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DIGEST

ASSOCIATED NEWSPAPERS OF CEYLON LTD AND ANOTHER VS. BRIGADIER WIJESEKERA

COURT OF APPEAL
CHITRASIRI. J.
CA 606/98[F]
DC COLOMBO15523/MR
MARCH 27, 2014
APRIL 30, 2014
MAY 19, 2014
JUNE 16, 2014

Defamation – Publishing of a Newspaper article – Burden of proof – Defence of public Interest – Fair comment – Privilege – Test of a reasonable man – Benefit of the public – Animus injuriandi.

The plaintiff – respondent instituted action claiming damages for defaming him by having published a newspaper article in the Sunday Observer – in its front page as the headline news .The defendant –appellant denied his averments and pleaded that it is of public interest and also amounts to making a fair comment. The defendant-appellants have also taken up the position that they had no malice towards the respondent, and justification and that, the alleged statements are true and is for the benefit of the public. The trial Court held with the plaintiff.

Held:

[1] It is the burden of the plaintiff-respondent to establish that the publication has led to injure his name and if so whether it was published with malice.

[2] The applicable test in order to determine whether or not a particular publication is defamatory of a person is the test of a reasonable man. The publication per se – is of defamatory character of the plaintiff - respondent.

[3] *Animus injuriandi* being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used. Defamatory words relating to the plaintiff have been published and *animus injuriandi* would be presumed in the publication.

[4] Malice on the part of the appellant is to be presumed, and then it is the burden of the appellants to show that they had no malice to injure the character of the plaintiff-respondent.

Article *per se* would be defamatory of the plaintiff-respondent and therefore it had been published with malice.

[5] According to the evidence it is clear that the newspaper publication contained no truth. Hence justification could not have been pleaded as a defence particularly when the publication in this instance – contains falsehood.

[6] It is seen that the plaintiff-respondent has been released from the Sri Lanka Army honorably upon completion of 60 years of age. there is no justification and it is not a fair comment either.
Comment is fair if it is honest that is a genuine expression of the critics real opinion and relevant to the fact commented upon.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

[1] *Jayawardane vs. Aberan* 1864 NLR [1863 -1868]

[2] *Perera vs. Pieris* 50 NLR 145

[3] *Associated Newspapers of Ceylon Ltd vs. Gunasekera* 53 NLR 481

[4] *De Costa vs. The Times of Ceylon Ltd and another* 62 NLR at 265

Kusan D, Alwis PC with *Chamath Fernando* for defendant- appellant.

Chrishmal Warnasuriya with *Dushantha Kularatne* for plaintiff-respondent.

27th July 2014

CHITRASIRI J.

Being aggrieved by the judgment dated 20.08.1998 of the learned District Judge of Colombo, the two defendant – appellants preferred this appeal seeking to set aside the said judgment and also to have the action of the plaintiff dismissed. Action of the plaintiff-respondent is to obtain damages amounting to Rupees Ten Million with interest thereto from the defendant-respondents for defaming him by having published a news paper article in the "Sunday Observer". The aforesaid article had been published on 03.04.1994 in the "Sunday Observer: in its front page as the headline news and it was marked as P4 in evidence.

The defendant-appellants in their amended answer, having denied the averments in the amended plaint had pleaded that the matters contained in the document P4 is of a matter of public interest and also it amounts to making a fair comment. In the answer filed by the two defendant-appellants, they, among other matters have also stated that the manner in which the two defendants were joined as parties to the action is erroneous and that the 2nd defendant had been made a party without any reason being assigned. Accordingly, they have prayed to have the plaint dismissed on the basis of mis-joinder of parties. Learned District Judge decided that the 2nd defendant was the editor of the Sunday Observer, at the time the newspaper which contained the document marked P4 was published and has declined to accept the said contention of the appellants.

Moreover, it must be noted that it is settled law that no action shall be defeated by reason of mis-joinder of parties.

[Section 17 of the Civil Procedure Code] Therefore, such a matter will not be a reason to have this action dismissed Furthermore, the 2nd defendant had been named as a party to the action merely due to the office he held then. Also, the reliefs that had been prayed for were to make the defendants jointly and severally liable. Therefore, this action shall not fail due to the alleged mis-joinder of parties. Indeed, the appellants have not pursued this ground of appeal when it came to the argument stage in this Court.

The appellants in their amended answer have also pleaded the defence of Privilege. Instances where the defence of Privilege is applicable are referred to in the book "The Law of Delict" by Mckerron. Accordingly, the defence of qualified privilege is generally taken up only when the;

(1) statements made in the discharge of a duty,

(2) statements made in the furtherance or protection of an interest,

(3) statements made in the course of judicial proceedings; and

(4) reports of parliamentary, judicial and certain other proceedings

[at page 189 in **"The Law of Delict" by Mckerron 7th Edition**]

Circumstances in this case do not fall into the categories referred to above and therefore the appellants are not in a position to plead the defence of privilege in this instance. In fact, the appellants have not pursued this appeal relying on the defence of Qualified Privilege.

I will now turn to consider whether the learned District Judge is correct or not when he decided that the contents in

the document marked P4 amounts to defame the plaintiff-respondent. The publication of the article P4 had been admitted by the appellants at the commencement of the trial in the District Court. It is also not in dispute that the news paper in which this article was published had been the news paper that had the largest circulation in this country. The said newspaper article marked P4 is reproduced herein below for convenience.

Permits issued to transport banned goods to Tiger territory

Brig. Wijesekera to be court martialled

Retired Brigadier Daya Wijesekera is to be court martialled on charges of misusing his official position while in service to enable the transport of banned goods to Tiger territory in the North.

One charge against him states that Brigadier Wijesekara acted outside his authority by obtaining for a trader named Yoosoof a number of permits to transport restricted items to the North.

The other charge states that while he was Officer-in Charge of the Media Section, Operational Headquarters, Ministry of Defence, he had ordered the release of trader Yoosoof, who was under interrogation by the Military Police at Anuradhapura.

After retirement from service Brigadier Wijesekera was re-employed as Director of Psychological operations in the Defence Ministry.

In January this year, President D. B. Wijethunge ordered a probe into how Brigadier Wijesekera's name was included

in a delegation to the United Nations for Human Rights Conference.

The name of Senior State Counsel Mr. Nihara Rodrigo had been left out and Brigadier Wijesekera's name had been included instead describing him as Mr. Wijesekera Director of Human Rights in the Ministry of Justice. There is no such post in the Justice Ministry.

This was detected before the departure of the delegation and Brigadier Wijesekera was left out of it.

Following are the full charges made against him for the Court Martial on conduct prejudicial to military discipline.

In that you whilst serving as the Officer-in- Charge of the Media Section Operational Headquarters Ministry of Defence Colombo did on 16th June 1991 instruct the Officiating Commanding Officer 2 Coy Sri Lanka Corps of Military Police Anuradhapura Major Asoka Thoradeniya to release one Yoosoof a civilian trader under interrogation by the Military Police, at Anuradhapura, to enable him to go home, and report back to the Military Police the following morning, consequently interfering with the ongoing investigations of the Sri Lanka corps of Military Police and thereby committing an offence punishable under Section 129 (1) of the Army Act No. 17 of 1949.

In that you whilst serving as the Officer-in-Charge of the Media Section Operational Headquarters Ministry of Defence Colombo did during the period First March 1990 to August 1991 misuse your official position as a Senior Officer at the Operational Headquarters of the Ministry of Defence and acted outside your authority by obtaining for civilian trader Yoosoof a number of permits which are a mandatory requirement to

transport restricted items to the North of Sri Lanka which said act, is in violation of the procedure set out by the said Operational Headquarters, thus enabling the abovementioned civilian to sell the permits at a profit and did thereby commit an offence punishable under section 129 (1) of the Army Act No. 17 of 1949.

It is the burden of the plaintiff-respondent to establish that the publication of the document marked P4 has led to injure his name; and if so, whether it was published with malice. Mackerron's view on the aspect of burden of proof is as follows:

> *"Where no secondary meaning is attributed to the words complained of, the test for determining whether they are defamatory is whether in the circumstances in which they were published ordinary reasonable men to whom the publication was made would be likely to understand them in a defamatory sense. The onus of proving this rests, of course on the plaintiff."*
>
> [At page 176]

Having referred to the law as to the party who is responsible to discharge the burden to prove a case filed to claim damages for defamation, I wish to refer to another decision mentioned in the book "Defamation and other aspects of the Actio Injuriarum" by C. F. Amerasinghe, in respect of the substantive law concerning defamation. In that book, the following passage from the decision in *Jayawardane v. Aberan*[1] had been quoted and it reads thus:

> *"Defamation is maliciously publishing either by word of mouth, by writing, by printing, or by pictorial or other representation either in his presence, or his absence, publicly or secretly, anything whereby a person's honour or good name in injured or damaged."*

I will once again refer to some of the passages in the book "The Law of Delict" by Mckerron relevant to the matters that have arisen in this case since it is a book that is being used as a guide, in determining the issues in the sphere of the Law of Delict. In that book at pages 171 and 172 it is stated that:

> *"A defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others. The typical example of a defamatory statement is a statement reflecting upon the moral character of the plaintiff; for example, a statement attributing to the plaintiff the commission of a crime, or imputing to him untruthfulness. dishonesty, immorality, or any other kind of dishonorable or improper conduct."*

At page 177, it is thus been mentioned:

> *"Thus, if a newspaper publishes an article which might reasonably be regarded by the ordinary reader as reflecting upon the moral character of the plaintiff, it is responsible for the impression which the article would produce upon the mind of the ordinary reader, and it is immaterial whether the writer of the article intended to produce that impression or not."*

The authorities mentioned above show that the applicable test in order to determine whether or not a particular publication is defamatory of a person is the "test of a reasonable man". Therefore, it is necessary to ascertain whether a reasonable and/or a prudent person who looks at the contents of the article P4, would come to the conclusion that those matters contained in the said publication amount to defamatory character of the respondent.

When a reasonable and prudent person sees the front page headlines in the "Sunday Observer" published on

03.04.1994 which reads that the respondent is to be court martialled, he/she would obviously think that the person, to whom it is being referred to, is not fit to be a Brigadier in the Sri Lanka Army. When such a person reads even the full text of the publication, he would certainly get the impression that the respondent is not a person who performs his duty in the manner required by an officer in the rank of a Brigadier in the Sri Lanka Army. Such news would amount to lower his standing in the society as well. It also may lead to ridicule that person by the ordinary people of the country. Therefore, it is clear that the publication marked P4 *per se* is of defamatory character of the respondent.

However, since the appellants have taken up the position that they had no malice towards the respondent when they published the article P4, then it is necessary to look at the *animus injuriandi* on the part of the appellants to ascertain malice on their part. In "The Law of Delict" by Mackerron, it is stated that the existence of *animus injuriandi* is an essential basis of such a cause of action. This position had been followed in *Perera v. Peiris*(2) at 145 as well.

The manner in which *animus injuriandi* is determined is described in the book titled "Defamation and other aspects of the *actio Injuriarum*" by C. F. Amerasinghe. At page 65 in that book, it is mentioned that:

> *"animus injuriandi being a state of mind had in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used."*

Also, in *Associated Newspapers of Ceylon Ltd v. Gunasekera,*(3) Nagalingam A. C. J. has stated thus:

"The position, therefore, is that defamatory words relating to the plaintiff have been published and animus injuriandi would be presumed in the publications."

As mentioned hereinbefore in this judgment, the matters contained in the article marked P4 amount to defame the respondent. Hence, malice on the part of the appellants is to be presumed when the law referred to in the authorities referred to above is applied. Then, is the burden of the appellants to show that they had no malice to injure the character of the respondent when they published the article marked P4.

I am unable to find any evidence forthcoming to show that the appellants had no malice towards the respondent when the article marked P4 was published. In the circumstances, it is clear that the presumption created establishing that the appellants had published the article with malice would prevail. This is more so, when the contents of the article is basically false. I will be dealing with this aspect of falsity of the news contained in the article marked P4 at a later stage in this judgment.

Also, in *De Costa v. The Times of Ceylon Ltd and another*[4] at 265 Privy Council's view on this point is that the matter tending to bring a person into contempt or ridicule would be defamatory. Therefore, the article P4 per se would be defamatory of the plaintiff-respondent and therefore it had been published with malice. Accordingly, it is seen that the *animus injuriandi* on the part of the appellants also have been established by publishing the article P4. In the circumstances, it is clear that the learned District Judge is correct when he decided that the contents of the article P4 would be defamatory of the plaintiff-respondent.

Then the issue is to ascertain whether the appellants were successful in establishing the defences that they have advanced in this instance. As I have already dealt with the defence of Privilege, I will now turn to consider the merits in the defences of public interest and fair comment. At this stage it is necessary to note that in the submissions filed in this Court upon the conclusion of the argument, the appellants have restricted their defences to fair comment and justification. (paragraph 7 of the submissions dated 16.06.2014)

Hence, it is necessary to consider whether the appellants have established the defences of fair comment and justification, successfully. When the defence of justification is taken up, it is up to the defendants to show that the contents in the alleged statements are true and the said publication is for the benefit of the public. Therefore, it is necessary to ascertain whether the contents of the document P4 are in fact true or false.

The headline of the article which is in bold font and in bigger characters is to read as **"Brigadier is to be court martialled"**. There is clear and unambiguous evidence to show that there is no such decision taken by the Sri Lanka Army. Edward Seneviratne Jayasinghe, an Attorney-at-Law attached to the Legal Services Division, Sri Lanka Army has testified that no Court Martial was to be held against the respondent. His evidence to this effect is as follows:

ප්‍ර. පැමිණිලිකරු සම්බන්ධයෙන් පවත්වන ලද සාක්ෂි සම්පිණ්ඩනයෙන් පසු යුධ අධිකරණයක් පැවැත්වීමට තීරණය කරලා නැහැ?

උ. නැහැ.

ප්‍ර. යුධ අධිකරණයක් තිබුණේ නැහැ?

උ. නැහැ. තිබුණේ නැහැ.

(vide proceedings at pages 180 and 181 in the appeal brief).

He has further said in evidence that there had been an inquiry called "Summary of evidence" and no court martial was to be held. The evidence to that effect is as follows:

ප්‍ර. තමන්ගෙන් ප්‍රශ්න කළා චෝදනා පත්‍රය ගැන. "පැ 4" හි තිබෙන?

උ. ඔව්.

ප්‍ර. ඒ සම්බන්ධයෙන් තමයි සාක්ෂි සම්පිණ්ඩනයක් තිබුණේ ?

උ. ඔව්.

ප්‍ර. ඒ සම්බන්ධයෙන් යුධ අධිකරණයක් තිබුණේ නැහැ?

උ. නැහැ.

(vide proceedings at pages 189 and 190 in the appeal brief).

ප්‍ර. චෝදනා කිහිපයක් තිබෙනවා කිව්වා සඳහන් කරලා?

උ. චෝදනා 02 ක් තිබෙනවා.

ප්‍ර. චෝදනා 02 සම්බන්ධයෙන් සාක්ෂි සම්පිණ්ඩනයක් තිබුණා කියලා කිව්වා?

උ. තිබුණා.

ප්‍ර. ඒ පිළිවෙත අනුව යුධ අධිකරණයක් පවත්වා නැහැ?

උ. යුධ අධිකරණයක් පවත්වා නැහැ.

Furthermore, the document marked P3, which is the final clearance certificate issued by the Sri Lanka Army, upon completion of 60 years in age by the respondent, show that he had an unblemished character whilst in the service. (vide at page 90 of the appeal brief) the document marked P11 also indicate that the then Commander of the Sri Lanka Army, Lieutenant General G. H. De Silva, having examined the proceedings of the summary of evidence had held that there was lack of evidence to proceed with a court martial on the charges alleged to have been made against the respondent. In the circumstances, it is clear that the newspaper publication,

published by the 1st defendant-appellant contained no truth. Hence, justification could not have been pleaded as a defence in this instance particularly when the publication contains falsehood.

In the book "Defamation and other aspects of Actio Injuriarium" by C. F. Amerasinghe, [at page 89] it is stated that:

> *"past crimes or conduct may not be resurrected and there are many cases which have held that statements which refer to such conduct are not for the public benefit."*

Hence, it is necessary to look at the contents of the document P4 in its entirely with that of the circumstances attached to it to ascertain whether the contents in P4 amount to fair comment. In the latter part of the article, it is alleged that the respondent was charged for interfering with investigations of the Sri Lanka Corps of Military Police by having allowed a civilian trader by the name of Yoosoof to sell the permits to transport restricted items to the North of Sri Lanka.

Learned District Judge having considered the evidence of Lieutenant P.J.M. Perera recorded on 19.08.1996, had decided that there had not been a disciplinary action against the respondent on such allegations. (vide Proceedings at page 277 in the appeal brief). Moreover, the document marked P3 show that the respondent had been released from the Sri Lanka Army honorably upon completion of 60 years in age. In the circumstances, it is clear that there is no justification and it is not a fair comment either, to have published the news item found in the document marked P4, with the comments made therein referring to the plaintiff-respondent.

I will now examine whether the publication of P4 could be considered as an article published for the benefit of the public. When this point is to be considered. it is necessary to note that the conduct of public officials has to be made known with impunity. That is because it is for the public benefit such conduct should be exposed. In "The Law of Delict" by Mckerron at page 201, it is stated as follows:

> *"Comment is fair if it is honest that is, a genuine expression of the critic's real opinion and relevant to the fact commented upon."*

In this instance, is it fair to state that the respondent is to be court martialled when no such decision had ever been taken? my opinion is No. Comments are to be considered fair, only when it is genuinely expressed. As referred to above, the contents of the article basically contain no truth. Therefore, there is no genuineness in the comments made in that article as far as the respondent is concerned. Therefore, I am not inclined to decide that the appellants are in a position to take up the defence of fair comment either, in this instance.

For the reasons set out hereinbefore, it is my opinion that the plaintiff has proved his case on a balance of probability and the defendant-appellants were not successful in establishing the defences that they have advanced in this instance. Hence, I do not see any reason to interfere with the findings of the learned District Judge.

Also, it must be stated that the learned District Judge has awarded only Rupees Two Million to the plaintiff-respondent though he has prayed for Rupees Ten Million damages for the injury caused to him by the publication of the news

contained in the article marked P4. Both parties have not made submissions on the question of damages and therefore it is clear that the appellants have not canvassed the quantum of damages awarded to the plaintiff-respondent. Therefore, it is not necessary to consider the quantum of damages awarded to the respondent by the learned District Judge.

For the aforesaid reasons, this appeal is dismissed with costs.

Appeal dismissed.

SARATH FERNANDO VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW J. (ACTING P/CA)
JAYATILAKA, J.
CA 270/2012
HC MATARA

Penal Code – Section 286, Murder – Robbery – Code of Criminal Procedure Act, No 15 of 1979 – Section 334 – Trial Judge – Misdirection – Appellate Court has power to sustain a conviction? Ellen borough principle – Is the establishing of the time of death vital? Rules governing circumstantial evidence.

The accused-appellant was convicted of the murder of one R and sentenced to death, he was also convicted for robbing a three wheeler from the possession of the deceased and sentenced.

The appellant contended that there were misdirections – non directions. It was contended by the accused that the Police did not establish that the ring discovered was that of the deceased and that the prosecution failed to establish the time of the death.

Held

Per Sisira de Abrew. J. [Acting P/CA]

"The learned trial Judge committed a misdirection as regards the ring. The learned trial Judge has concluded on the evidence that, the 2nd accused had pawned the ring and that the ring discovered from the Pawning Centre belonged to the deceased – there is no concrete evidence to arrive at this conclusion."

[1] Though the trial Judge committed a misdirection, the Court of Appeal in terms of Section 334 – proviso – Criminal Procedure Code had a power to sustain a conviction.

[2] The accused has failed to offer an explanation to the incriminatory evidence – the principle laid down by Lord Ellenborough applies. The prosecution has put forward a strong *prima facie* case and it is in the power of the accused to offer an explanation to the said incriminatory evidence.

[3] As regards the contention that the time of death should be established – the body was found after 5 days of the incident. It was in a highly decomposed position – K. vs. Appuhamy(7) could be distinguished.

[4] In a case of circumstantial evidence if the Court is going to arrive at a conclusion of guilt such an inference must be the one and only, irresistable and inescapable inference that the accused committed the crime.

In order to justify the inference of guilt from purely circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

APPEAL from the judgment of the High Court of Matara.

Cases referred to:

1. *K vs. Musthapa Lebbe* – 44 NLR 505
2. *M. H. M. Lafeer vs. The* Q -74 NLR 246
3. *R. vs. Lord Cochrane and others* – 1814 – Gurneys Reports 479
4. *Sumanasena vs. Attorney General* – 1999 – 3 Sri LR 137
5. *Baddewithana vs. Attorney General* – 1990 – 1 Sri LR 275
6. *Boby Mathew vs. State of Karnataka* – 2004 – Cr CJ Vol III
7. *K vs. Appuhamy* – 46 NLR 128
8. *K vs. Abeywickreme* – 44 NLR 254
9. *Podi Singho vs. The King* – 53 NLR 49
10. *Emperor vs. Browning – 1917 Cr LJ 482*

Indica Mallawaratchi for accused – appellant.

Yasantha Kodagoda DSG for AG.

12th February 2014

SISIRA J. DE ABREW, J (ACTING P/CA)

Accused – appellant is present in Court produced by the Prison Authorities.

Heard both Counsel in support of their respective cases. The accused – appellant in this case was convicted of the murder of a man named, Maithripala Rubasinghe and was sentenced to death. He was also convicted for robbing a three wheeler bearing registration No. 203-1067 from the possession of the said deceased person and was sentenced to a term of 7 years rigorous imprisonment and to pay a fine of Rs. 10,000/- carrying a default sentence of 6 months rigorous imprisonment. Being aggrieved by the said conviction and the sentence he has appealed to this Court.

The accused-appellant is the 2nd accused in this case. The 1st and the 2nd accused both were charged for the offence of murder and the offence of robbery. The 1st accused too was convicted for both offences. The 1st accused was tried in absentia. He has not appealed against the conviction.

Facts of this case may be briefly summarised as follows:-

On 18.08.1997 around 8.30 to 9.30 a.m. the deceased person who was a three wheeler driver parked his three wheeler in-front of Matara bus stand. Around 11.00 a.m. on that day two people came and discussed a hire to go to Hakmana with the deceased person. The deceased person quoted Rs. 400/- for the hire. The discussion between the said two people and the deceased person took about five minutes. Chaminda Pushpa Kumara who was also a three

wheeler driver whose three wheeler was parked near the deceased's three wheeler witnessed the entire discussion between the deceased and the two people. These two people were later identified by Chaminda Pushpa Kumara at an identification parade. They were the 1st and 2nd accused.Chaminda Pushpa Kumara says that the said two persons (the 1st and the 2nd accused) took the rear seat of the three wheeler and the three wheeler driver, the deceased person, drove away the three wheeler. This was between 11.00 a.m. and 11.45 a.m. The deceased person never returned to the three wheeler park. About 5 days later, decomposed body of Maithripala Rubasinghe (the deceased person) was found at a place called Walpita Jungle which was 6 miles away from Akuressa town. Chaminda Pushpa Kumara, at an identification parade, had identified the two persons as the persons who took the three wheeler with the deceased person. He also identified the 2nd accused (accused – appellant) in this case as one of the persons who went with the 1st accused in the three wheeler of the deceased person.

10 days later the deceased's three wheeler was found in the compound of one Letchamie in Matale district. The Grama Sevaka of the area Sunil Senanayake handed over the three wheeler to the police station. Minutes after he handed over the three wheeler to the police station, a person came and claimed the three wheeler. Sunil Senanayake later identified this person at an identification parade. He is the 1st accused in this case. Sunil Senanayake directed the 1st accused to go and claim the three wheeler from the police station. The 1st accused after going on the road shown by Sunil Senanayake de-routed, but did not go to the police station. The 1st accused never claimed the three wheeler from the police station.

Police, on a statement made by the 1st accused, recovered a pawning receipt which indicates that a ring has been pawned to a Pawning Centre in Matale. Thereafter police recovered a ring. Prosecution tried to establish that the ring discovered from the Pawning Centre was that of the deceased. But when we consider the evidence we feel that the prosecution has not established that the ring discovered was that of the deceased. Police observed the name of A.G. Sarath Fernando in the pawning receipt. Learned trial Judge has concluded, on the said evidence, that the 2nd accused had pawned the ring to the said Pawning Centre. He further concluded that the ring discovered from the Pawning Centre belonged to the deceased person. But when we consider the evidence there is no concrete evidence to arrive at the said conclusion. We therefore hold that the learned trial Judge committed a misdirection on the said point. Although the learned trial judge committed a misdirection we must consider whether the rest of the evidence establishes the charge against the accused-appellant. Although the learned trial Judge committed a misdirection, the Court of Appeal in terms of proviso to Section 334 of the Code of Criminal Procedure Act No. 15 of 1979 has a power to sustain a conviction. Proviso to Section 334 of the Code of Criminal Procedure Act reads as follows:

> "Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

In this connection I rely on a judgment of the Court of Criminal Appeal in *The King vs. Musthapa Lebbe* (1) wherein the Court held thus –

"The Court of Criminal Appeal will not interfere with the verdict of a jury unless it has a real doubt as to the guilt of the accused or is of opinion that on the whole it is safer that the conviction should not be allowed to stand."

Further I rely on a Judgment of His Lordship Justice H.N.G. Fernando in *M. H. M. Lafeer vs. The Queen*(2) wherein His Lordship Justice H.N.G. Fernando held thus –

"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

According to the prosecution case the two accused after discussing a hire to Hakmana went in the three wheeler driven by the deceased person. The deceased person's body was later found in highly decomposed position. The deceased person never returned to Matale and the 1st accused who went with the 2nd accused claimed the ownership of the three wheeler. Learned Deputy Solicitor General does not rely on the evidence relating to discovery of the pawning receipt and the ring. It has to be noted here that the two accused persons went in the three wheeler on a hire to go to Hakmana. What is the explanation given by the accused-appellant to the above incriminating evidence? He merely denied the charge. When we consider the dock statement we feel that the accused has failed to offer any explanation to the incriminating evidence

set out above. Since the accused-appellant has failed to offer an explanation to the incriminating evidence that I have stated above, I would like to rely on the dictum of Lord Ellenborough in *R Vs. Lord Cochrane and others*[3] wherein it says –

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong *prima facie* case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, if is a reasonable and justifiable conclusion that the evidence so suppressed or not adduced would operate adversely to his interest."

When I consider the evidence in this case I hold that the prosecution has put forward a strong *prima facie* case and it is in the power of the accused to offer an explanation to the said incriminating evidence. Therefore, I am justified in relying on the dictum of Lord Ellenborough.

In *Sumanasena Vs. Attorney General* [4] His Lordship Justice Jayasuriya held thus –

> "When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him."

In *Baddewithana Vs. The Attorney General* [5] His Lordship Justice P.R.P. Perera held thus –

"From the failure of an accused to offer evidence when a *prima facie* case has been made out by the prosecution and the accused is in a position to offer an explanation, an adverse inference may be drawn under Section 114 (f) of the Evidence Ordinance."

In *Boby Mathew vs. State of Karnataka*[6]

The body of the deceased person was found tied to a cot in the accused –appellant's room. But the accused – appellant did not offer any explanation to the evidence led by the prosecution. Indian Supreme Court held that the accused was bound to offer an explanation to the evidence led by the prosecution. His conviction of murder was affirmed by the High Court of India.

Applying the principles laid down in the above judicial decisions, I hold that failure of an accused person to offer an explanation when a strong *prima case* has been established by the prosecution can be considered against the accused-appellant.

Learned Counsel for the accused-appellant relying on the judgment in *The King vs. Appuhamy*[7] contended that the time of death should be established by the prosecution. She further contended that the time of death has not been established in this case. But we observe when the body was found after 5 days of the incident it was in a highly decomposed position. In *The King vs. Appuhamy's* case the deceased person was last seen with the accused-appellant. But the accused-appellant after he left with the deceased person came and met the brother of the deceased person on two occasions. Considering the facts of that case His Lordship Justice Keuneman decided that the establishing the time of

death in a circumstantial evidence case is essential. But the facts of *Appuhamy's* case are quite different from the facts of this case. We therefore hold that the said decision is not applicable to this case. The 1st accused who claimed the three wheeler 10 days after 18.08.1997 went with the 2nd accused in the three wheeler driven by the deceased person. This was a hire to go to Hakmana. Hire was discussed by both the 1st and the 2nd accused. When I consider the evidence led at the trial, I hold that the participation of the 2nd accused to the crime has been established beyond reasonable doubt. Since the case of prosecution depended on circumstantial evidence I would like to consider the rules governing circumstantial evidence.

In the case of *The King vs. Abeywickrema*(8) Soertsz J. remarked as follows:

> "In order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypotheses of his innocence".

In the King vs. Appuhamy (Supra) Keuneman J held that –

> "in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt".

In Podisingho vs. The King(9) Dias J held that –

> "in a case of circumstantial evidence it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt."

In *Emperor vs. Browning* [10] court held that –

> "the jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts, the prisoner must have the benefit of those doubts."

Applying the principles laid down in the above judicial decisions I hold that in a case of circumstantial evidence if the Court is going to arrive at a conclusion of guilt such an inference must be the one and only, irresistible and inescapable inference that the accused committed the crime. In the present case the two accused, who went on a hire to Hakmana in the three wheeler driven by the deceased person, did not offer any explanation to the said journey. Later the decomposed body of the deceased person was found at a place called Walpita Jungle which was 6 miles away from Akuressa town. The three wheeler was claimed by the 1st accused who went with the 2nd accused in the said three wheeler. When I consider the above evidence I hold that one and only, irresistible and inescapable inference that the Court can arrive is that the both accused-appellant committed the murder of the deceased person and robbed his three wheeler. For the above reasons, we affirm the conviction and the sentences and dismiss the appeal.

P. W. D. C. JAYATHILAKA, J. – I agree.

Appeal dismissed.

FRESH SEA FOOD EXPORTERS [PVT] LTD AND ANOTHER VS. HATTON NATIONAL BANK LTD

COURT OF APPEAL
H.N. J. PERERA J.
CA 145/99/F
DC COLOMBO 16629/MB
JANUARY 23, 2014

Civil Procedure Code – Section 86 [2] , Section 86 [3], Section 87 [3] – Section 187 – Ex parte judgment – Application to purge default – Should it be supported by an affidavit from the defendant? Revision – Constitution Article 138

At the trial the defendant – appellant nor an attorney –at-law appeared. The matter was taken up *ex parte* and judgment delivered on the same date. The defendant – appellant sought to get the judgment vacated, and filed petition supported by the affidavit of his attorney-at-law. Objection was taken that, there is no affidavit from the defendant and therefore the application to purge default should be rejected. The District Court held with the plaintiff.

In appeal,

It was contended that there is no mandatory requirement under Section 86 [3] that the supporting affidavit shall be affirmed by the petitioner himself, who is making the application under Section 86 [3].

Held:

[1] Under Section 86 [2] it is the defaulting party who has to file an application and satisfy Court that he had reasonable grounds for such default.

[2] The defendant – appellants were not present in Court when the case was taken up. The Counsel who appeared for them had sought for a postponement but when that application was refused

the Counsel had clearly stated that he cannot proceed with the trial as the defendants are not present. Therefore, the defendant – appellants are bound to give a good reason for not being present in Court on the trial date. They have failed to do so.

[3] Under Section 86 [2] it is clear this Court can set aside an ex parte decree only if the defendant has satisfied Court that there were reasonable grounds for his default.

[4] A default judgment can be canvassed on the merits in the Court of Appeal in Revision though not in appeal and not in the District Court itself.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

[1] Coomaraswamy vs. Mariamma 2002 3 Sri LR 312

[2] David Appuhamy vs. Yassassi Thero 2002 1 Sri LR 43

[3] Chandrawathie vs. Dharmaratne 2002 1 Sri LR 43

[4] Mrs. Sirimavo Bandaranayake vs. Times of Ceylon Ltd 1995 1 Sri LR 23

Sanath Weerasinghe for defendant – appellants

Ronald Perera PC with *N. Amerajeewa* for plaintiff-respondent.

Cur.adv.vult.

23rd September 2014

H. N. J. PERERA, J.

This is an appeal from the order of the learned District Judge of Colombo dated 13.01.1999 refusing to set aside the judgment entered upon the default of the Defendant-Appellants. According to plaintiff-respondent when the said case came up for trial on 26th June 1996 the defendant –appellants were not present in court and an adjournment was sought for

by the Counsel who appeared for the defendant-appellants. The court rejected the said application for adjournment and informed counsel that the case will be taken up for trial and the case was kept down. Afterwards, when the case was taken up for trial since neither the defendant-appellants nor an Attorney-at-Law appeared, the plaintiff-respondent moved to take up the case *ex-parte* against the defendant – appellants. The *ex-parte* trial was held and the judgment delivered on the same date.

After the *ex-parte* decree was served on the defendant-appellants they made an application to vacate the same. After inquiry the learned District Judge on 13.01.1999 rejected the application to vacate the *ex-parte* judgment. Aggrieved by the said order the defendant – appellants have preferred this appeal to this Court.

The main contention of the Counsel for the plaintiff-respondent was that the petition filed by the defendant – appellants under Section 86 (2) of the Civil Procedure Code to vacate the *ex-parte* judgment dated 26.06.1996 was misconceived and bad in law for the reason that the said petition did not comply with imperative requirement stipulated in Section 86(3) of the Civil Procedure Code as it was not supported by affidavit of the defendant – appellants. The affidavit filed along with the petition was not that of the defendant –appellants but the affidavit given by their Attorney-at-Law who made an appearance on the day when the case was taken up for trial. It was submitted by the Counsel for the plaintiff-respondent that since the defendant – appellants failed to support their petition made under Section 86(2) with an affidavit sworn by them as required by Section 86(3), no proper application before the District Court had been filed and therefore the defendant – appellants did not properly invoke the jurisdiction of the District Court to vacate the said ex-parte judgment.