THE ATTORNEY-GENERAL

v.

BARANAGE

COURT OF APPEAL
FERNANDO, J., AND
AMARATUNGA, J.
CA 101/98
H.C. (Rev) 61.98
H.C. COLOMBO 8902/97
MAY 22, 2002

Penal Code – Indictment – Sections 356 and 380 of the Code – After prosecution closed its case High Court acquitted and discharged accused, without calling for his defence – Validity – Code of Criminal Procedure, sections 200(1) and 220(1) – Administration of Justice Law, No 44 of 1973, section 212(2) – Criminal Procedure Code of 1898 compared – Is there a miscarriage of justice? – What is meant by "No Evidence" ? – Evidence Ordinance, section 157.

After the prosecution closed its case against the accused, the trial judge acting under section 200(1) of the Code of Criminal Procedure Act acquitted and discharged the accused without calling for his defence. The Attorney-General appealed against the acquittal.

Per Ameratunga, J.

> "A practice has developed in our law to consider a submission of 'No Evidence' at the virtual end of the prosecution case even though it has not reached its terminal end. This practice is applicable not only to trials before a jury but also to trials by a judge without a jury."

(i) In a trial by a judge without a jury, the judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for his defence he is entitled to consider such matters as the credibility of the witness, the probability of the prosecution case, the weight of evidence and the reasonable inferences to be drawn from the proven facts.

Having considered those matters, if the judge comes to the conclusion that he cannot place any reliance on the prosecution evidence, then the resulting position is that the judge has wholly discredited the evidence for the prosecution. In such a situation the judge shall enter a verdict of acquittal.

(ii) The true rule is that where the judge concludes that the evidence, even if believed by the jury and the legitimate inferences therefrom do not permit a conclusion of guilt beyond reasonable doubt to a reasonable juryman, he must direct an acquittal.

(iii) *Per* Ameratunga, J.

"In an appeal against an acquittal on a question of fact the prosecution has a heavy burden to discharge. Such an appeal could only be justified if there had been a palpable misdirection by the judge when considering the facts of the case which could be demonstrated to be wrong on the very face of the record and which had in effect resulted in a miscarriage of justice."

APPEAL from an order of acquittal of the High Court of Colombo.

Cases referred to:

1. *R* v *Galbraith* (1781) 2 All ER 1060
   Crim Ap. Reports 124
2. *R* v *Hipson* (1969) Crim Law Rev. 85
3. *Queen Empress* v *Vajiram* – (1892) 16 Bombay 414
4. *Pauline de Croos* v *Queen* – 71 NLR 169
5. *Attorney-General* v *Gunawardena* (1996) 2 Sri LR 149
6. *Attorney-General* v *Ratwatte* – 72 CLW 92
7. *Curly* v *United States* – 81 US App D.C. 389
8. S.C. 66/67 – M.C. Colombo 34638/A
9. *R.* v *Shippy* (1988) Crim Law Rev. 767

P.P. Surasena, State Counsel for Attorney-General

Dr. Ranjith Fernando with *Sandamalee Munasinghe, Sandamalee Manatunga* and *Kavindra Nanayakkara* for accused respondent.

Cur. adv. vult.

June 12, 2003

GAMINI AMARATUNGA, J.

This is an appeal filed by the Attorney-General against the acquittal of the accused-respondent (hereinafter called the accused) by the learned High Court Judge of Colombo after trial before the High Court without a jury. The accused and two others were charged before the High Court on indictment which contained the following counts.

1. That on or about 29th September 1995 at York Street within the jurisdiction of this Court, you, the accused abovenamed did abduct Nyambu Sethuram in order to wrongfully confine him and that you are thereby guilty of an offence punishable under section 356 of the Penal Code.
2. That at the time and place aforesaid and in the course of the same transaction, you did commit robbery of cash Rs. 2,24,700/- and a bracelet valued at Rs. 18,000/- which was in the possession of the said Sethuram and that you are thereby guilty of an offence punishable under section 380 of the Penal Code.

At the trial held before a Judge of the High Court sitting without a jury the prosecuting counsel at the end of the prosecution case informed the judge that the prosecution did not wish to proceed against the 2nd and 3rd accused and thereupon both of them were acquitted and discharged. After the prosecution closed its case against the accused, the learned trial Judge acting under section 200(1) of the Code of Criminal Procedure Act acquitted and discharged the accused without calling for his defence. This appeal has been filed against the acquittal.

The case against the accused depended on the evidence of the said Sethuram, particularly on his evidence regarding the identification of the accused. His evidence at the trial was as follows. He was a broker and was also engaged in the business of buying and selling coconut oil. He had business dealings with a trading company called Wimal Stores. On 29/9/1995 when he visited Wimal Stores the proprietor of that firm gave him a cheque to be encashed at the Bank. It was a cheque for Rs. 2,24,700/- received by him from a customer and given to Wimal Stores two days ago. He took the cheque to the Commercial Bank branch at Bristol Street,

Colombo and encashed it. He then came out of the bank with the bundle of money and signalled a three wheeler to stop. As the three wheeler came to a halt in front of him, a car which came from the opposite direction stopped between him and the three wheeler.

This car was a Mitsubishi Lancer car and the word POLICE appeared on the adjustable sunwiser behind the front windscreen. Then left front door of the car was opened and at that stage he sensed that there was a person just behind him outside the car. That man then said to the person who was in the driver's seat "Sir, this is the man". The person in the driver's seat was in police uniform and from his braided cap Sethuram identified him as an Assistant Superintendent of Police. Then that person asked for Sethuram's identity card. When it was given to him he examined it and asked Sethuram whether he was a dealer of drugs. Sethuram informed that person that he was engaged in the business of selling coconut oil. Then he was asked to get into the car and he got into the left front seat. The person who was behind him also got into the rear seat and at that time there was another person in the rear seat. Then the car was driven past the Telecom and the Lake House buildings and through Slave Island towards Borella. On the way Sethuram was asked to hand over the parcel of money and he handed it over to a person who was in the rear seat. Thereafter he was asked to remove and hand over his gold bracelet and the wristwatch. He complied with that command too. Sethuram has not stated whether it was the accused or the other persons who asked him to do those things.

He was also told that a person had given information to the police about him and that they wanted to show him to that person. He was told that if that person does not identify him he would be released. Near the Castle Street hospital the car was sopped and he was asked to get into the rear seat. After he changed the seat the car was driven towards the Diyawanna Oya. At one point the car was stopped and Sethuram was asked to go behind some bushes which were there on the side of the road. Whilst behind the cover of the bushes he was asked to remove his shirt and slacks. After he removed his clothes he was dressed only in his underwear. At that stage the person who drove the car came to that spot. He was without his tunic at that time and was wearing a long sleeved

banian. He had a pistol in his waist. At that point Sethuram realized that they were going to rob him. He was asked to sit on the ground. Then he pleaded with them not to do any harm to him. At that time the person who had the pistol put two bullets into it and placed it against Sethuram's forehead. Just then one of the other persons said that a cycle was coming and the person holding the pistol looked in that direction. Taking advantage of this slight diversion of attention of the gunman Sethuram started to run. The gunman tried to grab him but as Sethuram did not have any clothes on his body that attempt did not succeed. Whilst running along the road Sethuram saw a passing police jeep and signalled to it but it took no notice of him. He eventually ran to a house and asked the inmates to help him. They gave him a sarong and later took him to the Thalangama police station where he made his complaint around 4 p.m.

In Court Sethuram has identified the 1st accused as the person who drove the vehicle on that day. He has stated that he has identified him earlier at an identification parade held in Court. At the trial before the High Court the defence has consented to accept the notes of the identification parade without calling evidence to prove it. These notes marked P3 are not attached either to the case record of the High Court or to the Magistrate's Court case record attached to the High Court record.

At the trial before the High Court Sethuram was shown a gold bracelet and he has identified it as the bracelet taken from him when he was being taken in the car. That bracelet had letters SMJ engraved on it which denotes the jewellery shop - Sri Maithily Jewellers. – from which he has purchased it. It appears from the evidence given by Sethuram that on the same day in the night he has given a statement to the Fort police. It is not clear from Sethuram's evidence as to what steps have been taken by the Thalangama police after recording his statement and the circumstances under which he happened to go to the Fort police station on the same day. It is clear from Sethuram's evidence that the accused was not known to him before the date of the incident. He has not seen or noted the number of the car in which he was taken to the vicinity of the Diyawanna Oya. It is therefore pertinent to examine the circumstances under which Sethuram came to

identify the accused as the police officer who drove the car in which he was taken.

According to Sethuram's evidence given under cross examination he has stated in no uncertain terms that before he picked out the accused at the identification parade, he has seen the accused at the Slave Island police station. He has stated that one day he saw a person like the accused riding a motor cycle and he has noted the number of the motor cycle. He went to the Slave Island police station to inform the police about this fact. However he has not stated in his evidence that he has informed any police officer about seeing a person like the accused riding a motor cycle or that he gave the number of the motor cycle to the police. He has not given even the date on which he visited the Slave Island police station. In his evidence Sethuram has stated that one day, in the morning, when he was at the Slave Island police station he saw the accused entering the police station. At that stage he has informed a police officer that that was the person who abducted him. The police officer has told him that it was their 'loku mahattaya'. The Court has specifically asked Sethuram whether the police arrested the accused after he pointed him out and the reply of Sethuram was that the police officer has asked him to go away without telling lies. The witness has not stated that he has informed any higher police officer that the person who has abducted him has come into the police station.

In his evidence Sethuram has stated that he has met one Udayapala an ASP and one Prasad, also an ASP at the Slave Island police station and that he was taken to Jagath Jayawardena, SP and DIG Kotakadeniya. He has not given the dates on which he met those officers and has not explained under what circumstances he met or was taken to those officers. He has not given details of what happened at those meetings. In cross examination Sethuram has stated that on one occasion when he met ASP Udayapala the name Baranage was mentioned but he has not stated who mentioned that name under what circumstances or for what purpose. The details about the circumstances under which Sethuram came to meet those high ranking police officers; the contents of their conversations with Sethuram and the instructions, if any, given by those police officers to Sethuram become significant in view of the

suggestion made by the defence in cross examination of Sethuram. It was the suggestion of the defence that in view of the accused's refusal to give evidence against another police officer he has incurred the displeasure of a high ranking police officer and that this allegation had been framed up against the accused due to that displeasure. In view of this suggestion made in cross-examination it has become necessary to elicit details about the number of Sethuram's visits to the Slave Island police station and specific details about his meetings with the high ranking police officers named by him but the prosecuting counsel has not taken any steps to clarify those matters in re-examination by Sethuram. From the mass of details given in cross-examination by Sethuram one cannot piece together a coherent account which flows according to a logical and chronological sequence explaining the circumstances under which Sethuram came to identify the accused after the date of the incident and before the date of the identification parade held on 1/12/1995, two months after the incident. The defence counsel by his cross-examination has succeeded in eliciting a mass of details creating confusion regarding the proper sequence of events from the date of the incident up to the eventual identification of the accused. The prosecuting counsel has not made any attempt in re-examination to place those details in their proper perspective to make Sethuram's account of what happened after the date of the incident to make that account coherent and logically intelligible. After reading Sethuram's evidence one cannot clearly ascertain how and by what gradual steps Sethuram came to pick and point out the accused as the person who abducted him on 29/9/95. It appears that at the end of Sethuram's evidence the prosecutor was content to rest his case on Sethuram's assertion that he identified the accused at the identification parade as the person who abducted him on 29/9/1995. The evidence with regard to the recovery of the gold bracelet did not in any way connect the accused to that bracelet. The letters SMJ engraved on the gold bracelet was not proof that the bracelet belonged to Sethuram as those letters referred to the identity of the maker of the bracelet. Thus, at the end of the prosecution case, the case against the accused solely depends on the complainant's evidence regarding the identification of the accused at the parade.

In a case depending on the sole testimony of a witness given relating to the visual identification of the accused, not only those matters relevant to support his evidence regarding identification but also evidence relating to the happenings of the event are material in considering the reliance to be placed on the sole witness's evidence. According to Sethuram near the Diyawanna Oya he was ordered to undress and at the time he fled from the scene he was wearing only his underwear. The inmates of the house to which he ran would have been the best witnesses to say that Sethuram appeared at their doorstep dressed only in an underwear. This evidence would have corroborated Sethuram's contention that he was asked to remove his clothes by his abductors. However no such evidence was led by the prosecution.

After recording Sethuram's complaint the police could have gone with him to the spot where he was asked to undress and recorded their observations relating to that place. This evidence would have provided corroboration of Sethuram's account by showing that there was in fact a place covered by bushes to give an opportunity to get Sethuram to undress by the side of the road in broad daylight without being seen by the passers by. But no such evidence from the police was led and Sethuram has not stated that he has shown that place to the police. The two matters I have set out above would have provided corroboration for Sethuram's account relating to the incident.

With regard to the evidence of identification the following evidence would have been relevant and material. When a person makes a complaint about an offence committed by a person who was not known to him before, it is a normal police practice to elicit from the complainant and include in the complaint a description of the appearance of the offender. A first complaint containing such material is admissible under section 157 of the Evidence Ordinance to support the complainant's testimony in court. Such material contained in a first complaint produced in evidence would have given an opportunity to a trial Judge to compare whether the appearance of the accused present before Court agrees with the description given in the first complaint. But no such evidence was led by the prosecution.

The witness has stated that the police car in which he was taken was a Mitsubishi Lancer. There was no police evidence whether on the date of the incident the accused had been using a car which fits into that description. The police could have checked the movements of the accused and of his car on the date of the incident to show that opportunity was available for him to participate in the alleged acts but no such evidence was placed before Court.

Inspector Linton who has taken over the investigation relating to Sethuram's complaint has taken charge of the accused from the C.D.B. headquarters on 12/11/1995. At that time the accused was being detained in the C.D.B.headquarters under Emergency Regulations. No evidence has been led to show why the accused had been arrested and for what offence and on what material. Therefore the reason and the place of arrest of the accused was not before Court. The prosecution could have very easily led this evidence but no such evidence was led.

Inspector Linton in his evidence has stated that at the time he took steps to get an identification parade held to enable the complainant to identify the accused he was not aware that the complainant has already seen the accused at the Slave Island police station. He has stated that according to the notes he has subsequently received from the Slave Island police, on 3/11/1995 the complainant on the instructions of the police has gone to the Slave Island police station and whilst being at the police station has identified the accused who was seen inside the police station. This evidence given by I.P. Linton from the notes of the officers of the Slave Island police station was hearsay evidence. In view of the importance of this evidence the prosecution should have called those police officers who were present at the time the complainant was said to have identified the accused at the police station. It appears from Linton's evidence that the accused was arrested at the Slave Island police station and at that time he was attached to that police station. Before that he had been attached to the Police Training School. No. evidence had been led to show the date on which the accused had been transferred to Slave Island. According to Linton, on the day the accused was identified at the police station Sethuram has gone there on the instructions of the police. No evidence has been led by the prosecution to show who was the police

officer who instructed Sethuram to visit the Slave Island police station on 3/11/1995. There was no evidence to explain the purpose for which Sethuram was summoned to the police station on that day. No evidence was led from police officers who had been present at the time the complainant was said to have identified the accused at the Slave Island police station. This evidence would have been very vital and material to the prosecution case and such evidence would have explained a lot of matters which remained unexplained at the end of the prosecution case.

Thus at the end of the prosecution evidence the case against the accused rested only on the complainant's evidence that he identified the accused at an identification parade held in Court. but the value of this evidence was much impaired by Sethuram's admission that before the parade he has seen the accused.

After the prosecution case was closed, the learned trial Judge, apparently acting under the provisions of section 200(1) of the Code of Criminal Procedure Act, has acquitted the accused without calling for his defence. According to the reasons later given by the Judge he has acquitted the accused on the basis that the complainant's evidence regarding the identification of the accused was not reliable.

Section 200(1) of the Code of Criminal Procedure Act is as follows.

> "When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused or of any other offence of which he might be convicted on such indictment he shall record a verdict of acquittal; if however the Judge, considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence."

This provision is identical to section 210(1) of Criminal Procedure Code of 1898 relating to trials before the District Court on indictment. This Court was unable to find any previous decision which contains an authoritative interpretation of Section 210(1) which is similar to present section 200(1).

In paragraph 7 of the petition of appeal it has been stated that:

(a) The trial Judge manifestly erred in law when he chose to acquit the accused without proper evaluation of the evidence in this case which established a case for the accused to answer.

(b) The learned trial Judge has not concluded that he wholly discredits the evidence on the part of the prosecution which is a *sine qua non* for an order of acquittal under section 200(1) and therefore the order has been made without jurisdiction.

(c) The learned trial Judge has misdirected himself when he relied on the subjective assessment of evidence instead of its objective assessment as required by aforesaid section 200(1) in making the said order of acquittal.

In view of the above grounds set out in the petition of appeal it is necessary to examine the nature of the Judge's function under section 200(1) and the scope of his power conferred by it. Before I deal with it, it would be helpful and relevant to consider the provisions of section 220(1) of the Code of Criminal Procedure Act which sets out the function of the Judge at the end of the case for the prosecution in a trial by jury. Section 220(1) reads as follows.

> "When the case for the prosecution is closed if the Judge considers that there is no evidence that the accused committed the offence he shall direct the jury to return a verdict of not guilty."

This provision is similar to section 212(2) of the Administration of Justice Law, No. 44 of 1973 and section 234(1) of the Code of Criminal Procedure Act of 1898. The situation contemplated in section 220(1) is a situation referred to as 'no case to answer'. The Court of Appeal in England in the case of *R* v *Galbraith*[1], set out the following guidelines upon which a Judge should approach a submission that there is no case to answer.

(1) If there is no evidence that the crime alleged has been committed by the accused the judge will stop the case.

(2) When there is some evidence but such evidence is of a tenous character as for example because of inherent weakness or vagueness or inconsistency with other evidence:

(a) Where the judge concludes that the prosecution case, taken at its highest, is such that a jury, properly directed, could not properly convict on it, it is his duty, on a submission of no case being made to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of the reliability of a witness or other matters which are generally within a jury's province, and where on one possible view of the facts there is evidence on which a jury could properly conclude that the accused is guilty, then the judge should allow the matter to be tried by the jury.

(3) The borderline cases should be left to the discretion of the judge.

Guideline 1 set out above is similar to section 220(1) of the Code of Criminal Procedure Act. What is meant by no evidence? The terms 'no evidence' has been often referred to as "not a scintilla of evidence". Coomaraswamy - *The Law of Evidence* Vol 2 Book I page 269. In *R* v *Hipson*[2], it has been held that not only must the judge consider whether there is some scintilla of evidence, which in law could go to the jury, but also whether it would be safe for a jury to convict on the evidence as it then stands. In the Indian case of *Queen Empress* v *Vajiram*[3], it has been held that the term no evidence must not be read as meaning 'no satisfactory, trustworthy or conclusive evidence'. It will definitely include a situation where the prosecution evidence has not taken the prosecution case beyond a matter of conjecture or grave suspicion. It may also include a situation where the prosecution case has gone beyond a mere matter of conjecture or grave suspicion and has reached the realm of probability but the evidence is self contradictory, contrary to reason and common sense. In such a situation if no reasonable person can place any reliance on such evidence, then it is a situation where there is no evidence. Sometimes the border line between a situation where there is no evidence and a situation where there is evidence of a tenuous nature may be so thin. In such a situation, as was suggested in the case of Galbraith,

it is matter to be decided by the judge according to his experience and discretion.

The words used in section 220(1) are "When the case for the prosecution is closed". A practice has developed in our law to consider a submission of 'no evidence' at the virtual end of the prosecution case even though it has not reached its technical end. *Pauline de Croos* v *the Queen*[4]; *Attorney General* v *Gunawardena* [5].This practice is applicable not only to trials before a jury but also to trials by a judge without a jury.

When one compares the words used in section 220(1) with the words in section 200(1) the difference of the words used is at once noticeable. While the former section uses the words ' there is no evidence' the latter section uses the words 'the judge wholly discredits the evidence'. The words used in section 200(1) indicate that the scope of the function and the power of a judge is wider than the power and the function of a judge under section 220(1). The case of *The Attorney General* v *Ratwatte*[6], provides an example of a situation where the judge has wholly discredited the evidence for the prosecution. The first accused in that case, at the time of the alleged offence, was the Private Secretary of the Prime Minister of Ceylon. He was indicted for accepting a bribe of Rs. 5000/-(given in two instalments) as an inducement for obtaining a grant of citizenship in terms of the Citizenship Act to a Malaysian national. According to the evidence of the prosecution witness, on the first occasion a sum of Rs.1000/- was openly given to the 1st accused in his house and the latter, in the presence of other unknown persons who had come with the person who gave the bribe, has put the money into his shirt pocket. Again two days later the same person has given Rs.4000/- to the first accused at the latter's ancestral house and even on that occasion the accused has openly accepted the money in the presence of persons unknown to him. At the end of the prosecution case the trial Judge, acting under section 210(1) of the Criminal Procedure Code of 1898, (which was similar to section 200(1) of the present Code) has acquitted the first accused without calling for his defence.

In his reasons the trial Judge has stated as follows. "On both occasions the 1st accused does not appear to have been in anyway hesitant about accepting the money. He does not appear to have been anxious to conceal the acceptance from any person who

may have seen it. He does not take the precaution even of accepting the money without being seen by the unknown persons. It cannot be said that he is unaware of the seriousness of the offence he is committing. He does not seem to care as to whether he is led into a trap or not. I do not think any ordinary person would accept a bribe in such a manner, least of all a person in the position of the 1st accused who holds such a responsible post under the Government." The learned trial Judge has therefore concluded that "no reasonable court can accept the oral testimony of Papuraj that this gratification was given to the 1st accused". In appeal the Supreme Court accepted the correctness of this reasoning and dismissed the appeal filed against the acquittal of the 1st accused.

In a trial by a judge without a jury the judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for his defence he is entitled to consider such matters as the credibility of the witnesses, the probability of the prosecution case, the weight of evidence and the reasonable inferences to be drawn from the proven facts. Having considered those matters, if the judge comes to the conclusion that he cannot place any reliance on the prosecution evidence, then the resulting position is that the judge has wholly discredited the evidence for the prosecution. In such a situation the judge shall enter a verdict of acquittal.

Even if the Judge has not wholly discredited the prosecution evidence,the words that the Judge 'is of opinion that such evidence fails to establish the commission of the offence charged against the accused or of any other offence of which he might be convicted on such indictment' give him the power to enter a verdict of acquittal without calling for the defence. It appears that the situation contemplated by the above quoted words is similar to Galbraith guideline 2(a) set out in the earlier part of this judgment. I set out below the said guideline again.

"When there is some evidence but it is of a tenuous character for example because of inherent weakness or vagueness or because it is inconsistent with other evidence;

(a) If the judge considers that the prosecution case, taken at its highest, is such that a jury, properly directed, could not

properly convict on it, it is his duty, on a submission of no case being made to stop the case.

With regard to the phrase 'the prosecution evidence taken at its highest' it has been stated in *R* v *Shippy* (9), that the requirement to take the prosecution case at its highest did not mean "picking out all the plums and leaving the duff behind". In the case of *Curly* v *United States* (7), the proper approach has been more accurately put in the following words. "The judge must assume the truth of the Government's evidence and give the Government the benefit of *all legitimate inferences to be drawn therefrom*"(emphasis added).Even before Galbraith guidelines were formulated, the Supreme Court of Ceylon in 1967 dealing with a situation similar to that set out in guideline 2(a) of the Galbraith guidelines has stated as follows. "The true rule in our opinion is that where the judge concludes that the evidence, even if believed by the jury and the legitimate inferences therefrom do not permit a conclusion of guilt beyond reasonable doubt to a reasonable juryman, he must direct an acquittal". *Order of Court at Trial at Bar* (8). A judge trying a case without a jury is also entitled to approach the evidence in the same way before deciding to call for the defence of the accused. The critical point in this boundary is therefore the existence or non-existence of a reasonable doubt as to the guilt. The law recognizes that the scope of a reasonable mind is broad. If the evidence is such that a reasonable mind, properly directed must necessarily have such a doubt, the judge must acquit because no other result is permissible in law.

In the present case, the trial Judge in his order has stated that he has acquitted the accused as there was a doubt with regard to the identification. He has also stated that he has taken into account the fact that the witness has seen the accused prior to the identification parade. It is possible to interpret his words as meaning that he has wholly discredited the prosecution evidence. The words used in the Code of Criminal Procedure (Sinhala Act) are "චෝදක පක්ෂය විසින් ඉදිරිපත් කරනු ලැබූ සාක්ෂි විනිශ්චයකාරවරයා මුළුමනින් ම අවිශ්වාස කරන්නේනම්." The Sinhales words used by the trial Judge in his order are "මහුගේ සාක්ෂිය කෙරෙහි විශ්වාසය තැබිය නොහැකි නියා මා විසින් මහුව (චුදිතව) එම චෝදනාවෙන් නිදොස්කොට නිදහස් කරන ලදී. " This clearly indicates that the Judge has wholly discredited the prosecution evidence.

In the petition of appeal it has been stated that the learned Judge has not concluded that 'he wholly discredits the evidence on the part of the prosecution'. Dealing with a similar submission on the Judge's failure to use the same words T.S. Fernando, J. in *Attorney General* v. *Ratwatte (supra)* has stated as follows: "There can, of course, be no set or invariable mode of expressing the judge's view that evidence is not creditworthy at all. Judges will employ varying language to express their opinion to this effect. To maintain an argument that the Judge is not wholly discrediting where the Judge says, as here, that no reasonable Court can accept the testimony on the point in question, it is necessary to go on to say also that the Judge is putting himself outside the pale of reasonable men! In the context in which the statement occurs, it amounts, in my opinion, to a total discrediting of the evidence on the one important point in the case."

In this case even if Sethuram's evidence regarding the identity of the accused is taken on its face value such evidence at its best was of a tenuous character in view of the inherent weakness arising from Sethuram's admission that he has seen the accused prior to the identification parade. The evidence was also vague in that Sethuram has failed to explain clearly the circumstances under which he came to ascertain the identity of the accused subsequent to the event. His failure to describe exactly what transpired at the meetings he had with the high ranking police officers named by him assumes significance in view of the defence suggestion that the allegation against him has been made at the instance of some high ranking police officers who were displeased with him due to his refusal to testify against another police officer. I have also referred to the evidence the prosecution could have procured and led at the trial to support Sethuram's version. The cumulative effect of all those deficiencies in the prosecution case was sufficient to raise a reasonable doubt in the mind of a reasonable man with regard to the guilt of the accused. Therefore even the conclusion that the evidence led failed to establish the commission of the offence charged against the accused is justified on the evidence available in this case.

Having considered the case presented by the prosecution against the accused this Court is of the view that the prosecution

case was starved of evidence. In an appeal against an acquittal on a question of fact the prosecution has a heavy burden to discharge. Such an appeal could only be justified if there had been a palpable misdirection by the Judge when considering the facts of the case which could be demonstrated to be wrong on the very face of the record and which had in effect resulted in a miscarriage of justice. In this appeal the prosecution has failed to discharge its burden. This Court cannot hold that the learned trial Judge's decision to acquit the accused without calling for his defence was wrong and that it has resulted in a miscarriage of justice.

Accordingly we affirm the verdict of acquittal of the accused and dismiss this appeal filed against the acquittal. For the reasons given in this judgment the revision application filed by the Attorney-General bearing No. 61/98 is also dismissed.

FERNANDO, J. – I agree.

Appeal dismissed.