 roods 3.4 perches. the

1st schedule of Deed ‘p11’ is in extent of about 6 Acres 1 rood

and 5 perches. the 3rd schedule of ‘p11’ refer to a land called

pellangahawatta owita. Although renouncing of rights to

property is referred to in ‘p11’ it is not certain on a perusal of

the Deed as to whether it applies to the land described in the

schedule to the plaint.

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Section 547 of the Code was repealed and reintroduced

as Section 545 of the Civil procedure Code on the question of

the property in dispute not being included in the inventory,

the following case law may be noted. In *Fernando vs. Dab-*

*arera* (4)...........

When an action for declaration of title to a land belong-

ing to a deceased person’s estate is instituted by a person

claiming to be a successor in title of the deceased, section

547 of the Civil procedure Code does not expressly pro-

hibit the maintenance of the action on the ground that

the name of the land is not included in the Inventory fled

in the testamentary action relating to the estate of the

deceased owner. In such a case the burden of estab-

lishing that the particular land was not included in

the Inventory must lie on the party who takes such

objection.

*Hussen Hadjiar vs. Levane Marikkar*(5), whilst this section

penalizes, does not prohibit, transfer of a property which

ought to have been, but has not been administrated.

It may fairly be argued that the words in section 547 “no

action shall be maintainable” mean only shall be capable

of been proceeded with.

*Perera vs. Kriekenbeck*(6), Section 547 of the Code con-

templates the transfer of the deceased’s assets without

the formality of taking out probate or letters of adminis-

tration at all, and not a mere defciency in stamp duty.

Another point stressed by the plaintiff respondent is

that the alleged family arrangement in 1948, to renounce the

right to the property in question, and in view of that three

other properties were vested with leelawathie Vivian perera

and one such property called bandi Godella which was

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partitioned according to ‘P12’ (fnal decree in case in 5593/P)

and the parties in that action were mary pinto’s heirs and

Vivien leelawathie perera. (7th plaintiff) If by the arrange-

ment in ‘D2’ in 1948, was to vest the three other properties

in leelawathie Vivian perera, there was no need to partition

the land called bandigodellawatta in 1952 along with Vivien

leelawathie perera and heirs of mary pinto, being plaintiffs in

that case. the response to this position of the respondent by

the Appellant is that ‘D2’ left bandigodellawatta in common

to both Vivian leelawathie perera and mary pinto’s heirs.

on this aspect of the case I wish to state that no reliance

could be placed on ‘D2’ since it has not been signed by all the

co-owners and not notarially executed. the points stressed

by the Appellant that bandigodellawatta was left in common

seems to have been submitted merely to fll a gap and not

with substance.

As regards the other two lands included in the alleged

family arrangement namely pellangaha owita and

pellangahawatta, which were given to leelawathie Vivian

perera as contended by the Appellant, there are two deeds of

gifts marked ‘D3’ & ‘D4’ executed in 1963 & 1964 by the heirs

of the said mary pinto which were gifted. It is the respon-

dent’s position that by executing ‘D3’ & ‘D4’ the Appellants

stand of not claiming any right or interest in the lands given

to leelawathie Vivian perera proved to be false. both deeds

also include the land in dispute in schedule 5 of ‘D3’ & ‘D4’.

In view of the objection raised by the Appellant that the

judgment is not in compliance with Section 187 of the Civil

procedure Code, evidence in this case and the judgment will

have to be examined very carefully. It is apparent that the

fndings of District Judge on the main issue is confned to

about 2/3 paragraphs of the judgment which is contained

immediately before answering the issues.

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the evidence of the Plaintiff at the beginning confrm the

matters referred to in paragraphs 3 – 5 of the plaint. plaintiff

was about 6 years old when her mother Vivian leelawathie

perera died. last will of her mother was produced as ‘p6” and

probate in favour of her uncle francis Joseph boteju was

marked as ‘p7’ in case no. 18728/t. Her uncle died in 1975

and his last will was marked as ‘p8’ and probate marked ‘p9’

issued to public trustee. the land in dispute is itemized in

clause 5 sub-section 3 in p8’. there is evidence of plaintiff

visiting the land in dispute with her uncle during his life

time and reference is made to the plantation in the property

concerned and cultivating by persons employed for the

purpose by francis Joseph boteju. When ‘p2’ was prepared

plaintiff visited the land. up to 1975 francis Joseph boteju

visited the land and took the produce in this property. this

evidence has been submitted to court, to prove prossession.

there is also evidence of the plaintiff regarding the family

arrangement. Plaintiff rejects that position and confrm that

the arrangement was for three other properties described

above and not concerning the land in dispute. She refers to

‘p11’ and states that the family arrangement was for three

other properties described in the schedule of ‘p11’ and not

for poththewala owitta, the land in dispute. this witness

categorically states that as regards ‘bandigodallawatta’ there

was no arrangement for her mother to own it exclusively. that

position of the Defendant is rejected by her.

In cross-examination of the Plaintiff I fnd that certain

questions about her personal life, birth certifcate, her

father, mother’s life etc. has been put to her by the defence to

discredit her but the main issue pertaining to the family

agreement which was rejected seems to have not been

disturbed. the question posed to her about the inventory

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and the land in dispute not being included in same, her an-

swer to that question she admits that the land in question

has not been inventorised or not included in ‘D1’. In order to

prove possession this witness mentions that as far as she can

remember since 1962 she had visited the land with her uncle.

this position has been maintained by this witness in cross-

examination, and the attempts to demolish that position has

not been successful. Witness had been questioned about the

plantation and cultivation of trees. this court observes that

after so many years it would be diffcult for any witness to

give the exact fgure, dates and description. As long as a fair,

reasonable, acceptable position is placed before court, I think

the evidence on this aspect of the plaintiff is more proba-

ble up to 1975 under francis Joseph boteju the land had

been looked after on his behalf under his supervision by his

employees. the family arrangement relied upon by the

Appellant’s party has been rejected by the witness and I

observe that it is an unsuccessful attempt by the opposing

party to displace the plaintiff, and the plaintiff version

is more acceptable on this aspect of rejecting the family

arrangement.

the other witness from the public trustee Department

gave evidence on behalf of the Plaintiff who testifed about

the land in dispute from the fle maintained in the Public

trustee’s Department, and produced ‘p10’ the valuation

report which refer to the land in question, in item no. 10 of

'P10'. He also testifed that in 1986 he visited the land and one

mrs. Jayasekera was present and had reprimanded him.

Witness Sediris an employee of francis Joseph boteju also

gave evidence for the plaintiff. Several questions somewhat

irrelevant questions had been put to this witness in cross-

examination. This witness confrms possession of Francis

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Joseph boteju and the several visits made by francis Joseph

Boteju with the Plaintiff to the land in dispute, and confrm

that cultivation on this land took place after 1962. He also

testifed that the 1st Defendant never possessed the land.

the Defence led evidence of several witnesses in the

District Court to prove possession including that of the 1st

and 2nd Defendant. The Grama Sevaka testifed that the 1st

Defendant’s husband had employeed persons and cultivated

the land during 1978 to 1986 and in 1986 the plaintiff

complained to him about construction of a house on the land.

He also testifed about the plantation in the land. However

prior to 1986 he had not visited the land since he had no

offcial business. He has seen the land prior to 1986 only

when he passed this land by road. the 1st Defendant had

never occupied the house on this land.

the 3rd Defendant claims that he knows this land

for about 7/8 years and that he is aware that Jayasekera

(1st Defendant’s husband) put up a hut on this land. He

testifed that his ancestors possessed this land but he admits

that Vivian leelawathie perera owned ½ share of the land. He

denies any possession by the plaintiff or her predecessors. He

claims rights on the ½ share devolved on mary pinto.

the 1st Defendant in her evidence tries to establish long

possession starting from the pinto family construction of the

hut on this land is also testifed by her in evidence and that

one pabilis cultivated on their behalf. there is also evidence

by her on the plantation. tax receipts were also produced.

the judgment of the District Court has been criticized by

the Appellant on the basis that the requirements set out in

Section 187 of the Civil Procedure Code had not been satisfed.

Considering the totality of evidence although strict non

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compliance with Section 187, I hold that the District Court

is not in error in entering judgment for the plaintiff, since no

failure of justice has prejudiced the Appellant.

However it would be pertinent to consider the decision

of the Supreme Court in *Dona Lucihamy vs. Ciciliyanahamy*

*(supra)*

per lW. De Silva AJ at 216. . . . .

“We are of the opinion that the failure of the trial judge

to examine the title of each party has prejudiced the

substantial rights of the parties. We accordingly order a

new trial”.

though l. W. de Silva A. J. in the said judgment

observed so, I am unable to hold the view that the learned

trial Judge in this case has totally failed to examine the

evidence adduced at the trial and the title. therefore no

prejudice has been caused to substantial rights of the

parties. In the light of the above I am inclined to take the

view that the decision in lucihamy’s case would lend no

assistance to the case at hand. I am also mindful of the

provisions contained in the proviso to Article 138(1) of the

Constitution.

Issue nos 5, 6 & 8 refer to the family arrangement.

entire case of the Appellant rests on the above issues.

Document ‘D2’ has not been signed by all the co-owners

and one cannot merely suggest an arrangement by way of a

proposal and stop at that if the parties intend to give validity

to such arrangement. there should have been a notarially

executed document. In the absence of such document this

court cannot hold that ‘D2’ is a legally binding agreement.

Issue no. (6) takes another turn. there is no evidence placed

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before the District Court to even suggest renouncing of rights

as indicated in issue 6, by Vivian leelawathie perera. As

correctly pointed out by the respondent if in fact rights of

Vivian leelawathie perera were renounced there could not be

a subsequent deed of gift as evidence by ‘D3’ & ‘D4’ by the

successors of mary pinto. All this would confuse the issue.

Heir is a person who succeeds by descent to an estate of

inheritance. *Wijewardena vs. Abdul Hamid*(7) on the death of

a person his estate, in the absence of a will passes at once by

operation of law to his heirs and the dominium vests in them.

once it is so vested they cannot be divested of it except by

several well known modes recognized by law *Silva vs. Silva*(8)

the fact that the inventory does not include the land in

question should not be a bar to subsequent partition suit. As

observed in *Fernando vs. Dabarera ( supra). . . .*

When an action for declaration of title to a land belong-

ing to a deceased person’s estate is instituted by a person

claiming to be a successor in title of the deceased,

section 547 of the Civil procedure Code does not expressly

prohibit the maintenance of the action on the ground that

the name of the land is not included in the Inventory fled

in the testamentary action relating to the estate of the

deceased owner.

plaintiff from the age of 6 years, was dependant on others

due to her mother’s demise, at that early age. She is entitled

to her legal entitlement on the death of her mother. A mere

lapse in the inventory of not including a property should not

deprive plaintiff’s real entitlement on succession.

the alleged amicable arrangement has confused the

issue and in the absence of valid documentation it would

not be safe to act on such arrangement where land is

concerned.

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Although the point was stressed by the Appellant about

an amicable arrangement, there is no proper deed or notarially

executed document produced in the trial court to prove such

arrangement. the only document relied upon by the Appellant

is ‘D2’ which appears only to be a proposal and not signed

by all those concerned. As such no reliance could be placed

on ‘D2” and the position would remain the same without a

change of title and will continue in the manner suggested

in the admissions recorded in the trial court, without any

arrangement to renounce title of a particular land, which is

the subject matter of this case.

In *Appuhamy v. Premalal* (9)

Held -

(1) An amicable division to be recognized by law must

be a division that puts an end to co-ownership of

property

(2) An amicable division can be given effect to –

(a) by a deed of partition and a partition plan where

all the co-owners sign agreeing to the division or

by a cross conveyance executed by each of the

co-owners whereby the notarial deeds would be the best

evidence of the termination of the common ownership.

In *Maria Perera v. Albert Perera*(10)

Held -

An amicable partition can be a starting-point of

prescription even though no deed of partition or cross

deeds or other documents have been executed. but

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inclusive possession by a co-owner for a period of

10 years alone cannot give rise to prescriptive title.

there must be the further important element of a

“change of circumstances from which an inference

could reasonably be drawn that such possession is

adverse to and independent of” all other co-owners.

there must be proof of circumstances from which

a reasonable inference could be drawn that such

possession had become adverse at some date ten

years before action was brought. mere exclusive

possession for 20 years (by taking the natural

produce of the land) on a plan not signed by any

of the co-owners to whom the plaintiff claimed lots

were allotted cannot constitute proof of ouster. the

possession of a co-owner would not become adverse

to the rights of the other co-owners until there is an

act of ouster or something equivalent to ouster.

Long possession may not be suffcient to prove ouster,

although one could argue that inference of ouster could

be drawn from such possession. facts and circumstances

of a particular case should be considered before accepting

any adverse possession and ouster in favour of a party to a

partition suit. that burden has not been properly discharged

by the Defence, to claim more than their entitlement to land

in dispute.

However when considering the totality of evidence placed

before the District Court I cannot conclude that the Appellant

has been prejudiced or some injustice had occurred. All the

possible evidence on both sides had been adduced. this is

a case which has a history and ownership of land originally

goes back to the year 1918.

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In the circumstances, on a consideration of the totality

of the evidence both oral and documentary led in this case.

I am of the view that notwithstanding the District Judge’s

failure to strictly comply with Section 187 of the procedure

Code there is no prejudice to the appellant or any injustice

caused. As such on an examination of the evidence I hold

that the District Judge is correct in pronouncing judgment in

favour of the plaintiff-respondent. this appeal is dismissed. no

order is made with regard to the costs of this appeal.

**CHAndrA ekAnAyAke J.** – I agree.

*Appeal dismissed.*

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**ARUNA ALIAS PODI RAJA VS. ATTORNEY GENERAL**

Court of AppeAl

SISIrA De AbreW, J.

upAly AbeyrAtne, J.

CA 71/2003

HC bADullA 67/2000

AuGuSt 31St, 2009

***Penal Code – Section 365 – Evidence Ordinance – Section 27***

***Recoveries – Dock Statement – Accused proved to be innocent –***

***Is there burden on the accused to prove anything? When is he***

***expected to offer an explanation? – Ellenborough principle –***

***Exceptions?***

the accused –appellant was convicted of the murder of a man called

W and was sentenced to death.

In appeal it was contended that the trial Judge failed to judicially

evaluate the items of circumstantial evidence and the reliance made by

the trial Judge on Section 27 recoveries was erroneous.

**Held:**

(1) When an allegation of murder is leveled against a person if he had

acquired the knowledge of the items he would have divulged the

way he acquired such knowledge in his dock statement which is

not even subjected to cross examination. this is the normal be-

havior. the conditions reached by the trial Judge that the appel-

lant acquired the knowledge of the items recovered by an act done

by him is not objectionable.

(2) An accused person against whom a criminal charge is leveled is

always presumed to be innocent until his guilt is proved. there is

no burden on the accused to prove anything but when strong and

cogent evidence is established an accused person in a criminal

case is expected to offer an explanation of the highly incriminating

circumstances established against him.

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As a rule a party’s failure to explain damming facts cannot convert

insuffcient evidence into prima facie evidence, but it may cause prima

facie evidence to become presumptive.

per Sisira de Abrew, J.

“When prosecution established a strong incriminating evidence

against an accused in a criminal case the accused in those

circumstances is required to offer an explanation of the highly

incriminating evidence established against him and the failure

to offer such explanation suggests that he has no explanation to

offer”.

**AppeAl** from the judgment of the High Court of badulla.

**Cases referred to:-**

1. *Ariyasinghe vs. Attorney General (G.C. Wickrenasinghe abduction*

*cave)* – 2004 2 Sri lr 357

2. *Rex vs. Cochrane and others* – 1814 – Gueney’s reports at 479

3. *King vs. Seeder Silva* 41 nlr 337 at 344

4. *Peiris vs. Appuhamy* 43 nlr 412 at 418

5. *King vs. Endoris* 46 nlr 499 (per Soertsz, J.)

6. *Inspector Arendstz vs. Wilfred Peiris* 10 ClW 121 at 123

7. *Queen vs. Seetin 68 NLR 160*

8. *Chandradasa vs. Queen* 72 nlr 160

9. *Beddavithana vs. A. G.* 1990 1 Slr 275 at 278

10. *Republic vs. Illangathilake* 1984 2 Sri lr 38

11. *Rex vs. Burdett* (1820) 4b and Ald 161, 162

12. *Chandradasa vs. Queen* 72 nlr 160

13. *Queen vs. Santin Singho* 65 nlr 445

14. *State of Tamil Nadu vs. Rajendran* 1999 Cri l.J. 4552

15. *Boby Mathew vs. State of Karanatake* 2004 Cri l.J. Vol 3p 3003 at

3015.

*Dr. Ranjith Fernando* for the accused-appellant.

*Dappula de Livera DSG* for the Attorney General.

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october 09th 2009

**SiSirA de Abrew J.**

the accused appellant in this case was convicted of the

murder of a man named Illeperuma Archchilage Wimalasena

and was sentenced to death. this appeal is against the said

conviction and the death sentence. the second accused who

was charged with the same offence was discharged at the end

of the prosecution case. learned Counsel for the appellant

urged the following grounds of appeal as militating against

the maintenance of the conviction.

1. the learned trial judge failed judicially to evaluate the

items of circumstantial evidence.

2. reliance made by the learned High Court Judge on

Section 27 recoveries was erroneous.

According to the prosecution case the deceased who

was working in a mine in the morning of 3.11.95 left for his

work place but he never returned home. At the time he left

his home he was wearing a red coloured shirt and a blue

coloured sarong. this red coloured shirt and a piece of the

sarong which were recovered in consequence of a statement

made by the appellant were later identifed by the wife of

the deceased. this was how the prosecution established the

identity of the dead body. Since the deceased did not return

home the wife of the deceased went and made inquiries from

thanagavelu and Gunasinghe who were working with the

deceased in the mine and learnt that on 3.11.95 around

12.30 p.m. the deceased left with the appellant who had

come to meet him. According to thangavalu around 12.30

on 3.11.95 the deceased and the appellant were seen

chatting at the bus stop and thereafter they went in a

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bus and got down at badalkumbura. When the wife of the

deceased went and asked about her husband, the appellant

told her that the deceased after watching a flm went to his

sister’s place. the wife of the deceased thereafter did not see

him for the next eleven months. the red coloured shirt of the

deceased and a piece of a sarong worn by the deceased were

found in a toilet pit of an uncle of the appellant. remnants of

a human skull and human bones were found in consequence

of a statement made by the appellant arrested eleven months

after the disappearance of the deceased.

prosecution led following items of circumstantial

evidence to prove the change.

1. All bones recovered in consequence of a statement

made by the appellant belong to one person.

2. Gender of the said person was proved to be that of a

male.

3. Age of the person whose bones were recovered in

consequence of a statement made by the appellant

was estimated to be between 24 and 36 years.

According to the wife of the deceased, the deceased

was a young person.

4. evidence of violence on the body of the deceased was

present. fractures and gun shot injuries were found

on the skull.

5. Cause of death was due to gun shot injuries or blunt

trauma.

6. the appellant and the deceased were known to each

other.

7. the deceased was last seen with the appellant on

3.11.95

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8. the appellant visited the deceased at his work place

(the mine) around 12.30 p.m. on 3.11.95 and spoke

to the deceased for about half an hour.

9. the appellant and the deeased went in a bus and got

down at badalkumbura on 3.11.95.

10. the appellant left his house on 5.11.95 and was

missing for about eleven months.

11. on the direction of the appellant who was arrested

after about eleven months from the disappearance

of the deceased, the investigating offcer recovered

remnants of a skull from a place which was 20 meters

away from the appellant’s house. the said remnants

were found inside a shopping bag which was found

in the appellant’s garden. Some pieces of the skull

which had come out of the shopping bag were found

near the said shopping bag.

12. on the directions of the appellant, the investigating

offcer dug ground area of about 7 x 4 feet which was

about 60 meters away from the appellant’s house and

found hair and bones of a human being.

13. on the directions of the appellant, the investigating

offcer went near the toilet pit of Gunathilake, an

uncle of the appellant and discovered a blue coloured

piece of a sarong and a red coloured shirt. these

clothes were identifed by the wife of the deceased as

the clothes of the deceased.

14. on the directions of the appellant the investigating

offcer went near a pond extent of which was about

15 x 20 feet. After the pond was emptied the investi-

gating offcer dug the base of the pond and recovered

human bones.

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15. medical evidence says that all the bones recovered

were of one human being.

learned trial judge when dealing with the evidence

relating to Section 27 (of the evidence ordinance) recoveries

considered the ways in which the appellant could have

acquired knowledge about the remnants of a human skull

and bones. According to the learned trial Judge there were

three ways in which the appellant could have acquired such

knowledge.

1. He acquired the said knowledge by an act done by

him.

2. He saw another person disposing of the dead body.

3. A person who had seen another person disposing of

the dead body told the appellant about it.

the learned trial Judge after considering the place where

the human bones were found concluded that the appellant

could not have acquired the knowledge through the 2nd and 3rd

ways. learned Counsel for the appellant contended that the

said conclusion of the learned trial Judge was wrong. I now

advert to this contention. It has to be noted here remnants

of a human skull were found in the garden of the appellant.

the red coloured shirt and a piece of a sarong were recovered

inside the toilet pit of one Gunathilake, an uncle of an

appellant. Some human bones were found after digging the

base of a pond. The investigating offcer had frst emptied the

pond. All these things were found in an area of 4 to 5 square

miles. If the appellant acquired knowledge of the said items

through the 2nd and 3rd ways described above, he would have

without any hesitation said those ways in his dock state-

ment. but the appellant failed to do so. When an allegation of

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murder is leveled against him, if he had acquired the knowl-

edge of the said items through the 2nd and 3rd ways described

above, he would have divulged those ways in his dock

statement which is not even subjected to cross examination.

this is the normal human behaviour. When I consider all

these matters, I hold that the conclusion reached by the

learned trial Judge that the appellant acquired the knowledge

of the items recovered by an act done by him is not objection-

able. but on this conclusion one cannot decide that it was the

accused who inficted injuries on the deceased or committed

the crime, leveled against him. In *Ariyasinghe vs. Attorney*

*General (GC Wickramasinghe abduction case)(*1) the view

expressed on Section 27 recoveries by the trial Judge was

very much similar to the view expressed by the trial judge in

the instant case. His lordship Gamini Amaratunga at 386

and 387 upheld the view expressed by the trial Judge.

After leading the above items of circumstantial evidence

the appellant made a statement from the dock. He, in his dock

statement, said that he did not know anything about the case.

I will reproduce his dock statement here. “I do not know any-

thing about the case. that is all.” I shall now consider whether

an accused person should offer an explanation when strong

and incriminating evidence has been led against him. An

accused person against whom a criminal charge is levelled

is always presumed to be innocent until his guilt is proved.

there is no burden on the accused to prove anything. but

when strong and cogent evidence is established against an

accused person in a criminal case he is expected to offer an

explanation of the highly incriminating circumstances estab-

lished against him. I am guided by several judicial decisions on

this point. lord ellenborough in *Rex vs Cochrane and others*(2)

at 479 stated thus: “no person accused of a crime is bound

to offer any explanation of his conduct or of circumstances of

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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 power to offer evidence, if such exist, in

explanation of such suspicious circumstances which would

show them to be fallacious and explicable consistent 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 interests.” this principle has been cited with

approval in a long line of cases:- *King vs. Seeder Silva*(3) at 344

(per Howard CJ); *Peiris vs. Appuhamy*(4) at 418 (per Howard CJ);

*King vs. Endoris*(5) (per Soertsz J); *Inspector Arendstz vs*

*Wilfred Peiris*(6) at 123 (per Justce moseley); *Queen vs. Seetin*(7)

at 321 (per t. S. fernando J); *Chandradasa vs. Queen* (8)

(per Justice Samarawickrama); *Beddavithana vs. A.G.*(9) at

278 (per Justice p.r.p. pererea); *Republic vs. Illangathilake*(10)

(per Justice Collin thome).

In 1820 Justice Abbott observed in *Rex vs. Burdett*(11)

:- “no person is to be required to explain or contradict un-

til 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 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.”

this principle was cited with approval by Samarawick-

rama J in *Chandradasa vs. Queen* (12)

In *Seeder Silva*’s case (supra) Howard CJ applying the

dictum of lord ellenbourough stated:- “A strong prima

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facie case was made against the appellant on evidence which

was suffcient to exclude the reasonable possibility of some-

one else having committed the crime. Without an explanation

from the appellant the jury was justifed in coming to the

conclusion that he was guilty”.

However basnayake CJ in *Queen vs Santin Singho* (13)

remarked:- “the direction that if a prima facie case is

made out the accused is bound to explain is wrong and

misleading.”

t.S. fernando J in *Seetin Vs. Queen (supra)* at 322 found

it diffcult to approve the above decision of Basnayake CJ.

t. S. fernando J referring to the judgment of basnayake CJ

in *Santin Singho’s Case (supra)* stated:- “the material parts of

the trial judge’s directions to the jury in Santin Singho’s case

appear in the judgment of the Court and, with due respect,

the majority of us fnd it diffcult to agree that those directions

were wrong or misleading.” t. S. fernando J, in the same

case, held: “As a rule a party's failure to explain damning

facts cannot convert insuffcient into prima facie evidence,

but it may cause prima facie evidence to become presumptive”

In deed basnayake CJ in *Santin Singho’s case (supra)*

observed the words reproduced below of Chief Justice Shaw

in an American case – Commonwealth vs Webster – quoted

in Ameer Ali’s ‘law of evidence’: “Where probable proof is

brought of a statement of facts tending to criminate the

accused, the absence of evidence tending to a contrary

conclusion is to be considered though not alone entitled

to much weight, because the burden of proof lies on the

accuser to make out the whole case by substantive evidence.

but when pretty stringent proof of circumstance is produced,

tending to support the charge, and it is apparent that the

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accused is so situated that he could offer evidence of all the

facts and circumstances as they exist, and show, if such was

the truth, that the suspicious circumstance can be accounted

for consistently with his innocence and he fails to offer

such proof, the natural conclusion is such that the proof,

if produced, instead of rebutting, would tend to sustain the

charge.”

In the case of State of *Tamil Nadu vs. Rajendran* (14)

Indian Supreme Court (Justice pittanaik) observed thus:

“In a case of circumstantial evidence when an incriminating

circumstance is put to the accused and the said accused

either offers no explanation or offers an explanation which

is found to be untrue, then the same becomes an additional

link in the chain of circumstances to make it complete.”

In the case of *Boby Mathew vs. State of Karanataka* (15)

at 3015, the dead body of the deceased was found tied to a

cot inside the room of the frst foor of the house which was

in exclusive possession and usage of the accused and the

dead body bearing as many as 31 injuries out of which the

injuries in region of the head being ante mortem and fatal in

nature. Dismissing the appeal of the accused, bannurmath J

observed thus: “Accused failing to give any explanation as to

how the body of the deceased came from his house or shown

to be in his house, has to be held against the accused when

there is no explanation. ……. no doubt it is true that under

our Indian jurisprudence, accused has a right of silence and

need not open his mouth as held in earlier pronouncements

’he can be a silent spectator watching the prosecution show

to prove him guilty beyond reasonable doubt’, views of the

Courts have now changed to the limited extent that once the

prosecution succeeds in prima facie showing number of cir-

cumstances pointing unerringly accusing fnger towards the

accused, it is for the accused to come out and say or at least

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explain those circumstances which are shown to be against

his innocence. If he still keeps his mouth shut and it is not

explained or even where he tries to explain certain things

which are found to be false, then the Courts are justifed

in drawing adverse inference against the accused as to his

conduct.”

Applying the principles laid down in the above judicial

decisions, I hold that when prosecution establishes a strong

incriminating evidence against an accused in a criminal

case, the accused in those circumstances is required in law

to offer an explanation of the highly incriminating evidence

established against him and failure to offer such an explana-

tion suggests that he has no explanation to offer.

In the instant case the prosecution established strong

and incriminating evidence against the appellant and he did

not offer an explanation except the bare statement that he

does not know anything about the case. In these circum-

stances I hold that the appellant had no explanation to offer

to the highly incriminating evidence established against him.

Although the learned Counsel for the appellant contended

that the learned trial Judge had failed judicially to evaluate

the items of circumstantial evidence, I am unable to agree

with this contention when I examine the judgment.

for the reasons stated above I hold that the prosecution

has proved the case against the appellant beyond reason-

able doubt and refuse to interfere with the judgment of the

learned trial Judge. I therefore affrm the conviction and the

death sentence and dismiss the appeal.

**AbeyrAtHne J.** – I agree.

*Appeal dismissed.*

*Bandara vs. Hon. Attorney General*

SC 55

**BANDARA V. HON. ATTORNEY GENERAL**

Supreme Court

Dr. SHIrAnI A. bAnDArAnAyAke, C.J.

AmArAtunGA, J. AnD

ImAm,

S.C. AppeAl no. 62/2008

September 9tH, 2010

***Penal Code – Section 293 – Culpable homicide – Section 294 –***

***Culpable homicide is murder subjected to exceptions stated in***

***Section 294 – Exception 4 – Plea of sudden fght***

this was an appeal from the judgment of the Court of Appeal by

which the Court of Appeal had dismissed the appeal of the Accused –

Appellant – Appellant and affrmed the judgment of the High Court. The

High Court convicted the appellant for murder and the death sentence

was imposed.

the Appellant preferred an application to the Supreme Court for special

leave to appeal and the Supreme Court granted leave on the following

question.

“Did the Court of Appeal misdirect itself by failing to evaluate the

possibility of sudden fght that spontaneously occurred between the

parties.”

**Held :**

(1) the offence of murder in terms of Section 294 of the penal Code

is reduced to culpable homicide not amounting to murder under

Section 293 of the Penal Code, if any of the fve exceptions to

Section 294 could be shown to apply.

(2) The Exception 4 to Section 294, the plea of sudden fght indicates

that the basis for investigation is purely depended on the fact that

the murder had taken place in a sudden fght, which had occurred

in the heat of passion upon a sudden quarrel. An important

ingredient which is necessary in such instance would be that there

was no malice or vindictiveness.

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(3) In order to come within the exception 4 of Section 294 of the penal

Code, it is necessary to satisfy the specifc requisites referred to in

Section 294 of the penal Code. Viz :

1. It was a sudden fght

2. there was no premeditation

3. the act was committed in a heat of passion; and

4. the accused had not taken any undue advantage or acted in a

cruel manner.

per Dr. Shirani A. bandaranayake, CJ.

“A sudden fght cannot be premeditated as the word ‘ sudden’

clearly means that there cannot be any such pre-arrangements.

It should also be noted that the lapse of time between the initial

argument and the fnal fght is material for an accused to

come within exception 4, since the lapse of time may grant the

opportunity for an accused to premeditate and make arrange-

ments for a fght. Such a fght is not spontaneous and therefore

cannot be regarded as one that could be described as sudden.”

**AppeAl** from a judgment of the Court of Appeal.

**Cases referred to :**

*(01) Surinder Kumar V. Union Territory Chandigarh –* AIr (1993) SC2426

*(02) Kikar Singh v. State of Rajasthan –* AIr (1993) SC 2426

*(03) Bhagwan Munaji Pawade V. State of Maharashtra –* AIr (1979)

SC 133

*(04) State of Himachal Pradesh V. Wazir Chend and Others –* AIr (1978)

SC 315

*(05) Pandurang Narayana Jawalekar V. State of Maharashtra -* AIr

(1978) SC 1082

*(06) Jumman and others V. State of Punjab -* AIr (1957) SC 469

*(07) Amrithalinga Nadar V. State of Tamil Nadu* - AIr (1976) SC 1133

*(08) Ahamed Sher and Others V. Emperor -* AIr (1931) lahor 513

*(09) Gajanand and Others V. State of Utar Pradesh* - AIr (1954) SC 695

*(10) Dharman V. State of Punjab* - AIr (1957) SC 324

*Shanaka Ransinghe* with *Suraj Rajapaksha* for Accused – Appellant –

Appellant

*A. Jinasena, SSC* for Complaint – respondent – respondent

*Cur.adv.vult*