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[2008] 1 SRI L.R. – PARTS 3 & 4

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Section 335 (2) (a) of the Code of Criminal Procedure, Act,15 of 1979 provides that in determination of appeals in cases where trial was without a jury, the Court of Appeal may reverse the verdict and sentence and acquit or discharge the accused or order him to be retried. Therefore 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 the offence, the period of incarceration the accused person had already suffered, and last but not the least, 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.

The learned counsel for the appellant had based his submissions on two grounds that this is not a fit case to order a retrial, namely:-

(a) The infirmities in the evidence of the prosecution based solely on the only eyewitness Isira.

(b) The time duration from the date of offence 07.02.99 up to now being almost 10 years.

On a consideration of the first ground as to the infirmities in the prosecution evidence the following salient features, as submitted by the learned counsel for the appellant, spring to the eye.

(1) In *Keerthi Bandara* v *Attorney-General*[2] at 261 it has been held that even the Appellate Court may peruse the Information Book Extracts in the interests of justice. The Information Book Extracts reveal that eyewitness Isira had made a belated statement to the police two days after the incident on 09.02.99. Even then it appears that he has not voluntarily done so but had been taken to the police station by I.P. Bopitiya to record his statement. A perusal of the evidence led at the trial indicate that Isira has failed to give a plausible reason to justify this delay.

(2) Neither has Isira divulged to the Colombo General Hospital authorities the true nature of the incident at the time he admitted the deceased to the hospital. The bed-head ticket

produced in evidence indicate a history of an accidental fall and consumption of alcohol.

(3) Even though Isira had stated in evidence that he too had received a club blow from the accused-appellant at the time of wresting the club from the accused, there is no evidence on record to indicate that he too received an injury.

(4) The appellant has given evidence from the witness box and had put forward on *alibi* which had not received the attention of the learned trial Judge.

(5) The subsequent conduct of the accused-appellant in being present as the cemetery where the funeral was held is not in keeping with the normal conduct of a person who had caused the death of the deceased under section 114 of the Evidence Ordinance.

In view of the above, there is some substance in the first ground urged by the learned counsel for the appellant.

As regards the second ground as to the time duration, it must be noted that as the alleged offence has been committed on 07.02.99, almost 10 years have elapsed since the date of the offence. In a long line of case law authorities, our Courts have consistently refused to exercise the discretion to order a retrial where the time duration is substantial.

In *Peter Singho* v *Werapotiya*[3] Gration, J. refused to order a retrial where the time duration was over 04 years.

In *Queen* v *Jayasinghe*[4] Sansoni, J. refused to order a retrial where the time duration was over 03 years.

In *L.C. Fernando* v *Republic of Sri Lanka*[5] at 374 Wijesundara, J. held that "It is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interests of justice so required.

In this case the original case record reveals that the appellant had suffered incarceration already for over 3 1/2 years since surrendering to the police. The learned Senior State Counsel had submitted that as the trial Judge who delivered the judgment did not have the benefit of recording the evidence of eyewitness Isira and therefore did not have the opportunity of observing the demeanour

and deportment of this witness, a retrial could be justified on this ground. I am unable to agree with the above contention as the interests of justice would not require the appellant to be subjugated to a protracted second trial in remand in the circumstances set forth above in that case, especially so where the only eyewitness has made a belated statement and the time duration since the date of the incident in almost 10 years.

Under the circumstances I uphold the submission of the learned counsel for the appellant that this is not a fit and proper case to order a retrial.

For the foregoing reasons, I allow the Appeal and set aside the conviction and sentence dated 08.07.2005 imposed on the appellant for the offence of murder under section 296 of the Penal Code by the learned High Court Judge of Panadura, and I acquit the appellant. The Registrar is directed to send a certified copy of this order to the High Court of Panadura.

IMAM, J. - I agree.

Appeal is allowed.

VEN. KIRAMA SUMANA NANDA THERO
v
RAJAPAKSHE

COURT OF APPEAL
EKANAYAKE, J.
CHANDRA GUNARATNE, J.
CA 136/2004
DC GAMPAHA 43630/M
OCTOBER 15, 2007

Pradeshiya Saba Act 15 of 1987 – Sections 35, 36, 210-214, 214(1) and (2), 215 – Demolition of walls – No prior approval of the Sabawa – Notice in writing to be given to Pradeshiya Saba before action is instituted? – If not – could action be maintained – Sabawa acting outside the scope of Authority? Civil Procedure Code section 461 – Amendment Act 20 of 1967 – compared.

The plaintiff-appellant claimed damages for demolition of walls of 4 rooms in the building which belonged to the plaintiff by the 1st and 2nd respondents (Mahara

Pradeshiya Sabawa). The position of the plaintiff-respondent was that demolition took place as the plaintiff failed to obtain prior approval of the Pradeshiya Sabawa.

The trial Judge held that, notice under S214 of the Pradeshiya Saba Act was not given to the Pradeshiya Sabawa and the Pradeshiya Sabawa was empowered under Section 35 and Section 36 to demolish the building.

It was contended in appeal by the plaintiff-appellant that (1) the trial Judge failed to consider the Law applicable for demolition under Act 15 of 1987 (2) That the trial Judge failed to consider that under Section 35 of the Act, the respondents could not have demolished a part of the building, without he being heard. (3) that the Court has misdirected itself.

Held:

(1) In terms of S210-215 – more specially S214 (1) and (2) no action could be instituted against any Pradeshiya Sabawa until the expiration of one month, next after notice in writing is given to the Pradeshiya Sabawa.

Per Anil Gunaratne, J.

"The above procedural provision is similar to S461 of the Civil Procedure Code involving the State. The earlier view was that if notice was not given action was not maintainable. The introduction of an amendment to S461 by Act 20 of 1977 with S461 A – where no notice has been given, S461A enables Court to stay proceedings for a further month. The section does not contemplate of a dismissal of action on failure to give notice."

Held further

(2) The position is different in the provisions relating to notice in the Pradeshiya Sabawa Act 15 of 1987 which does not contain a similar provision as S461 of the Code. Provisions in S214 seem to be an imperative requirement.

(3) S35/36 contemplates to safeguard human life from possible dangers by a structure in a collapsible state. If these ingredients are present the Pradeshiya Saba of the area could adopt or cause to take such steps to do everything possible to prevent a dangerous state.

(4) The main items of evidence to support the ingredients in S35/36 are contained in the defendants' documents. The Pradeshiya Sabawa has not acted outside its scope of authority. The plaintiff had constructed a building not according to approved specifications. it is an unauthorised construction, the neighbours have expressed fear about the unauthorised construction and the possible danger which may ensue.

APPEAL from the judgment of the District Court of Gampaha.

Cases referred to:

(1) *Saiboo and others v Attorney-Genera;l*– 48 NLR 574.

(2) *Weerasinghe v De Silva* – 1994 – 2 Sri LR 248.

(3) *Liyanage* v *Municipal Council of Galle* – 1994 - 3 Sri LR 217

(4) *Johannesburg Municipality* v *African Reality Trust* – 1927 - AD 163.

(5) *Paramasothy* v *Veenayagamoorthy* – (1943) 44 NLR 361

(6) *Perera* v *Perera* – (1957) 59 NLR 133.

Udaya Gammanpila for plaintiff-respondents.

1st and 2nd defendant-respondents absent and unrepresented.

January 30, 2008

ANIL GOONERATNE, J.

This was delictual action filed in the District Court of Gampaha where the plaintiff-appellant claimed damages for demolition of walls of 4 rooms in the building which belongs to plaintiff, by the 1st and 2nd defendant-respondents in the manner pleaded in paragraphs 5/6 of the plaint. It was the position of the respondents according to the answer filed in the Original Court that demolition took place as the plaintiff failed to obtain prior approval of the Pradeshiya Sabhawa Act, No, 15 of 1987, and in view of a series of complaints about illegal construction by the plaintiff, demolition had to be done, and such act of demolition by the Pradeshiya Sabha was legal. Judgment was delivered by the learned District Judge on or about 14.01.2004 dismissing plaintiff's action.

At the hearing of this appeal only the appellant was represented. This appeal arises from the said judgment and in the Petition of Appeal, appellant plead *inter alia*.

(a) The learned District Judge has failed to consider the law applicable for demolition under the Pradeshiya Sabha Act, No. 15 of 1987.

(b) The learned District Judge has failed to consider that under section 35 of the Pradeshiya Sabha Act, the respondents could not have demolished the part of the building as aforesaid, of the said appellant without he being heard and/or after filing an action in the respective Magistrate's Court prior to the said demolition.

(c) The respondents falsely misdirected the court and the learned District Judge without considering that documents marked V1 and V1 were not proved misdirected her herself and delivered a wrong judgment.

Parties proceeded to trial on 23 issues. This appeal needs to decide whether statutory provisions in Pradeshiya Sabha Act and it's applicability to the case in hand justifies demolition as described above, and the question of compliance with procedural requirements.

The learned District Judge *inter alia* refer to the following points and findings arising from evidence led at the trial.

(a) In the complaint P2, 4 persons and a lady came to the temple in a Double cab on 28.4.99 at about 10.30 a.m. and threatened to demolish the building. Court observes that persons concerned are not identified.

(b) Evidence of plaintiff in court is to the effect that the Chairman of the Pradeshiya Sabha with others caused damages to the buildings and demolished, same.

(c) By P3 plaintiff complains to the police that when he arrived at the temple on 29.4.1999 at 4.30 p.m. about 1/3 of the walls in the hall upstairs (Dharma Shalava) had been pulled down. P3 shows that plaintiff was not present at the scene of the building when damage was caused to the building, and in cross-examination stated that when the Chairman of the Pradeshiya Sabha is supposed to have come he was not present.

(d) In court, the plaintiff claimed damages caused to the building upstairs and the ground floor. But in paragraphs 6 of the plaint damages where claimed only for the damages caused to the building upstairs.

(e) The main ground urged on behalf of the Chairman Pradeshiya Sabhawa was that the construction was an unauthorized construction and plans had not been approved and the construction had taken place not according to any approved specification. Plaintiff's evidence too confirms this position. Plan had been submitted for approval only after unauthorized construction. Plaintiff admitted that the

foundation of the building was done without authority and construction done by plaintiff priest himself without any guidance by persons involved in building construction which caused danger to those in the vicinity.

(f) 1st defendant's contention is that the plaintiff had constructed a building not according to approved specification and as a result it is dangerous to other premises in the vicinity.

(g) Evidence of 1st defendant on D1, a letter addressed to the plaintiff priest and the police. D1 refers to unauthorized construction which had been done without approval or any specification, which building had been inspected by the technical officer. The neighbours have expressed fears about the unauthorised construction and the possible danger which may ensue. A direction to stop construction and removal of building in a dilapidated state. D1 should be dated 12.4.1999 but the District Judge states 12.4.1992.

(h) D2 of 18.5.1999 is a letter by Divisional Secretary Mahara addressed to Commissioner of Buddhist Affairs and copies to plaintiff and Chairman Pradeshiya Sabha, about the illegal acts mentioned in D1 and requesting that the dangerous building be cleared and a request to inspect the building.

(i) D3 is a letter addressed to plaintiff by Chairman, Mahara Pradeshiya Sabhawa referring to unauthorized structure, danger to neighbours as a result of structure, previous warnings, inspection by Technical Officer etc. The last paragraph of D3 states that the unauthorized structure should be removed in 7 days and a notice under section 35 of Act, No. 15 of 1987. It further states that failure to comply as above, action will be taken under section 36 to remove same without any warning to remove the obstruction and the unauthorized structure. D3 is copied to Commissioner of Buddhist Affairs, Government Agent and a Minister.

(j) Plaintiff has admitted receipt of D1 and D2. Plaint had been filed when D3 was dispatched to plaintiff.

(k) District Judge comments on the valuation report on damages marked P4, and rejects P4 and observes.

(i) P4 contains facts submitted by plaintiff priest and not that of the author of same.

(ii) Report submitted by the author only the face value.

(iii) Author unable to testify about the foundation of the building i.e. material, strength etc.

In a case of this nature the primary question for plaintiff to establish is whether by any illegal act of the Defendants (unless protected by statute) the private life of the plaintiff had been interfered with and if so mandatory procedural requirements to bring an action have been complied with by the plaintiff to succeed in damages. Compliance with procedural requirements would be the first precondition to be looked into in a case of a statutory authority. The learned District Judge has answered issue Nos. 3 and 4 in the negative. These issues relate to illegal acts of the defendants. Issue No. 7 relates to the above procedural requirement, which is also answered in the negative in favour of the defendants.

In terms of Pradeshiya Sabha Act procedure and legal proceedings are embodied in section 210 to 215 of the Act. Issue No. 7 refers to section 214 of the said Act. Section 214(1) & (2) reads thus:

(1) No action shall be instituted against any Pradeshiya Sabha or any member or any officer of the Pradeshiya Sabha or any person acting under the direction of the Pradeshiya Sabha for anything done or intended to be done under the powers conferred by this Act, or any by-law made thereunder, until the expiration of one month next after notice in writing shall have been given to the Pradeshiya Sabha or to the defendant, stating with reasonable certainty the cause of such action and the name and the place of abode of the intended plaintiff and of his Attorney-at-Law or agent, if any, in such action.

(2) Every action referred to in subsection (1) shall be commenced within ix months after the accrual of the cause of action and not thereafter.

The above procedural provisions are somewhat similar to section 461 of the Civil Procedure Code in cases involving the state and in that regard representation of the Attorney-General, comes into

the picture. Earlier view was that if notice was not given action was not maintainable *Saiboo and others* v *Attorney-General*[1]. Object of section 461 of the Civil Procedure Code is to afford an opportunity to the persons concerned to consider his position with regard to a claim and come to terms of settlement *Weerasinghe* v *De Silva*[2]. The introduction of the amendment to section 461, by Act, No.20 of 1977 with section 461A, procedure where no notice has been given is dealt with to enable court stay proceedings for a further month. The said section does not contemplate of a dismissal of action on failure to give notice.

However position is different in the provisions relating to notice in the Pradeshiya Sabha Act, No.15 of 1987 which does not contain a similar provision as section 461A of the Civil Procedure Code.

As such the provisions contained in section 214 of the said Act seems to be an imperative requirement. District Judge in this case had answered issue No. 7 in the negative and held that plaintiff cannot maintain this action. The appellant's counsel argued that there was no necessity to give notice as the respondent's have no power to act in the manner they acted. In *Liyanage* v *Municipal Council Galle*[3].

(a) Section 307(1) of the Municipal Councils Ordinance requires notice of action in respect of "anything done or intended to be done under the provisions of (the Ordinance". Clearly it is not in respect of **every** act or omission that notice is required.

(b) Section 307(1) does not apply to those acts which a Municipal Council has no power to do or which it has power to do (under statue, common law or contract) otherwise than under the Ordinance.

(c) Notice is also not required in respect of *mala fide* acts or those vitiated by some procedural or other defect.

The next question is whether the defendants had the power to act as above. The learned District Judge has to a great extent considered the factual position to enable the Pradeshiya Sabha to act according to section 35 and 36 of the Pradeshiya Sabha Act.

The learned District Judge as enumerated in (E), (F), (G), (H), (I) and (K) of the above findings, gives an indication that the ingredients referred to in section 35 and 36 of Act, No.15 of 1987 has been considered, in the Original Court Judgment. The said sections reads thus ....

Section 35 – If any house, building, boundary wall or gateway adjoining any street or thoroughfare in any area or anything affixed thereon, be deemed by the Pradeshiya Sabha of that area to be in a ruinous state, whether dangerous or not, or to be likely to fail, the Pradeshiya Sabha shall immediately if it appears to be necessary, cause a proper hoarding or fence to be put up for the protection of persons using such street or thoroughfare, and shall cause notice in writing to be served on the owner or occupier forthwith to take down, secure, or repair such house, building, boundary wall, gateway or thing affixed thereon, as the case may require.

Section 36 – If any person, on whom a notice is served by or on behalf of a Pradeshiya Sabha under section 35 does not begin to comply with such notice within three days of the service thereof or does not complete the work with due diligence, the Pradeshiya Sabha shall cause all or so much of the work as it may think necessary to be carried out, and all the expenses incurred by the Pradeshiya Sabha shall be paid by such person and shall be recoverable as hereinafter provided.

If one takes a close look at the above sections, any structure in close proximity to a road referred to therein, it is evident that it should be in a ruinous state which could be dangerous and likely to fall on to the road. The section contemplates to safeguard human life from possible dangers by a structure in a collapsible state. If these ingredients are present the Pradeshiya Sabha of the area could adopt or cause to take such steps to do everything possible to prevent a dangerous state.

Statutory Authority – *Principles of Ceylon Law by H.W. Thambiah Q.C.* pg. 403/404.

The defendant may plead that a statute protects his action and, therefore, no action for damages lies, if as a result of some act done under the authority of the statute damage is caused to another. In such cases as Innes J. said (*Johannesburg Municipality* v *African Reality Trust*[4] "the primary question is whether the statute in question justifies an interference with private lives. If it does not, then there is an end to the matter. Anyone whose private life has been interfered with, (without, of course some justification) has a remedy." Where the defendant has discharged the onus by proving that his act was justified by law, it is still open to the plaintiff

to prove that the defendant is not entitled to the protection of statutory defence because the powers conferred upon him by statute were exercised negligently *Paramasothy* v *Veenayagamoorthy*(5). Thus, although The Cattle Trespass Ordinance authorizes an irrigation headman to take charge of trespassing cattle, yet his position is that of a bailee for reward and if he has not exercised due diligence after taking the custody of the cattle he will be liable in damages for the negligence *Perera* v *Perera*(6). Public servants are protected by many statutes in Ceylon for any action which they may *bona fide* do under the provisions of statute law (Fernando, *Actions Against Public Servants in Ceylon*).

The main items of evidence to support the ingredients in the above sections are contained in defendant's documents, D1 to D3. Perusal of these documents indicate very clearly that the author of those documents have given his mind to the ruinous state of the structure put up by the plaintiff. I cannot hold that the defendant acted outside their scope of authority, to enable the Original Court to grant relief to the plaintiff. As such it would be a precondition to issue a notice under section 214 of the said Act prior to filing action. The trial court Judge has correctly answered issue No.7, and on this alone action has to be dismissed. In any event issue No.14, 16-21 has been answered correctly by the learned District Judge which issues more or less refer to section 35 and 36 of Act, No.15 of 1987. In the circumstances judgment of the District Court is affirmed. Appeal dismissed with costs.

EKANAYAKE, J. - I agree.

Appeal dismissed.

VANATHAWILLUWA VINEYARD LTD
v
COMMERCIAL BANK OF CEYLON

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE,J.
MARSOOF, PC, J.
SC CHC 31/1999
HC CIVIL 27/1996 (1)
DC COLOMBO 12808 / MR
NOVEMBER 10, 2005
FEBRUARY 7, 2006
APRIL 25, 2006
MAY 8, 2006
SEPTEMBER 25, 2006
NOVEMBER 7, 2006
DECEMBER 5, 2006
JANUARY 16, 2007
FEBRUARY 28, 2007
MARCH 22, 2007

Commercial Transaction – Financing of Exports – Contracts of sale of goods on documents against payment (D/P) – Collection arrangement – Right of remitting Bank discounting Bills to have recourse to exporter? – Bankers duty of care and duty to follow instructions? – Estoppel by representation? – Applicability of Uniform Rules of Collection (URC).

VWV Ltd shipped two consignments of gherkins to a buyer in Holland (K) on two merchant vessels. The bills of lading issued by the vessels were made to the order of Commercial Bank (CB). For procuring payment VWV Ltd drew on the buyer K two bills of exchange payable to the order of CB at 'sight'. The Bills of lading were endorsed by CB with the words deliver to the order of Giro Van De Bank. On the instructions of VWV Ltd, CB discounted the two bills of exchange and credited the VWV Ltd account with the equivalent of the value of the said bills of exchange in SL Rupees. The CB debited the account of VWV Ltd with the rupee value of the bill of exchange, on the basis that the said bills of exchange have been dishonoured. VWV Ltd instituted action to recover the rupee equivalent of the value of the two bills of exchange that were debited by CB with interest. The Commercial High Court held with the CB.

The plaintiff-appellant VWV Ltd contended that the action filed by the plaintiff should be viewed as a case involving financing exports in the context of contracts of sale of goods on D/P terms involving a 'collection agreement', and the defendant-respondent CB contended that this transaction should be disposed of by applying the legal principles relating to discounting of bills of exchange. It was also contended by VWV Ltd that Giro Van De Bank was not a Bank in the commercial sense, and the CB has acted negligently and without due care and diligence in carrying out its duty/function of a remitting Bank.

Held:

(1) The Commercial High Court has held that the payment for the said two exports were on D/P terms and in the absence of any cross appeal by CB, the appeal has to be dealt on the basis that the transactions in question were on D/P terms.

(2) There is a privity of contract between the exporter and the remitting Bank and also between the remitting Bank and the collecting bank but not between the seller and the collecting Bank, unless the seller contemplates that a sub agent will be implied and authorize the remitting Bank to create privity of contract between himself and the collecting bank.

The relations between the seller and the remitting bank and between the remitting bank and the collecting bank will normally be governed by the Uniform Rules of Collections (URC). These Rules have introduced privity of contract between the seller and the collecting bank because they provide for the rights and liabilities of the parties to collections to be established contractually. The question as to the objectives of the remitting bank vis-a-vis the exporter, and the liability of the remitting bank for the wrongful acts and omission of the collecting bank have to be considered in the light of the provisions of URC 1978.

It is the duty of the remitting bank to keep track of the bills sent for negotiations to the collecting bank and to give instructions in regard to the handling of the documents. In the event that the bills of exchange are dishonoured by non-acceptance or non payment, it is the duty of the collecting bank to return all the documents including the bills of lading to the remitting bank from which the collection order was received.

(3) The CB has failed to discharge its responsibilities as a remitting bank in terms of the URC Rules. The remitting bank cannot take refuge in the instructions given by the customer, if it had failed to act in good faith and with reasonable care or acted in reckless disregard of the procedure set out in the URC Rules.

This case has to be dealt with as one involving a collection arrangement, the fact that the bills of exchange were discounted by CB does not change the character of a documentary collection.

(4) A bill of lading represents the goods to which they relate, so that the transfer of the bill of lading of itself constitutes a transfer of the goods themselves. It is not like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. The Maxim *'memo dat quod non habet'* does not apply to a bill of lading in favour of the shipper even against a *bona fide* purchaser for value.

Under a collection arrangement the bill of lading is held as security for payment of the price and should only be released against payment.

Per Saleem Marsoof P.C. J

"It is clear from Article 20 of URC 1978 that the remitting bank should act in collaboration with the collecting bank and must give timely and appropriate instructions to the latter regarding the handling of the documents, it is also contemplated that if no contrary instructions are received from the remitting bank, the documents should be returned to the bank from which the collection order was received".

Held further

Per Saleem Marsoof P.C. J

"In order to succeed with a defence based on estoppel, the person raising the plea should establish that by reason of the representations he was led to believe that the said representation was true and acted thereon to his prejudice, it is obvious that the state of mind and the conduct of the person who raises the plea of estoppel is of great relevance, and which the plea is raised by a party that does not lead any evidence in support of it, the plea cannot succeed".

(5) The trial Court was in error in holding that VWV Ltd was estopped from denying that Giro Do Van de bank was a bank by reasons of the instructions given.

APPEAL from the Commercial High Court - Colombo.

Cases referred to:

(1) *Harlow & James Ltd* v *American Express Bank Ltd* – 1990 – 2 Lloyds Report 343 at 349

(2) *Minories Finance Ltd* v *Afribank Nigara Ltd* – 1995 – 1 Lloyds Report 134 at 139

(3) *Scholar* v *National Westminster Bank Ltd* 139 – 1920 2 QB 719

(4) *Commercial Banking Co. of Sydney Ltd* v *Jalsard (Pvt.) Ltd* 1974 – AL 279

(5) *Redomons* v *Allied Irish Bank PLC* – 1987 – 2 KTLR 264 at 266

(6) *Honourable Society of the Middle Temple* v *Lloyds Bank* – 1999 – 1 All ER (common) 193

(7) *Linklaters (afir)* v *HSBC Bank Ltd* – 2003 – EWAC 1113 (common), 2003 All ER (D) 345 (May)

(8) *Calico Printers Association Ltd.* v *Barclays Bank* 1931 – 145 LT 51

(9) *Boastone & Firminger Ltd* v *Nasima Enterprises (Nyma) Ltd* – 1996 – CLC 1902 at 1908

(10) *RE Johns Ltd* v *Waring & Gillow Ltd* 1926 – AL 670

(11) *Sze Hai Tong Bank* v *Rambler Ceyde Co Ltd* – 1959 – AL 576 at 586

(12) *The Honda* – 1994 – 2 Lloyes Rep 541 at 553

(12a) Gurney v Behrend – 1854 3 E&B 622 at 633.

(13) *The Prinz Adalbert* – 1917 – AL 586

(14) *H. M. Procurator – General* – v *Mc Spencer Controller of Mitsui & Company Ltd* –1945 Al 124

(15) *Maclaine* v *Catty* – 1921 1 AL 376 381 (H.L)

(16) *Hirdaramani Ltd* v *De Silva* – 55 NLR 294

K. Kanag Iswaran PC with *Dr. Harsha Cabral* PC and *Ms. Dilrukshi Boteju* for plaintiff-appellant.

Romesh de Silva PC with *Hiran de Alwis* and *Shanaka Cooray* for defendant-respondent.

February 27, 2008

SALEEM MARSOOF, PC. J.

This is an appeal from the decision of the Commercial High Court dated 12th July 1999 dismissing the action filed by the plaintiff-appellant Vanathawilluwa Vineyard Ltd., against the defendant-respondent Commercial Bank of Ceylon Ltd., with costs. Vanathawilluwa Vineyard Ltd., hereinafter referred to as the 'VWV Ltd.' is a company incorporated in Sri Lanka, engaged in the export of Gherkins-in-Brine to USA, Europe and Australia. It is claimed that VWV Ltd. enjoyed 60% of the market share in exports to Belgium and 50% of the market share in exports to Holland. The Commercial Bank of Ceylon Ltd., hereinafter referred to as the 'Commercial Bank,' is a bank incorporated in Sri Lanka of which VWV Ltd. is a customer.

The facts material to this appeal may be briefly stated as follows: On 4th July 1990 and 14th August 1990 VWV Ltd., shipped two consignments of gherkins to a buyer in Holland named Hans Van Kilsdonk on two merchant vessels 'MV CGM Rimbaurd' and 'MV

Rubelend' respectively. The bills of lading issued by the said merchant vessels were made to the order of the Commercial Bank, the port of discharge being Antwerp. The name and address of Hans Van Kilsdonk also appear in the two bills of lading in the column meant for the address of notification. It is common ground that for procuring payment for the aforesaid consignments of gherkins, VWV Ltd. drew on the buyer Hans Van Kilsdonk two bills of exchange respectively for Netherlands Guilders 46,800.00 (P4) and 40,800.00 (P5) payable to the order of the Commercial Bank 'at sight'. Admittedly, the bills of lading were endorsed by the Commercial Bank with the words "Deliver to the order of Giro Van De Bank'. It is the position of the Commercial Bank that the said endorsements were made as instructed by VWV Ltd. in the covering letters marked 'P6' and 'P7' signed by the Director of VWV Ltd., with which the said bills of lading and bills of exchange were submitted to the Commercial Bank for negotiation. In view of the importance of these letters, which were substantially similar, the undated letter marked 'P6' that related to the first of the two shipments, is quoted below in full –

"Vanathawilluwa Vineyard Ltd.,
441/1A, Razeendale Gardens,
Colombo 4.

The Manager,
Commercial Bank of Ceylon Ltd.,
Wellawatte Branch,
Colombo 6.

Dear Sir,

HO LICENCE NO. CL/1890/04772

We forward herewith final documents for negotiation by your Outward Bills Dept., Bristol St., Colombo 1. Kindly set off 5% of the Fob Value (US$. 1,627.50) as broker's fee as shown in our abovementioned licence and remit same by T/T to the under mentioned, and arrange for the balance proceeds to be credited to our A/C 5820 (Wellawatte Branch):-

MICHAEL L. JONES,
A / C 232 096799
Security Pacific National Bank
NEWBURRY PARK OFFICE 0232
NORTH REINO ROAD,
NWBURRY PARK,
CALIFORNIA 913220, U.S.A.

Please courier the original documents to the under mentioned Bank and debit charges to our account:–

GIRO VAN DE BANK, KAMER VAN KOOPHANDEL
ODRDRECHT NR. 55988
HOLLAND.

Thanking you,

Yours faithfully,

VANATHAWILLUWA VINEYARD LTD.,

Sgd / Ms. V. Viswakula,
Director."

On the instruction of VWV Ltd. the Commercial Bank discounted the two bills of exchange and credited the account of VWV Ltd. with the equivalent of the value of the said bills of exchange in Sri Lanka Rupees. The dispute that gave rise to this action and appeal arose from the subsequent decision of the Commercial Bank to debit the account of VWV Ltd. with the rupee value of the bills of exchange, on the basis that the said bills of exchange have been dishonoured.

VWV Ltd., instituted this action on 23rd November 1992 to recover the rupee equivalent of the value of the two bills of exchange that were admittedly debited by the Commercial Bank but also the further amount charged by the bank as interest totaling to Rs. 2,377,759.72 and Rs. 1,433,286.01 respectively, together with interest at 28 % from 1st November 1992. This action was filed on the basis that 'Giro Van De Bank was not a bank in the commercial sense and that the

Commercial Bank had acted negligently and without due care and diligence in carrying out its duty and function of a remitting bank VWV Ltd. alleged that the Commercial Bank had released the bills of lading and the other shipping documents to the said buyer wrongfully, unlawfully, negligently, without due care and without collecting payment thereon, and was therefore not entitled to debit the account of VWV Ltd.

At the trial which commenced in the District Court of Colombo, twenty issues were settled on 2nd November 1995, and by reason of the transfer of jurisdiction to the Commercial High Court in terms of the High Court of the Provinces (Special Provisions) Act, No.10 of 1996, the trial was thereafter continued in the Commercial High Court on the same issues. It is unnecessary for the purpose of this appeal to set out in full all the issues on which the case went to trial, as the main thrust of the case of VWV Ltd. is embodies in issue No.10 raised on its behalf, and which is quoted below–

"10. Has the defendant-bank having discounted the said Bills 'P4' and 'P5' acted negligently and without due care and diligence in carrying out its duties and functions as a remitting bank?"

The position of the Commercial Bank was simply that the bills of lading and the bills of exchange were sent to the Giro Van De Bank in compliance with specific instructions received from VWV Ltd. in 'P6' and 'P7', and that in these circumstances, it cannot be liable for any loss that may have been sustained by VWV Ltd. The defence of the Commercial Bank is crystallized in issues 14, 15 and 16 which are quoted below–

"14. At all time material to this action, was the defendant entitled to and / or obliged to follow instructions given by the plaintiff.

15. (a) At all times material to this action did the defendant act as the agent of the plaintiff on whose behalf the Bills referred to in the plaint were sent for collection.

(b) If issue 15(a) is answered in the affirmative is the defendant not liable for the loss and damage, if any, caused thereby.

16. (a) By letters marked "P6" and "P7" did the plaintiff give specific instructions to the defendant to send the said Bills and documents by courier to the address sated therein.

(b) If so, did the defendant comply with the said specific instructions?

(c) If issues 16 (a) and (b) are answered in the affirmative can the plaintiff have and maintain this action."

The other substantial defence taken up on behalf of the Commercial Bank relating to estoppel was formulated as issue No. 18, and will be considered later in this judgement. Issue No. 19 raised on behalf of the Commercial Bank related to the question of prescription, but the issue was answered against the Commercial Bank by the learned trial Judge, and the Commercial Bank has not appealed. At the trial before the Commercial High Court, Sachyarachchige Don Cyril Jiasena Perera, a banking expert, Verena Nirmalee Viswakula, the Director of VWV Ltd. and Nimal Perera, Director of Aitken Spence Shipping Ltd. gave evidence on behalf of VWV Ltd. The latter was only a formal witness called to prove certain documents marked subject to proof.

The Pivotal Issue

The submissions of counsel throughout the argument of this appeal focused on one pivotal issue, namely whether the action filed by VWV Ltd. should be viewed, as suggested by President's Counsel for the said company, as a case involving the financing of exports in the context of contracts of sale of goods on 'Documents against Payment' (D/P) terms involving a 'collection arrangement', or should be treated, as contended by learned President's Counsel for the Commercial Bank, as one that can simply be disposed of by applying the legal principles relating to discounting of bills of exchange.

Learned President's Counsel for VWV Ltd., submitted that the appeal should be considered in the broader context of transactions based on 'documentary bills' which necessarily involve some collection arrangement. He has quoted extensively from Schmitthoff's *Export Trade* (10th Edition) and relies heavily on the following passage from page 145–

"The most frequent payment methods in which banks are involved are a collection arrangement or payment under a letter of credit. In a collection arrangement the bank receives its instructions from the seller. The exchange of the documents of title representing the goods and the payment of the price is normally effected at the place at which the buyer carries on business. Conversely, in the case of a letter of credit the instructions to the bank usually emanate from the buyer. The exchange of the documents and the price is normally effected at the seller's place of business. A considerable amount of business is transacted under letters of credit under which the banker, on the instructions of the buyer, promises to accept, honour or negotiate bills of exchange drawn by the seller. Both these methods, the collection arrangement and the letter of credit, enable the interposed bank or banks to use the documents of title as a collateral security."

In regard to the 'collection arrangement' on which this action is alleged by VWV Ltd. to be based, learned President's Counsel for VWV Ltd. submits that it is usual for the exporter to ask his bank to arrange for collection of the price by presenting the bill of exchange for acceptance and / or payment, and that the bank will carry out this task through it's own branch office abroad or a correspondent bank in the buyer's country. He further submits that banking practice relating to collection arrangements is contained in the Uniform Rules for Collection, and that at the relevant time it was the 1978 version of these Rules that were in force. He submits that the provisions of these Rules will have to be carefully examined and applied.

As against these submissions, learned President's Counsel for the Commercial Bank contends that even if the transactions were considered to be in the broader perspective as contended on behalf of VWV Ltd., some significance must be given to the issuance of the bills of exchange and the role played by the bills in the context of the transaction. He submits that the bills of exchange in fact relates to the method of payment, and is autonomous from the underlying sale of goods transaction. He quotes from Ross Cranston's book, *Principles of Banking* Law (2nd Edition) in which under the head 'The Underlying Transaction' at page 381, it is observed that –

> "If the bank, having bought a trade bill and still holding it, seeks payment from the buyer or acceptor on its maturity, can it be defeated by any claim which the buyer had in relation to the underlying contract - failure of consideration, late or defective performance and so on? In general, the bank, as holder in due course of the bill, holds the bill free from any defect of title of prior parties, as well as mere personal defences available to prior parties among themselves. So whatever claims the immediate parties to the bill - the buyer and supplier - might be able to raise in proceedings between themselves, the bank would not be troubled by them."

Learned President's Counsel submits that in the instant case, the bills of exchange were included as a part of the transaction so that if the buyer does not pay on the bills drawn on him, the exporter as drawer of the bills is obliged to make payment to the bank. Accordingly, if the drawee fails to honour the bill, the exporter as drawer is liable *qua* surety to the discounting bank. He submits that the remitting bank that discounts any bills of exchange has the ultimate right of recourse to the exporter.

I have no doubt in my mind that while the aspect of discounting of the bills of exchange is relevant, this case should be dealt with in the broader perspective of the financing of an international trade transaction.

D/P terms and URC

A question of fundamental importance that arises in this connection is whether the sale of gherkins to the buyer in Holland was on 'Documents against Payment' (D/P) terms. The trial court had formulated the issue as follows-

"2 (a) was payment for the said two exports on D/P terms?"

It is the case of VWV Ltd., that the two consignments of gherkins were sold on 'Documents against Payment' (D/P) terms and that the handling of documents relating to these transactions was governed by the Uniform Rules for Collections, 1978 Revision (ICC Publication No. 322). The Uniform Rules for Collections (URC) apply if incorporated into the contracts by the parties, whether expressly or by course of dealings or simply by the international custom and practice of

bankers. See *Harlow & Jones Ltd.* v *American Express Bank Ltd.*(1) at 349, per Gatehouse J; *Minories finance Ltd.* v *Afribank Nigeria Ltd.*(2) at 139, per Longmore J. Fortunately, it is not necessary to go into the question of the applicability of URC 1978 to the collection in this case, as 'the Commercial Bank has in paragraph 13(c) of its answer admitted that URC is applicable, and in fact, both learned President's Counsel appearing for VWV Ltd. and the Commercial Bank have relied extensively on the provisions of URC 1978, which they have agreed apply to the case.

However, the Commercial Bank did not admit the position that the transactions were on 'Documents against Payment terms'. At the trial, the testimony of Verena Nirmalee Viswakula, who was a Director of VWV Ltd., to the effect that the sale was on Document against Payment (D/P) terms, was not challenged in cross-examination. In fact, Sachyarachchige Don Cyril Jiasena Perera, who was called on behalf of VWV Ltd. as a banking expert, testified that when a bill of exchange is used as a financing document and is drawn for payment on sight, it signifies payment on D/P terms. The learned Commercial High Court Judge has in his judgement dated 12th July 1999 answered issue No. 2 (a) in the affirmative, and in the absence of any cross-appeal by the Commercial Bank, this court has to deal with this appeal on the basis that the transactions in question were on D/P terms.

The Duty of Care v *the Duty to follow Instructions*

Two well-known duties of bankers and agents that are generally complementary to each other, come into loggerheads in the intriguing circumstances of this case. VWV Ltd. contends that having discounted the bills of exchange marked 'P4' and 'P5', the Commercial Bank acted negligently and without due care and diligence in carrying out its functions as a remitting bank in forwarding the documents for collection to Giro Van De Bank, which was in fact not a 'Bank' in the commercial sense. The Commercial Bank with equal force argues that in sending the documents for collection to Giro Van De Bank, it simply acted in accordance with the instructions of VWV Ltd contained in the letters marked 'P6' and 'P7'.

In this case, it is common ground that VWV Ltd has given express and clear instructions to the Commercial Bank to forward the

documents to Giro Van De Bank for collection. Learned President's Counsel for the Commercial Bank has submitted that as the agent of VWV Ltd. and as the remitting bank, the Commercial Bank was obliged to obey the specific instructions of VWV Ltd. While learned President's Counsel for VWV Ltd. strenuously argued that the Commercial Bank, as the remitting bank, was bound to exercise a high degree of care and was under a duty to verify whether the "bank" nominated by VWV Ltd., in fact existed, and to satisfy itself of its standing and ability to function as the 'collecting bank', learned President's Counsel for the Commercial Bank submitted the contrary.

Before going into the legal issues, it may be useful to consider the evidence placed before the trial judge in regard to the conduct of the parties. The main witness called to testify on behalf of VWV Ltd. in this connection was Verena Nirmalee Viswakula, the Director of VWV Ltd., who testified in detail about the transactions in question. It appears from the testimony of this witness that instructions relating to the first shipment of gherkins were given to the Commercial Bank by the undated letter 'P6' in consequence of which the Bank discounted the bill of exchange marked 'P4' and the account of VWV Ltd., was credited with a sum of Rs. 1,381,614.00 on 9th July 1990. Thereafter, on account of the second shipment regarding which the instructions were given by a letter dated 16th August 1990 marked 'P7', the bill of exchange marked 'P5' was also discounted by the Bank and a further sum of Rs.880,275.25 was credited to the account of the said company. The aforesaid amounts were credited to the account of VWV Ltd. after discounting the 'on sight' bills of exchange marked 'P4' and 'P5' drawn on Hans Van Kilsdonk, the buyer of the gherkins in Holland and made payable "to the order of Commercial Bank of Ceylon Ltd." The account of VWV Ltd. was credited with the rupee values of the said bills of exchange less brokers fees, and the witness expected that the bills of exchange will be dispatched to Giro Van De Bank along with the bills of lading for collection.

The witness testified that she was perturbed when there was no intimation of payment on the bills of exchange and that around 16th or 17th August 1990 she got to know from the Manager - Exports of the Commercial Bank that no payment has been received on account of the first shipment. She thereafter requested the Manager - Exports to follow up with the Giro Van De Bank, and she produced in evidence

a copy of the letter dated 17th August 1990 (P10) by which the Manager - Exports of the Commercial Bank drew the attention of the Manager of the Giro Van De Bank regarding the payment due on the first shipment. In fact the said letter refers to "a tele-inquiry of 29/7/1990 for fate thereof." This clearly shows that even on 17th August 1990, the Commercial Bank was under the impression that the Giro Van De Bank was a bank in the commercial sense. Thereafter, she got to know from the shipping agent, Aitken Spence Shipping Ltd., that the cargo on the first shipment had been delivered on 23rd August 1990. When she communicated this information to the Commercial Bank and asked the Bank to find out how the gherkins were delivered without payment, she was informed by the Manager - Marketing of the Commercial Bank, for the first time, that there was no bank by the name Giro Van De Bank and that consequently the buyer had been able take delivery of the gherkins without payment.

When the account of VWV Ltd. was thereafter debited the witness addressed a letter dated 19th October 1990 (P13) to the Commercial Bank in which significantly she states as follows –

> "We negotiated our documents with you as our Bankers (Buyer's Bank) under a complete fiduciary relationship to obtain payment on further negotiating the 'title to the goods'.
>
> In the circumstances, kindly refrain from debiting our account until you revert the 'title to the goods' negotiated through you.
>
> Please expedite the returning of the documents within another week as the goods are of perishable nature and necessary action has to be taken to recall the goods as soon as possible."

The only response she received from the Commercial Bank was the letter dated 24th October 1990 (P14) by which she was called upon to settle the sums of Rupees 1,381,536.00 on account of the first shipment and Rs. 881,198.25 on account of the second shipment and further informed that the company account would be debited with these amounts if she fails to settle. She further testified that the company account was thereafter debited with the aforesaid amounts wrongfully and unlawfully.

Witness Viswakula could not produce the original bills of lading and testified marking in evidence photo-copies thereof she had obtained from the respective shipping agents and produced in

evidence without objection. The witness took pains to point out that the endorsements of the Commercial Bank on the reverse of the said bills of lading marked 'P2' and 'P3' had been made using a rubber stamp where the words "Pay / Deliver to the Order of" appear to be stamped, below which the words "Giro Van De Bank" have been inserted in the hand writing of the Authorized Signatory above his signature. The witness emphasized that the world "Pay" has been scored off in ink at the time when the signature was placed, which significantly may have facilitated the taking of delivery of the cargo without making payment.

She also produced copies of the letters dated 8th February 1991 addressed by the Commercial Bank to Aitken Spence Shipping Ltd ('P18'), agents for Nedloyd Lines owning 'MV CGM Rimbaurd' and to Freudenberg Shipping Agencies Ltd ('P19'), agents for Happag-Lloyd owning 'MV Rubeland' claiming damages for the wrongful delivery of the gherkins without due endorsement of the relevant bills of lading by Giro Van De Bank. She also produced copies of the responses received from the owners of the said vessels, namely, the letter dated 19th March 1991 ('P20') from Happag-Lloyd and the letter dated 16th April 1991 ('P21') from Nedloyd Lines. It is admitted by the owners of the vessels in these letters that the gherkins were delivered to the buyer, Hans Van Kilsdonk, without due endorsement on the bills of lading by Giro Van De Bank. As justification for the said action of the carriers, it is expressly stated in both letters that there is no bank in existence with the name 'Giro Van De Bank.' Additionally, it is stated in the letter of Hapag-Lloyd ('P20') that the words 'Giro Van De Bank' in Dutch meant "account of the bank" and consequently the endorsement was taken as "an order to deliver the goods to the holder of the bill of lading for the account of the Bank (i.e. the Commercial Bank of Ceylon Limited)". The witness testified that the originals of the bills of lading, which had ben submitted by VWV Ltd with 'P6' and 'P7' to the Commercial Bank for negotiation, were at no time returned to that company. She claimed that in these circumstances, the Commercial Bank had not properly discharged its duties as the remitting bank and that the debiting of the account of VWV Ltd. without returning the original bills of lading was wrongful and unlawful. Under cross-examination she admitted that the said bills of lading had been sent to Giro Van De Bank in accordance with her instructions given in 'P6' and 'P7'.

The other witness called on behalf of VWV Ltd. was Sachyarachchige Don Cyril Jiasena Perera, who admitted under cross-examination that he only has "a hazy idea" about the facts of the case, and was justifiably treated by the trial judge as "an expert with regard to banking practice only." The gist of his testimony was that Giro Van De Bank was a money transfer system and was not a commercial bank listed in the Bankers' Almanac. According to him, if there was any doubt in the mind of a remitting banker regarding the existence or standing of an entity such as the Giro Van De Bank named as a collecting bank, he should have the matter verified, and if necessary, negotiate the documents through his own correspondent bank. He expressed the opinion that in the event of a dishonour of a discounted bill of exchange, the discounting bank has recourse to the drawer of the bill only after returning the original shipping documents including the bill of lading. However, it is noteworthy that under cross-examination he admitted that in the event of dishounour of the bill, the remitting bank is entitled to debit the customer's account for the value of the discounted bill, after giving notice of dishonour to the drawee.

It is significant that the Commercial Bank, which was in the best position to explain the circumstances in which the bills in question were dishonoured, chose to close its case without leading any evidence. However, it appears that VWV Ltd. and the Commercial Bank had believed that Giro Van De Bank was a bank which would collect the proceeds of the bills of exchange as is customary in this kind of international commerical transaction, although it was admittedly not listed in the Bankers' Almanac.

Learned Counsel for the Commercial Bank submitted that both as agent for the exporter as well as the remitting bank, the Commercial Bank was under a duty to comply with the instructions of the principal, and was not under any duty to advise the principal or to warn against any commercial or other risks. He invited the attention of court to decisions such as *Schioler* v *National Westminster Bank Ltd.*(3) *Commercial Banking Co. of Sydney Ltd.* v Jalsard Pty. Ltd(4) *Redmons* v *Allied Irish Banks PLC* (5) at 266, per Saville J. *Honourable Society of the Middle Temple* v *Lloyds Bank PLC* (6) and *Linklaters (a fir)* v *HSBC Bank Plc* (7). Learned President's Counsel further submitted that since speed is of the essence in transactions

involving international trade, the bank is obliged to follow the instructions of the customer without undue delay. He relied heavily on the following *dicta* of Lord Diplock in *Commercial Banking Co. of Sydney Ltd.* v *Jalsard Pty. Ltd.* (supra) at 286 in a case dealing with the dealings of a bank with a letter of credit-

> "Delay in deciding may in itself result in a breach of his contractual obligations to the buyer or to the seller. This is the reason for the rule that where the banker's instructions from his customer are ambiguous or unclear he commits no breach of his contract with the buyer if he has construed them in a reasonable sense, even though upon the closer consideration which can be given to questions of construction in an action in a court of law, it is possible to say that some other meaning is to be preferred."

Learned President's Counsel for the Commercial Bank contends that as far as the instant case is concerned there was absolutely no ambiguity in regard to the instructions that were given by the exporter to the Bank, and the instructions have been faithfully carried out by the Commercial Bank, and further submits that since the exporter had selected the Giro Van De Bank as the collecting bank, the Commercial Bank cannot be held responsible for any act or omission of the Giro Van De Bank.

In this context it may be relevant to observe that there is privity of contract between the exporter and the remitting bank, and also between the remitting bank and the collecting bank, but not between the seller and the collecting bank, unless the seller contemplates that a sub-agent will be implied and authorizes the remitting bank to create privity of contract between himself and the collection bank. See *Calico Printers' Association Ltd.* v *Barclays Bank Ltd.*(8) However, relations between the seller and the remitting bank, and between the remitting bank and the collecting bank, will usually be governed by the Uniform Rules for Collections (URC) and it is possible that as suggested by Rix J in *Bostone & Firminger Ltd.* v *Nasima Enterprises (Nigeria) Ltd* (9) at 1908, these Rules have introduced privity of contract between the seller and the collecting bank because they provide for the rights and liabilities of the parties to collections to be established contractually. Therefore, the question as to the obligations of the remitting bank *vis-a-vis* the exporter, and the liability of the remitting bank for the

wrongful acts or omissions of the collecting bank have to be considered in the light of the provisions of URC 1978 which is admittedly applicable to this case.

Uniform Rules for Collection

The Uniform Rules for Collection embodies banking practice relating to documentary collections codified by the International Chamber of Commerce. Although the Uniform Rules are revised from time to time, it has been agreed by President's Counsel for both parties in this case that the version that is applicable is the 1978 Revision of the Uniform Rules for Collection. The provisions of these Rules apply to all 'collections' which term is defined as "the handling by banks, on instructions received, of documents ..... in order to (a) obtain acceptance and/or, as the case may be, payment, or (b) deliver commercial documents against acceptance and/or, as the case may be, against payment, or (c) deliver documents on other terms and conditions."

It is expressly stated in these Rules that the term 'documents' would include financial documents such as bills of exchange and commercial documents such as invoices, shipping documents and documents of title such as bills of lading. In the context of the question that arises in this case as to the liability of the Commercial Bank as the remitting bank, it is instructive to quote, Article 3 of the Uniform Rules for Collection in full-

> "For the purpose of giving effect to the instructions of the principal, the remitting bank will utilise as the collecting bank-
>
> (1) the collecting bank nominated by the principal, or,
>
> (ii) in the absence of such nomination, any bank, of its own or another bank's choice, in the country of payment or acceptance, as the case may be.
>
> The documents and the collection order may be sent to the collecting bank directly or through another bank as intermediary.
>
> *Banks utilising the services of other banks for the purpose of giving effect to the instructions of the principal do so for the account of and at the risk of the latter.*

The principal shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws or usages." (Italics added)

Learned President's Counsel for the Commercial Bank has argued that since in terms of 'P6' and 'P7' the Commercial Bank acted on the clear instructions of VWV Ltd. in sending the relevant bills and other documents to Giro Van De Bank for negotiation, the services of Giro Van De Bank were utilised "for the account of and that risk of" the principal, VWV Ltd.

I cannot agree with this submission as it is in my view fundamental to Article 3 that the collecting bank should be a "bank" in the commercial sense. Giro Van De Bank does not appear in the Bankers' Almanac and no evidence has been placed before the original court as regards its existence or standing as a banker. In this context, it is necessary to refer to Article 1 of the URC 1978, which requires all banks governed by the Rules to "act in good faith and exercise reasonable care". It is evident from the correspondence produced in evidence marked 'P16', 'P18', 'P19', 'P20' and 'P21' that the Commercial Bank believed 'Giro Van de Bank' to be a commercial bank capable of functioning as a collecting bank, and had on that basis even presented a claim against the carriers for delivery of the goods without due endorsement by Giro Van de Bank, only to be informed by the carrier that 'Giro Van de Bank' was not a bank but was in Dutch the equivalent of a "blank endorsement" which enabled the buyer Hans Van Kilsdonk to collect the gherkins by presenting the bills of lading to the carrier.

An important feature of the URC 1978 is that they contain certain minimum standards for the conduct of business by remitting, collecting and other banks to whcih the Rules apply. For instance, Article 6 of the Rules expressly lays down that-

"Goods should not be dispatched direct to the address of a bank or consigned to a bank without prior agreement on the part of that bank. In the event of goods being dispatched direct to the address of a bank or consignd to a bank for delivery to a drawee against payment or acceptance or upon other terms without prior agreement on the part of that bank, the bank has no obligation to take delivery of the goods, which remain at the risk and responsibility of the party dispatching the goods."

The various articles of URC 1978 also contain the procedure for making the documentary collection. For example, Article 10 expressly provides that "the collection order should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (D/P)." It further provides that in the absence of such statement, "the commercial documents will be released only against payment." Article 14 provides that "amounts collected (less charges and / or disbursements and / or expenses where applicable) must be made available without delay to the bank from which the collection order was received in accordance with the instructions contained in the collection order." Article 17 requires that the collection order should give specific instructions regarding protest (or other legal process in lieu thereof), in the event of non-acceptance or non-payment. There was no evidence placed before the original court that prior to dispatching the relevant bills of lading, which are documents of title to goods, to Giro Van De Bank, the Commercial Bank had entered into any "prior agreement" with the Giro Van De Bank as contemplated by Rule 6, nor has the Commercial Bank produced any evidence regarding the collection order dispatched by the Commercial Bank to the Giro Van De Bank. In the absence of any evidence in this regard, it has to be inferred that the Commercial Bank had not only acted in total disregard of the provisions of the URC 1978, but had acted recklessly in violation of its obligations to act in good faith and to exercise reasonable care in discharging its obligations as a remitting bank.

It is necessary at this stage to refer to Article 20 of the URC 1978, which requires collecting banks "to advise fate" of bills sent for collection. The Article provides the following guidelines to be followed in the event of a dishonour-

"..... the presenting bank should endeavour to ascertain the reasons for such non-payment or non-acceptance and advise accordingly the bank from which the collection order was received.

On receipt of such advice remitting bank must, within a reasonable time, give appropriate instructions as to the further handling of the documents. *If such instructions are not received by the presenting bank within 90 days from its advice of non-payment or non-acceptance, the documents may be returned to the bank from which the collection order was received."* (Italics added)

It is very clear from the above quoted Article that it is a durty of the remitting bank to keep track of the bills sent for negotiation to the collecting bank and to give appropriate instructions in regard to the handling of the documents. It is evident that the Commercial Bank failed to discharge its responsibilities as a remitting bank in terms of this article. Furthermore, it is significant that this Article provides that in the event that the bills of exchange are dishonoured by non-acceptance or non-payment it is the duty of the collecting bank to return all the documents including the bills of lading to the remitting bank from which the collection order was received. It appears from the evidence in this case that instead of returning the bills of lading to the remitting bank and through it to the exporter VWV Ltd., the buyer in Holland Hans Van Kilsdonk was permitted to take delivery of the gherkins without making any payment on the bills of exchange. It is this kind of misadventure that responsible banks involved in documentary collection are expected to avoid through compliance with the accepted banking practice that has been codified by the ICC as the Uniform Rules. I am unable to agree that a remitting bank could take refuge in the instructions given by a customer if it had failed to act in good faith and with reasonable care or acted in reckless disregard of the procedures set out in these Rules.

The Right of Recourse on a Discounted Bill of Exchange

In my view this case has to be dealt with as one involving a 'collection arrangement' in which financial documents in the form of bills of exchange marked 'P4' and 'P5' accompanied by commercial documents including the bills of lading marked 'P2' and 'P3' were submitted to the Commercial Bank with the covering letters marked 'P6' and 'P7' for negotiation. The fact that the bills of exchange were discounted by the Commercial Bank does not change the character of a 'documentary collection'.

However, learned President's Counsel for the Commercial Bank has stressed the importance of the principles relating to the right of recourse of a discounting banker against the exporter in the event the discounted bill of exchange is eventually dishonoured. Learned President's Counsel contends that the issuance of the bills of exchange is a significant factor, and empahsises the autonomous nature of the bill of exchange from the underlying sale of goods transaction. He submits that as observed by Ross Cranston in

Principles of Banking Law (2nd Edition) at page 381 "the bank, *as holder in due course* of the bill, holds the bill free from any defect of title of prior parties, as well as mere personal defences available to prior parties among themselves". He submits that this proposition is further fortified by Holden, *Law and Practice of Banking* (5th Edition) where at page 316 (Volume 1) it is stated that-

> "The legal effect of the negotiation of the bill is that the negotiating bank becomes the holder in due course of the bill, and also holds the shipping documents by way of security."

He submits that therefore any claims that the buyer and supplier might be able to raise in proceedings between themselves are irrelevant when recourse is had against the seller on the discounted bill.

I find it difficult to agree with the submission that the Commercial Bank is a holder in due course of the bills of exchange marked 'P4' and 'P5'. This is because the Commercial Bank was named as the original payee of these bills. In *R. E. Johns Ltd.* v *Waring & Gillow Ltd.*(10) it has been held by the House of Lords that the original payee of a bill of exchange does not fall within the expression 'a holder in due course'. The reasoning of the House of Lords was that in terms of section 29 (1) of the Bills of Exchange Act of 1882, 'a holder in due course' is a person to whom a bill has been "negotiated". Therefore, although generally a discounting bank may become 'a holder in due course' of the bill that is discounted, this does not occur when the banker is also the payee.

Nevertheless, I am impressed by the submission of the learned President's Counsel for Commercial Bank that in the instant case, the bills of exchange were included as a part of the transaction so that if the buyer does not pay on the bills drawn on him, the exporter as drawer of the bills is obliged to make payment to the bank. Accordingly, if the drawee fails to honour the bill, the exporter as drawer is liable *qua* surety to the discounting bank. In support of this proposition he relies on the following passage from Cranston's, *Principles of Banking Law* (2nd Edition) page 379-380 under the heading 'Trade Bills':-

> "Now assume the Bill is first negotiated to the supplier's bank. The bank discounts the bill i.e., it buys the bill at less than its face

value, to reflect the fact that it is out of its money till the bill matures. The supplier is, of course, paid immediately, which is the very object of the exercise. The Bank claims against the buyer on maturity of the bill. It collects the bill on its own account. In the event of non-payment, the bank will have recourse against the supplier, its customer. The bank, having discounted the bill has clearly given value."

Learned President's Counsel submits that in these circumstances, if the bill is dishonoured, the negotiating bank will necessarily look to its own customer as drawer to re-imburse it in respect of the amount of the bill, together with interest and charges, and that therefore the debiting of the customer account by the Commercial Bank was perfectly lawful.

However, in this case there is absolutely no evidence in regard to the question whether the bills of exchange marked 'P4' and 'P5' were forwarded along with the relevant bills of lading marked 'P2' and 'P3' and other relevant documents to Giro Van De Bank. It is significant that at the trial no admission was recorded, nor any evidence lead with respect to the alleged dishonour of the two bills of exchange marked 'P4' and 'P5'. Indeed there is no admission or evidence even in regard to the question whether the bills of exchange in question were ever presented to the buyer Hans Van Kilsdonk for acceptance / payment. It is trite law that a remitting bank has no right of recourse against the drawer of a discounted bill of echange unless and until the bill has been duly presented for acceptance / payment and has been in fact dishonoured. In the absence of any evidence to show that the bills of exchange in question were in fact dishonoured. In the absence of any evidence to show that the bills of exchange in question were in fact presented to the drawee Hans Van Kilsdonk, I hold that the Commercial Bank had no right of recourse against VWV Ltd. nor any right to debit its account with the value of the bills of exchange.

Duty of Discounting Bank to return Bills of Lading

In regard to the 'collection arrangement' on which this action is alleged by VWV Ltd. to be based, learned President's Counsel has referred us to Schmitthoff's *Export Trade* (10th Edition) page 155 wherein it is stated as follows-

> "The seller often attaches to a bill of exchange which he has drawn on the buyer the bill of lading to the goods sold. Such a bill of exchange is known as a *documentary bill.* The purpose of issuing a documentary bill is mainly to ensure that the buyer shall not receive the bill of lading and with it, the right of disposal of the goods, *unless he has first accepted or paid the attached bill of exchange according to the arrangement between the parties.* If the buyer fails to honour the bill of exchange, he has to return the bill of lading, and, if he wrongfully retains the latter, the law presumes that the property in the goods sold has not passed to him." (italics added)

It is settled law that a bill of lading represents the goods to which they relate, so that the transfer of the bill of lading (in proper form and manner) of itself constitutes a transfer of the goods themselves. An order bill of lading entitles the holder to call for delivery of the goods. Where the goods are surrendered to a person other than the holder of the bill of lading, the shipowner so delivering is exposed to risk of liability to the holder: *Sze Hai Tong Bank* v *Rambler Cycle Co Ltd* [11] at 586. Leggatt LJ *in The Houda* [12] stated at 553-

> "Under a bill of lading contract a ship owner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession."

A bill of lading differs from a bill of exchange and other negotiable instruments in one important respect highlighted in the following *dicta* from the old decision *Gurney* v *Behrend* [12a] at 633-

> "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bona fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and, in this instance the

transfer of the symbol does not appear more than a transfer of what is represented".

It follows that the maxim *nemo dat quod non habet* does apply in relation to a bill of lading in favour of the shipper even against a *bona fide* transferree for value. Under a collection arrangement, the bill of lading is held as security for payment of the price, and should only be released against payment. An instructive decision in this connection is *the Prinz Adalbert* (13) in which referring to a transaction of a similar nature with the immaterial difference that the financial document involved was a draft and not a bill of echange, Lord Sumner made the following observation at 589 and 590 of the judgement-

> "When a shipper takes his draft, not as yet accepted, but accompained by a bill of lading, endorsed in this way, and discounts it with a Banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting Banker surrenders the bill of lading to security for its payment. If, in turn, the discounting Banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the endorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorizes and directs the Banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done."

The same principle is illustrated by the more recent decision in *H. M. Procurator-General* v *M. C. Spencer, Controller of Mitsui & Company Limited.*(14) In this case, a Japanese Company carrying on business in Japan, had branches in London and Hamburg. The business in Germany was later incorporated there, but the whole of the shares in the German company were owned by the Japanese

company and their trustees, and, in addition, the German Company was controlled and staffed by, and was entirely dependent on, the Japanese company, being really a purchasing and selling house of that company. A contract, made before the outbreak of war in 1939, for the sale of goods by the Japanese company to the German company stipulated, *inter alia*, Hamburg as the destination, the price per ton, c.i.f. Hamburg, and that payment was to be by a three months sight draft against a letter of credit on a Bank. An irrevocable letter of credit was duly issued by the Hamburg branch of the Bank to the Japanese company, authorizing them to draw on the London branch of the Bank at three months for account of the German company for the price of the goods. The letter contained instructions that the bills of lading, drawn in triplicate, were to be made out to the order of the Bank, and the invoices and insurance, in triplicate, in the Bank's name or in that of the shipper and bank endorsed. Two sets of documents were to be sent to the Bank at Hamburg, and one set, with drafts on London attached, was to be delivered to the Bank in London against acceptance of the drafts. The goods were shipped in Japan on the M. V. Glenroy, a British vessel, and bills of lading issued, invoices prepared and insurance taken out on 31st July 1939, in accordance with those instructions. On 7th August 1939, the Japanese company drew a bill in accordance with the credit, negotiated it through the Japanses branch of the Bank, which delivered three sets of the documents as arranged. The set sent to London was received on 13th September 1939, and owing to the outbreak of war the draft was not accepted nor the documents taken up. On September 13, 1939, the German company cancelled the contract unconditionally. Meanwhile the Glenroy had been diverted to Liverpool, where she arrived on 17th October 1939, and there, on 2nd November, the goods were seized as prize. A claim was made by the Crown that the goods were enemy property or contraband of war and as such liable to condemnation. Lord Porter at page 134 of the judgement of the Privy Council referred to section 19 (2) and (3) of the Sale of Goods Act, 1893 which correspond to section 20 (2) and 20 (3) of the Sale of Goods Ordinance and observed that-

> "..... where the seller draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of

exchange, *the buyer is bound to return the bill of lading if he does not honour the bill of exchange,* and if he wrongfully retains the bill of lading the property in the goods does not pass to him," (Italics added)

P. S. Atiyah, The Sale of Goods (10th Edition) at page 430 extracts from the above decisions, the following principle-

> "Even if the seller draws a bill of exchange on the buyer and discounts it with a Bank before it has been accepted by the buyer, the property will still not pass. Although the seller may obtain payment in this way he remains under a secondary liability as drawer of the bill of exchange and so property remains in him as security for this contingency. Indeed, even when the seller has received the full price in advance there may be special circumstances which give him some interest in retaining the property and it may be held that the transfer of the documents remains necessary to pass property."

As already noted, it is clear from Article 20 of URC 1978 that the remitting bank should act in collaboration with the collecting bank and must give timely and appropriate instructions to the latter regarding the handling of the documents. It is also contemplated by the said Article that if no contrary instructions are received from the remitting bank, the documents should be returned to the bank from which the collection order was received. As Schmitthoff in *Export Trade* (10th Edition) observes at page 164 -

> "If the collecting bank releases the documents to the buyer contrary to instructions, for example, by not insisting on payment or the acceptance of a time bill, the bank is liable in damages to the seller for breach of contract and for conversion of the documents."

It is trite law that in the absence of any agreement to the contrary, the remitting bank would be liable to the exporter for the acts of the collecting bank, its agent. See *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (15th Edition) paragraph 1128. These principles fortify the position taken up by VWV Ltd. that a discounting bank can have recourse to the seller as drawer, only after returning the original shipping documents.

The Question of Estoppel

The other question that arises in this appeal is one of estoppel, and learned President's Counsel for VWV Ltd. has sought to impugn the decision of the trial judge on this point. At the trial, the question of estoppel by representation was raised by the Commercial Bank in issues 18 (a) to (g) which are quoted below:-

" (a) Did the Defendant send the said Bills and documents to the address pleaded in paragraph 9 of the plaint in compliance with specific instructions from the plaintiff?

(b) By the documents marked 'P6' and 'P7' and / or in the circumstances pleaded in paragraph 12 (a) to 12 (h) or any one or more of them, did the plaintiff represent to the defendant that 'Giro Van De Bank' is a Bank?

(c) Did the plaintiff give the said instructions and make the said representation in order to cause the defendant to send the said Bills and documents to the said address?

(d) Did the defendant and its officers believe the said representation to be true?

(e) Did the defendant and its officers act on the said representation and cause the said Bills and documents to be sent by courier to the said address?

(f) If any one or more of the above issues marked 18 (a) to 18 (e) are answered in favour of the defendant, is the plaintiff estopped from denying that the 'Giro Van De Bank' referred to in 'P6' and 'P7' and the plaint is a Bank?

(g) If issue 18 (f) is answered in the affirmative, can the plaintiff have and maintain this action?"

The learned trial Judge has answered issues 18 (a), (b), (c) and (f) in the affirmative while noting that there is insufficient evidence to answering issues 18 (d) and (e). However, he has answered issue 18 (g) in the affirmative and arrived at the conclusion that VWV Ltd. cannot have and maintain the action as it is estopped from denying that the 'Giro Van De Bank' is a Bank.

In *The Law relating to Estoppel by Representation,* (4th Edition), paragraph 1.2.2, Spencer Bower explains the concept of estoppel by representation of fact as follows:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment,* the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (Italics added)

It is clear from this definition that in order to succeed with a defence based on estoppel, the person raising the plea should establish that by reason of the representation he was led to believe that the said representation was true and acted thereon to his prejudice. As Lord Birkenhead put it in the case of *Maclaine* v *Catty* (15), the essence of the doctrine may be illustrated as follows: where 'A' has by his acts or conduct justified 'B' in believing that a certain state of facts exists, and 'B' has acted upon on such belief to his prejudice, 'A' is not permitted to affirm against 'B' that a different state of facts existed at the same time.

It is obvious that the state of mind and the conduct of the person who raises the plea of estoppel is of great relevance. Where, as in this case, the plea is raised by a party that does not lead any evidence in support of it, the plea cannot succeed. This is very clear from the decision of the Supreme Court in *Hirdaramani Ltd.* v *De Silva* (16) in which Gratiaen, J. observed at 297 that he cannot see how 'estoppel' can be applied to the facts of that case in the absence of evidence to support the view that the plaintiff was misled into the belief that the defendant company would continue making certain payments that had been made to the plaintiff by the owner of a business that the defendant company had subsequently taken over. The learned trial

judge was clearly in error in holding that VWV Ltd. was estopped from denying that 'Giro Van De Bank was a Bank by reason of the instructions contained in 'P6' and 'P7'.

Conclusions

For the foregoing reasons, the appeal is allowed, the judgment of the Commercial High Court dated 12th July 1999 is set aside and judgment is entered in favour of the plaintiff-appellant Vanathawilluwa Vineyard Ltd. as prayed for in prayer (a) (i) and (ii) of the plaint. In all the circumstances of this case I am inclined to award the plaintiff-appellant nominal costs in a sum of Rs.10,000 both as costs of suit in terms of prayer (b) of the plaint and as costs of this appeal.

JAYASINGHE, J. - I agree.

TILAKAWARDANE, J. - I agree.

Appeal allowed.

SEYLAN BANK LTD
v
SAMDO MACKY SPORTSWEAR (PVT.) LTD. AND OTHERS

SUPREME COURT
S. N. SILVA, C. J.
TILAKAWARDANE, J.
SOMAWANSA, J.
SC 44/2007
SC 45/2007
SC (HC) LA 25/07
SC (HC) LA 26/07
HC (CIVIL) 239/04 (1), 207/02 (1)
NOVEMBER 19, 2007
MARCH 4, 2008

Stamp Duty Act, No. 43 of 1982 – section 51, section 69, section 71 – Regulations – Gazette 224/3 of 20.12.1982 and 948/15 of 6.11.1996 – Guarantee Bond – Is it liable for the payment of stamp duty – What is a bond? – Deed? – Document? – Is the guarantee bond a bond attracting stamp duty?

Held

(1) Stamp Duty Act imposes a pecuniary burden on persons, and it has to be subject to strict consideration. There is no room for intention, construction or equity about duties or taxation.

(2) A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt.

In case of the guarantee bond, the term providing for guarantor liability is not the principal convenant between the parties, but merely a condition subsequent to a primary obligation.

The obligation to pay is in the form of a penalty that comes into operation, if and only if the proposed obligation of the principal debtor is violated. The arrangement contemplated by the guarantee bond is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the principal debtor obligation.

(3) Inherent in the monetary obligation of a 'bond' contemplated by section 7 (a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. Given the inherently indeterminate nature of the guarantors respective payment obligations under the guarantee bond, such an instrument cannot be construed as the type of bond referred to in section 7(a). As such the guarantee bond does not warrant stamp duty as a bond under the Stamp Duty Regulations.

Per Shirani Tilakawardane, J.

"The Ceylease case is distinguishable as the finance company in that case had entered into a bond with the security of the property – a vehicle – that was mortgaged and which could be considered movable property. No such arrangements exist in the current action that suggests their inclusion under section 7 of the regulations.

APPEAL from an order of the Commercial High Court, with leave being granted.

Cases referred to:

(1) *Tissera* v *Tissera* – 2 NLR 238.

(2) *Ceylease Financial Services Ltd.* v *Sriyalatha and another* – 2006 – 2 Sri LR 169 (distinguished)

Romesh de Silva PC with *Maitri Wickremasinghe, Shanaka de Silva, Shanaka Cooray* for plaintiff-petitioner-appellant.

Chandima Liyanapatabendi with *Rangika Pilapitiya* for defendant-respondent-respondent.

Sanjay Rajaratnam DSG as *amicus.*

June 26, 2008

SHIRANI TILAKAWARDANE, J.

Leave to Appeal from the Order of the Commercial High Court of Colombo (defined herein) dated 26th July 2007 with respect to Case No. CHC (Civil) 239/04 (1) and Case No. CHC (Civil) 207/02 (1) (hereinafter referred to as the "Commercial High Court Order") was granted by the Supreme Court by its order dated 15th December 2007 and it was agreed by the parties that the only issue to be determined was whether stamp duty was payable on the Guarantee Bond dated 25th of August 1999.

In response to the default of two loans it had granted. the plaintiff-petitioner-appellant (hereinafter referred to as the "appellant") instituted two actions in the High Court of the Western Province exercising jurisdiction pursuant to the High Court of the Provinces (Special Provisions) Act, No.10 of 1996 (hereinafter referred to as the "Commercial High Court of Colombo"). The appellant's first action was dated 13th September 2002 and was for the recovery of a sum of Rs.662,500/= together with interest thereon at 30% per annum and Business Turnover Tax on Rs.2,500,000/= from 1st July 2002 till date of decree. Appellant's second action was dated 26th October 2004 and was for the recovery of a sum of $781,842/= together with interest thereon at 9% till 26th October 2004 and at 21% per annum thereafter till payment in full. Such actions were initiated because neither the "Principal Debtors" nor their respective guarantors (also defendant-respondents-respondents to the respective actions and herein referred to collectively as the "guarantors"), paid the outstanding loan amounts when demand for repayment was made on them consequent to the Principle Debtors' defaults on the loans.

The matter to be determined in this case arises out of an appeal against the Commercial High Court Order, which held, in response to an attempt by the appellant to submit a Guarantee Bond into evidence in each action, that (i) the Guarantee Bond (marked 'P9' in the

appellant's affidavits for the actions, dated 18th January 2006 and 24th May 2006, respectively, and hereinafter referred to as "Document P9") was not sufficiently stamped and (ii) the petitioner would be afforded a final opportunity of stamping the said documents by 20th September 2007.

Being aggrieved by the said Commercial High Court Order, the appellant has this filed application for a determination whether Document P9 is liable to be stamped under section 7 of the regulations made by the Minister in terms of section 69 of the Stamp Duty Act, No.43 of 1982 (referred to herein as the "Stamp Duty Regulations"). These Stamp Duty Regulations were published in Gazette Extraordinary No.224/3 of 20th December 1982 as amended by the Order published by the Minister of Finance under the said section in Gazette No. 948/15 dated 6th November 1996.

It is common ground that the only matter to be decided is whether the Document P9 is liable for the payment of stamp duty under section 7 of the amended regulations which, by subsection 7(a), mandates the payment of stamp duty on "a Bond, pledge, Bill of Sale or Mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air Navigation Act, (Chapter 365) ..." As it is clearly not within the meaning of "pledge", "bill of sale" or "mortgage" the only matter to be admittedly determined is whether it is a "Bond".

The lengthy arguments and submissions of the learned President's Counsel for the appellant averring that (1) there is no comma between the word "Bond" and "pledge" in the regulations, and (2) therefore, that the reference to a "Bond pledge" is what was intended, is without basis as the Sinhalese edition of the Gazette clearly evidences a separation between the words through the use of a comma, though the written submission incorrectly states that a comma between the two operative words is missing from both the English and Sinhalese version of the Gazette.

Section 2 of the Stamp Duty Act No 43 of 1982 provides that stamp duty shall be charged on every instrument which is executed, drawn or presented in Sri Lanka, to be prescribed at a certain rate depending upon the class or category in which an instrument falls, unless such instrument is (i) exempted from stamp duty by virtue of its inclusion

within section 5 of the Stamp Duty Act, as amended, or (ii) not contemplated by the Stamp Act altogether.

The type of "document" for which stamps must be affixed is defined in section 71 of the aforementioned Act and includes a Bond, and the question arises as to whether a Guarantee Bond is also included as a "Bond" which has been referred to by the aforesaid regulations prescribed by the Minister of Finance and referred to in subsection 7(a).

Needless to say, as the Stamp Duty Act imposes a pecuniary burden on persons, it has be subject to strict construction. There is no room for intention, construction or equity about duites or taxations. The explicit language of the Statute must be the yard stick which guides the imposition of the stamp duty, and assumption and presumptions must be strictly excluded. If the imposition of duty upon a particular instrument is not expressly contemplated by the simple reading of the language of the statute then the benefit of the exclusion must necessarily be afforded.

The simple meaning of subsection 7(a), finds clarity in both the English version referred to above, and more so in the Sinhalese edition of the Gazette which reads as follows:

(365 වන අධිකාරය වූ) ගුවන් ගමනාගමන පනත යටතේ ලියාපදිංචි කළ ගුවන් යානයක් නොවන යම් දේපළකට බලපාන යම් නිශ්චිත හෝ නියමිත මුදල් ප්‍රමාණයක් සඳහා වූ බැඳුම්කරයක්, ඔඩපනයක්, විකුණුම් පත්‍රයක් හෝ උකස් කරයක්-

Clearly the "Bond" contemplatd by the language above has to be one where the money obtained is secured by, and correlated to property. Document P9 did not, at the time of the creation of the principal covenant, seek to secure or refer to any property in other words it was not a bond that bound property for the payment of the money.

A bond conditioned for the payment of money such as referred to in section 6 of the Prescription Ordinance 22 of 1871, has also been defined in *Tissera* v *Tissera*(1) where the meaning of a Bond was defined as "a document executed in triplicate before a Notary and two witnesses, whereby the person executing it acknowledges to have borrowed and received from the person in whose favor it is

executed a certain sum of money and promises to pay the latter the same with interest on demand and binds all his property generally as security for the debt..."

"Bond" is defined in Stroud's Judicial Dictionary of Words and Phrases as "an obligation by deed." (3rd edition, Volume III, at p. 318)

In the case of a deed it is essential that a deed must be necessarily be under seal. A "deed" is defined in Wharton's Law Lexicon to mean "a formal document on paper or parchment duly signed, sealed and delivered" (14th Edition, at p. 308). A document which is not under seal cannot be a deed.

A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt. In the case of Document P9, the terms providing for guarantor liability are not the principal covenant between the parties, but merely a "condition subsequent" to a primary obligation. In other words, the obligation to pay is in the form of a penalty that comes into operation if, and only if, the principal obligation of the Principal Debtor is violated. Had the Principal Debtors complied with the principal convenant to pay, then the Guarantors' obligations to pay would never have arisen. The arrangement contemplated by Document P9 is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the Principal Debtor's obligation.

Inherent in the monetary obligation of a "bond" contemplated by subsection 7(a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity, given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. However, when Document P9 was executed, no fixed amount of money could be said to have been agreed as payable, as the Guarantors' respective obligations to pay in connection with the loans, in fact, only arose upon the breach of the respective principal convenants to pay, with the owed amounts necessarily determined only after the respective breaches actually occurred. Given the inherently indeterminate nature of the

Guarantors' respective payment obligations under Document P9, such instrument cannot be construed as the type of Bond referred to in subsection 7(a).

In construing the meaning of the word Bond in the context of subsection 7(a), the accrual of the obligation to pay money should precede the performance or non-performance of the specified act of payment. This is an essential distinction as even though the performance or non-performance of the specified act is incumbent upon the obligor, the obligation to pay does not precede the performance or non performance of the Act. Document P9 in this context is just an agreement to pay and cannot be considered as a bond as envisaged in terms of subsection 7(a) referred to above. Document P9 is merely an agreement to pay with consequences for default, with no attestation and no obligation by Deed. As such, Document P9 does not warrant stamp duty as a Bond under the Stamp Duty Regulations.

The Learned High Court Judge arrived at his determination, it appears, solely on the finding that he was bound by the decision in the case of *Ceylease Financial Services Limited* v *Sriyalatha and another*[2] (hereinafter referred to as the "*Ceylease Case*"). In that case Justice Bandaranaike considered section 7 of the Stamp Duty Regulations in the context of a document entitled Guarantee and Indemnity and executed in connection with a lease agreement, and held the document to be one contemplated by section 7. The aforementioned case was used as legal authority by the Learned Judge of the Commercial High Court, in order to substantiate the fact that Document P9 would also come within section 7 of the regulations of the Stamp duty Act, as amended.

However, the decision in the *Ceylease Case* is inappliable to, and therefore not determinative of, the present matter at hand as the facts of the *Ceylease Case* are clearly distinguishable in a very material and relevant manner from the facts of the present actions before this Court . The *Ceylease Case* is distinguishable as the finance company in that case had entered into a bond with the security of the property – more particularly, a vehicle – that was mortgaged and which could be considered movable property. No such arrangements exist in the current actions that suggest their

inclusion within section 7 of the Stamp Duty Regulations.

Accordingly this Court sets aside the said Commercial High Court Order dated 26th July 2007 appeal is allowed no costs.

S. N. SILVA, C.J. - I agree.

SOMAWANSA, J. - I agree.

Appeal allowed.

WIMALARATNE SILVA AND ANOTHER
V
ATTORNEY - GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 156/2002
HC AMPARA 483/2007
OCTOBER 18, 2006
SEPTEMBER 20, 2007
NOVEMBER 29, 2007
MARCH 10, 2008
MAY 5, 2008
JULY 8, 2008

Penal Code – Section 296 – Evidence Ordinance – Section 8(2), section 27, section 30, section 114 – Credibility of main witness – Absence of direct evidence as to Actus Reus – Ellenborough principle – Common murderous intention? Evidence Ordinance sections 8, 27(1), sections 36, 9, 114. – alibi Burden of Proof.

The two accused-appellants who were brothers were convicted for the murder of one P and sentenced to death.

It was contended in appeal that (i) the main prosecution witness displayed a complete lack of creditworthiness (ii) due to the total absence of direct evidence as to the actus reus itself, there is no clear cut evidence as to who actually caused the death of the deceased either by way of individual liability or by way of joint liability on the basis of common intention. (iii) The two accused were seated in wrong places in the dock during the trail, giving rise to a confusion as to which accused committed which act (iv) No valid reasons

given for the rejection of the defence evidence (v) Defence of alibi not considered (vi) Burden of proof-misdirection.

Held

(1) In review the veracity or creditworthiness of a witness, the appellate court may resort to (i) look into the statement to the police made by the witness (ii) credibility of a witness may be impugned by employing tests of probability and improbability, consistency and inconsistency, spontaneity, belatedness, disinterestedness and interestedness.

Evidence of Sriyawathie, displayed her total incredibility and complete lack of creditworthiness – further her evidence was not corroborated by any other conclusive evidence direct or circumstantial. It is quite evident that Sriyawathie was the mistress of both the deceased and the 1st accused-appellant, which she had denied. In applying the test of spontaneity and belatedness, Sriyawathie has failed to adduce a justifiable and plausible reason to justify the belated and involuntary nature of her statement to the police.

It would have been unsafe to have founded a conviction on the uncorroborated testimony of Sriyawathie.

(2) On a perusal of the judgment it is quite confusing and ambiguous as to on what basis the convictions were founded. At the outset the trial Judge opines that the prosecution should prove the presence of common intention but in the last passage in the judgment concludes by convicting the appellants on the basis of individual liability. The judgment is flawed, as a conviction has to be founded on individual liability or vicarious liability or sometimes both, it should be based on concrete evidence and not on surmise and conjecture.

(3) The totality of the circumstantial evidence does not give to an irresistible inference that the 1st accused was harboring a common murderous intention with the 2nd accused to kill the deceased.

(4) '*Ellenborough dictum*' should not be drawn haphazardly in order to bolster the sagging fortunes of the otherwise weak prosecution. The prosecution as a prerequisite should establish strong and incriminating evidence against the accused. The trial judge has failed to perceive that the chain of circumstantial evidence against the accused person was impregnated with lacunas on several vital aspects in that it was insufficient to point an unwavering finger of guilt at the accused on a charge of murder – in which event the evidence falls short of the requirements to apply the '*Ellenborough dictum*'.

Per Sarath Abrew, J.

"It is the paramount duty of court to act well within the bounds of admissible evidence and not to act on mere conjecture and surmise and where the prosecution has failed to establish the charge beyond

reasonable doubt, the benefit of the doubt should always be given to the accused".

(5) The trial judge has gravely misdirected himself by imputing a burden on the accused to prove their innocence and to disprove the prosecution evidence. He has also misdirected himself by failing to evaluate the evidentiary plea of alibi in order to determine whether it could create a doubt in the prosecution case whether the accused persons were present at the scene at the time of the commission of the offence.

Appeal from the judgment of the High Court of Ampara.

Cases referred to

1. *Keerthi Bandara* v *Attorney General* – 2002 – 2 Sri LR 245 at 261
2. *Wickremasuriya* v *Dedoleena and others* – 1996 –1 Sri LR 95
3. *Sumanasena* v *Attorney General* – 1999 – 3 Sri LR 137
4. *Q* v *Pauline de Croos* – 71 NLR 169 at 186
5. *K* v *Assappu* – 50 NLR 324
6. *Punchi Banda* v *Q* – 74 NLR 494
7. *H. M. Heen Banda* v *Q* – 1996 – SC 118/08 – SCM 13.3 1969
8. *Lionel alias Hitchikolla* v *A. G.* – 1998 – 1 Sri LR 97
9. *Rex* v *Cocharine* – 1814 Gurney's Report 479.
10. *Geekiyanage John Singho* v *K* – 46 NLR 73
11. *Sirisena alias Cyril Baas* v *A. G.* – 125/96 – CAM 22.3.1999

Ranjith Abeysuriya PC with *Thanuja Rodrigo* for 1st and 2nd accused-appellants

Sarath Jayamanne, DSG, for Attorney-General.

November 11, 2008

SARATH DE ABREW, J.

The two accused-appellants , who were brothers were indicted before the High Court of Ampara for having committed the murder of one Aranwala Gamage Priyaratne on 03.08.1997 at Kudagala, Ampara under section 296 of the Panel Code. After trial without a jury, the learned trial Judge on 18.03.2002 convicted the 1st and 2nd accused-appellants for the aforesaid offence and duly sentenced them to death. Being aggrieved of the aforesaid conviction and sentence the appellants have tendered this Appeal to this court.

The facts pertaining to this case are briefly as follows. The deceased Piyaratne, the main prosecution witness Sriyawathie, the 1st accused "Appu" and his younger brother the 2nd accused "Putha" were all living in close proximity to each other in the village of Kudagala in the Dehiaththkandiya police area. Sriyawathie's husband had expired a couple of years before and the young 32 year old widow was living alone with her three small children, 02 daughters and a son. Sriyawathie eked out an existence by doing manual labour in deceased Priyaratne's paddy land. The deceased was middle aged man of around 37 years at the time of his death and was having constant quarrels with his wife Sumanawathie over his involvement with other women and Siriyawathie. A few days before this incident, Sumanawathie had left the deceased Piyaratne and gone with her two daughters to her sisters house at Katunayake in search of employment.

The 21 year old first accused Wimalartne Silva alias Appu too closely associated with the deceased Piyaratne and of late had developed an intimacy with the young widow Siriyawathie. Therefore in the far-flung hamlet of Kudagala there arose the eternal triangle, the young widow fighting for survival with no scruples about her morals, the middle-aged man who provided employment to her having quarrels with his wife and the youngster just attained manhood attracted to the young widow. The formula was therefore ripe to generate criminal activity that ensured to disturb the tranquility of this village.

The evidence unfold the following events which culminated in the death of Piyaratne. The case for the prosecution rested entirely on circumstantial evidence. The following witnesses had given evidence for the prosecution namely neighbours Siriyawathie, Chandra Kanthi Seneviratne, Oliver De Silva and Pathiranage Sarath, wife of the deceased Sumanawathie, two brothers of the deceased Tillekaratne and Premaratne, J.M.O. Dr. Seneviratne who conducted the post-mortem examination, and S.I Asoka De Silva and S.I. Mahindasiri, then attached to the Dehiattakandiya Police and finally the Interpreter Mudaliyar Surendran. After the closure of the prosecution case the 1st and 2nd accused-appellants had given evidence from the witness box denying complicity and stating that they were inside their house after 8.30

p.m. on 03.08.1997, the date of the incident. Two defence witnesses Somawansa and Wilbert Silva had given evidence to buttress his position.

According to the prosecution evidence, the deceased Piyaratne was last seen alive on the night of 03.08.1997 in the company of Siriyawathie and the 1st accused-appellant. His body was found 11 days later on 14.08.1997 in a state of putrefaction buried in a marshy waterway overgrown with "kankun" adjacent to a paddy land belonging to the accused persons. The story unfolds with the movements of the deceased on the fateful night of 03.08.1997. According to Pathiranage Sarath his house was about 100-150 yards away from the house of Siriyawathie, while the deceased lived about 1 kilo-meter away. According to this witness the deceased Piyaratne had arrived at his house around 7.30 p.m. on 03.08.1997 and had obtained a match-box to light a "beedi" and had walked away. According to Chandra Kanthi, Piyaratne had arrived at her house the same night around 9 p.m. and had spent about 15 minutes there talking to her and had partaken of two glasses of water and left towards the road. During the course of this conversation Piyaratne had revealed to Chandra Kanthi that his wife had left him. Witness Oliver De Silva has stated around 9.45 p.m. that night, while he was passing by Siriyawathie's house, he had noticed the deceased Piyaratne and the 1st accusd Appu seated on the ground opposite Siriyawathie's house, and were talking to each other apparently drunk.

According to Siriyawathie, while she was alone at her house with the 03 children, the deceased Piyaratne had come there during 10-11 p.m., that night and having informed her that his wife has left home to visit relatives, had caught her by the hand and attempted to coerce her to go with him to his house. Siriyawathie had resisted and declined. Thereupon the deceased had started to assault her whereupon the 1st accused Appu had appeared at the scene and intervened. Thereafter the deceased had assaulted Appu too who then had left the scene. According to Siriyawathie thereafter the deceased had retreated towards the road and for about half an hour was shouting at them threatening to kill them. That was the last seen and heard of the deceased alive.

The following items of evidence are disclosed against the 1st and 2nd accused-appellants from the evidence led at the trial.

(a) Three days after the above incident which took place on 03.08.97, Siriyawathie had informed 'Putha' the 2nd accused-appellant that she was contemplating selling her land and leaving Kudagala in fear of the deceased Piyaratne, whereupon 'Putha' had divulged that the deceased had left Kudagala and gone to his own village. Thereafter the 2nd accused-appellant had also told Siriyawathie not to be afraid as the deceased Piyaratne will not come back. On a subsequent date the 2nd accused-appellant had confessed to Siriyawathie that he and his brother 'Appu', the 1st accused-appellant had attacked the deceased Piyaratne with a rice-pounder and having killed him, had buried the deceased in the marshy waterway overgrown with 'kankun' adjacent to the paddy land of the two accused persons. The body had been discovered by the police 11 days after the incident and Siriyawathie too had been taken into custody along wtih the 2nd accused-appellant "Putha", whereupon she had made a statement to the police on 14.08.1997. As disclosed from the non-summary proceedings of 24.04.98, Siriyawathie had admitted at the High Court trial that she had been remanded for giving false evidence at the non-summary inquiry. This alleged confession to Siriyawathie made by the 2nd accused-appellant shall not be regarded as evidence against the 1st accused-appellant under the provisions of section 30 of the evidence ordinance.

(b) Witness Chandrakanthi Seneviratne has given evidence that subsequent to the deceased Piyaratne visiting her house around 9.00 p.m. on the night of 03.08.1997 she had not seen Piyaratne alive and on the following day she had met the 1st accused-appellant "Appu" to whom she had said that the door of deceased Piyaratne's house is opened and that there is no information as to where Piyaratne has gone, whereupon "Appu" had replied in relation to the deceased "අයේ ජීවත් වෙන්නේ නැහැ, ටෝච් එක අරගෙන ගියා." The only inference that could be reasonably drawn from the above was that the 1st accused-appellant was aware by this time that the deceased was dead.

(c) Witness Oliver de Silva had seen the deceased in the company of the 1st accused-appellant Appu seated in front of the house of Siriyawathie apparently drunk around 9.45 p.m. on 03.08.1997, the last time the deceased was seen alive. The above provides evidence of opportunity and is in direct conflict with the defence evidence that the 1st accused-appellant arrived home around 8.30 p.m. on 03.08.1997 and did not depart from his house thereafter.

(d) I.P. Asoka De Silva, then OIC Dehiaththakandiya, has given evidence to the effect that a complaint was received on 13.08.97 as to the disappearance of the deceased Piyaratne, whereupon on 14.08.97 the 2nd accused-appellant "Putha" was taken into custody and consequent to an extract from his statement (P2), the dead body of the deceased was discovered. The evidence further disclose that as the statement of Siriyawathie recorded on 14.08.97 prior to that of the 2nd accused-appellant had divulged the location of the dead body to the police, this item of evidence would be admissible against the 2nd accused-appellant not under section 27(1) but under section 8(2) of the Evidence Ordinance under subsequent conduct.

(e) S.I. Mahindasiri has given evidence to the effect that consequent to an extract from the statement of the 1st accused-appellant (P4), and axe (P3) allegedly used to commit the offence was recovered hidden in a paddy field. However the police have failed to send this axe to the Government Analyst. Even though the medical evidence had established that the injuries on the dead body were inflicted by a heavy blunt weapon that had crushed the skull and also by a sharp-cutting weapon causing an injury on the jaw and had also completely severed a leg, there is no conclusive evidence to establish that the aforesaid axe (P3) was used to commit the offence.

Based on the above evidence, the learned trial Judge had convicted both the accused-appellants for murder under section 296 of the Penal Code and sentenced them to death. As recorded in the last paragraph of the judgment (Page 264 of the original record), the learned trial Judge had arrived at this conclusion on the

basis of individual liability of each accused and not on the basis of common intention as stated in the preceeding paragraphs of the judgment. (Pages 262 - 263).

The learned counsel for the appellants has raised the following contentions in support of his arguments to assail the convictions of the appellants.

(A) The learned trial Judge has misdirected himself by placing total reliability on the most important witness Siriyawathie who had displayed a complete lack of creditworthiness in that it was not safe to found a conviction based on her evidence.

(B) Due to the total absence of direct evidence as to the *actus reus* itself, there is no clear-cut evidence as to who actually caused the death of the deceased either by way of individual liability or by way of joint liability on the basis of common intention, and therefore the conviction founded on the basis of individual liability of each accused cannot be sustained. (page 45 of the judgment and page 264 of the original record)

(C) Until the end of the evidence of the 4th witness for the prosecution the two accused persons were seated in wrong places in the dock during the trial (page 88 of the original record) giving rise to a confusion as to which accused commited which act, which is reflected not only in the evidence of the first few witnesses but also in the judgment itself.

(D) (a) There is a total failure on the part of the trial Judge to properly scrutinize and analyse the evidence of the defence and had failed to give valid reasons for the rejection of the defence evidence.

(b) The learned trial Judge had failed to evaluate the evidence with regard to the defence of *alibi* adduced by the accused-appellants.

(c) While evaluating the defence evidence, the learned trial Judge had misdirected himself in attaching a burden to the defence to prove its innocence and to disprove the veracity of the prosecution evidence.

Having perused the entirety of the proceedings, the judgment of the learned trial Judge, the Information Book Extracts and the oral

and written submissions tendered to court, I now proceed to deal with the several grounds of appeal urged on behalf of the appellants, in the light of the oral and written submissions tendered on behalf of the respondent.

At the outset it must be emphasized that the paramount question that has to be answered first is the question of credibility of the main witness Siriyawathie as stated in the first contention raised on behalf of the appellants. In order to arrive at a reasonable conclusion in this regard, the following features in the evidence of Siriyawathie has to be closely scrutinized.

(a) Eight contradictions (V1 - V8) have surfaced in Siriyawathie's evidence at the High Court trial. The learned trial Judge has opted to disregard these contradictions on the basis that they do not go to the root of Siriyawathie's evidence. (Page 255 of the originial record).

(b) Under cross-examination at the trial, even though Siriyawathie has denied having admitted to giving a false statement to the police and to giving false evidence at the inquest (V4) (Page 58) and also giving false evidence at the non-summary inquiry (V6) (Page 59), non-summary proceedings of 24.04.98 indicate otherwise and that she had been remanded after admitting she had given false evidence. (Pages 30-31 non-summary proceedings). This important aspect had escaped the attention of the learned trial Judge while evaluating the evidence of Siriyawathie.

(c) The learned trial Judge had also failed to assess the belated nature of Siriyawathie's testimony. The evidence reveals that from the third day after the disappearance of the deceased Piyaratne, the 2nd accused-appellant 'Putha' had been making utterances to Siriyawathie, firstly to the effect that the deceased had left Kudagala to go to his native village, secondly that the deceased will not come back and Siriyawathie need not be afraid, and thirdly culminating with the confession that he and his brother Appu, the 1st accused-appellant killed and buried the deceased. Siriyawathie obviously was not only a belated witness but a reluctant witness as she had made no attempt to divulge this vital

information either to the Grama Sevaka or the Police, until she was apprehended by the Police and her statement was recorded on 14.08.1997. The explanation for the delay as contained in V8 (Page 61 of the original record) was that she waited for the body to be found to make a statement. Under the circumstances, the conduct of Siriyawathie was more in the nature of an accomplice who may have instigated the commission of the offence.

In reviewing the veracity or creditworthiness of a witness, the appellate court, which do not have the benefit of observing the demeanor and deportment of a witness first-hand, may resort to the following methods.

(a) The appellate court may look into the statement to the police made by the witness. *Keerthi Bandara* v Attorney-General(1)

(b) Credibility of a witness may be impugned by employing the tests of probability and improbability, consistency and inconsistency, spontaneity and belatedness and interestedness and disinterestedness. *Wickremasuriya* v *Dedoleena and others* (2)

The following salient features in Siriyawathie's evidence displayed her total unreliability and complete lack of creditworthiness as contended on behalf of the appellants.

(a) On a perusal of Siriyawathi's statement to the police it is quite evident that Siriyawathie was the mistress of both the deceased Piyaratne and the 1st accused-appellant "Appu", even though she had vehemently denied this position at the High Court trial. The defence had marked contradicition VI in this respect. As the entire episode revolved around the relationship of Siriyawathie with the deceased and the 1st accused-appellant, this contradiction goes to the root of the matter as far as Siriyawathie's creditworthiness was concerned.

(b) As illustrated by contradictions V4 and V6, Siriyawathie had kept on changing her position from the police statement, inquest proceedings, non-summary inquiry and finally the High Court trial.