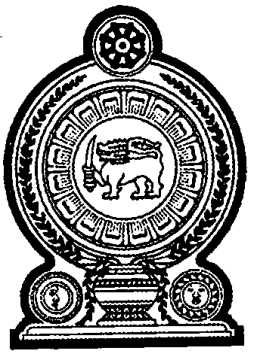

THE

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

[2008] 1 SRI L.R. – PART 2

PAGES 29 - 56

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at Sarvodaya Vishva Lekha, Ratmalana

Price : Rs. 40.00

DIGEST

Page

CONSTRUCTIVE TERMINATION – Services constructively terminated? Use of term 'resignation by an employee' – Does it by itself preclude him from claiming relief on the footing of a constructive termination? – What is constructive termination?

MURDER – failure to consider principles governing cases of circumstantial evidence – Fatal? Should the trial Judge state the principles governing circumstantial evidence in the judgment? Dock statement – importance? Common intention? Criminal Procedure Code – Sections 217, 229, 245.

PENAL CODE – Section 296 – Convicted – Placing burden on the defence to rebut prosecution evidence – Is it fatal? Retrial – Would it meet the ends of justice? – Discretion vested in Court – Criminal Procedure Code Section 335 (2) a – Constitution Article 13 (5) Art 138 – Evidence Ordinance Section 114.

SUPREME COURT RULES 1990 – Rule 8 (3) – Rule 8 (5) – Rule 40 – Tendering the relevant number of notices along with the application for service on respondents in time – Variation or extension of time permitted with permission of Court – Does non compliance with Rule 8(3) result in the dismissal of the application?

An examination of Rule 8(3) clearly specifies the necessity to tender the relevant number of notices along with the application for service on the respondents. The said Rule, not only specifies the need to tender notices but also describes the steps that have to be taken in tendering such notices. It is also to be borne in mind that in terms of Rule 8(3), tendering of such number of notices for service has to be done, at the time the petitioner hands over his application and it appears that the said requirement is mandatory. The purpose of Rule 8(3) is to ensure that, the respondents are notified that a Special Leave to Appeal application is lodged in the Supreme Court. The Rule clearly stipulates that such notice should be given along with the filing of the application. The need for serving notice on the respondents, is further emphasized in Rule 8(5), where it is stated that,

> "The petitioner shall, not less than two weeks and not more than three weeks after the application has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered, the petitioner shall furnish the correct address for the service of notice on such respondent. The Registrar shall thereupon dispatch a fresh notice by registered post and may in addition dispatch another notice with or without copies of the annexure, by ordinary post...."

A careful examination of this Rule quite clearly indicates that the purpose of it is to ensure that the respondents have received the notices of petitioners application lodged in this Court and in the event that the said notice not been received by the respondents, to make provision for the Registrar to dispatch fresh notice by registered post.

Referring to Rule 8(3) of the Supreme Court Rules of 1990, learned Deputy Solicitor General for the petitioners, submitted that the objective of Rule 8(3) is to ensure that the respondent is given notice by way of registered post, prior to the Special Leave to Appeal application is supported. Learned Deputy Solicitor General also referred to the decision in *Soong Che Foo* v *H.K. de Silva*[4]

where S. N. Silva, C. J. referring to Rule 8(3) had observed that,

> "The rules are so designed that the respondents would have adequate notice of the application. A non-compliance with rules may even result in the matter being considered in the absence of the respondents."

Learned Deputy Solicitor General had also referred to the observation made by Bandaranayake, J. in *Samantha Niroshana* v *Senarath Abeyruwan (supra)*, where it was stated that,

> ". . . the purpose of the Supreme Court Rules is to ensure that all necessary parties are properly notified in order to give a hearing to all parties and Rule 8 specifically deals with this objective."

Learned Deputy Solicitor General for the petitioners accordingly contended that considering the circumstances in *Samantha Niroshana (supra)*, this Court was correct in upholding the preliminary objection of the respondent as the petitioners in that case had not acted reasonably and efficiently upon discovering the defect in their application for Special Leave to Appeal and the respondent had received no notice of the Special Leave to Appeal application. The position taken up by the Deputy Solicitor General for the petitioners therefore was that, considering the circumstances of the present case, the petitioners have fulfilled the objective and discharged the requirements of Rule 8(3), *although it may not have been in strict compliance of Rule 8(3) of the Supreme Court Rules 1990.*

Accordingly, learned Deputy Solicitor General contended that in the event an applicant, 'fails to strictly, but manages to substantiately comply with a Rule, and in so doing causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application.' In support of his contention learned Deputy Solicitor General referred to the judgment to Mark Fernando, J. in *Kiriwanthe and another* v *Navaratne and another (supra)*, and also to the

decisions of *Rasheed Ali* v *Mohamed Ali and others (supra), Gangodagedara* v *Mercantile Credit Ltd.*[5] *Jayawickrama, Someswaram and Manthri and Company v Jinadasa*[6] and *Samarawickrama v Attorney General.*[7]

It is to be noted that, all the aforementioned decisions had considered the effect of non-compliance of a Rule or Rules of the Supreme Court Rules of 1978 and not of the Supreme Court Rules of 1990. Also, as admitted by the learned Deputy Solicitor General, in most of the decisions, the provisions of the Rules were regarded as imperative in nature. For instance, in *Gangodagedara* v *Mercantile Credit Ltd., (supra)* Wijetunga, J. had held that,

> " . . . I am of the view that the provisions of Rules 49 are imperative in nature and call for strict compliance. Failure to comply with such a mandatory requirement is fatal to the application."

Moreover in *Rasheed Ali (supra)* Soza, J. had held that,

> ". . . the provisions of Rule 46 are imperative and should be complied with by a party who seeks to invoke the revisionary powers of this Court."

Kiriwanthe v *Navaratne (supra)* decided in1990 considered the need to comply with the requirements of Supreme Court Rules of 1978. The rationale of its decision, as clearly examined and stated in *Samantha Niroshana* v *Senarath Abeyruwan (supra)*, was that in certain instances, taking into consideration the surrounding circumstances, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction. Notwithstanding the above position, it is to be borne in mind that in the decision of *Kiriwanthe* v *Navaratne (supra)* this Court had not suggested automatic exercise of its discretion to excuse the non-compliance of Supreme Court Rules. The procedure that has to be followed in considering the exercise of discretion was clearly examined by Mark Fernando, J. where it was stated that,

> . . . I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute

compliance is not essential, it is sufficient if there is compliance which is 'substantial' – this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied, as in the case now before us; the Court should first have determined where the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction . . ."

It is thus apparent that the Supreme Court did not hold that the discretion of the Court would always be exercised to excuse a non-compliance of the Supreme Court Rules. What the Court stated was that instead of mechanically applying its discretion, the Court would have to consider certain aspects with regard to the non-compliance in question. These steps included the following:-

a) the Court should first have determined whether the default had been satisfactorily explained and/or;

b) the default had been cured subsequently without unreasonable delay.

If the said requirements were fulfilled, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction.

Thus it is obvious that it would be necessary to evaluate the provisions of the relevant Rule/Rules before considering the effect of any non-compliance. For this purpose it is essential that the relevant Rule/Rules be carefully examined and it is on that basis that I had stated in *Shanmugavadivu* v *Kulathilake*[8] and *Samantha Niroshana* v *Senarath Abeyruwan (supra)* that *Kiriwanthe's* case was decided on 18.07.1990 on the basis of the Supreme Court Rules of 1978 and on 13.11.1990 the amended Supreme Court Rules of 1990 had come into effect.

The Supreme Court Rules of 1990 applicable to those cases had indicated the objectivity of exercising judicial discretion, and such discretion had to be exercised in terms of those provisions.

This position was further strengthened in the decision of *Annamalie Chettier* v *Mangala Karunasinghe and another*,[9] where the preliminary objection on non-compliance with Rules 30(1) and 30(6) of the Supreme Court Rules of 1990 was sustained by this Court. In these circumstances, it is evident that the issue in question has to be considered only in terms of Supreme Court Rules of 1990.

Rule 8(3) of the Supreme Court Rules of 1990, as stated earlier, clearly states that,

> *"The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself. . ."*

As referred to earlier, the petitioner has filed the petition, affidavit and documents marked A1 – A11 on 22.10.2007. The motion does not refer to the notices being tendered to the Registry. Instead it stated thus:

> " Copy of this motion together with copies of petition, affidavit and documents mentioned above were sent to the petitioner-respondent by registered post and the registered postal article receipt bearing No. 5109 dated 22.10.2007 is annexed hereto."

It is therefore apparent that the petitioners had not tendered with the application the required number of notices to the Registry in terms of Rule 8(3) of the Supreme Court Rules 1990, but had sent copies of the motion, petition, affidavit and the documents by registered post to the respondent. As stated earlier, on 31.10.2007, the Attorney-at-Law for the respondent filed a motion moving to reject the petitioners' application and on 01.11.2007, the petitioners had tendered notices and annexure without a motion.

Learned Deputy Solicitor General for the petitioners relied on the decisions based on Supreme Court Rules of 1978, and even in terms of the provisions under the said Supreme Court Rules of 1978 the said Rules were imperative in nature and needed strict compliance and further Court required at least an explanation regarding the petitioners' failure to comply with the said Rules.

It is to be noted that the Supreme Court Rules of 1990, makes provision for a petitioner to file an application for a variation or an extension of time, if and when the need arises. In fact Rule 40 of the Supreme Court Rules of 1990 refers to Rule 8(3) and states that,

> " An application for a variation or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in chambers:
>
> a) tendering notices as required by rules 8(3) and 25(2); . . ."

It is therefore quite clear that in terms of Rule 8(3) the petitioners should have tendered notices on the day they filed the petition, viz., 22.10.2007 to the Registry for the Registrar to act in terms of Rule 8(1) to give notice forthwith to each of the respondents, by registered post. In the normal course of events, the petitioners should have complied with Rule 8(5) to verify by Attorney at the Registry that notice has not been returned undelivered and this has to be done not less than two weeks and not more than three weeks after the application had been lodged. In this application however, it is to be noted that, on 31. 10. 2007, the respondent had filed a motion moving to reject the application of the petitioners as they have not complied with Rule 8(3) of the Supreme Court Rules 1990. By that time, not only there was non-compliance with Rule 8(3) of the Supreme Court Rules of 1990, but the petitioners also had not taken steps to make an application in terms of Rule 40 for variation or an extension of time in tendering notices as required by Rule 8(3).

It is not disputed that the petitioners had not taken any of the aforementioned steps and it is also apparent that there is clear non-compliance with Rules 8(3) and 40 of the Supreme Court Rules of 1990.

As I had stated in *Samantha Niroshana* v *Senarath Abeyruwan (supra)* I am quite mindful of the fact that mere technicalities should

not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Bonser, C.J., in *Wickramathilaka* v *Marikar*[10] referring to Jessel M.R., in *Re Chenwell.*[11]

> "It is not the duty of a Judge to throw technical difficulties in the way of the administration of Justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

It has also to be noted that the purpose and the objective of Rule 8 of the Supreme Court Rules of 1990, is to ensure that all parties are properly notified in order to give a hearing to all parties. The procedure laid down in Rule 8 of the Supreme Court Rules, 1990 clearly stipulates the process in which action be taken by the Registrar from the time an application is lodged at the Registry of the Supreme Court. It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules 1990 and in the event that there is a need for a variation or an extension of time the petitioner could make an application in terms of Rule 40 of the Supreme Court Rules of 1990. Accordingly as I had states in *Annamalai Chettiar Muthappan Chettiar (supra)* and *Samantha Niroshana* v *Senarath Abeyruwan (supra)*, an objection raised on the basis of non-compliance with a mandatory Rule such as Rule 8 of the Supreme Court Rules of 1990 cannot be considered as a mere technical objection.

It is also to be noted that, there was no dispute over the language used in Rules 8(3) and 40 of the Supreme Court Rules of 1990 and that there was no ambiguity of its construction. In such instances it is clear that when there is only one construction that could be given to a particular provision it would be necessary to enforce such construction. Referring to instances, where clear and unequivocal language had been used Farwell, L.J. in *Sadler* v *Whiteman*[12] referring to Lord Campbell in *Reg.* v *Skeen*[13] at 892 stated that,

> "Where by the use of clear and unequivocal language capable only of one construction, anything is enacted by the Legislature, we must enforce it, although, in our opinion, it may be absurd or mischievous."

Accordingly where there has been non-compliance with a mandatory Rule such as Rule 8(3), serious consideration should be given for such non-compliance as that kind of non-compliance by a party would lead to serious erosion of well established Court procedure in our Courts, maintain throughout several decades.

Having said that, the question that has to be answered is whether the non-compliance with Rule 8(3) would result in the dismissal of the application. This question was considered in *Samantha Niroshan* v *Senarath Abeyruwan (supra)*, where reference was made to a long line of cases of this Court, *K. Reaindran* v *K. Velusomasunderam,*(14) *N.A. Premadasa* v *The People's Bank,*(15) *Hameed* v *Majibdeen and others,*(16) *K.M. Samarasinghe* v *R.M.D. Rathnayake and others,*(17) *Soong Che Foo* v *Harosh K. de Silva and others (supra), C.A. Haroon* v *S.K. Muzoor and others*(18) that had decided that non-compliance with Rule 8(3) would result in the dismissal of the application.

In the circumstances, for the reasons aforementioned, I uphold the preliminary objection raised by the learned President's Counsel for the respondent and dismiss the petitioners application for Special Leave to appeal, for non-compliance with the Rules of the Supreme Court, 1990.

I make no order as to costs.

DISSANAYAKE, J. - I agree.

BALAPATABENDI, J. - I agree.

Preliminary objection upheld.

Application dismissed.

WALKER AND SONS & COMPANY LTD.
v
GURUSINGHE

SUPREME COURT
SHIRANI BANDARANAYAKE, J.
MARSOOF, J.
BALAPATABENDI, J.
SC(APPL) 61 OF 2005
HCA 305/2003
LT 4/G/23590/99
FEBRUARY 27, 2008
APRIL 2, 3, 29, 2008

Resignation – Services constructively terminated? Use of term 'resignation' by an employee – Does it by itself preclude him from claiming relief on the footing of a constructive termination? – What is constructive termination?

Held:

(1) The employee informed the appellant employer that due to the non availability of the resources at the new place of work he would not be in a position to accede to the additional duties that were assigned to him and therefore he is tendering his resignation. The appellant had taken immediate steps to demote him to his previous position, and had also taken steps to call for explanation for his non attendance at meetings. In conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a 'constructive termination' by the employer, which puts an end to the contract.

(2) The mere use of the term resignation by an employee does not by itself preclude him from claiming relief on the footing of a 'constructive termination' by the employer.

(3) After receiving the 'resignation' letter the employer appellant had taken steps to demote the respondent to his previous position. The employer appellant also took steps to call for explanation for his non attendance at meetings – thus confirming the fact that the employer had not accepted the resignation tendered by the employee respondent – it is abundantly clear that the appellant's action against the respondent amounts to 'constructive termination'.

APPEAL from the judgment of the High Court of Matara

Wasantha Gunasekara for respondent-appellant-appellant.

Rohan Shabandu with *Athula Perera* for applicant- respondent-appellant.

Cur.adv.vult.

October 19, 2008

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the Southern Province dated 30.03.2005. By that judgment, the learned judge of the High Court affirmed the order of the Labour Tribunal dated 04.08.2003, by which the Labour Tribunal had held that the services of the workman-applicant-respondent- respondent (hereinafter referred to as the respondent) had been constructively terminated by the respondent-employer-appellant (hereinafter referred to as the appellant) and awarded him a sum of Rs. 264,000/- as compensation for the loss of employment. The appellant appealed to the High Court of the Southern Province, where special leave to appeal was granted to the Supreme Court. Since, no questions of law had been specified by the High Court, both learned Counsel had agreed on 20.02.2006 that the appeal could be argued on the following question:

> "Whether the Labour Tribunal and the High Court erred in law in considering that there was a wrongful termination of service by the employer, considering the documents and the evidence that is adduced in the case"

The fact of this appeal, *albeit* brief are as follows:

The respondent had joined the appellant Company as a supervisor on 26.06.1985 (A1). In terms of the terms and conditions of his employment, his age of retirement was 55 years. Thereafter the respondent was promoted to the post of Training Assistant Engineer (Mechanical) with effect from 01.06.1993 (A2). Later on 30.08.1995 the respondent was promoted to the position of Assistant Engineer (A3) and by document marked A4, he was promoted to the position of engineer of the appellant Company with effect from 01.03.1999. Since July 1985, the respondent had been

serving in the appellant Company, for a continuous period of over 13 years.

The promotion granted to the respondent in March 1999, was conditional as he had to serve a period of six (6) months on probation, and it was also common ground that, the appellant Company by its letter dated 23.03.1999 (A4A), had assigned additional duties to the respondent, which were as follows:

a. Continue to improve the level of activity at the branch ensuring that the turn over does not fall below the figures over the past six (6) months;

b. Endeavour to re-commence revenue work for repairs to plantation machinery at a value, not less than Rs. 250,000/- per month; and

c. Co-ordinate with the Branch Accountant in the collection of dues to the Company in respect of invoices raised in pursuance of work carried out in (a) and (b) above.

During this period the respondent had to work in the office at Galle Fort, which was admittedly a large well equipped Garage. After his new appointment, the said Garage was sold and the machinery and the equipment were taken to a place at Mihiripenna. The respondent after the receipt of the notice, assigning additional duties (A4A), had tendered his resignation by his letter dated 07.07.1999, to be with effect from 31.08.1999 stating that he is unable to accede to the terms and conditions of his new appointment (A6). By their letter of 09.07.1999, the appellant, whilst reverting the respondent to his former position as Assistant Engineer Galle Branch on the salary allocated to Assistant Engineer's post, informed the respondent that they are awaiting his confirmation of his resignation.

The respondent by his letter dated 02.08.1999 had informed the appellant that they have terminated his services, constructively, and that he would be instituting proceedings in the Labour Tribunal.

The Labour Tribunal had decided that the appellant had terminated his services constructively and had ordered to pay him Rs. 264,000/- being two years salary taking into account Rs. 11.000/- as his monthly salary, for the loss of his employment.

The learned Judge of the High Court had affirmed the order of the Labour Tribunal. Accordingly, both the Labour Tribunal and the High Court had come to the conclusion that the respondent's employment had been constructively terminated by the appellant.

It is not disputed that the respondent, as stated earlier, was promoted to the post of Engineer of the Galle Branch by letter dated 23.03.1999 with effect from 01.03.1999. It is also not disputed that by a further communication, the respondent was informed of the additional duties assigned to the respondent.

In his evidence, the respondent had stated that after he was promoted to the post of Engineer, the Garage, which was the biggest of that kind in the Southern Province, was sold and the establishment was re-located at Mihiripenna. The respondent's position was that the new location at Mihiripenna was a small house that was taken on lease and that the machinery and equipment were not re-located and installed. The new place was not fitted with three phase electricity, which was essential to run the heavy equipment machinery and sufficient number of workmen were not assigned to him. In the circumstances, although the appellant Company had been manufacturing Roll Breakers, Tea Rollers and all equipment necessary for the Tea trade when the garage was located in Galle, it was not possible to manufacture any of the above, after moving to Mihiripenna. The resulting position was that it was not possible to achieve the targets set out in the document, which listed out the additional duties (A4A) as none of the Estate Superintendents had given work to the appellant Company since they lacked the necessary infrastructure.

In fact the respondent has expressed his difficulties in achieving the expected goals due to the insufficient infrastructure facilities. In his letter dated 07.07.1999, (A6) he had stated thus:

> "....
>
> Notice of Resignation
>
> "I wish to bring to your notice that I cannot accede to your terms and conditions and the expectations of my new appointment as a Covenanted Staff Engineer at Galle Branch with the available Company infrastructure.

The available resources for Galle Branch Engineering Division is not sufficient to implement any mode of operation and also we do not get any concession from any other divisions which could deteriorate the present level of operation. *(sic)*

Hence, I am compelled to notify my resignation in advance complying with A.G.M (P & L)'s Circular No. 1/99 : WMSWF : SS : MK dated 22.01.1999 to utilize my entitle leave with the appropriate condition prior to the resignation. *(sic)*

I intend to resign from the services from 31.08.1999. However the confirmation would be as per letter of appointment.

I would like to make this opportunity to appreciate superiors who are devoted to develop our establishment."

In response to the respondent's said letter of resignation (A6), the Assistant General Manager/Personnel and Legal, had informed the respondent that since the respondent is unable to accept the terms and conditions stipulated in the letter of appointment placing him in the new post, that the appellant has no alternative other than reverting the respondent to his former position. Accordingly the respondent was reverted to his former position as Assistant Engineer, Galle Branch on the salary drawn by an Assistant Engineer. The said letter had further stated that the respondent's 'intention to resign from the services of Walker Sons and Co. Ltd.' was noted and that they were awaiting his confirmation of his resignation (A5 and A5A). The said letter (P5) was dated 09.07.1999. On the same date the Assistant General Manager/Personnel and Legal had written to the respondent calling for explanation to be sent within seven days from 09.07.1999 (R3). The said letter was in the following terms :

"It is noted that you have failed to participate at the Monthly Management Meeting held on 06.07.99 although you were informed to attend.

You were thereafter, requested to appear before the management at a Special Meeting held on 08.07.99 at

10.30 a.m. along with Mrs. Anwar – Accountant and AGM/Galle Branch.

Your failure to participate in the above Meetings appears to be a gross violation of the disciplinary rules and regulations of the Company and misconduct on your part.

Therefore please send me your explanation on or before the lapse of seven (07) days from today as to why you failed to participate in the above mentioned 02 meetings."

It is in this context, that we will have to examine as to whether the respondent had resigned from his employment or whether his services were constructively terminated by the appellant.

Considering the factual position, which was referred to earlier, it is to be borne in mind that after the receipt of the letter specifying the additional duties, the respondent had tendered his resignation since it was difficult for him to fulfill those with the available infrastructure facilities. Thereafter the appellant had informed the respondent that he would have to confirm his resignation. Notwithstanding the above, the appellant took steps to demote the respondent and to call for explanation for his non-participation at a monthly Management Meeting held on 06.07.1999 and a Special Management Meeting held on 08.07.1999. Both these action were taken, it is to be noted well after the respondent had sent his letter or resignation, on 07.07.1999.

The Labour Tribunal had considered all the circumstances referred to above in coming to the conclusion that the appellant had constructively terminated the service of the respondent, which decision was affirmed by the learned judge of the High Court.

Describing the instances and as to what amounts to constructive termination, would not be a simple question to give a brief answer. However, the doctrine of constructive termination, in its conceptual from has been identified in the following terms (The Contract of Employment. S. R. de Silva, The Employers' Federation of Ceylon, monograph No. 4, pg.158):

> The difficult question arises in connection with what amounts to a constructive termination of employment .... In conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a constructive termination by the employer, which puts an to the contract.

In his examination of the doctrine of constructive termination, S.R. de Silva *(supra)* had set out examples that clearly illustrates its meaning. According to his examination:

> If an employer refuses to pay an employee his salary in circumstances which make such refusal illegal, the employee can treat the employer's refusal as a constructive termination of the contract or again, *the employer may seek to unilaterally vary the contract on a fundamental matter, e.g. demote him. In such cases the employee often purports to resign from the service of the employer for the reason that the latter has compelled him to do so. Such a resignation is in law a constructive termination by the employer and does not preclude the employee from claiming relief before a Labour Tribunal on the basis that there has been a termination by the employer. The mere use of the term 'resignation' by an employee does not by itself preclude him from claiming relief on the footing of a constructive termination by the employer"* (emphasis added).

When the respondent informed the appellant that due to the non availability of the resources for the Engineering Division of the Galle Branch that he would not be in a position to accede to the additional duties that were assigned to him and therefore he is tendering his resignation, the appellant had taken steps immediately to demote the respondent to his previous position. Notwithstanding the above, as stated earlier, the appellant also took steps to call for explanation from the respondent for his non-attendance at meetings, thereby confirming the fact the they had not accepted the resignation tendered by the respondent by his letter dated 07.07.1999 (A6).

In such circumstances, on a consideration of all the material adduced in this case, it is abundantly clear that the appellant's action against the respondent amounts to constructive termination of the respondent's service. Accordingly, I answer the question on which this appeal was heard, in the negative. 220

For the reasons aforesaid, this appeal is dismissed and the judgment of the High Court dated 30.03.2005 is affirmed. The appellant will pay the respondent a sum of Rs. 25,000/- as costs.

MARSOOF, J. - I agree.

BALAPATABENDI, J. - I agree.

Appeal dismissed.

PREMARATNE
v
REPUBLIC OF SRI LANKA

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 15/2000
HC GALLE 1709
JANUARY 24, 28, 29, 2008

Murder – failure to consider principles governing cases of circumstantial evidence – Fatal? Should the trial Judge state the principles governing circumstantial evidence in the judgment? Dock statement – importance? Common intention? Criminal Procedure Code – S217, S229, S245.

The 1st and 2nd accused were indicted for committing the murder of Y and C – and were convicted for both offences and sentenced to death.

In appeal it was contended that

(1) The trial Judge treated the case as a case based on direct eye witness account where in fact this was a case based on circumstantial evidence.

(2) That the trial Judge has not laid down all the principles of law in his judgment.
(3) That, the rejection of the dock statement was bad in law.
(4) That the accused did not share the common murderous intention.

Held

(1) The learned trial Judge had observed that the evidence of the witness in this case can be categorized as eye witness account and not based on circumstantial evidence, but the learned trial Judge had also observed that the prosecution had led circumstantial evidence. The above observation had not caused prejudice to the accused.

Per Sisira de Abrew. J.
"In a trial by a judge without a jury, the judge cannot be expected to lay down all the principles of law in his judgment but this does not mean that the trial judge can ignore the legal principles relevant. If the appellate Court is of the opinion that the case had been proved beyond reasonable doubt the appellate Court will not set aside the conviction on the ground that the judge failed to lay down the principles of law in the judgment".

(2) In a trial by a judge of the High Court without a jury it is significant that there are no such provisions similar to S217. There is no requirement similar to S229 that he should lay down the law which he is to be guided. The reason being that the law takes far granted that a Judge with a trained legal mind is well possessed of the principles of law he would apply.
(3) A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence without compartmentalizing and ask himself whether as a prudent man in the circumstances of the particular case, he believes the accused guilty or not guilty.
(4) In considering all the matters before Court, it is seen that, the both accused had committed the murder of the two deceased persons – there was common murderous intention.

APPEAL from the judgment of the High Court of Galle.

Cases referred to:

(1) *Dayananda Lokugalappathy* v *State* – 2003 3 Sri LR 362 at 392
(2) *James Silva* v *The Republic of Sri Lanka* 1980 2 Sri LR 167 at 176.

Dr. Ranjith Fernando for appellant.
Kapila Widyaratne DSC for the Republic of Sri Lanka.

February 29, 2008

SISIRA DE ABREW, J.

A.J.M. Rathnasiri Jayasundara alias Bandara, the 1st accused and K.M. Premarathne, the 2nd accused appellant were indicted in the High Court of Badulla for committing the murder of Yasarathne and the murder of Chandrasena who was a grade six student. The 1st accused was tried in absentia while the 2nd accused was defended by a lawyer. After trial the learned trial judge convicted both accused for both offences and sentenced to death. This appeal, by the 2nd accused appellant, is against the said conviction and the said sentence. The facts of the case may be briefly summarized as follows.

The unfortunate incident in this case took place on 1st of December 1988 which was a curfew day declared by the Janatha Vimukthi Peramuna (JVP). Around 6.30 p.m. on the fateful day both the 1st accused and 2nd accused appellant came to the house of Kirihathana and consumed one bottle of toddy which was with Kirihathana. The 2nd accused appellant, at this time apparently addressing Kirihathana told that he kept a gun on the pile of timber stacked in one of the rooms of Kirihathana's house. After they left, Kirihathana heard somebody shouting in the following language; "Ammo Ammo I am finished." When Kirihathana went to see what it was, the 1st accused, armed with a gun, threatened him in the following language: "If you tell anybody your entire family would be killed." At this time the 2nd accused appellant was seen in the company of the 1st accused. Then both accused chased after Kirihathana preventing him from proceeding further in the direction that he heard the cries of distress. As a result of this behaviour of both accused, Kirihathana who could not see what was happening or what has happened went and locked himself up inside his house. Following morning when he came with the police he saw two dead bodies about 75 yards away from the place where the two accused threatened him in the previous evening. Kirihathana had never seen the deceased persons prior to this incident.

On hearing a wailing cry of a human being around 6.30 p.m. on the fateful day Raman Wijendran (hereinafter referred to as Raman) stepped out of his house to make inquiries about the said

human voice i.e. "do not assault me." He then, saw two male persons lying fallen at the edge of the Village Council Road (VC Road) and the two accused standing near the fallen men. The distance between the two accused was 3 to 4 feet. When he was inquiringly looking what was happening, the 1st accused, who was armed with a gun, using filthy language, questioned as to why he came and threatened to kill him and to set fire to his house. Following morning Raman saw tow dead bodies at the afore-mentioned place i.e. the edge of the VC Road.

Around 7.00 to 7.30 p.m. on the fateful day Jamis, who was living about 1/2 mile away from the place where the two dead bodies were found in the following morning, opened the door as somebody was knocking on the door. Both accused then entered the house. When the 1st accused requested his gun, he gave an iron pipe. Following morning he saw two dead bodies about 1/2 mile away from his house.

On behalf of the 2nd accused appellant following grounds were urged as militating against the maintenance of the conviction.

1. Learned trial Judge erred by considering the matter as a case based on direct eye witnesses account when in fact it was a case based on circumstantial evidence.
2. There was no judicial evaluation of the circumstantial evidence .
3. Learned trial Judge erred by failing to consider the effect of the dock statement.
4. The 2nd accused appellant did not share common murderous intention with the 1st accused and as such the conviction of the 2nd accused appellant cannot be permitted to stand.

I shall now advert to these grounds. Learned Counsel for the appellant drew our attention to page 107 of the brief and contended that the learned trial judge had treated the case as a case based on eye witnesses account when in fact this was a case based on circumstantial evidence. The learned trial judge at page 107 of the brief observed that the evidence of the witnesses in this case can be categorized as eye witnesses' account and not as circumstantial

evidence. But the learned trial judge, at the same page, observed that the prosecution had led circumstantial evidence. He further observed that the witnesses in this case were almost witnesses. Raman stated, in his evidence, that he could see the scene of murder when he opened his door. He opened the door since he heard somebody shouting 'do not assault me.' When he stepped out he saw two people lying fallen and the two accused standing near the fallen people. Thus it appears if Raman stepped out of his house one or two seconds before he heard the said cries of distress he would have witnessed the deceased persons being assaulted. In view of these matters, the aforementioned observations of the learned trial judge have not caused prejudice to the accused. Therefore, we are unable to agree with the first ground urged by the learned Counsel.

I shall now advert to the second ground urged by the learned Counsel for the 2nd accused appellant. Learned Counsel contended that the conviction of the 2nd accused appellant could not be sustained as the learned trial judge had failed to consider the principles governing cases of circumstantial evidence. It is true that the learned trial judge failed to observe the principles governing cases of circumstantial evidence. Should the trial judge always state the said principles in his judgment? In considering this question, I must not forget the fact this was a trial by a judge and not by a jury. In a trial by a jury, at the commencement of the trial, the judge has to inform the members of the jury of their duties. At that stage the judge also directs them briefly on the presumption of innocence, the burden of proof and other principles of law as may be relevant to the case. Vide section 217 of the Criminal Procedure Code (CPC). This is because jurors are ordinary laymen. It is noteworthy to mention here that Attorney-at-law cannot serve as jurors. Vide Section 245 of the CPC. Thus the law presumes that jurors do not possess knowledge in law. This appears to be the reason that the judge is expected to direct the jurors on the relevant principles of law in both his opening address and in summing up. The judge who has a trained legal mind cannot be equated to a juror. In this connection I would like to quote a passage from the judgment of Justice Kulathilake in the case of *Dayananda Lokugalappathy* v *The State*(1) at 392: "In a trial by a Judge of the

High Court without a jury it is significant that there are no such provisions similar to section 217 of the Act, for example to set forth the basic principles of criminal law, i.e. the presumption of innocence, the burden of proof etc. We do not see any requirement similar to section 229 that he should lay down the law which he is to be guided. The reason being that the law takes for granted that a Judge with a trained legal mind is well possessed of the principles of law, he would apply." Considering all these matters I hold the view that in a trial by a judge without a jury, judge cannot be expected to lay down all the principles of law in his judgment. But this does not mean that the trial judge can ignore the legal principles relevant to the case in deciding the issue before him. If the appellate court is of the opinion that the case had been proved beyond reasonable doubt, the appellate court will not set aside the conviction on the ground that the judge had failed to lay down the principles of law in his judgment. If a conviction is set aside on the said ground such a course would lead to deterioration of administration of justice. Considering all these matters, I reject the 2nd ground urged by the learned Counsel as there is no merit in the said ground.

Learned Counsel for the 2nd accused appellant contended before us that the learned trial judge erred by failing to consider the effect of the dock statement. Contention of the learned Counsel was that the rejection of the dock statement by the learned trial judge was wrong. He further contended that the learned trial judge had compared the dock statement with the prosecution evidence. In order to find out whether the accused is guilty of the offence or not, can the trial Judge consider the dock statement in isolation? In a straight forward case of murder by shooting where the case is based on several items of evidence such as the evidence of eye witnesses; the evidence of the police officer to whom the gun was handed over by the accused; the evidence of the Government Analyst who confirms that the empty cartridge found at the scene of offence had been discharged from the gun handed over by the accused to the Police and corroborates the eye witnesses regarding the distance between the accused and the deceased at the time of firing; and the medical evidence which confirms the deceased died of gun shot injuries, can the trial Judge ignore the prosecution evidence and acquit the accused when he denies the

incident from the dock? In such a case can the trial judge consider the dock statement in isolation, accept the same and reject the prosecution case? If Court adopts such a course, will it not lead to mockery of justice instead of administration of justice? In my view, in considering the question whether the dock statement should be accepted or rejected the proper course is to consider the both prosecution and defence evidence. This view is supported by the opinion expressed by Justice Rodrigo in the case of *James Silva* v *The Republic of Sri Lanka*(2) at 176 wherein His Lordship remarked thus: "A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty." Considering all these matters, I reject the contention of the learned Counsel as there is no merit in it.

Learned Counsel further contended that the 2nd accused appellant did not share common murderous intention with the 1st accused and therefore the conviction of the 2nd accused appellant could not be sustained. I now turn to this contention. Soon before the crises of distress heard by Kirihathana, both accused came to Kirihathana's house and the 2nd accused appellant told that he kept the gun on the pile of timber. Soon after the said cries of distress Kirihathana saw both accused together and the 1st accused was armed with a gun. There was no any other person present at this time. Both accused chased away Kirihathana preventing him from proceeding further in the direction that he heard the cries of distress. Following morning Kirihathana saw two dead bodies 75 yards away from the place where the two accused were standing in the previous evening. When Raman opened his door on hearing a wailing cry of a human being i.e. "do not assault me" he saw both accused standing there and two persons lying fallen near them. Raman was chased away by the two accused when he was looking at the place where two men were lying fallen. Following morning he saw two dead bodies at this place. Around 7.00 to 7.30 p.m. on the fateful day both accused came to Jamis's house and demanded his gun. Considering all these matters I hold

the view that both accused had committed the murder of two deceased persons. I am therefore unable to agree with the contention of the learned Counsel for the 2nd accused appellant that the 2nd accused appellant did not share common murderous 190
intention. When the evidence led at the trial is considered I hold the view that the prosecution had proved the case beyond reasonable doubt. For the above reasons I affirm the conviction and the sentence of the 2nd accused appellant and dismiss this appeal.

SILVA, J. – I agree.

Appeal dismissed.

NANDANA
v
ATTORNEY-GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 58/2005
HC 1520/2000 PANADURA
NOVEMBER 23, 2006
APRIL 4, 2007
JULY 18, 2007
FEBRUARY 6, 2008
APRIL 28, 2008
AUGUST 20, 2008

Penal Code – S296 – Convicted – Placing burden on the defence to rebut prosecution evidence – Is it fatal? Retrial – Would it meet the ends of justice? – Discretion vested in Court – Criminal Procedure Code S335 (2) a – Constitution Art 13 (5) Art 138 – Evidence Ordinance S114.

The accused-appellant was indicted and convicted for the murder of his own father, and sentenced to death. In the appeal it was contended that, the trial Judge has committed a very serious and fundamental misdirection of law by attaching a burden on the defence to rebut the prosecution evidence, and due to the filmsy nature of the evidence and due to the long lapse of time since the date of the incident, ordering a retrial would not meet the ends of justice.

Held:

(1) Imposing a burden on the accused to prove his innocence is totally foreign to the accepted fundamental principles of our Criminal Law as to the presumption of evidence.

Per Sarath Abrew, J.

"The mis-statements of law by the trial Judge would tantamount to a denial of a fundamental right of any accused as enshrined in Art 13(5) of the Constitution – a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned and could necessarily vitiate the conviction."

Held further

(2) A discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration. Since the date of appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered.

(3) In the circumstances of this case, the interests of justice would not require the appellant to be subjected to a protracted second trial, especially so where the only eye witness has made a belated statement and the time duration since the date of the incident is almost 10 years.

APPEAL from a judgment of the High Court of Panadura.

Cases referred to:

(1) In *Re M.A.S. de Alwis* – (1972) 75 NLR 337

(2) *Keerthi Bandara* v *Attorney General* – 2SLR 245 at 261

(3) *Peter Singho* v *Warapitiya* – 55 NLR 157

(4) *Queen* v *Jayasinghe* – 69 NLR 413

(5) *L.C. Fernando* v *Republic of Sri Lanka* – 79(2) 313 at 374

Ranjith Abeysuriya PC with *Thanoja Rodrigo* for appellant.

Priyantha Navana, Senior State Counsel for Attorney-General

October 19, 2008

SARATH DE ABREW, J.

The accused-appellant (hereinafter sometimes referred to as the "Appellant") was indicted before the High Court of Panadura for having committed the murder of his own father Warnagodage Punyasiri Ratnasuriya on 07.02.1999 at Wadduwa under section 296 of the Penal Code. After trial without a jury the learned trial Judge had convicted the appellant for the offence of murder under section 296 of the Penal Code and sentenced him to death. Being aggrieved of the aforesaid conviction and sentence the appellant had preferred this Appeal to this Court.

The only eyewitness Meegama Archarige Isira, a neighbour, had given evidence for the prosecution followed by I.P. Karunatilleke Bopitiya, then OIC Crimes, Wadduwa Police Station, who had conducted the investigations. Thereafter, then AJMO Colombo, Dr. Chandrasiri Herath had given evidence regarding the post-mortem Examination and injuries on the body followed by the Interpreter Mudaliyar Suduhetti, whereupon the prosecution had closed its case producing in evidence P1-P3 as productions. Thereafter the accused has given evidence from the witness-box denying complicity and the defence had called one Malini Ariyaratne, a Medical Records Officer of the Colombo General Hospital.

The facts pertaining to this case briefly are as follows. The deceased, whose second son was the accused, used to live at Gnanatilleke Road, Morontuduwa, Wadduwa, about 04 to 05 houses away from the residence of eyewitness Isira. The deceased was subsequently estranged from the family, lived elsewhere and used to visit his family often. At the time of the incident the deceased Punyasiri was staying with elder brother Sumanadasa a couple of houses away from that of witness Isira, where the appellant was residing at Wellaboda about 01 mile away.

According to eyewitness Isira, on the morning of 07.02.99, he was working in their garden getting ready to put a concrete layer at their kitchen furnace while his parents, younger brother and sister too were present at their house. Around 10.30 - 11.00 a.m. that

morning the deceased had come running towards the house of Isira from the direction of the road with his son the accused-appellant in hot pursuit around 10 feet behind. The deceased had told Isira that his son is coming to assault him and the appellant too had uttered an obscenity to the effect that that he is going to kill the deceased. As the deceased reached the front step of Isira's house, the appellant had picked up a milla club (P1) which had been there for use in the concrete work of Isira, and dealt a blow on the head of the deceased. After the deceased fell on the step of the house, the appellant had dealt a second blow on the forehead of the deceased, at which point Isira had intervened and wrested the club from the appellant and thrown it away, while himself suffering a club blow into the bargain. Thereafter witness Isira had dragged away the accused-appellant towards the road and sent him away and subsequently had rushed the injured person to the Colombo General Hospital where he was pronounced dead the following day after emergency surgery. Witness Isira had made a statement to the police two days later on 09.02.1999. According to Isira the motive for the attack was not known. The appellant, who had apparently, attended the funeral too, had surrendered to the police on 15.02.1999.

I.P. Bopitiya had testified as to the presence of blood stains at the front step of Isira's house and as to the recovery of the club (P1) from the compound of Isira. AJMO Dr. Herath had testified to the presence of 05 external injuries on the skull and forehead of the deceased and that the injuries were necessarily fatal. The cause of death given was due to Craniocerebral injuries caused by "blunt" weapon.

The accused-appellant, while denying complicity, testified that his father the deceased had deserted his mother and family when he was about 08 to 09 years of age and had gone to Negombo to live with another woman. The appellant further stated that he was a fisherman by profession and on the fateful day 07.02.1999, he was engaged in "madal fishing". Thereafter he had gone to his fiancee's house closely and attended a birthday party of his fiancee's elder sisters daughter the following day. Subsequently he had gone Galle to visit a friend who had informed the appellant that his father was in hospital on the night of 08.02.1999. He had gone

to the cemetery where his father's funeral was held. Subsequently, on learning that he was wanted by the police in connection with his fathers' death he had surrendered to the police. Another witness was called on behalf of the defence to testify to the history of the patient as recorded on the bed-head ticket.

At the hearing of the Appeal, the learned Counsel for the appellant adduced the following contentions in support.

1. In the judgment, the learned trial judge has committed a very serious and fundamental misdirection of law, as reflected in page 154 of the original record which vitiated the conviction, by attaching a burden on the defence to rebut the prosecution evidence, which would necessitate a retrial, as conceded by the learned Senior State Counsel.

2. Adducing several authorities in support, the learned Counsel for the appellant submitted that due to the ostensibly flimsy nature of the evidence available and due to the long lapse of time since the date of the incident, ordering a retrial would not meet the ends of justice.

On the other hand, the learned senior State Counsel, while conceding that the fundamental defect in the judgment of the learned trial judge imposing a burden of proof of innocence on the accused (page 151 of the original record) vitiated the conviction, nevertheless submitted that as the evidence of eyewitness Isira is corroborated by the medical evidence and well-supported by the evidence of IP Bopitiya who had observed blood stains at the door-step of the house of the eyewitness, there was ample evidence to justify a conviction, and therefore this is a fit and proper case to be sent for re-trial.

I have perused the totality of the proceedings, the Information Book Extracts and the written submissions tendered by both parties. On a perusal of the judgment of the learned trial judge the following glaring misdirection of law as to the required burden of proof appear on the record which would necessarily vitiate the conviction and sentence. The learned Senior State Counsel too has conceded this fundamental error on the part of the learned trial judge which would have prejudiced the substantial rights of the

appellant and occasioned a failure of justice under the proviso to article 138 of the Constitution.

At pages 150-151 of the original record, in her judgment, the learned trial judge had stated "එබැවින් විත්තිය විසින්, එයේ ප්‍රබල සාක්ෂි තිබියදී පදනම් රහිත ස්ථාවරයක් මත පිහිටා විත්තිවාචිකයක් ඉදිරිපත් කිරීම කිසියේත්ම විත්තිකරුගේ නිර්දෝෂිභාවය ඔප්පු කිරීමක් නොවේ." The leaned trial judge had therefore sounded a death knell on the conviction and death sentence *per se* by imposing a burden on the accused to prove his innocence which is totally foreign to the accepted fundamental principles of our criminal law as to the presumption of innocence. Further at page 154 of the original record, the learned trial judge in her judgment, further ventures to state "මෙහිදී පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද ප්‍රබල සාක්ෂි කිසියේත් බිඳහෙළීමට විත්තියට නුපුළුවන් විය." There too she introduces a concept foreign to our Criminal Law that there is a burden on the defence to rebut the prosecution evidence.

The above mis-statements of law by the learned trial judge would tantamount to a denial of a fundamental right of any accused person as enshrined in Article 13(5) of our Constitution which stipulates that "Every person shall be presumed innocent until he is proved guilty." In the case of *M.A.S. de Alwis*(1) G.P.A. de Silva S.P.J. held that a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned and would necessarily vitiate the conviction.

Therefore I am in total agreement with the learned Counsel for the appellant and the learned Senior State Counsel that the two mis-statements of law highlighted above would suffice to vitiate the conviction and sentence imposed in this case.

It is now left to decide whether the nature of the evidence led in this case and the time duration that has elapsed would justify ordering a retrial to meet the ends of justice. On this issue the learned Counsel for the appellant and the learned Senior Counsel for the Attorney-General are in conflict with each other and have adduced contrasting arguments. I have carefully considered the oral and written submissions of both parties on this issue, and also the case law authorities submitted on behalf of the appellant.