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(ii) But that does not mean that the entire evidence of the victim should be rejected as being false. Contradictions may occur due to various factors, such as faulty memory.

Ranjith Silva, J.,

"It is true that the Police had tutored the victim to state various facts that were not within her knowledge such as the names of the accused and her husband – but I have no doubt that the instances of cruelty alleged by the victim such as the accused pinching and assaulting the victim have taken place if not exactly the way she narrated" at least in some form or other.

(iii) Even though it transpired in the course of the evidence that the Police has tutored the victim yet there is overwhelming evidence given by the victim in regard to various other acts of cruelty and ill treatment meted out to her by the accused and the Doctor and the JMO have corroborated the evidence of the victim, the evidence of the two expert witnesses have gone virtually unchallenged;

(iv) The findings are based largely on credibility of witnesses and the findings of the High Court Judge cannot be branded as perverse;

(v) According to the facts and circumstances of the case it was not necessary to lead the evidence of the osteologist/anatomist or dental surgeon to prove that the victim was less than 18 years of age at the time of the incident;

(vi) The evidence with regard to the age of the victim given by the victim herself and the JMO – who is not a qualified osteologist/anatomist or dental surgeon – could be acted upon as what was not challenged when one had the opportunity to challenge has to be taken as admitted especially so according to the facts and circumstances of the case.

APPEAL from the High Court of Colombo.

Cases referred to:

(1) *Bhojraj* v *Sita Ram* – AIR 193

(2) *Bharwada Bhoginbhai Hirijibhai* v *State of Gujarat* – AIR 1983 SC 753 LJ – 1983 Cr. L.J. 1983 1096

(3) *Samaraweera* v *Attorney-General* – 1990 – 1 Sri LR at 256

(4) *Kashi Nath Panday* v *Emperor* – AIR 1952 – Cal 214

(5) *Sugal* v *The King* – (1945) 48 Bom LR 138

(6) *State v Shanker Prasad* – AIR (1952) All 776 – 1952 Cr. LJ 1585

(7) *Wickremasooriya* v *Dedoleena* – 1996 2 Sri LR 95

(8) *Alwis* v *Piyasena Fernando* – 1993 1 Sri LR 119 at 122

(9) *Fraad* v *Brown & Co. Ltd.*– 20 NLR at 282

(10) *Mohamed Syedol* v *Ariffin* – AIR 1916 PC 242

(11) *Laimayum Tonjou* v *Manipur Administration* – AIR Manipur 5 (V49 C3)

(12) *Sulthan* v *Emperor* – AIR 1934 Sind 119

(13) *Regina* v *Pinhamy* – 57 NLR 169

(14) *Queen* v *Kularatne* – 71 NLR 529 at 542

(15) *Visaka Ellawela* v *Attorney-General* – CA 52/02 – HC 180/99 Colombo

(16) *Gratiaen Perera* v *The Queen* – 61 NLR 522 at 524

(17) *Ajith Samarakoon* v *Attorney-General* (Kobeigane Murder) 2004 – 2 Sri LR 209 at 230

(18) *Sarwan Singh* v *State of Punjab* – 2002 AIR (Sc) (iii) 3652 at 3655, 3656

(19) *Boby Mathew* v *State of Karnatake* 2004 – 3 Cri LJ 3003

(20) *Himachal Pradesh* v *Thakur Dass* – 1983 2 Cri LJ 1694 at 1983

(21) *Motilal* v *State of Madya Pradesh* – 1990 – Cri LJ No.C 125 MP

(22) *Phillippu Mandige Nalaka Krishantha Kumara Thisera* v *Attorney-General* – CA 87/2005 – CAM 17.5.2007

D.P. Kumarasinghe PC for accused-appellant.

Jayantha Jayasuriya D.S.G. for accused-appellant.

Cur.adv.vult.

June 04, 2007

RANJITH SILVA, J.

The accused-appellant was indicted in the High Court of Colombo for acts of assault committed on one Welayudan Sivakumari between the 20th of January 1996 and 20th of January 1997 an offence defined as "Cruelty to children" punishable under sec. 308(A) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995. **Sec. 308(A)** of the Penal Code reads.:

"Whoever, having the custody, charge or care of any person under 18 years of age, willfully assaults, ill treats, neglects or abandons such a person or causes or procures such a person to be assaulted, ill treated, neglected or abandoned in a manner likely to cause him suffering or injury to health (including injury to or loss of sight or hearing or limb or organ of the body or any mental derangement) commits the offence of cruelty to children."

The prosecution in support of their case led the evidence of Sivakumari the victim, Dr. H. Sivasubramaniam, Drs. L.B.I. de Alwis (JMO), Nalin de Silva, a technician at the JMO's office, WPC Gayani and WSI Indrani. The accused gave evidence from the witness box denying the charges.

After trial on the 28-2-2001 the accused-appellant who shall hereinafter be referred to as the accused was found guilty of the charge and was sentenced to a term of three years rigorous imprisonment. In addition the accused was ordered to pay compensation in a sum of Rs. 20,000 to the victim and in default was sentenced to a term of one year rigorous imprisonment. Aggrieved by the said judgment and sentence the accused has preferred this appeal to this Court challenging the judgment pronounced and the sentences imposed on the accused.

The Counsel for the accused argued that the conviction should be set aside on the following grounds:

(1) The victim was coached by the police and therefore she was an unreliable witness.

(2) The evidence of the victim was not credible as there were material contradictions in her evidence.

(3) The evidence of the victim was not corroborated by Dr. Alwis the JMO.

(4) The absence of acceptable evidence to prove that the victim was below the required age.

The first two grounds of appeal are inter related and can be dealt with together

The entire case for the prosecution rests on the Credibility of the witness Sivakumari the victim in this case. In this regard the principles enunciated by Lord Roche in *Bhojraj* v *Sita Ram*[1] are very pertinent. Lord Roche observed in the above mentioned case I quote "How consistent is the story with itself? (Consistency *per se*) How does it stand the test of cross-examination? (Stability under cross-examination) How far does it fit in with the rest of the evidence and the circumstances of the case (consistency *inter se*)."

The only witness to the alleged acts of cruelty was Sivakumari the victim. I find on a perusal of the brief and the oral and written submissions made on behalf of both parties that there are some

significant contradictions *per se* and *inter se* in the evidence of the victim. The evidence of the victim in respect of one of the injuries found on her body (injury No. 2 fractured teeth) was contradictory to the medical evidence led in the case, and the victim herself has contradicted her own evidence in regard to injuries No. 1 and 2.

Referring to an injury on the head, above the right eye, (No. 1 in the JMO report), the victim having first attributed it to the accused, later in her evidence admitted that the child of the accused had hit her on the head with a stick causing that injury, although she made an attempt to show that the accused too inflicted an injury on the same place. The victim admitted in cross examination that she had told the police that it was the child of the accused who inflicted that injury. (Vide pages 58 and 59 of the brief)

As regard injury No. 2 (fractured teeth), according to the JMO's report and her evidence in Court the victim had given several contradictory versions as to how it happened. She had told the doctor the JMO that the accused bashed her head on the floor. (Vide 155 of the brief) But what she had stated in her evidence in court is somewhat baffling and confusing. In her evidence she had stated that the accused held her hair and bashed her on the floor, in the same breath she had stated that the accused held her by the hair and hit her on the teeth and as there was some water on the floor, she slipped her leg and fell down and due to the fall two of her teeth broke into pieces. (Vide page 45 and 65 of the brief)

It is thus apparent that the victim had taken contradictory positions as to the first and the second injuries found on her body. It is also in evidence that some of the injuries were old scars of burn injuries inflicted by her own father when she was at home. Dr. Sivasubramaniam instead of corroborating the evidence of the victim has stated in his evidence that the 2nd injury could not have been caused as a result of a fall on the ground and thus contradicted the evidence of the victim with regard to injury No. 2 Dr. Sivasubramaniam has assigned good reasons for forming this opinion. He has stated that if the front two teeth were fractured as a result of a fall on the ground, there ought to have been other injuries and since he did not observe any injury on the nose or the chin the injury to the teeth could not have been caused as a result of a fall on the ground. (Vide page 127 lines 9 and 10 and the first few lines of page 128)

Dr. Sivasubramaniam has further stated that the injury to the teeth could have been caused by hitting with a weapon or by banging the face of the victim against some object by holding the victim by her hair. (Vide page 108). Both these positions described by Dr. Sivasubramaniam were flatly contradicted by the evidence of the victim.

There is another important factor that needs consideration by this Court namely undue influence that was brought to bear upon the victim by the police. The learned trial judge himself has stated in no uncertain terms highlighting a few instances that it was *ex facie* evident that the victim had been subjected to undue influence or pressure by the police in the course of their investigations and that there had been a colossal attempt to build up a case against the accused. (Vide the judgment at page 287 of the brief) What is discernible from the comments made by the trial judge appears to be that the two investigating police officers were unduly and culpably interested in the outcome of the case and that they tutored the victim to give false evidence against the accused. The learned trial judge has referred to various unsatisfactory and grossly indecent actions on the part of the police, deploring such practices. But the learned trial Judge has discreetly refrained from stating that the victim gave false evidence.

Thus in the light of the contradiction *per se* on very material points referred to above and the contradictory nature of the expert medical evidence, with regard to the injury No. 2, coupled with the undue influence exerted by the police it is seen that the evidence of Sivakumari with regard to certain matters, is vague and unreliable. But that does not mean that the entire evidence of the victim should be rejected as being false. Contradictions may occur due to various factors such as faulty memory etc.

The learned trial Judge in his judgment has commented and expressed his sentiments with regard to the crooked practices on the part of the investigating officers. Yet the learned trial Judge had opted to rely and act on the evidence of the victim despite the infirmities in her evidence. I cannot but admire and appreciate the efforts of the learned Judge to do what he thought was just, without taking the easy way out. The approach of the learned Judge does not baffle me in any way for the following reason.

It is true that the police had tutored the victim to state various facts that were not within her knowledge, such as the names of the accused and her husband. But I have no doubt that the instances of cruelty alleged by the victim such as the accused pinching and assaulting the victim have taken place if not exactly the way she narrated, at least in some form or the other. Even though the victim gave contradictory versions as to how injuries I and 2 occurred I find that it happened as a result of a faulty memory and not exactly because the victim was tutored. The victim had sustained the 2nd injury about four years prior to the date she gave evidence in Court. She was only 12 or 13 years of age at the time of the incident. The incident itself was not such a palatable or a pleasant one that ought to have remained imprinted in her memory. To say the least one cannot expect a child of such tender years to recall in the order of sequence an incident that occurred under such tragic and traumatic conditions. (Vide *Bharwada Bhoginbhai Hirijibhai* v *State of Gujarat* (2).

In *Samaraweera* v *The Attorney-General* (3) at 256, it was held, I quote "The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observations, or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim ..... In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so ..... The jury of Judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can be separated from the true."

The third ground of Appeal – Lack of Corroboration

The tender years of the child coupled with the other circumstances such as demeanour and unlikelihood of tutoring may render corroboration unnecessary but that is a question of fact in each case. On the contrary, the facts and circumstances in the instant case indicate that the police had tutored the victim.

In *Kashi Nath Panday* v *Emperor* (4) it was held "... it is a sound rule of practice not to act on the uncorroborated evidence of a child whether sworn or unsworn but is a rule of prudence, not to law". (See also *Sugal* v *The King* (5)).

In *State* v *Shanker Prasad* (6), it was held that the evidence of a child should be examined with great caution.

Even though it transpired in the course of the evidence that the police has tutored the victim yet there is overwhelming evidence given by the victim in regard to various other acts of cruelty and ill-treatment meted out to her by the accused such as the accused pinching and assaulting her on numerous occasions. What is more Dr. Sivasubramaniam and the JMO who examined the victim has corroborated the evidence of the victim. The evidence of the two expert witnesses has gone virtually unchallenged. Therefore one cannot argue that there isn't corroboration of the evidence of the victim. The victim had been examined by a competent dental surgeon and the medical evidence has referred to the observations of the dental surgeon as well. The report of the dental surgeon was marked as P3 subject to proof but has gone unchallenged when the prosecution closed its case leading in evidence P1 to P8. Sec. 414(1) of the Criminal Procedure Code reads thus; (only the relevant portions are reproduced below).

'Any document purporting to be a report under the hand of ..... Government Medical Officer upon any person matter or thing duly submitted to him for examination ..... may be used as evidence in any inquiry, trial or proceeding under this code although such officer is not called as a witness.'

The identity and the regularity of the report of the dental surgeon could be presumed under section 114 of the Evidence Ordinance. Ever if the dental report were to be rejected yet there is other evidence independent of the dental report corroborating the evidence of the victim. (Vide the evidence of Dr. Sivasubramaniam and the JMO)

It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings of this case are based largely on credibility of witnesses. An appellate court can and should interfere even on questions of facts although those findings cannot be branded as

"perverse" unless the issue is one of credibility of witnesses keeping in mind that the trial Judge is better equipped to adjudicate on facts as the trial judge is the one who has the priceless advantage and the privilege of observing the demeanour and the deportment of the witnesses.

A question of fact is a compendious expression comprising of three distinct issues. In the first place what facts are proved? In the second place, what are the proper inferences to be drawn from the facts which are either proved or admitted? And in the last place what witnesses are to be believed? It is only in the last question any special sanctity attaches to the decision of a court of first instance. On the first two questions no special sanctity attaches. By any special sanctity is meant the disinclination on the part of an appellate body to correct a judgment as being erroneous. (Vide *Wickremasooriya* v *Dedoleena* (7).

In *Alwis* v *Piyasena Fernando*(8) at 122 it was observed by the learned Judges who heard that case as follows. "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings of this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."

In *Fraad* v *Brown & Co. Ltd.*(9) at 282 it was held I quote"... it is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is overruled by a Court of Appeal because a Court of Appeal recognizes the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and as specific as these, a Court of Appeal will overrule a Judge of a first instance." It was further held in that case that when the issue is mainly on the credibility of witnesses an appellate Court should not interfere unless the findings of the Judge are perverse.

In the instant case the findings are based largely on credibility of witnesses and the findings of the learned High Court Judge cannot be branded as perverse. I am therefore of the view that there is no reasonable basis upon which the Court of Appeal could reverse the findings of the trial judge.

For the reasons I have adumbrated above I reject the first three ground of appeal taken by the defence.

Now I shall turn to the 4th ground of appeal which is as follows

'The absence of acceptable evidence to prove that the victim was below the required age.'

The Counsel for the accused argued that the most important element in a charge under section 308(A) of the Penal Code is the age and that the best evidence to prove the age is the birth certificate or, if it is not available, evidence of the mother or the father of the victim could have been placed before Court. He further argued that the prosecution has failed to lead the best evidence but called the JMO Colombo to give an opinion, he is not properly qualified to express. In this context the Counsel for the accused has invited this Court to draw a presumption under sec.114 (f) of the evidence ordinance.

114(f) of the E.O.:

The evidence which could be and is not produced would if produce, be unfavorable to the person who withholds it.

In support of this contention (4th ground of appeal) the defence has cited several Indian and local reported cases which I have cited below.

In *Mohamed Syedol* v *Arriffin*[10] (decision of the Privy Council) "A certificate given by a doctor about the age on an examination of the teeth, appearance, and voice etc is not the certificate of an expert, but only an assumption of his opinion which was worthless.

In *Laimayum Tonjou* v *Manipur Administration*[11] it was held *inter alia* I quote: "As far as we know from medical jurisprudence the conclusive test in such matters of age is the ossification of bones and for this X ray examination of the bones was absolutely necessary. (see also *Sulthan* v *Emperor*)[12].

In order to emphasize that it is only an osteologist, or an Anatomist who is properly qualified to perform ossification test and to some extent, dental surgeon, by examining the dentition and no other medical person can give an authoritative opinion as to the age, the defence has cited *Regina* v *Pinhamy*[13] where it was held "The mere

reference to the medical witness as JMO Colombo is insufficient for the purposes of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fall within the function of a medical practitioner." (See also *Queen* v *Kularatne*[14] at 542)

In *Visaka Ellawela* v *A.G.*[15] it was held that it is only an osteologist / anatomist and or a dental surgeon who is properly qualified to express an opinion as to age and no doctor qualified in other fields is regarded as an expert in this field.

I have my highest regards and utmost respect for the observation made and the views expressed by the eminent justices in the above mentioned *dicta*. Whether the same would be applicable to the facts and circumstances of this case and if so what the scope is, in its application are matters that need the attention of this Court.

A trial Judge is not prevented from bringing an independent mind to bear upon the question of age using what ever the legal admissible evidence that is available to him, including his observations where possible. Expert evidence is not the *sine qua non* in each and every case where "proof of age" is in issue if the trial Judge can safely and correctly form an opinion of his own, independently of any expert medical evidence. There could be instances; a decision on such an issue would not be possible without the assistance of an expert, qualified in the particular field. At the same time there may be instances where such opinion would not be necessary and the trial Judge himself, or with the assistance of a medical officer like a JMO, even though such a medical officer may not be an expert on matters relating to age such as an osteologist/anatomist or a dental surgeon, could decide the issue.

In *Gratiaen Perera* v *The Queen*[16] at 524 Sinnathambi, J. observed I quote: "While I would not go to the extent of saying that an experts evidence would only afford 'some slight corroboration of the conclusion arrived at independently' I would hesitate to act solely upon it. If there is other independent evidence in support of the conclusion reached, recourse need not be had at all to the expert evidence." It was further held in that case by Sinnathambi, J. "A Court cannot of course without the assistance of an expert come to an opinion on so **difficult a question.** (emphasis added). At the same

time the decision being the Judge's he should not be delegate his functions to the expert. The opinion of the expert is relevant, but the decision must nevertheless be the Judge's".

A careful study of this dictum of Sinnathamby, J. reveals that if the question is a difficult one 'expert evidence' may some times be necessary but if the question is not a difficult question then expert evidence may not be necessary. Thus if a child of three years is raped and the birth certificate of the child is not available or the whereabouts of the parents of the child are not known should the trial judge or the defence insist on a report from an osteologist/anatomist or a dental surgeon. Such a proposition undoubtedly would be absurd and ludicrous.

In *Laimayum Tonjou* v *Manipur Administration (supra)* the age of the child was 15 years and the required age limit in that case was 16. Under the circumstances of that case as the margin was very thin (one year) it was held in that case that the prosecution should have proved the age of the victim by leading expert evidence of an osteologist/anatomist or a dental surgeon. In that case the age of the victim being 15 years and the age limit 16 it would have been a very difficult question for the trial judge to decide on his own whether the child was under 16 years of age, without the assistances of an expert qualified in that particular field.

But the facts and circumstances are rather different in this case and the question to be decided was not a difficult one. In the instant case the child was about 12 years at the time of the incident and the required age limit is 18 years according to section 308(A) of the Penal Code. In the instant case the gap is about 6 years and the trial Judge could easily decide that the child was below 18 years. On the other hand the victim stated in evidence that she was 14 years of age at the time she gave evidence at the trial and that should have alerted the prosecution that the child was 12 years of age at the time of the incident. Although the JMO was not a qualified osteologist/anatomist or a dental surgeon I hold that one need not be so qualified to observe that the victim did not have hair in her armpits or that her breasts were in the formative stages and express the opinion that the victim was below 18. I hold that even without the dental report there was ample evidence for the trial judge to conclude that the victim was less than 18 years of age at the time of the incident.

For these reasons I hold that according to the facts and circumstances of the case it was not necessary to lead the evidence of an osteologist/anatomist or dental surgeon to prove that the victim was less than18 years of age at the time of the incident.

On the other hand the age of the child was never in dispute.The evidence of the victim or the JMO was not challenged not for nothing but for obvious reasons best known to the defence. At this stage I would like to cite a few authorities in order to show that the evidence, with regard to the age of the victim given by the victim herself and the JMO could be acted upon. What was not challenged when one had the opportunity to challenge has to be taken as admitted, especially so according to the facts and circumstances of this case.

In the *Kobaigana Murder* Case *Ajith Samarakoon* v *A.G.*(17) at 230 Ninian Jayasuriya, J. held 'that evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused.'

In *Sarwan Singh* v *State of Punjab* (18) at 3655, 3656 , "it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This case was cited with approval in the case of *Boby Mathew* v *State of Karnataka*(19).

In *Himachal Pradesh* v *Thakur Dass* (20) at 1983 V.D. Misra, CJ. held: "Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."

"Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact". *Motilal* v *State of Madya Pradesh*(21).

For a recent case I would like to refer to the Judgment of His Lordship Sisira de Abrew, J. in *Pillippu Mandige Nalaka Krishantha Kumara Thisera* v *A.G.*(22), I quote "....I hold that whenever evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."

For the reasons adumbrated above, in my judgment, on the facts and the law, as there is no merit whatsoever in any of the grounds of appeal urged by the defence, I find no justification in interfering with the verdict, findings or the judgment entered or the sentence imposed by the learned High Court Judge on the accused on 28.02.2001.

I affirm the conviction and the sentence and dismiss this appeal.

SISIRA DE ABREW, J. – I agree.

Appeal dismissed.

NANDASENA
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
C.A. 101/2004
H.C. MATARA 47/2002
JULY 27. 2007

Penal Code – Section 77, 296, 315 – Defence of insanity – Rule in Mc.' Naughton's case – Evidence Ordinance – Section 105 – Burden of proving insanity – on whom?

Held:

(i) When a defence of insanity is taken under section 77 there must be evidence to prove that the accused was insane and this fact had to be proved on a balance of probability like in a civil case.

(ii) It is the burden of the accused to prove that he was incapable of (i) knowing the nature of the act (ii) that he is doing what is either wrong or contrary to law.

(iii) It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law."

APPEAL from the Judgment of the High Court of Matara.

Case referred to:

1. *King* v *Ebrahamappu* – 40 NLR 505

Niranjan Jayasinghe – Assigned Counsel for accused-appellant
Buwaneka Aluvihare – D.S.G. for Attorney-General

Cur.adv.vult.

July 27, 2007

RANJITH SILVA, J.

The accused was charged on two counts of murder under section 296 of the Penal Code for causing the death of one Korawage Sunethra who happened to be his wife, for causing the death of Saman Kumara his son and for causing hurt in the cause of the same transaction to one Dharmadasa Wickramasinghe an offence punishable under section 315. After trial, without jury the accused was found guilty on all three counts and in respect of counts one and two he was sentenced to death and in respect of count three he was sentenced to three years R.I. Aggrieved by the said judgment and the sentences the accused has come before this court. In this appeal the Counsel for the appellant confined himself to one ground of appeal. The ground urged before this Court was insanity. The Counsel for the defence drew our attention to portions of evidence given by the witnesses for the prosecution where they have stated that the accused was a very devoted father who attended to their daily needs and looked after the children well. It was in evidence that the accused never behaved in this manner prior to this incident and had no quarrels or arguments with the deceased wife. The Counsel for the appellant also drew our attention to the evidence of Dharmadasa where the witness had stated that the accused acted in an

unusual manner while he was attempting to assault him with a mamoty. We have perused the brief and we find that at page 148 of the brief the learned trial Judge had referred to the fact that the medical evidence did not reveal that the accused was insane but on the contrary the medical evidence was that the accused was not insane. When a defence of insanity is taken under section 77 of the Penal Code there must be evidence to prove that the accused was insane, and this fact had to be proved on a balance of probability like in a civil case. It is the burden of the accused to prove that he was incapable of (1) knowing the nature of the act, (2) that he is doing what is either wrong or contrary to law. In the book titled "Law of Crimes" by Ratnalal and Thakore it is stated thus, 'It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law'. The offender may kill a child under an insane delusion that he is saving him from sin and sending him to haven. He is incapable of knowing by reason of insanity that he is doing what is morally wrong. A person strikes another in consequence of an insane delusion thinking he is breaking a jar. Here he does not know the nature of the act.

In this particular case the accused believed that the deceased poisoned his food and beetle and intended killing the people who he thought were responsible for that act. In which case he should be held responsible for his act.

It cannot said that the accused did not know the nature of the act that he committed. Because it is very clear that he was trying to punish or avenge the wife for what he thought that happened whether it really happened or not. The accused was under the impression that the wife poisoned the shunami. On the other hand the accused was suspicious about an illicit affair the wife had with witness Dharmadasa. Therefore he knew that he was taking revenge. Therefore he cannot be said that he did not know the nature of his act. It is equally clear that he knew that what he was doing was wrong, or contrary to law.

It was held in Mc'.Naughton's case that

(i) Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury.

(ii) To establish a defence on the ground of insanity it must be 'clearly' shown that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature of the act he was doing or not to know that what he was doing was wrong morally.

(iii) If the accused was conscious that the act was one which he ought not to do and if that act was at the same time contrary to the law of the land, he is punishable. The test is the power of distinguishing between right and wrong in regard to the particular act committed.

In *King* v *Ebrahamappu*[1] Soertz, ACJ. observed as follows:

Section 77 of the Penal Code is a condensed reproduction of the rule in Mc'.Naughton's case and in view of section 105 of our Evidence Ordinance there can be no doubt that the burden of proving insanity is on the prisoner (accused) in the words of the Judges in Mc.'Naughton's case insanity must be clearly proved to their satisfaction (of the jury) or as Roefe B, stated it is for the prisoner (accused) to make it clear and the jury must be satisfied "the burden of proving innocence rested on the accused." Late Mr. H.C. Perera Q.C., in the same case argued before the Court of Appeal that the burden imposed by law on prisoner the accused was no greater than to raise a reasonable doubt in the minds of the jury as to his insanity. The Court of Appeal disagreed with this view. Soertz. ACJ, referring to several decisions of the court in England including the decision of Mc.'Naughton's case held "if a prisoner seeks to excuse himself upon the plea of insanity it is for him to make it clear that he was insane, at the time of committing the offence charged. The *onus* rest on him. If the matter is left in doubt, the prisoner should be convicted. Because every man is presumed to be responsible for his acts till the contrary is clearly shown.

In this case the accused had not taken up the plea of insanity nor has he led any evidence to prove to the satisfaction of the trial Judge that he was insane at the time of the commission of the offence. We are constrained to disagree with the Counsel for the appellant and rule that the plea of insanity cannot be sustained.Therefore we are of the 100
opinion that this appeal should fail. Accordingly we affirm the conviction and sentence and dismiss the appeal.

SISIRA DE ABREW, J. – I agree.

Appeal dismissed.

SAMARASEKERA

v

INDRANI

COURT OF APPEAL
EKANAYAKE, J.
SRISKANDARAJAH, J.
CALA 74/2003
DC GALLE RE 440/98

Civil Procedure Code – Section 754(4), Section 757 – Amendment No. 79 of 1988 – Section 765– Leave to Appeal notwithstanding lapse of time – Bona fide mistake in noting down the date by party and his Attorney-at Law – Cause not within his control?

Held:

(1) A mistake or oversight on the part of the Attorney-at-Law or a party to a suit is not such cause within the meaning of Section 765 as would enable such party to the relief under the said provision – Section 765.

(2) 'Noting down the wrong date' cannot be considered as a ground that falls within the purview of 'causes' not within his control'.

APPLICATION under Section 765 of the Civil Procedure Code.

Cases referred to:

(1) *Rankira* v *Silindu* – 10 NLR 376
(2) *Julius* v *Hodgson* – 11 NLR 25

S.F.A. Cooray for defendant-petitioner
Hemasiri Withanachchi for plaintiff-respondent.

January 31, 2007

CHANDRA EKANAYAKE, J.

The defendant-petitioner (hereinafter sometimes referred to as the defendant) by his petition dated 11.03.2003 (supported by an affidavit) in addition to other interim reliefs had moved for leave to appeal from the judgment of the learned Additional District Judge of the Galle pronounced on 07.02.2003 in D.C. case Galle No. 140/98/RE, that this appeal be admitted notwithstanding the lapse of time, that the judgment of the District Court pronounced on 07.02.2003 be set aside and that this action of the plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) be dismissed.

The plaintiff had instituted the above styled action against the defendant by her plaint dated 10th June 1998 seeking a declaration that the plaintiff is the owner of an undivided 1/10 share of the premises described in the schedule to the plaint, ejectment of the defendant from the said premises and recovery of damages as prayed in sub paragraph (c) of the prayer to the plaint. The basis of the plaint had been that the plaintiff who was one of the 10 children of one Albert who had become the owner of the subject matter in 1986 and the said Albert had died in 1990, leaving his 10 children as intestate heirs. The plaint had averred that the defendant was in forcible and wrongful possession of the subject matter since 23.10.1990 (the date of death of said Albert).

The defendant by his answer whilst praying for a dismissal of plaintiff's action had moved for judgment in his favour on the claim in reconvention averred therein. The defendant further took up the position in the answer that he originally came into occupation of the premises in suit in 1969 as the tenant of one Harriet Wijeratne Jayaratne to whom he paid monthly rental until May 1979 against whom the defendant also had obtained relief from the Rent Board in respect of effecting necessary repairs to the premises in suit and thereafter the defendant being informed that the said Harriet Wijeratne Jayasekera had gifted the premises to her niece one Lakshmi Wickremasinghe, who had had refused to accept the monthly rent and therefore the defendant had to deposit the same in the Galle Municipal Council until 1999. Further it was averred that on or about April 1980 the defendant having learned that the said Harriet

Wijeratne Jayasekera had sold the premises in suit to one Viola Avery when the defendant was preparing to purchase the same and that he was not called upon either by the seller or the buyer to pay the rent to the new purchaser and further it was contended that different persons in turn having bought the premises over the head of the defendant tenant and thereafter only that same had been purchased by the said Albert on 23.10.1990. It had been specifically averred by the defendant in his answer that the said premises was governed by the Rent Act No. 7 of 1972 (as later amended) and at no stage the said Albert or the plaintiff had requested the defendant to attorn to them. The basis of the claim in reconvention of the defendant had been that since the plaintiff had instituted the above action in order to harass the defendant in the absence of accrual of any cause of action against him.

The trial having commenced in the District Court after leading evidence by both parties the learned trial Judge by his judgment pronounced on 07.02.2003 had granted the reliefs in favour of the plaintiff and had dismissed the claim in reconvention of the defendant.

The basis of the present petition is that after conclusion of the trial the learned trial Judge before whom the said trial was taken up had been transferred from Galle and the delivery of the judgment was delayed.On 11.01.2002 judgment was fixed for 10.05.2002 and the same being not ready on that date also it was postponed for 26.07.2002. As it was not ready on 26.7.2002 also same was postponed for 06.09.2002 and on 06.09.2002 also it was postponed for 29.11.2002. As averred in paragraph 16 of the petition the petitioner has contended that when the case was called for the purpose of pronouncing the judgment on 29.11.2002 the defendant and his registered Attorney (Ms. Saroja Mendis) were both present in court and since the judgment was not ready same was postponed, and both the defendant and the above registered Attorney noted the next date for judgment as 27.02.2003. On 27.02.2003 both defendant and the said registered Attorney were present in Court on 27.02.2003 expecting delivery of the judgment, as this case was not called and after making inquiries as to why the case was not called the said Attorney-at-Law had found that the case had been called on 07.02.2003 and the judgment had been delivered on that date granting the reliefs in favour of the plaintiff.

Being aggrieved by the said judgment the defendant wished to appeal therefrom to this Court and he was advised on 27.02.2003 that the period allowed by law for filing of notice of appeal had expired on 26.02.2003 and as such papers have to be filed directly in this Court. However the defendant had filed the notice of appeal in the District Court on 28.02.2003 against the aforesaid judgment and a copy of the said notice of appeal has been annexed to the petition marked X12 with a copy of the bank receipt for the deposit of Rs. 750/- as security for costs of appeal (X11), true copy of the bond hypothecating the said sum in favour of the Registrar of the said Court (X13) and a true copy of the registered postal article receipt in proof of posting, a copy of the notice of appeal to the plaintiff and to her registered Attorney (X14) and those are pleaded as part and parcel of the petition amongst other documents. Being aggrieved by the said judgment delivered on 07.02.2003 the defendant has made this application for leave to appeal notwithstanding the lapse of time of this Court on the grounds urged by sub paragraphs 23(a) to (i) of the present petition. Further the defendant has urged that on the aforesaid facts (which were supported by an affidavit of his registered Attorney-at Law Mrs. Saroja Mendis), that he was prevented due to causes not within his control from complying with the provisions of Section 754(4) of the Civil Procedure Code by duly filing a notice of appeal and further he is advised that he has good grounds of appeal. In the aforesaid premises he has moved for the reliefs prayed by the prayer to the present petition.

Having supported the above application made by the said petition after receiving notice the plaintiff by her statement of objections dated 26th March 2003 (supported by an affidavit) whilst denying the averments contained in the petition had moved for a dismissal of the defendant's application.

At the hearing before this Court Counsel who represented both parties after concluding their oral submissions have rendered written submissions as well.

Since this appears to be an appeal made under and in terms of section 765 (as amended) of the Civil Procedure Code it would be pertinent to consider the provisions of the above section. Thus section 765 (as amended by Act No. 79/1988) reads as follows:

"It shall be competent to the Supreme Court to admit and entertain a petition of appeal from a decree of any original court, although the provisions of section 754 and 755 have not been observed;

Provided that the Supreme Court is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions; and

Provided also that it appears to the Supreme Court that the petitioner has a good ground of appeal, and that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment-creditor that the decree or order appealed from should be disturbed."

Plain reading of the above section would reveal that, it shall be competent to admit and entertain a petition of appeal from a decree of any original Court, although the provisions of section 754 and 755 have not been observed on the Court being satisfied of the two requirements namely;

(1) that the petitioner was prevented by causes not within his control from complying with those provisions and

(2) that the petitioner has a good ground of appeal, and nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment creditor that the said decree or order should be disturbed.

The position of the defendant is that he was unable to comply with provisions of section 754(4) and to prefer an appeal by lodging a notice of appeal within the time frame stipulated therein, due to the *bona fide* mistake made by the defendant and his registered Attorney-at-Law (Mrs. S. Mendis) in noting down the next date 27.02.2003 given for judgment (when in fact the date given had been 07.02.2003).

Whether the defendant has satisfied the requirements of the 1st proviso to section 765 of the Civil Procedure Code; that is whether he was prevented by causes not within his control from filing the notice of appeal has to be considered. In this regard necessity would arise

to consider the affidavit of the registered Attorney-at-Law for the defendant Mrs. Saroja Mendis marked as X21. This affidavit has been affirmed on 11.05.2003. Present petition of the defendant is a petition dated 11.03.2003 and the supporting affidavit had been affirmed on the same day (11.03.2003). The date stamp placed on the said petition and the motion with which the same were filed would established that the date of filing was 12.03.2003. Thus it is clear that the defendant's registered Attorney-at-Law's affidavit had not been filed along with the said petition and affidavit but filed subsequently when filing the counter affidavit.

What is left for consideration now is the supporting affidavit of the defendant filed along with the present petition, wherein he has taken up the position that (vide paragraphs 18 and 19 of the affidavit) he too maintains a diary and on 29.11.2002 when the delivery of judgment was postponed he made a note of it in his pocket note book and later an entry was made in his diary for 29.11.2002 to the effect that the judgment had been postponed for 27.02.2003. Further it is stated that he having obtained a diary for the year 2003, under the date 27.02.2003 he noted that the judgment in this action was due on that date. According to paragraph 19 it is stated that he and his registered Attorney-at-law were both present on Court on 27.02.2003 expecting the delivery of the judgment since this case was not called on investigating as to why the same was not called his Attorney-at-Law had found that it had been called on 07.02.2003 and judgment had been delivered on that day in favour of the plaintiff and he wished to prefer an appeal against the same.

It is seen from paragraph (20) of the affidavit that his position had been on all previous dates the judgment was due to be pronounced the only day he was not present was the 07.02.2003, as he was unaware of the said date (07.02.2003) having mistakenly heard and noted down on 29.11.2003 the next date as 27.02.2003. The defendant's position that he and the defendant's registered Attorney-at-Law both were present on 29.11.2002 is contradicted by the Journal Entry No. 3 of the above date. This Journal Entry does not reflect anything else other than the fact that the judgment was due from the predecessor and to inform the date to him. The above Journal Entry bearing the date 29.11.2003 is to the following effect:

"තීන්දුව පුර්වගාමී විනිසුරුතුමාගෙන් නියමිතයි.
දිනය පූර්වගාමී විනිසුරු තුමාට දන්වා යවන්න"
කැඳවන්න 7/2/2003 "

This alone cast a doubt with regard to the defendant's position that he and his registered Attorney-at-Law both were present in Court on 29.11.2002 and the next date was mistakenly read and noted down as 07.02.2003. Even assuming that they were present and they defendant having heard the next date as 07.02.2003, what has to be now considered is whether it would amount to 'a cause not within his control' from complying with the provisions of Sections 754 and 755 of the Civil Procedure Code. In the case of *Rankira* v *Silindu*(1) was held that:

> "A mistake or oversight on the part of the proctor of a party to a suit is not such cause within the meaning of section 765 of the Civil Procedure Code as would enable such party to the relief of leave to appeal notwithstanding the lapse of the time."

In the instant case the notice of appeal had been filed out of time solely on the ground that having mistakenly noted down the wrong date by the defendant and the registered Attorney-at-Law. In this context it would also be pertinent to consider the decision in *Julius* v *Hodgson*(2) by which the following principle was offered:

> "The practice is not to give leave to appeal where the only ground relied on is that the applicant or his proctor made some miscalculation of time or some other mistake, or that the failure was due to the proctor's neglect."

In the case at hand same mistake is said to have committed by the defendant and the Attorney-at-Law both to wit: 'noting down the wrong date'. When the above principles are applied a mistake with regard to taking down of the wrong date (for delivery of the judgment) by a party and his Attorney-at-Law cannot be considered as a ground that falls within the purview of 'causes not within his control'. Furthermore in the present case Vide the relevant Journal Entry neither the defendant nor his registered Attorney-at-Law was present on the relevant date (29.11.2002) and a doubt has arisen with regard to the defendant's alleged position of writing down the wrong date on 29.11.2002.

In this Court with the motion dated 12.05.2003, when filing the counter affidavit the defendant had tendered documents marked as X 19 to X 21.

X20 being an affidavit sworn by another Attorney-at-Law Ms. Nandanie Arumahannadi bears the fact that on 07.02.2003 she moved for postponements in cases of Attorney-at-Law Saroja Mendis and this number was not included in that list of cases. The position of the defendant and his Attorney-at-Law Mendis also was that both did not appear on 07.02.2003. (the date of the delivery of the judgment) So, this affidavit (X20) too confirms nothing but the position that the defendant's registered Attorney-at-Law Ms. Mendis had not appeared in Court on 07.02.2003. The affidavit of the defendant's registered Attorney-at-Law Ms. S. Mendis also confirms the above position and all what is stated is that she was unaware of the date 07.02.2002 in this case.

In the foregoing circumstances I am unable to conclude that the circumstances enumerated as above by the defendant in this case could be considered as causes not within his control from complying with section 754 and 755 of the Civil Procedure Code. However, the question with regard to whether the defendant has a good ground of appeal has to be examined. Having examined the judgment, I am unable to assert that there is a good ground of appeal.

For the above reasons I am inclined to dismiss the present application of the defendant-petitioner and same is hereby dismissed. In all circumstances no order is made with regard to costs.

SRISKANDARAJAH, J. – I agree.

Appeal dismissed.

JAYAWARDANE
v
SENARATNE & OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 2366/2004
DC COLOMBO 7, 2006

Writ of Certiorari / Mandamus – Criminal Procedure Act 15 of 1978 – Section 108 – Coroner – Services terminated without any inquiry – Charge sheet not served – Audi Alteram partem principle – Applicability – Petitioner on extension.

At the inquest into the death of a school boy – the petitioner – city coroner – returned a verdict of suicide on the evidence before him. A show cause letter was received by him alleging that the petitioner failed to consider relevant materials sufficiently before coming to the said verdict. The petitioner replied the said letter, but his services were terminated without any inquiry.

It was contended that his services were summarily terminated without any inquiry and it is irrational, unfair, unreasonable, arbitrary and tainted with *mala fides*, for the reason that the show cause letter was solely based on the unfounded allegations of the deceased's mother – and that he was not served with a charge sheet and he was not given an opportunity to be heard.

Held:

(1) There is no Rule governing the petitioner's appointment and the appointment, extensions and termination of service as an inquirer is in the discretion of the relevant Minister. The petitioner is in extension of his service and his extension was coming to an end in December 2004 and the petitioner's services were terminated in October 2004, two months before the date on which the petitioner's extension was coming to an end.

(2) In view of the facts and circumstances of this case the petitioner cannot claim that a charge sheet should have been served on him and an inquiry should have been held. The explanation given was not accepted therefore the respondents terminated the services.

Per Sriskandarajah, J.

"The extent and the nature of hearing in relation to a termination of service depends on the circumstances of the case, the nature of the service, the rules under which the respondent is acting, the subject matter that is being dealt with"

(3) In these circumstances, the petitioner cannot state that the rule of natural justice have been denied to him.

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

(1) *Russel* v *Norfolk* – 1 All ER 109 at 118

(2) *Premachandra* v *Jayawickrema* – 1994 – 2 Sri LR 90, 105

(3) *Bandara* v *Premachandra* – 1994 – 1 Sri LR 301-312

(4) *Tennekoon* v *De Silva* – 1997 1 Sri LR 16 (SC)

(5) *Jayawardane* v *Wijeyetilleke* – SC 186/95 – SCM 27.7.95

J.C. Weliamuna with *U. Wijesinghe* for petitioner.

L.M.K. Arulanandan DSG for respondents.

March 12, 2007

SRISKANDARAJAH, J.

The petitioner was serving as a City Coroner in the Gampaha District during the relevant period. He was appointed as the City Coroner of Gampaha District by the letter of appointment dated 23.11.1990 issued by the Secretary to the MInistry of Justice. This appointment was with effect from 1.12.1990 for a period of 3 years. This appointment was extended time to time up to 18.12.2004. The petitioner submitted that on or about 24.6.2004, he conducted an inquest into the death of a school boy who met with a train accident. At the inquiry the petitioner recorded the mother's evidence and her brother's evidence. The petitioner further submitted that both the mother and her brother have stated that they do not suspect any foul play and that they too suspect that the boy had committed suicide by jumping into the wheels of a train. In the Inquest report the petitioner returned a verdict of suicide on the evidence before him. The petitioner submitted that he received a show cause letter dated 25.08.2004, alleging that the petitioner failed to consider

relevant materials sufficiently before coming to the said verdict (P6). The petitioner replied the said letter by his letter of 3.9.2004 (P7). The petitioner contended that his services were summarily terminated by the 1st respondent by his letter dated 8.10.2004 without any inquiry (P8), and it is irrational, unfair, unreasonable, arbitrary and tainted with *mala fides* for the reason that the show cause letter was solely based on the unfounded allegations of the deceased's mother, he was not served with a charge sheet and he was not given an opportunity to be heard.

The petitioner in this application is seeking a *writ* of *certiorari to quash* the decision contained in P8 and a *writ of mandamus* directing the 1st to 3rd respondents to extend his service upto the age of 70 years as per Ministry of Justice Circular No. 15/94 dated 21.6.2004.

The respondent contended that the mother of the deceased boy by her affidavit and the letter dated 14.07.2004 requested the Secretary Ministry of Justice to have another Inquiry as she is suspecting foul play. She also complained by her letter dated 7.8.2004 that the petitioner has recorded matters not stated by her in her statement at the inquest and the contents was not explained to her. She gave a detail statement to Sri Lanka Police Headquarters Colombo 1 on 27.04.2004 suspecting foul play and complained that the petitioner has not conducted the inquest in terms of the requirements of law (X2). The complaint of the deceased boy's mother with her affidavit was forwarded to the Gampaha Magistrate. The 1st respondent submitted that the perusal of the inquest proceedings in M.C. Gampaha Case No. 38136 does not reveal an *iota* of evidence to indicate that the boy came about his death by committing suicide. The learned Magistrate in his Order dated 01.11.2004 (P9) has come to the finding that the petitioner has not duly performed his duties as an inquirer. He has observed the following lapses in the inquiry: that the petitioner has not visited the seen, he has not ascertained the identity of the person who brought the body of the deceased to the mortuary. The evidence of the doctor is to the effect that the injuries would have been caused as a result of train accident or the boy being pushed on to ongoing train. The 1st respondent further contended that the petitioner as an inquirer was not entitled in law

to investigate the crime, and the petitioner as inquirer had only to record the cause of death. The petitioner's verdict of suicide is not supported by evidence and has impeded the progress of investigation on the part of the Police and has resulted in a miscarriage of justice. In this regard an explanation was called by his letter dated 25.08.2004 (P6) on the directions of the 2nd respondent as to why he came to the finding that the boy came about his death by committing suicide. The petitioner by letter marked P7 has explained that he came to the conclusion by examining the injuries found on the deceased that the death was due to suicide.

It is obvious that only by examining the injuries on the deceased who was run over by a train one cannot come to the conclusion that the death was due to suicide, accident or murder. The 1st respondent also submitted that by his letter dated 10.09.2004 observations were called from the learned Magistrate and he has observed that the petitioner has not duly performed his official duties and his services should be suspended till the conclusion of the inquiry.

The 1st respondent submitted that the learned Magistrate's observation and other facts in the said inquiry clearly established that the petitioner is an incompetent inquirer and to allow the petitioner to continue to function as an inquirer would obstruct the cause of justice and would lead to travesty of justice.

The Appointment of an Inquirer (Coroner) is provided under section 108 of the Criminal Procedure Act No. 15 of 1979. Under this section the Minister has discretion to appoint any person by name or by office to be an inquirer for any area. In this instant the petitioner by letter dated 23.11.1990 (P1) was appointed as an Inquirer (Coroner) with effect from 1.12.1990 for a period of three years. His services were extended time to time up to 18.12.2004 by letter dated 23.10.2003. The Ministry of Justice by its Circular No. 15/94, dated 21/6/2004 marked P2 has extended the retirement age of the inquirer from 65 to 70. But this extension has to be made yearly by the Minister after consideration of the application of the inquirer.The petitioner was given the extension time to time under the said circular yearly after consideration. On the said complaint made by the mother of a deceased boy, the respondents after

investigation and after calling for explanation from the petitioner found that the petitioner has not performed his duties as expected to be done by an inquirer and he has acted in an unbecoming manner. In these circumstances the extension given to the petitioner upto 18.12.2004 was terminated on 8.10.2004 (P8) for the reason stated in the said letter.

The petitioner contended that he was not served with a Charge Sheet regarding the alleged lapses on his part and the show cause letter marked P7 was based on the unfounded allegation of the deceased mother and he was not given an opportunity to be heard in defence before the arbitrary termination of his service and therefore the protection of the rules of natural justice has been denied to him. In these circumstances the petitioner seeks to quash the decision to terminate his service as an inquirer and a *Mandamus* directing the respondents to grant extension up to petitioner's 70 years.

The *audi alteram partam* rule requires that there should be prior notice and hearing for the person whose interests would be adversely affected by the act or decision in question. How this principle applies in any given case is depend upon the particular set of circumstances. More specifically, the wide range of cases in which the *audi alteram partam* principle is held applicable ensures that as a principle it can have no fixed and immutable content . Tuker LJ emphasised this point in *Russell* v *Norfolk*[1] at 118 D-E:

> "There are no words which are of universal application to every kind of inquiry .... The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth."

"It is conceivable therefore that there may be situations in which natural justice does not require that a person must be served with a charge sheet and an inquiry should be held. But a hearing should be given by calling for explanation or by requesting to explain a particular conduct. In this case the petitioner was only appointed as an inquirer under the Criminal Procedure Act. The appointment letter does not give the terms and conditions of the

appointment. The said appointment was not covered by the Establishment Code or any other Rule or Regulation for the authorities to follow the procedure set out in the Code, Rule or Regulation to terminate his service. The petitioner at the time of termination of his service was in extension and the extension is given after consideration of his ability. When the appointing authority is of the view that the ability of the petitioner is lacking he could refuse to give any further extension. But in this case the respondents before the expiration of the period of the extension has terminated the services of the petitioner therefore the petitioner has a legitimate expectation to serve until the end of his extended period of service. In these circumstances the petitioner is entitled for a hearing. In *Premachandra* v *Jayawickrema*(2), at 105 the court held;

> "There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."

That applies to powers of appointment and dismissal, *Bandara* v *Premachandra*(3) and *Tennakoon* v *de Silva*.(4) In *Jayewardene* v *Wijeyetilleke*(5) SC held:

> "Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability, in administration; and this means – in relation to appointments to, and removal from, offices involving powers, functions and duties which are public in nature – that the process of making a decision should not be shrouded in secrecy, and that there should be no obscurity as to what the decisions is and who is responsible for making it."

The extent and the nature of hearing in relation to a termination of service depends on the circumstances of the case, the nature of the service, the rules under which the respondent is acting, the subject matter that is being dealt with. As I have discussed above there is no rule governing the petitioner's

appointment and the appointment, extension and termination of service as an inquirer is in the discretion of the relevant minister. The petitioner is in extension of his service and his extension was coming to an end in December 2004 and the petitioner's service was terminated in October 2004 two months before the date on which the petitioner's extension was coming to an end. This was done after having given the petitioner a hearing by way of a show cause letter. In view of the facts and circumstances of this case the petitioner cannot claim that a charge sheet should have been served on him and an inquiry would have been held. The explanation given by the petitioner was not accepted by the respondents therefore the respondents terminated the services of the petitioner. In these circumstances the petitioner cannot state that the rules of natural justice have been denied to him. As the petitioner has not shown any other ground to challenge the said order this court dismisses this application without costs.

Application dismissed.

KARUNARATNE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 162/01
H.C. AMPARA 156/96
MAY 8th, 9th, 25th 2007

Penal Code – Section 296 – Criminal Procedure Code – Section 414(1) – Bad Character of deceased wrongfully attributed to accused? – Mistake made by Court by a wrong reference to the accused– Miscarriage of justice? Evidence insufficient? – Fire Arms Ordinance – Section 2(9) – Evidence Ordinance – Section 54, Section 114 – "Ellenborough dictum".

The accused-appellant was indicted for murder; after trial sentenced to death. In appeal, it was contended that the bad character of the decreased was wrongly attributed to the accused, when the character was not at all relevant, and that the evidence was insufficient to prove the charge and that the trial Judge wrongly applied the *"Ellenborough dictum".*

Held:

(i) Bad character of the deceased generally is irrelevant.

Per Ranjith Silva, J.,

> "This is only a practice hardened to a rule but there is no provision in the Evidence Ordinance or any other enactment which precludes evidence of bad character of the deceased being led."

(ii) A mistake made by the Trial Judge by a wrong reference to the accused has not resulted in either causing any prejudice to the accused or a miscarriage of justice and is manifestly clear that the Trial Judge did not make any mistake as to who he was referring to.

(iii) *Ellenborough principle* would apply only where there is a 'strong *prima facie*' evidence already existing against the accused and not to augment or strengthen a weak case and to convert it to a strong *prima facie* case.

(iv) The prosecution has made out a strong *prima facie* case against the accused. The accused failed to explain away the highly incriminating circumstances against the accused.

APPEAL from the Judgment of the High Court of Ampara.

Cases referred to:

(1) *Parkes* v *The Queen* – 1976 3 All ER 380-383

(2) *R* v *Mitchel* – 1892 – 17 Cox CL 503 at 508

(3) *R* v *Raviraj* – 85 Cr. App. P.93

(4) *Sarwan Singh* v *State of Punjab* – 2002 AER SC 111, 3652 at 3655, 3656

(4a) *Boby Mathew* v *State of Karnataka* – 2004 – 3 Cri LJ 3003

(5) *Himachal Pradesh* v *Thakur Dass* – 1983 – 2Cri LJ 1694 at 1983

(6) *Motilal* v *State of Madya Pradesh* – 1990 Cri LJ No. C 125 M.P.

(7) *Phillipu Mandige Nalaka Krishantha Kumara Thisera* v *Attorney-General* – CA 87/2005 – CAM 17.5.2007

(8) *Illangathilake* v *The Republic of Sri Lanka* – 1984 Sri LR 38

(9) *Ajith Samarakoon* v *The Republic of Sri Lanka* (Kobaigane Murder) 2 – SLR at p. 209

(10) *R.* v *Cochrane* – Guruneys Report 479

(11) *R* v *Burdette* – 1820 4B Alderman Reports 95 at 120

(12) *Inspector Arendstz* v *Wilfred Peiris* – 10 CLW 121

(13) *R* v *Seeder Silva* – 41 NLR 337

(14) *K* v *Wickremasinghe* – 42 NLR 313

(15) *K* v *Pieris Appuhamy* – 43 NLR 410

(16) *K* v *Endoris* – 46 NLR 490

Mohan Pieris P.C. with *Widura Ratnayake* for the appellant
Shavindra Fernando, D.S.G. for the respondent.

Cur.adv.vult.

July 2, 2007

RANJITH SILVA, J.

The accused-appellant Kammalpitiya Gethara Karunaratne alias Suranimala (accused) was indicted in the High Court of Ampara for the murder of Jayasinghe Arachchilage Somapala at No. 16 Colony on 19.07.1990, an offence punishable under section 296 of the Penal Code.

The prosecution led the evidence of seven witnesses including the evidence of the medical officer and two police officers. At the conclusion of the evidence for the prosecution the Learned High Court Judge called for a defence and the accused opted to remain silent. After trial the learned Judge on 22.11.2001, found the accused guilty of murder and sentenced the accused to death.

The accused, aggrieved by the aforesaid, conclusions, findings, judgment and the sentences has preferred this appeal to this Court praying *inter alia* that the said conviction and sentence be set aside.

The Learned Counsel for the accused argued the appeal on the following grounds. (as understood by me)

(a) That the bad character of the deceased was wrongly attributed to the accused, when the character of the accused was not at all relevant causing substantial prejudice to the accused.

(b) The evidence led before the High Court was insufficient to prove the charge levelled against the accused beyond reasonable doubt. Especially with regard to the identity of productions, in that the prosecution failed to establish the nexus between the evidence regarding the gun, alleged to have been used by the accused and the gun which was produced in Court.

(3) The Trial Judge wrongly applied the *Ellenborough Dictum* against the accused in the absence of a strong *prima facie* case against him.

The Facts

In the morning on the day of the incident that is on 19.07.1990 witness George Perera who happened to be a principal of a school at the relevant time left his house in order to tie his cattle for the purpose of grazing. On his way he had to go passing the premises of the deceased and the deceased who met the witness near his premises requested the witness to help him fill the house holders list. The witness having acceded to the request informed the deceased that he would be back soon after attending to his cattle and would help the deceased. When the witness was returning home having tied his cattle, after about 30 minutes, close to his house he heard a report of a gun from the direction of his house. At that time the witness was approaching his house and within about a minute he came to the turn off to his house from where he saw the deceased fallen on the ground and the accused standing with a gun in his hand in his compound. Upon seeing this, witness confronted the accused and questioned the accused as to what he had done assuming that the accused had shot the deceased. "අයියේ නිමල් කරුණාරත්න මොකක්ද කළේ" . From the tone and tenor of the words used by the witness it is seen that the question was undoubtedly an accusation levelled against the accused lamenting the cruel act of the accused. Accused had simply gaped at him without replying. According to the evidence (*Vide*. The evidence of W.M. Somawathie at page 57 of the brief) it appears that the witness had grappled with the accused and taken the gun away from the accused although witness George Perera does not say so in so many words but merely says that the gun came to his hands suggestive of some sort of effort on the part of the witness to snatch the gun from the accused. After the gun was taken away from the accused the accused had walked away from the premises of the witness without a protest and the witness handed over the gun to witness Somawathie, the wife of the Chief Gramarakshaka who happened to be there at the scene. Somawathie had witness only the scuffle between George Perera and the accused when witness George Perera grappled with the accused for the gun. Witness Somawathie kept the gun at her place

till the police took the gun into their custody later. The Police officer who took the gun into his custody from the chief gramarakshaka's house had noted the number of the gun and the same gun bearing No. 8882171 was marked in evidence at the trial in the High Court. I cannot see a break in the chain. It was the same gun that George Perera took from the accused that was handed over to witness Somawathie and the same gun was handed over to the police by Somawathie which was sent to the Government Analyst and later produced in Court at the trial. The PR number according to the evidence was 189 whereas when it was marked in evidence at the trial the PR number was 152/97. There is a discrepancy with regard to the PR number of the gun yet the number of the gun was the same and therefore the discrepancy which according to the police witness was 'unexplainable' looses its significance. In fairness to the accused it must be noted that there is no evidence to show that the investigating officers carried out any test such as searching for traces of gun powder or testing for the smell of gun powder, to ascertain whether a shot had been fired from the gun recently. In fact the police officers who carried out investigations failed to observe the empty cartridge in the barrel of the gun which they claimed to have been discovered in courts, later. What is strange here is that the police were unable to find any wads, at least one of them that are normally found at a scene when a cartridge is discharged from a gun.

The son of the deceased Jayasinghe in his evidence stated that the deceased and the accused were friends but had a dispute about a week before the incident and that after the dispute the accused did not visit the deceased.

The medical evidence was that the death was due to a gun shot injury fired from a distance of about 20-25 yards.

The prosecution did not lead the evidence of the government analyst but simply led in evidence what was stated in his report dated 13.06.1991 marked P3. Document P3 has been received in evidence without any objections from the defence. (Vide page 111 of the brief) According to this report, the government analyst has stated that the gun could be classified as a gun as defined in S.2(a) of the Fire Arms Ordinance and that the empty cartridge had been fired from the gun, both of which were sent to the Government Analyst for examination and report.

S.414(1) of the Criminal Procedure Code reads thus; (only the relevant portions are reproduced below).

'Any document purporting to be a report under the hand of the Government Analyst ..... upon any person matter or thing duly submitted to him for examination or analysis and report ..... may be used as evidence in any inquiry, trial or proceeding under this code although such officer is not called as a witness.'

The identity and the regularity of the report of the Government Analyst could be presumed under section 114 of the Evidence Ordinance.

I find on a perusal of the evidence that the evidence of the witnesses for the prosecution especially with regard to the main issues, had gone virtually unchallenged. The credibility of the witnesses including the 1st witness George Perera was never challenged or doubted. With regard to the credibility of witnesses I shall be dealing with later in this Judgment.

First Ground of Appeal

The Counsel for the accused vigorously contended that the trial Judge started the evaluation of evidence by committing a fundamental error by attributing the evidence of bad character of the deceased to the accused. He argued that firstly, the Trial Judge could not have taken the bad character of the accused into consideration and secondly, the Trial Judge wrongly attributed the bad character of the deceased to the accused and thereby misdirected himself on the facts to the detriment of the accused. I find that the Counsel for the accused during the cross-examination of witness George Perera had asked a number of questions in order to show that the deceased was a bad egg in the area who walked about carrying a gun, that he was a person who had a murder case against him and that many people in the village were not on good terms with the deceased. (vide. pages 58, 59 and 60). At the end of the cross-examination of witness George Perera, the trial Judge questioned the witness in further clarification of the questions asked in cross-examination. The bad character of the deceased generally is irrelevant (**Vide. Bench Book, Law of Evidence page 139**), and the Trial Judge should not have allowed such evidence to go in as the character of the deceased was not in issue in this case. This is only a practice

hardened into a rule but there is no provision in the Evidence Ordinance or any other enactment which precludes evidence of bad character of the deceased being led. Even if it is assumed that the trial Judge was not aware of this principle, yet it is inconceivable that the Learned Judge, as a person trained in law, with a legal back ground and experience was not aware that the bad character of the accused was irrelevant. In fact on a perusal of the evidence of the witnesses clearly show that evidence of bad character of the accused had not been led.

S.54 of the Evidence Ordinance

"In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character.'

Explanation 1 – This section does not apply to cases in which the bad character of any person's itself a fact in issue.

I have no doubt that the Learned Judge was aware of this basic legal principle and certainly would not have allowed any evidence of bad character to go in as evidence let alone considering such evidence of bad character of the accused in the evaluation of evidence in arriving at a decision. Reading through the Judgment of the Learned Judge one could arrive at but one conclusion and that is that the learned Judge has used the word 'accused' instead of 'deceased' by an oversight. (Vide. pages 58, 59 and 60 of the brief.) I arrive at this conclusion as I find that at page 3rd, 4th and 5th lines of the Judgment (page 120 of the brief) the learned Judge has stated referring to the evidence of George Perera concerning Somapala the deceased that the witness had stated in evidence that he did not see the deceased carrying a gun when he saw the deceased on the day of the incident. In the Judgment from pages 118 to 123 the Learned Judge has narrated the evidence in reference to the evidence in cross-examination given by witness George Perera. It is certain on a reading of the entire paragraph (1st paragraph page 3 of the judgment - page 120 of the brief) that the learned judge was referring to the deceased and not the accused. For the reasons I have stated above I hold that the mistake made by the Trial Judge by a wrong reference to the accused has not resulted in either causing any prejudice to the accused or a miscarriage of justice and is manifestly

clear that the learned High Court Judge did not make any mistake as to who he was referring to. On the other hand after reading through the judgment carefully, I find that the learned Trial Judge had not relied on the evidence of bad character in favour or against the accused, in arriving at his decision although he had just referred to that evidence in his judgment.

Second Ground of Appeal

The main thrust of the defence was that there was no direct evidence to prove that it was the accused that fired the fatal shot. The prosecution had to depend on circumstantial evidence in order to bring home the charge against the accused and that the evidence led by the prosecution fell short of proving the case against the accused beyond reasonable doubt. The learned Counsel for the accused further contended that the trial Judge committed a fundamental error in law by applying '*Ellenborough' Dictum* when there wasn't a strong *prima facie* case made out against the accused by the prosecution.

The learned Deputy Solicitor General contended citing the judgment of Lord Diplock in *Parkes* v *The Queen*[1] that the silence on the part of the accused together with his conduct, in the face of the accusation levelled against him by witness George Perera shortly after the incident amounted to an admission that he shot the deceased.

The facts of that case were, a mother of a girl who was found with stab wounds asked the appellant why he had stabbed her. The appellant made no reply, but when the mother threatened to hold him until the police arrived he drew a knife and tried to stab her. It was held in that case that the appellant's silence coupled with his subsequent conduct, was a matter from which it could be inferred that the appellant accepted the truth of the accusation.

Lord Diplock in *Parkes* v *The Queen (supra)* observed as follows. I quote "Now the whole admissibility of statement of this kind rests upon the consideration that if a charge is made against a person in that persons presence it is reasonable to express that he or she will immediately deny it, and that the absence of such denial is some evidence of an admission on the part of the person charged and of the truth of the charge. Undoubtedly when persons are speaking on even terms, and a charge is made, and the person

charged says nothing, and express no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

My efforts, to find more authorities pertaining to this subject, were not in vain. It was held in the case of *R* v *Mitchel*[2] at 508 by Cave, J. "Undoubtedly when persons are speaking on even terms, and a charge is made, the accused person ought to reply, and if he does not, it is some evidence to show that he admits the charge to be true."

In *R* v *Raviraj* [3] C.A. Stocker, L.J. observed as follows "Guilt may be inferred from unreasonable behaviour of a defendant when confronted with facts which seems to accuse him." (*Vide*. The book titled Criminal Pleadings, Evidence and Practice 15/390 Archibald 1997).

The learned Judge has observed that the accused had neither challenged the evidence led by the prosecution nor the credibility of the prosecution witnesses. The evidence of the first witness George Perera has gone virtually unchallenged.

In *Sarwan Singh* v *State of Punjab*[4] "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted." This case was cited with approval in the case of *Boby Mathew* v *State of Karnataka*[4a].

In *Himachal Pradesh* v *Thakur Dass* [5] at 1983 V.D. Misra CJ held: "Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."

"Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact." *Motilal* v *State of Madya Pradesh*[6].

For a recent case I would like to refer to the Judgment of His Lordship Sisira de Abrew, J in *Pilippu Mandige Nalaka Krishantha Kumara Thisera* v *A.G.*[7] I quote "....I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not

disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."

The learned Trial Judge has analyzed the evidence against the accused and observed that the accused had not challenged the evidence of the witnesses for the prosecution on the facts or with regard to their credibility. He had cautioned himself that the silence of the accused alone would not be sufficient to prove the case against the accused and concluded citing *Illangathilake* v *The Republic of Sri Lanka* (8) that the prosecution had established a strong case against the accused that warranted the application of the *Ellenborough Dictum*.

In this regard I quote Lord Ellenborough "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 refused to do so where a strong *prima facie* case had been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

In *Ajith Samarakoon* v *The Republic*(9) at 209 it was held: *Per* Jayasuriya, J. "The principle laid down in *R* v *Cochrane*(10) *and R* v *Burdette*(11) at120 do not place a legal or persuasive burden on the accused to prove his innocence or to prove that he committed no offence but these two decisions on proof of a *prima facie* case and on proof of highly incriminating circumstances shift the evidential burden to the accused to explain away the highly incriminating circumstances when he had both the power and the opportunity to do so". (See also; *Inspector Arendstz* v *Wilfred Peiris* (12), *R* v *Seeder Silva*(13), *King* v *Wickramasinghe*(14), *King* v *Peiris Appuhamy*(15), King v Endoris(16).

Thus it is seen that "*Ellenborough principle*" would apply only where there is 'strong *prima facie* evidence already existing the accused and not to augment or strengthen a weak case and to convert in into a strong *prima facie* case. On a careful analysis of the evidence in the instant case I find that the evidence is sufficient to establish the following facts.

(1) The fact that witness George Perera saw the accused with a gun in his hands and the deceased fallen on the ground, a few yards away, with gun shot injuries in the compound of the witness.

(2) The fact that witness George Perera heard the report of a gun near the turn off to his house one minute immediately prior to his arrival at the scene.

(3) The fact that there was only the accused and no body else at the scene at the relevant time.

(4) The fact that the accused maintained complete silence when he was questioned by the witness George Perera in an accusing tone. (to wit. Ayse Karunaratne what have you done?)

(5) The fact that the accused walked away after his gun was snatched away from him and did not make a complaint against witness George Perera for having forcibly taken his gun.

(6) The fact that a week prior to the incident the accused had a dispute with the deceased.

(7) The fact that the Government Analyst had expressed his opinion that the empty shell that was found inside the barrel of the gun had been fired from that gun. Both these items were sent to him for examination and report. (P2 has been fired from P1).

The prosecution in the instant case has made out a strong *prima facie* case against the accused. The accused failed to explain away the highly incriminating circumstances against the accused. The evidence in this case, in my opinion is sufficient to warrant the application of the *Ellenborough Dictum.*

For the reasons I have adumbrated on the facts and the law I find no justification to interfere with the findings, conclusions or the adjudications of the learned Trial Judge. Accordingly I affirm the conviction and the sentence and dismiss this appeal

SISIRA DE ABREW, J. - I agree.

Appeal dismissed.

KAMALA PERERA
v
LIYANAPATHIRANA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 604/95 (F)
DC COLOMBO 6393/RE
MAY 30, 2007

Rent Act 5 of 1972 – Section 28 – Section 28 (1) – Non occupation of premises – Non-occupying tenant – Constructive occupation? – Genuine and lawful cause – Landlord not informed – Possession requires not merely an animus possdendi but a corpus possesionis – Exclusive possession of dependents of the tenant. Possession through outsiders – Difference.

Action was filed to evict the defendant-appellant tenant in terms of Section 28 of the Rent Act. The defendant-appellant's position was that he left for Singapore for employment for a total period of 3 years, and the defendant's mother and sister were kept at the premises, and she had the intention to return at the end of the period of employment. It was the position of the defendant-appellant that he had 'constructive occupation' as a result of his mother and sister occupying the premises.

The plaintiff-respondent contend that, the defendant-appellant was not in possession for a continuous period of 4 years, and that there was no reasonable cause for non-occupation, and the electoral registers prove the occupation of the premises by outsiders.

The trial Judge held with the plaintiff-respondent.

Held:

(1) Section 28 envisages a reasonable cause of the tenant to be absent from the premises in question for a continuous period of 6 months to avoid ejectment. It has to be genuine and a lawful cause to get the protection of the statue for a tenant.

(2) The period spent outside the Island by the tenant is admitted, the version of the tenant does not indicate as to whether the landlord was informed about the departure.

(3) There is an absence of exclusive possession of the dependents of the tenant. There were outsiders in the premises. Possession by unknown persons should be only with the landlords' consent.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

(1) *Subendranathan* v *Dr. S. Ponnampalam* – 1985 – Sri LR 205
(2) In *Re Samy – Hussain Appellate Law Recorder* – 2005 (2) 9
(3) *Weerasingham and another* v *De Silva* – 2002 – 2 Sri LR 233
(4) *Fonseka* v *Gulamhussein* – 1978/79 – 2 Sri LR 312
(5) *Siththi Fausiya* v *Harun Kareem* – 1990 – 2 Sri LR 154
(6) *Mahinda* v *Periapperuma* – 1996 – 2 Sri LR 90
(7) *Pir Mohamed* v *Kadhibhoy* – 60 NLR 186
(8) *Skinner* v *Geary* – 1931 – 2 KB 546
(9) *Amarasekera* v *Gunapala* – 73 NLR 469

V. Kulatunga for defendant-appellant
C.E. de Silva for plaintiff-respondent

September 4, 2007

ANIL GOONERATNE, J.

This was an action filed in the District Court of Colombo for ejectment of the tenant (defendant-appellant) in terms of section 28 of the Rent Act on the basis of non-occupation of residential premises for a period of 6 months without any reasonable cause and damages. The appeal arises from the judgment dated 18.7.95 entered in favour of the respondent landlord, as prayed for in the plaint.

The fact of tenancy and that the premises is a residential premises were admitted at the trial. Parties proceeded to trial on 12 issues. The defendant tenant filed answer through her power of Attorney holder and pleaded *inter alia* that the defendant-appellant tenant left for Singapore for employment on or about 18th August 1984 on a contract of employment for period of two years initially, which was extended for a further period of 2 years. The defendant-appellant contends the following matters.

(a) Defendant's mother and sister were kept at the premises in suit with the intention of the defendant's return to the island at the end of the period of employment.

(b) Plaintiff admitted in cross examination that mother and sister were at the premises in dispute.

(c) Defendant went abroad with the intention of returning to Sri Lanka.

(d) Defendant maintains constructive occupation as a result of her sister and mother occupying the premises.

The substituted-plaintiff-respondent contends.

(i) Defendant-appellant was not in occupation of the premises in suit from 18.8.84 for a continuous period of 4 years. As such the burden is on the defendant to prove, reasonable cause for non-occupation.

(ii) The electoral registers marked P2-P4 proves occupation of the premises by outsiders and persons unknown to the original plaintiff.

(iii) A valid notice to quit dispatched to defendant terminating tenancy.

(iv) Defendant failed to prove a reasonable cause as required in terms of section 28(1) of the Rent Act.

Several authorities were cited by counsel on either side. I refer to those authorities very briefly and demonstrate below the gist of it, before considering the evidence and the judgment of the District Court, to ascertain the position urged by both parties.

(a) *Subendranathan v Dr. S. Ponnampalam*[1] occupation by the tenant's wife and children was constructive occupation by the tenant.

In the case in hand it is the position of the tenant that during her absence the old mother and sister occupied the premises.

(b) In *Re Samy*[2] at page 9. If the premises are occupied exclusively by the dependants in the absence of the tenant, the landlord should be informed of such occupation and landlords should consent.

It is my view also that the landlord as the owner of the premises should be aware of the state of his own premises and as to who and who are occupying the premises.

(c) *Weerasingham and another* v *De Silva*[3] temporary absence of tenant with intention to return within a reasonable period should not deprive tenant of the protection under the Rent Act. However if the house is kept closed or exclusively occupied by strangers, tenant cannot avert eviction.

(d) *Fonseka* v *Gulamhussein*[4] occupation through a license is not protected by section 28(1) of the Rent Act, unless there is reasonable cause. Otherwise tenant is liable to be ejected. Consent of landlord if some other person is placed in the premises would be necessary.

(e) *Siththi Fausiya* v *Harun Kareem*[5]. No formal requisites for a notice of termination except period of duration to quit specified by statute.

(f) *Mahinda* v *Periapperuma*[6]. Proper period of notice is relevant.

The eviction of the tenant is relied upon by the respondent in terms of section 28(1) of the Rent Act. The said section reads thus ...

"Notwithstanding anything in any other provisions of this Act, where the tenant of any residential premises has ceased to occupy such premises, without reasonable cause, for a continuous period of not less than six months, the landlord of such premises shall be entitled in an action instituted in a court of competent jurisdiction to a decree for the ejectment of such tenant form such premise."

The said section envisages a reasonable cause of the tenant, to be absent from the premises in question for a continuous period of 6 months to avoid ejectment. It has to be a genuine and a lawful cause to get the protection of the statute for a tenant, to resist eviction. It is a special statutory right given to the landlord to eject the tenant.

The District Judge has taken the view that defendant's evidence does not disprove the plaintiff's evidence and plaintiff's version. The

learned District Judge has accepted the evidence of the plaintiff. It is observed by the Trial Court Judge that plaintiff testified that one Daya Weerasekera was having a wood workshop in the premises and that the plaintiff had not given his consent for such purpose. Further the plaintiff had not been informed about defendant's departure from the island to Singapore. Extracts from electoral registers were marked in evidence as P2 – P4, and Daya Weerasekera's name had been included in those documents pertaining to the premises in dispute. The Trial Court Judge also observes that defendant does not deny Daya Weerasekera's role in the premises and as such plaintiff's version is more probable on this aspect and plaintiff's version is acceptable. Defendant's stay in Singapore for 2 years and extension of her stay for a further 2 years is not disputed.

The evidence relied upon by the appellant could be summerised as follows. As demonstrated in the written submissions.

(a) The Power of Attorney holder gives the reason for her sister leaving the island to seek employment. That is to find money for a family member to cover medical expenses.

(b) Tenant would return to the island and occupy the premises.

(c) Since August 1984 rent paid from the money recovered by her sister (tenant).

(d) Landlord's son visited the premises in October 1984.

(e) Premises occupied by family member and not by any outsider.

The period spent outside the island by the tenant is admitted. The version of the tenant does not indicate as to whether the landlord was informed about the departure from the island. Daya Weerasekera's role or occupation of the premises, is also not specifically denied by the appellant. As such Trial Court Judge cannot be faulted for accepting respondent's version. Claim of the landlord must necessarily be preferred to that of a non-occupying tenant. Daya Weerasekera was in no sense privy to the contract of tenancy.

In the written submissions the appellant emphasis the fact that the tenant had the intention to return to Sri Lanka. The position of Daya Weerasekera was denied by the tenant. Tenant also suggest

constructive tenancy by occupation of her mother and sister the power of attorney holder. The answer given by the District Judge to issue No. 1 and 5 is faulted by the appellant.

The evidence of the original landlord is that he visited the premises in question in December 1984 and found several outsiders inside the premises. It is also in evidence that no permission had been given to any person of Daya Weerasekera to have a wood workshop. Documents P1-P4 has been admitted in evidence, and there was no objection to those documents at the close of the case.

The learned District Judge has preferred to accept the version of the respondent and rejected the story of the appellant in connection with the premises in question. However it is apparent from the evidence placed before the original court that no permission of landlord was obtained prior to departure of the tenant from the island and that there is an absence of exclusive possession of the dependents of the tenant. There is no reason to disbelieve the evidence of the original landlord who maintained that there were outsiders in the premises. Long absence of the tenant is also not disputed. Possession by unknown persons should be only with landlords consent. I cannot see any such consent given by the respondent from the evidence led at the trial.

At this point I would also refer to some case law and certain authorities where the position of non-occupation of tenant has been discussed. Although earlier view as in the case of *Pir Mohamed* v *Kadhibhoy*[7] Basnayake, J. disapproved adoption of English Law principles to our Rent Restriction Act, one cannot in todays context reject English Law principles as regards the Rent Act No. 7 of 1972 (with Amendments) to ascertain the question of non-occupation.

In *Skinner* v *Geary*[8] Tenant Geary had lived elsewhere for ten years, and the premises were occupied by his relations and by his sister, presumably as tenants at will. The occupation of the relations and the sister was not for the purpose of preserving the house for the tenant, and at no time did the tenant contemplate residing in the house again, **Scrutton L.J.** dealt with the history of the Rent Restriction Acts in England, and observed that the statutory tenant's right was not a right of property but purely a personal right to occupy the premises. In his view, the fundamental principle of the Act was "to

protect a resident in a dwelling house, not to protect a person who is not resident in a dwelling house."

In *Amarasekera* v *Gunapala*(9),Alles J. had no hesitation in holding that the defendant came within the definition of a 'non-occupying tenant'. So far as the gist of this concept was concerned, reliance was placed on the law as expounded in the English authorities. In Robson v Headland. Lord Tucker, speaking for the Court of Appeal, applied the principle of a 'non-occupying tenant' to the case of a divorced wife who, the Court held, was a stranger to the husband. In *Brown* v *Brash and Ambrose* the Court of Appeal (Scott, Bucknill and Asquith L.JJ). Sought to explain what was meant by a non-occupying tenant'. Asquith L.J. conceded that the absence of the tenant from the premises may be denied if he coupled and clothed his inward intention with some formal, outward and visible sign such as installing a caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his ultimate home-coming. Acquith L.J. said "Possession in fact requires not merely an *animus possidendi* but a *corpus possessionis* – namely, some visible state of affairs in which the *animus possidendi* finds expression.

Therefore I am inclined to accept the views of the learned District Judge and hold that the appellant has not satisfied the Original Court that there was a reasonable cause to absent herself for over 6 months from the premises in question. As such the appellant cannot seek to get the protection of the Rent Act. Therefore the respondent would be entitled to a decree for the ejectment of the tenant from the premises in dispute. The judgment of the District Court is affirmed. Appeal dismissed with costs, fixed at Rs. 10,000/-.

EKANAYAKE, J. - I agree.

Appeal dismissed.

WANNAKU ARACHCHILAGE GUNAPALA
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
C.A. 70/2004
H.C. NEGOMBO 115/2000
July 10, 2007

Penal Code – Section 296 – Convicted – Weapon used not produced – Is it fatal to a conviction? Evidence Ordinance Section 60(1)(2) – Section 91, Section 165 – Statement of facts made by witness not challenged – What is the conclusion?

Held:

(i) Non-production of a material object is not fatal to a conviction.

(ii) Provisions of the Evidence Ordinance itself have made a clear distinction with regard to the documentary evidence on the one hand and real evidence on the other.

(iii) Absence of cross-examination of a prosecution witness of certain facts leads to the inference of admission of that fact.

APPEAL from the Judgment of the High Court of Negombo.

Cases referred to:

(1) *Hichin* v *Ahquirt Brothers* – 1943 All ER 722
(2) *Lucus* v *William and Sons* – 1892 2 QB 113
(3) *Rex* v *Francis* – 1874 Law Reports 2 CCR 128 at 132
(4) *Sarwan Singh* v *State of Punjab* – 2002 – AIC SC (iii) 3652 at 3655, 3656,
(5) *Boby Mathew* v *State of Karnataka* – 2004 3 Cri LJ 3003
(6) *Himachal Pradesh* v *Thakuar Dass* – 1993 2 Cri 1694 at 1983
(7) *Motilal* v *State of Madya Pradesh* – 1990 Cri LJ No. C 125 MP
(8) *Edrick de Silva* v *Chandradasa de Silva* – 70 NLR 169 at 170

Jagath Abeynayake for accused-appellant.

Shavindra Fernando, DSG for Attorney-General.

Cur. adv. vult

July 2, 2007

RANJITH SILVA, J.

The accused-appellant was charged in the High Court of Negombo for having committed the offence of murder an offence punishable under section 296 of the Penal Code. After trial the accused was found guilty of the charge and was sentenced to death. Aggrieved by the said judgment and the sentence the accused-appellant has preferred this appeal to this Court. At this stage of the argument learned Counsel for the appellant confines himself to only one ground of appeal namely that the High Court Judge erred in convicting the accused, in the absence of any evidence to prove that the accused stabbed the deceased with the weapon that was mentioned in the charge. Further he contends that the weapon used was never produced in Court and was not identified by the Doctor to be the murder weapon or a like weapon that could have caused the injuries. A production in a case is only one of the circumstantial evidence against an accused in a case. When there is cogent evidence given by eye-witnesses sufficient to warrant a conviction it would not always be necessary to produce the weapons used in the crime.

I hold that non production of a material object is not fatal to a conviction. The provisions of the Evidence Ordinance itself have made a clear distinction with regard to documentary evidence on the one hand and real evidence on the other. Section 91 of the Evidence Ordinance excludes parole evidence whereas section 60(1) and (2) of the Evidence Ordinance enacts that if the oral evidence refers to a fact which could be seen or perceived by any other sense or in any other way, it must be the evidence of the witness who says that he saw or perceived that fact by that sense or in that manner, that should be led to prove that fact, although the Court **may, if it thinks fit, require the production of such material thing for its inspection**. (Section 165 of the Evidence Ordinance) Thus the prosecution was entitled to lead oral evidence of a witness without producing the material object.

Although the English law is different on this point in several English cases it was held that the production of a material object is not necessarily fatal to a conviction. Vide the following case *Hichin* v *Ahquirt Brothers*(1), *Lucus* v *William & Sons*(2), *Rex* v *Francis*(3) at 132.

In the circumstances the contention that as the knife was listed as a production in the indictment, its non production at the trial is fatal to the conviction, is an untenable proposition.

We have heard both Counsel in support of their cases. We have perused the evidence in this case and we find that the accused-appellant had not taken up any objection as to the non-production of the weapon in the course of the trial and also we find that the accused had not thought it fit to question the doctor with regard to the nature of the weapon. Eye-witness Roshantha has stated in his evidence that he saw the accused-appellant stabbing the deceased with a pointed weapon. No questions were asked from him in cross examination as to the nature or the type of the weapon used. It appears that the nature or the type of the weapon was not put in issue instead the Counsel for the defense had challenged this witness only on the basis that the witness did not see the incident or the weapon that was used in the commission of the crime. Therefore we find that it is not in the mouth of the accused now, to take up all these objections that were not raised at the trial. In *Sarwan Singh* v *State of Punjab*(4) at 3655, 3656. " It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted." This case was cited with approval in the case of *Boby Mathew* v *State of Karnataka*(5).

In *Himachal Pradesh* v *Thakuar Dass*(6) at 1983 V.D. Misra, CJ held: Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.

"Absence of cross examination of prosecution witness of certain facts leads to the inference of admission of that fact." *Motilal* v *State of Madya Pradesh*(7).

In *Edrick de Silva* v *Chandradasa de Silva*(8) at 170 Justice H.N.G. Fernando observed I quote "Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the word "prove" in section 3 of the Evidence Ordinance, and as trial

Judge or Court must necessarily take that fact into consideration in adjudicating the issue before it".

The witnesses including the medical officer was not questioned or challenged with regard to the nature of the weapon alleged to have been used in the Commission of the Crime.

Therefore the learned trial Judge could not be faulted for convicting the accused on the charge of murder and it cannot be said that the prosecution has failed to prove the identity of the weapon used in the crime beyond reasonable doubt. 80

For these reasons we find that there is no merit in this appeal. We affirm the conviction and the sentence. Accordingly the appeal is dismissed.

SISRA DE ABREW, J. - I agree.

Appeal dismissed.

ABEYAGUNAWARDANE
v
SAMOON AND OTHERS

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA PHC 34/2007 (REV.)
HC COLOMBO 2006/04
NOVEMBER 9, 2007

Evidence (Special Provisions) Act 14 of 1995 – Section 4(1) (a) (b) (c) and (d) – Section 7 (1) (a) – Requirements to be satisfied before admission of video evidence? – Is it mandatory to comply with Section 7 where the document is in the possession of the adverse party? – Do the provisions of Act 14 of 1995 override the provisions in any other law – Poisons Opium and Dangerous Drugs Ordinance Act 13 of 1984?

An Application was made to lead evidence of a video recording. The High Court made order directing the petitioner to satisfy Court of compliance with the requirements of Section 4 (1), (b) (c) and (d) of Act 14 of 1995. After inquiry, the High Court made order refusing the application to lead video evidence. The petitioner moved in revision.

Held:

(1) After the Evidence (Special Provisions) Act 14 of 1995 came into operation admission of video recordings is governed solely under the provisions of the said amendment.

(2) In accordance with Section 2 it is clear that the provisions of the amending Act 14 of 1995 overrides both the Evidence Ordinance or any other written Law. Therefore Section 4 (1) (a) – (d) have to be complied with.

(3) It is apparent that

(1) Evidence led by both prosecution and defence prove that there was no contemporaneous recording of the raid.

(2) Evidence clearly establishes that whatever recording that was made was not kept in safe custody at all material times.

(3) No sufficient precautions were taken to prevent the possibility of such recording being altered or tampered with.

It is clearly seen that provisions of Section 4 (1) (a) – (d) of Act No. 14 of 1995 have not been complied with – the video cassette is not admissible in evidence.

Cases referred to:

(1) *Abeygunawardane* v *Samoon and others* – CA 212/2000 CAM 23.1.2007 (where the same petitioner was directed to make a fresh application with regard to leading of evidence of the video tape).

(2) *Wijepala* v *Attorney-General* – 2001 – 1 Sri LR 46

(3) *Q* v *Abubucker* – 54 NLR 546

(4) *Karunaratne* v *Q* – 69 NLR 10

Faiz Musthapha PC with *Gaston Jayakody, Amarasiri Panditharatne* and *Ms. T. Machado* for 2nd accused-petitioner.

Shavindra Fernando DSG with *Chetiya Goonasekera* SSC for the 3rd complainant-respondent.

November 21, 2007

IMAM, J.

The 2nd accused-petitioner (hereinafter referred to as the "Petitioner" has tendered a Revision Application 34/2007), and a Leave to Appeal Application (39/2007) respectively seeking to set aside the Order of the learned High Court Judge of Colombo dated 28.02.2007 as prayed for in paragraph (a) of the Prayer to the Petition in Revision Application No. 34/2007 and paragraph (c) of the Prayer to the Petition in the Leave to Appeal Application No. 39/2007 01

respectively. The "petitioner" further seeks to lead in evidence the Video recording marked as "2V1A" as prayed for in paragraph (b) – of the Prayer to the Petition of the Revision application (No. 34/2007) and paragraph (d) of Prayer to the Petition of the Leave to appeal Application (No. 39/2007) respectively. One order is made in respect of the aforesaid 2 applications as a matter of convenience, for the parties are the same, the subject matter the same, and the Applications similar.

The facts pertaining to the aforesaid applications are as follows:

The petitioner tendered a Revision Application (P5) bearing No. 212/2006 in another division of this Court consequent to an Interlocutory Order made by the learned High Court Judge of Colombo dated 16.10.2006 having refused an Application by the 'Petitioner' to admit as evidence a Video recording. Subsequently their Lordships S. Sriskandarajah, J. and W.L.R. Silva, J. in CA 212/2006 (P5) and CA 212/2006 on 23.01.2007[1] directed the learned High Court Judge of Colombo to permit the Defence to make a fresh Application with regard to the leading of evidence of the Video tape (2VIA) in the relevant High Court, and to support such Application with relevant evidence. The aforesaid Lordships observed that the Honourable Attorney-General was at liberty to take any objections at the relevant time, and that the learned High Court Judge was entitled to make an order with regard to the Admission and Reception of Evidence. Accordingly, the 'petitioner' made a fresh Application for the Admission of the aforementioned Video evidence on 08.02.2007. On evaluating the Submissions of the learned President's Counsel for the 'petitioner' the learned High Court Judge directed the 'petitioner' to lead evidence to satisfy Court that the requirements of section 4(1)(a) (b) (c) and (d) of the Evidence (Special Provisions) Act No. 14 of 1995 have been complied with before an Order is made. On 28.02.2007 the learned High Court Judge delivered his order refusing the leading of the said Video as Evidence, as the learned High Court Judge held that the 'petitioner' had failed to establish the compliance of section 4(1)(a)(b)(c) and (d) of the Evidence (Special Provisions) Act No. 14 of 1995.

Hence the 'petitioner' has filed this Revision Application before this Court claiming to be aggrieved by the aforesaid Order of the learned High Court Judge of Colombo dated 28.02.2007. The 3rd respondent avers that the Application of the 'petitioner' cannot

succeed for reasons specifically adduced in his Written Submissions. The petitioner was indicted by the Attorney-General along with the 1st and 3rd accused on charges of abetting the 1st accused in the commission of trafficking of approximately 1.290 kilograms of heroin, an offence punishable under the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984. The indictment consisted of six counts.The 1st and 2nd counts in the indictment related to the possession and trafficking by the 1st accused of 1.290 kilograms of heroin respectively, the 3rd count was as mentioned before against the 2nd accused for abetting the 1st accused in the trafficking of 1,290 kilograms of heroin. Count 4 was against the 1st and 3rd accused of possession of 1.290 kilograms of heroin.Count 5 was against the 1st accused of trafficking in 7,796 kilograms of heroin, and count 6 was against the 3rd accused of abetting the 1st accused in trafficking in 1.290 kilograms of heroin. The total quantity of heroin was 23 kilograms, which was considered to be the biggest haul detected in recent years. According to the Government Analyst the quantity of pure heroin was 9.086 kilograms. The detection was made at the Ward Place residence of the 1st and 3rd accused, the street value haul of which was nearly Rs. 450 lakhs. The petitioner is a tri-shaw driver indicted for abetting the 1st accused in the trafficking of heroin, as more fully set out in the indictment.

The case for the Prosecution

The case for the prosecution is that on information received a party of policemen led by IP Priyantha Liyanage, PS Rajitha Manappriya and others, positioned themselves at approximately 7 a.m. on 28.11.2003 outside the Ward Place residence of the 1st and 3rd accused. At about 10.00 a.m. they observed a 3 wheeler (Trishaw) driven by the petitioner being parked outside the **small gate** of the aforesaid premises, after which the petitioner went towards the **small gate** with 2 black polythene bags (referred to as "tulip bags") consequent to which the 1st accused came out, took the 2 bags from the 'petitioner' and went into the house, while the 'petitioner' remained outside. A short while later the 1st accused came out towards the petitioner carrying a polythene bag. They were both apprehended by the police and the polythene bag was found to contain 1.290 kilograms of heroin which constitutes the 1st, 2nd and 3rd charges. On the house being searched by the Police, 7.796 kilograms of heroin was found in a suitcase under the bed in the master bedroom, which

constitutes the subject matter of the other charges. The prosecution is of the view that the video cassette recording cannot be marked as evidence and the relevant statute has been discussed in detail in the course of this Order.

The case for the accused is that the heroin was introduced by officers of the Narcotic Bureau at the instigation of Chief Inspector Amarajith the then Officer-in-Charge of the Narcotics Bureau who had fallen out with the 1st accused. According to the defence witness Sunil Fonseka, a large consignment of heroin was seized by officers of the Narcotic Bureau from the residence of the 1st accused on 28.11.2003, amongst which officers namely IP Liyanage and PS Rajitha Manappriya were present. The position of the accused is that the Police team waited near the Dewatagaha Mosque, until the three-wheeler driven by the 'petitioner' arrived, consequent to which the 'Petitioner' was asked as to whether he was involved in distributing heroin. It was contended by the accused that the 'petitioner' was assaulted by several police officers who included PS Manappriya. The 'petitioner' complains that he was pushed at gun point onto the rear seat of the three wheeler, restrained by the police officers, that PS Manappriya drove the three-wheeler, and that the other police officers followed in a police vehicle, until they arrived at the Ward Place residence of the 1st accused, where PS Manappriya drove the three-wheeler and parked it near the **Main Gate** as against the prosecution version that the three-wheeler was parked opposite the **small gate**. The defence states that at about 10.30 a.m. the main gate was opened to enable a car driven by the 3rd accused to enter the premises. Subsequently the three wheeler was driven towards the gate and stopped just outside it, when the police officers forcibly entered the house. The defence suggests that the heroin was introduced at the main hall into a bag, which was found in the premises. The position of the 1st accused is that this introduction was engineered by OIC Amarajith with whom he had been associating very intimately when this officer was attached to the Katunayake airport, when the 1st accused used to travel abroad regularly on business. The OIC had as the 1st accused claimed fallen out with him when the OIC had demanded a sum of Rs. 2.5million from the 1st accused which he had refused to oblige, with the result that the OIC had become very hostile towards the1st accused. The position of the accused was that PS Karunatilake videoed the evidence at the residence.