Sri Lanka
DOCK STATEMENTS
Related Judgements

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1. **Sarath Vs. Attorney General (2006) 3 Sri L.R. 96**:

- It emphasizes that a dock statement should not be considered in isolation.
- The judge must be aware of the prosecution case and consider the dock statement alongside the prosecution's story.

The case of Sarath Vs. Attorney General (2006) 3 Sri L.R. 96 is significant in the context of evaluating dock statements within Sri Lankan legal proceedings. Here are the key points from this case:

- The judgment in this case emphasized that a dock statement cannot be considered in isolation. This means that when a judge evaluates a dock statement, it must be done in the context of the entire case, including the prosecution's evidence and narrative.
- The case underlines the principle that the judge who hears the evidence is fully aware of the prosecution's case and will always consider the dock statement alongside the prosecution's story. This holistic approach is crucial to ensure that the dock statement is given a fair and proper evaluation.
- The implication of this ruling is that the credibility and weight of a dock statement can only be assessed by considering how it aligns or conflicts with other evidence presented during the trial.
- The case reinforces the idea that the acceptance or rejection of a dock statement requires a comprehensive understanding of the case as a whole, rather than viewing the statement as a standalone piece of evidence.

2. **Rupasinghe v. Attorney General - [1986] LKSC 8; (1986) 2 Sri LR 329 (15 July 1986)**:

- The Court of Appeal examined the probative value of the dock statement and the infirmities within it.
- The Court of Appeal took into account the appellant's failure to mention the exculpatory statement at the earliest opportunity.
- The appellant's silence during the investigative stage was not treated as corroboration of evidence against him, nor was an inference of guilt drawn from it.

The case of Rupasinghe v. Attorney General - [1986] LKSC 8; (1986) 2 Sri LR 329 (15 July 1986) is a significant legal decision from the Supreme Court of Sri Lanka. Here are the key points and legal principles that were addressed in this case:

- **Bribery and Public Officers**: The accused-appellant, who was a public officer serving as an interpreter in a court, was charged with accepting a bribe. This act was alleged to have been an inducement or reward for interfering with the due administration of justice.
- **Right to Silence**: The case discussed the right to silence of the accused and how it should be treated in the context of the legal proceedings. The court considered the implications of the accused's silence during the investigation stage.
- **Burden of Proof**: A significant aspect of the case was the burden of proof placed on the accused-appellant to demonstrate that the gratification received was authorized by law or the terms of his employment.
- **Evaluation of Dock Statement**: The dock statement made by the appellant was the only evidence he provided at his trial. Both the Court of Appeal and the High Court Judge scrutinized this statement carefully. The statement was ultimately found to be false, leading to the conclusion that the appellant had not discharged the burden of proof required by the law.
- **Judgment**: The appeal was dismissed, affirming the conviction of the accused-appellant under the relevant count of the indictment by the Court of Appeal. The sentence imposed by the Court of Appeal was also affirmed.

This case serves as a precedent for how the courts in Sri Lanka handle cases involving bribery by public officers, the significance of an accused's right to silence, and the evaluation of dock statements in criminal trials. It also illustrates the standards of proof required when an accused is charged under the Bribery Act and the consequences of failing to meet that burden.

3. **Mannar Mannan v. The Republic of Sri Lanka - [1990] LKSC 9; (1990) 1 Sri LR 280 (30 January 1990)**:
    - The trial judge failed to direct the jury on the impact of the dock statement on the prosecution evidence.
    - It is settled law that if the dock statement raises a reasonable doubt in the minds of the jury about the prosecution's case, the accused is entitled to an acquittal.

The case of Mannar Mannan v. The Republic of Sri Lanka - [1990] LKSC 9; (1990) 1 Sri LR 280 (30 January 1990) is a decision from the Supreme Court of Sri Lanka. Here are the key points and legal principles that were addressed in this case:

- **Case Background**: The case involved an appeal by the accused, Mannar Mannan, against the judgment of the Court of Appeal.

- **Legal Representation**: The accused-appellant was represented by Ranjith Abeysuriya, P.C., with L. Wickrematunga and Missly de Silva, while the Attorney-General was represented by Tilak Marapona, P.C., Additional Solicitor-General, with C. R. de Silva, Senior State Counsel, and K. Indatissa, State Counsel.

- **Evidence and Testimony**: The prosecution's case rested upon the testimony of two key witnesses, Nesaratnam (the widow) and Wijayaluksamy (the daughter of the deceased). Their testimonies provided the primary evidence against the appellant.

- **Circumstantial Evidence**: The case highlights the importance of evaluating the circumstances of the case, the quality of the evidence adduced, and the weight to be attached to it.

- **Judgment**: The Supreme Court dismissed the appeal, indicating that the evidence presented was sufficient to uphold the conviction. The judgment emphasized a flexible and sensible approach to the facts and circumstances of each case, in line with section 334(1) of the Criminal Procedure Code.

- **Legal Precedents Cited**: The judgment referenced several other cases, which were used to support the legal reasoning and conclusions drawn by the court.

This case is an example of how the Supreme Court of Sri Lanka deals with appeals involving circumstantial evidence and the assessment of witness testimony. It also demonstrates the court's approach to applying the law in a manner that is flexible and sensitive to the unique facts of each case.

5. University Council of Vidyodaya University v. Linus Silva - [1964] LKSC 11; (1964) 66 NLR 505 (5 November 1964):

- This case was referenced in relation to the special position of Dock Workers under the Dock Workers (Regulation of Employment) Act 1946, but it does not directly address the concept of a dock statement in a criminal trial.

The case of University Council of Vidyodaya University v. Linus Silva - [1964] LKSC 11; (1964) 66 NLR 505 (5 November 1964) is a significant legal decision from the Supreme Court of Sri Lanka. Here are the key points and legal principles that were addressed in this case:

- **Background**: Linus Silva held a teaching position at the Vidyodaya University and was dismissed by a unanimous resolution of the University Council on 4th July 1961.
- **Legal Proceedings**: Following his dismissal, Silva petitioned the Supreme Court for writs of Certiorari and Mandamus to quash the order of the Council and to be reinstated, arguing that the Council should have acted judicially and given him an opportunity to be heard.
- **Supreme Court's Decision**: The Supreme Court directed that the order of the University Council terminating Silva's appointment be quashed.
- **Appeal to the Privy Council**: On appeal, it was contended that the relationship between the University and Silva was that of master and servant, and that the contract of employment was terminated by the University. It was argued that in such circumstances, it was not competent for the Supreme Court to issue a writ of Certiorari.

- **Legal Principles**: The case discusses the conditions necessary for the issue of a writ of Certiorari, the scope of remedy where an alternative remedy is available, and the concept of "duty to act judicially." It also touches upon the proper remedy for dismissal from office without a defence being heard, in the context of the Vidyodaya University and Vidyalankara University Act, No. 45 of 1958, and the Industrial Disputes Act.
- **Outcome**: The Privy Council delivered the judgment, which would have addressed the issues raised in the appeal, including whether the Supreme Court's issuance of a writ of Certiorari was appropriate in the context of a master-servant relationship and wrongful dismissal.

This case is an example of how the Sri Lankan legal system handles issues of wrongful dismissal within the context of educational institutions and the extent to which judicial review mechanisms like Certiorari can be applied in employment disputes.

6. **Ehelepola v. Officer In Charge, Police Station, Kandy and Another - [1998] LKSC 51; (1998) 1 Sri LR 295**:

- The Magistrate misdirected himself by stating that the dock statement made by the appellant had no evidentiary value.
- An unsworn statement from the dock must be considered as evidence, subject to the infirmity that the accused refrained from giving sworn testimony.
- If such a statement is believed, it must be acted upon.

The case of Ehelepola v. Officer In Charge, Police Station, Kandy and Another - [1998] LKSC 51; (1998) 1 Sri LR 295 involves the following key points:

1. **Background**: The petitioner, Ehelepola, and four others were charged with fraudulently removing an underground cable drum valued at Rs. 125,000/- belonging to the Department of Telecom from the possession of Ariyaratne Serasinghe of Werallagama on or about 6.4.1994.
2. **High Court Proceedings**: The case was heard in the Magistrate's Court of Kandy, and upon appeal, the High Court of the Central

Province holden in Kandy set aside the convictions and sentences imposed on the accused-appellants and ordered a retrial before another Magistrate.

3. **Supreme Court Appeal**: The appellant (the 2nd accused-appellant in the High Court appeal) lodged an appeal against the judgment of the High Court ordering a retrial. No appeals were filed by the other four accused.
4. **Written Submissions**: Both counsel for the appellant and counsel for the State agreed that the matter was fit to be decided upon the written submissions filed in the case.
5. **Supreme Court's Decision**: The Supreme Court affirmed the judgment of the learned High Court Judge directing a trial de novo (new trial) before a different Magistrate. The appeal was dismissed.
6. **Legal Implications**: The case illustrates the legal process of appeals in the Sri Lankan judicial system, the circumstances under which a retrial may be ordered, and the role of the Supreme Court in reviewing decisions from lower courts.
7. **Judges' Agreement**: The decision of the Supreme Court was unanimous, with all judges in agreement, as indicated by the concurring opinions of Justices Anandacoomaraswamy and Bandaranayake.

This case demonstrates the appellate process in Sri Lanka and the checks and balances in place to ensure that legal proceedings are fair and just, allowing for retrials when necessary to uphold the integrity of the judicial system.

Rupasinghe v. Attorney General - SLR - 329, Vol 2 of 1986 [1986] LKSC 8; (1986) 2 Sri LR 329 (15 July 1986)

RUPASINGHE
v.
ATTORNEY-GENERAL

SUPREME COURT.
WANASUNDERA, J., COLIN-THOME, J., RANASINGHE, J., TAMBIAH, J.
AND L. H. DE ALWIS, J.
S.C. APPEAL 43/84-H.C. 624/B.
FEBRUARY 17, 18, 19, 1986 AND JUNE 30, 1986.

Bribery - Bribery Act ss. 8, 16, 18(c) - Right to silence - The Code of Criminal Procedure Act, section 1 10 - Evidence Ordinance, section 105 - Burden of proof that gratification was authorised by law on the terms of his employment.

The accused-appellant a public officer (interpreter of a court) was held to have accepted a gratification of Rs. 50 from an accused person allegedly to save him from a prison sentence. The accused was indicted before the High Court on two counts under the Bribery Act. He was acquitted on count 1 but convicted on count 2.

The accused-appellant while giving his own account of the incident relied on three main defences:

1. Violation of his right to silence by the police interrogators,

2. Failure to accept his exculpatory statement that the money was an advance for a translation job,

3. Failure to consider the two charges separately

Held-

(1) Under section 110(1) of the Code of Criminal Procedure Act the police are invested with powers during the investigations of offences of examining orally any person supposed to be acquainted with the facts and circumstances of the case and the person interrogated is bound to answer truly all such questions relating to the case put to him except questions which have a tendency to expose him to a criminal charge or to a penalty or forfeiture. In Sri Lanka, unlike in England, the right to silence is restricted only to questions which would have a tendency to expose any person to a criminal charge or to a penalty or forfeiture. Further if the accused person does make an incriminating statement in answer to questions by the police that statement shall not be proved against him at the trial as section 25 of the Evidence Ordinance expressly forbids it subject to the proviso in section 27 of the Evidence Ordinance.

(2) The exculpatory dock statement that the payment of Rs. 50 was an advance fee for translating an appeal brief though admissible in evidence was belated and not made at the earliest opportunity and was rightly rejected.

(3) The acquittal of the accused-appellant on the first count of having accepted a gratification as an inducement or reward for interfering with the due administration of justice-is an offence under s. 16 of the Bribery Act-did not call for an independent review by the Court of Appeal of the facts relating to count 2 where the accused was being charged for accepting a gratification as a State Officer under s. 19 of the Bribery Act as amended by Act No. 40 of 1958. There was no offence if the payment was authorised by law or the terms of his employment but the burden of proving this was on the accused in view of the provisions of the new proviso to s. 19 of the Bribery Act brought in by the amendment. The accused had failed to discharge this burden.

Cases referred to :

(1) R v. May-(1952) 36 Cr. App. R. 91, 93.

(2) R v- Prager-(1972) 56 Cr. App. R 151(1972) 1 All E.R. 1114.

(3) Hall v. Regina-(1971) I All E. R. 322.

(4) R v. Whitehead-(1929)1 K 8 99.

(5) R v. Keeling-(1942) 1 All E. R. 507.

(6) R v. Feigenbaum-(1919) I K B 437.

(7) R v. Ryan-(1966) 50 Cr. App. R. 144, 148.

(8) R v. Sullivan-(7966) 51 Cr.App. R. 102.

(9) R v. Gilbert-(1978) 66 Cr. App. R. 237.

(10) R v. Lewis-(1973).57 Cr. App. R. 860.

(11) Nathen's Case-(1968) 52 Cr. App. R. 97.

(12) Van Cuylenberg v. Caffoor-(1933) 34 N.L.R. 433.

(13) Van Cuylenberg v. Sellamuttu-(1933) 35 N.L.R. 99.

(14) Deheragoda v Alwis-(1913) 16 N.L.R. 233.

(15) Sugathadasa v. The Republic of Sri Lanka-(1977) N.L.R. 495.

(16) The Queen v Kuaratne-(1968) 71 N.L.R. 529, 557.

(17) Mohamed Auf v. The Queen-(1967) 69 N.L.R. 337, 343.

APPEAL from a judgment of the Court of Appeal.

E. R. S. R. Coomaraswamy, P. C. with Lakshman de Alwis, Rohan de Alwis and Ravi Algama for accused-appellant.

Asoka de Z. Gunawardena, D. S. G. with Nihara Rodrigo, S.C. for Attorney-General.

Cur. adv. vult.

July 15, 1986.
COLIN-THOME, J.

The accused-appellant was indicted under two counts as follows:

1. That on or about the 2nd December, 1975 being an officer of the Homagama Magistrate's Court, to wit, Interpreter Mudaliyar, you did accept a gratification of Rs. 50 from Avis Singho as an inducement or reward for interfering with the due administration of justice in Magistrate's Court, Homagama, case No. 22928, an offence punishable under section 16 of the Bribery Act I

2. That at the same time and place aforesaid and in the course of the same transaction you being a state officer, to wit, Interpreter Mudaliyar, Magistrate's Court, Homagama, you did accept a gratification of Rs 50 from the said Avis Singho an offence punishable under section 19 (c) of the Bribery Act as amended by section 8 of the Bribery (Amendment) Law No. 38 of 1974.

The High Court Judge found the accused-appellant guilty under both counts. He was sentenced to one year's rigorous imprisonment on each count, the sentences to run concurrently, and to a fine of Rs. 1,000 on each count, in default of payment of the fine to six weeks' rigorous imprisonment, and also to pay a penalty of Rs. 100.

The accused-appellant appealed to the Court of Appeal. The Court of Appeal allowed the appeal against the conviction and sentence on count 1 and dismissed the appeal against the conviction and sentence on count 2, subject to the penalty of Rs. 100 being reduced to Rs. 50.

Avis Singho and one other were charged for theft in the Magistrate's Court, Homagama, case No. 22929. On 11-11.1975 Avis Singho and his co-accused pleaded guilty to the charge. They were finger-printed and warned to appear in Court on 25.1 1.75 for sentence. Thereafter Avis Singho made representations to the Supreme Court through his attorney-at-law alleging that he had been forced by the Judge and the Interpreter Mudaliyar to plead guilty. He could not appear before the Magistrate's Court on 25.11.75 and sentence was postponed for the 2nd December.

On 26.11-75 Avis Singho met the accused-appellant (hereinafter called the appellant) to obtain relief by way of a light sentence. He hoped that the appellant would not disclose to the Court that he had two previous convictions for theft. The appellant promised to obtain some relief and solicited a sum of Rs. 50. Avis Singho promised to meet the appellant on 2.12.75 the next calling date with the money.

On 27.11.75 Avis Singho made a complaint to the Bribery Commissioner's Department and it was decided to lay a trap for the appellant on 2.12.75.

Inspector V. Dharmapala who was in charge of the arrangements instructed Avis Singho to meet the appellant along with Police Constable Bissomenika who was to pose as his sister. He was also handed marked notes totalling Rs. 50 to be given to the appellant. Inspector Dharmapala instructed Avis Singho to discuss with the appellant about the money he had solicited and to inquire from him the nature of the relief he would be granted. Avis Singho was also instructed by Inspector Dharmapala to have this discussion with the appellant in the presence and hearing of Bissomenika.

When Avis Singho along with Bissomenika met the appellant on 2.12.75 he merely told the appellant "I have brought the money that I promised" and gave the money to the appellant. The appellant put the money in his pocket. Avis Singho failed to carry out two vital instructions given him by Inspector Dharmapala, namely, to inquire from the appellant the nature of the relief he would be granted and to discuss this matter in the hearing of Bissomenika.

At the trial Avis Singho insisted that he spoke to the appellant in a normal tone to be heard by Bissomenika. On this point he was contradicted by Bissomenika who stated that Avis Singho bent down and spoke to the appellant softly contrary to Inspector Dharmapala's instructions and she did not hear what he said. Avis Singho was also contradicted by his statement to the police where he admitted that he "bent down and told the suspect in a soft tone that he had brought the money he promised". He added "I thought that if I discuss about the bribe in a loud tone, that the suspect would suspect me and not accept the bribe from me. Hence I spoke to him softly”. Bissomenika stated that after the appellant accepted

the marked notes she asked him "Sir, will my elder brother go to jail?" The appellant replied that he. would save her brother with a fine without sending him to jail.

Inspector Dharmapala stated that on receiving a prearranged signal he entered the Courthouse and requested the appellant to hand over the bribe that he had accepted. The appellant got up from his seat took a purse from his right hand hip pocket, removed the marked notes from his purse and handed them to the inspector. The case record was before the appellant on his table. Thereafter the appellant was charged, taken into custody and searched. He was taken to the residence of the Magistrate of Homagama and later brought to the Bribery Commissioners Department where his statement was recorded.

The appellant made a dock statement. He stated that Avis Singho came to see him on 14.11.7 5 and requested him to translate into English an appeal brief and to type it in triplicate. He went through the copy of the appeal and told Avis Singho that it would take time and asked him to bring it later with an advance. On 2.12.75 Avis Singho met him with a female. He bent down and said in a soft tone "I brought the advance. Keep it, otherwise 1 might spend it". He accepted the money. The female asked him, "Sir, will my elder brother go to jail?" He replied "He will go to jail on today's case". Then it struck him that there was an earlier case, thereafter he told her "He will escape with a fine". He did not tell her he would save Avis Singho with a fine.

He was taken by Inspector Dharmapala to the residence of the Judge. He told the Judge "He (Avis Singho) paid off a grudge against Court".

He did not think s proper for him to tell Inspector Dharmapala that the money was taken as fees for translation and that this amount of money was taken an advance. He intended to place these facts before the Bribery missioner but unfortunately he was not taken before him. C. Amerasekera, Office Assistant of the Ministry of Justice, called by the prosecution, stated that the appellant was Interpreter in the Magistrate's Court of Homagama in 1975. He was a State Officer. He was entitled to charge copying fees and

translation fees but he had to issue a receipt on Form 172 for those fees. In this case the appellant had not issued a receipt to Avis Singho.

The main grounds of appeal from the judgment of the Court of Appeal were:

(a) That there was a misjoinder of charges.. Learned President's Counsel for the appellant abandoned this submission in the course of the argument of this appeal.

(b) That there was a material misdirection as to the right to silence of the appellant.

(c) That there was a misdirection on a vital point used against .the appellant, to wit, the contents of the reply that the appellant gave to the question asked by Bissomenika, according to his dock statement.

(d) That there was a misdirection in acting on the findings of fact of the High Court Judge (who failed to separate the evidence relating to the two charges and to consider the two charges separately and whose judgment was set aside on Charge 1) in the review by the Court of Appeal of the evidence against the appellant on Charge 2, without an independent review.

Learned President's Counsel for the appellant submitted that as there was no express provision in our law dealing with the legality and propriety of comment by court on the right to silence exercised by an accused person during the police investigation we should have regard to the provisions of section 100 of the Evidence Ordinance and have recourse to the corresponding lave of evidence for the time being obtaining in England.

The imugned portions of the judgment of the Court of Appeal which learned President's Counsel submitted violated the accused's "Right to silence" as laid down in a series of English decisions stated, inter alia, that:

(a) "The accused stated that by his experience he thought it was not proper to tell the inspector that he had accepted the money as an

advance fee for translations, because he was connected with the raid. This conduct of the accused - appellant is strange. He is a senior, experienced officer of court and being the Interpreter Mudaliyar of a Magistrate's court, he would have known that it was important for him to tell his version, if the transaction was an innocent and lawful one, at the earliest opportunity to a person in authority. If he did not want to mention this to Inspector Dharmapala, he had every opportunity to do so to the District Judge, who remanded him, if he could have told the Judge as follows, He paid off a grudge against ` Court", he could then surely have told him that he accepted Rs. 50 as an advance for the translation of the appeal into English."

(c) "Then, he had every opportunity of informing the Bribery Commissioner of his version, but he had not done so."

(d) "Though he stated that he wanted to tell his version of this transaction to a public officer superior to Inspector Dharmapala, he has taken no steps to do so."

(e) "It is very strange that it took him almost four and a half years after the incident, to divulge his version for the first time in Court."

The origin of the Judges" Rules in England for the guidance of police officers conducting investigations was in 1912. Since then these Rules have been amended from time to time. Judges' Rules which came into effect on January 27, 1964 (see Home Officer Circular No. 89/1978) are not rules of law. In R v. May (1) Lord Goddard observed:

"Judges' Rules are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules."

In R v. Prager (2) the Court of Appeal reaffirmed that the essence of admissibility is that the statement was made voluntarily. This principle is expressly left untouched by the Rules. The "non-observance (of the Rules) may, and at times does, lead to the

exclusion of an alleged confession; but ultimately all turns on the Judge's decision as to whether, breach or no breach, it has been shown to have been made voluntarily."

Rules II and III deal with the administering of a caution at different stages

II. As soon as a police officer has evidence, which would afford . reasonable grounds for suspecting that a person has committed an offence. he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence. The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

III (b) purpose of preventing or minimising harm of loss to sour prosecuted for an offence, he shall be cautioned in the following terms:

(The caution here is similar to the caution in Rule 11).

III (b). It is only in exceptional cases that questions relating to the offence should be put to the accused person after he had been charged or informed that he may be prosecuted. Sub questions may be put where they are necessary for to purpose of preventing or minimizing harm or loose to son other person or to the public or for clearing up an ambiguity a previous answer or statement.

(The caution here is similar to the caution in Rule 11).

In Hall v. Regina (3) a defendant was informed by a police office who did not caution him, of an allegation made by a third pers against him. The defendant remained silent. The Privy Council observed (per Lord Diplock at Page 324) that:

'It is a clear and widely-known principle of the common law Jamaica, as in England, that a person is entitled to refrain for answering 'a question put to him for the purpose of discover whether he has committed a criminal offence. A fortiori, he is un no obligation to comment when he is informed that someone has

accused him of an offence. It may be that in very exceptic circumstances an inference may be drawn from a failure to give explanation or a disclaimer, but in their Lordships view silence ale on being informed by a police officer that someone else has an accusation against him cannot give rise to an inference that person to whom this information is communicated accepts the of the accusation.'

The appeal was allowed and the appellant's conviction quash The Privy Council affirmed the principles la id down in R v. Whiteh (4) and in R v. Keeling (5) and disapproved of R. v. Feigenbaum (6)

In R. v. Whitehead (supra) it was held that the fact that the prise when charged and cautioned made no denial of the charge could be corroboration.

In R. v. Keeling (supra) the appellant was convicted on a charge of having unlawful carnal knowledge of a girl of 8 years. Having regard to her age, the little girl was not sworn and according to the proviso to section 38 of the Children and Young Persons Act, 1933, it was essential as a matter of law that her evidence should be corroborated some other material evidence implicating the appellant.

The Judge directed the jury that there was in fact the necessary corroboration to be found, if they thought proper to take that view, in the conduct of the appellant from first to last when the accusation in question was made against him

The conduct referred to consisted of the appellant's answers at three stages in the proceedings preliminary to his trial. When he was cautioned that he was not bound to make any statement and told of the charge by the police officer who arrested him, he said,

"I know what you mean, but not likely. She plays with the Sawbridge girl".

After the warrant had been read over to him, he said. "I have got you-nothing to say".

At the hearing before the committing magistrate, the appellant was cautioned in the manner provided by statute, thus

"Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so but whatever you say will be taken down in writing and may be given in evidence upon your trial."

Having been cautioned by the magistrate, his answer was as follows

"I am not guilty. I am going to state nothing."

The trial judge drew the attention of the jury to the prisoner's conduct. Each of the three stages was mentioned by the trial judge and, in particular, he referred to the failure of the prisoner to make any further statement before the magistrates, and his failure to go, into the witness-box at the trial.

It was held:

"That some at least of the conduct to which the judge referred in his direction to the jury, and most obviously the conduct of the prisoner when addressed by the committing justices in not making any denial of the charge beyond saying that he was not guilty cannot in point of law be regarded as affording corroborative material for the jury. It is impossible to say whether that part, if any, of the statement which was admissible would have been sufficient to satisfy the jury. The judge told the jury that they could look at the prisoner's conduct from first to last in failing adequately to deny the charge as affording the necessary corroboration. In our opinion that conduct did not in point of law afford such material. Accordingly, the conviction cannot stand and must be quashed, and this appeal allowed."

On the other side of the dividing line is the case of R. v. Feigenbaum (supra). The appellant was charged with having incited certain boys to steal fodder. Evidence was given for the prosecution by the boys and also by a police officer, who stated that he had called at the appellant's house, after the boys had been arrested for stealing fodder, and had told him that the boys giving their names, had informed the police that the appellant had sent them to steal

the fodder, that they had stolen fodder for the appellant on other occasions, giving the dates and that the appellant had paid them specified sums for the stolen fodder. The appellant had made no reply to this statement. It was held that the jury had been rightly directed that they were entitled to consider whether the appellant's failure to reply was not in the circumstances some corroboration of the boys' evidence. (This decision was disapproved in Hall v. Regina (supra)).

In R v. Ryan (7) the Court of Criminal Appeal observed that

". .. . it is wrong to say to a jury, 'Because the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt', it is quite a different matter to say 'This accused, as he was entitled to do, has not advanced at any. earlier stage the explanation that he has offered to you today; you, the jury, may take into account when you are assessing the weight that you think right to attribute to the explanation'".

In R v. Sullivan (8) the accused, who was convicted of smuggling watches from Switzerland, had refused to answer questions asked by the Customs Officers. During the course of his summing up the judge said to the jury:

"Of course, bear in mind that he was fully entitled to refuse to answer questions, he has an absolute right to do just that, and it is not to be held against him that he did that. But you might well think that It a man is innocent he would be anxious to answer questions. Now, members of the Jury, that is really what it amounts to."

The Court of Appeal said with reference to this (per Salmon, L.J. at 105)

"It seems pretty plain that all the members of that jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them. The appellant was not obliged to answer, but how odd, if he was innocent, that he should not have been anxious to tell the Customs Officers why he had been to Geneva, whether he had put the watches in the bag, and so on." ,

Then, after referring to the authorities, the judgment went on to say that sometimes comment on the accused's silence was unfair but that there was no unfairness in this case. It then continued

"The line dividing what may be said and what may not be said is a very fine one, and it is perhaps doubtful whether in a case like the present it would be even perceptible to the members of any ordinary jury."

The court held that they were compelled, in the existing state of the law, to hold that the judge's comment was a misdirection, but they dismissed the appeal under the proviso to section 4(1) of the Criminal Appeal Act 1907 (c. 23) on the ground that "no possible miscarriage of justice occurred".

In R v. Gilbert (9) the appellant was charged with the murder of one Taylor. At the trial for the first time, when admitting that he had stabbed his victim, he said he had done so, inter alia, in self defence. The trial judge read the appellant's statement to the police to the jury and remarked that the appellant was perfectly entitled to remain silent, but that he had made no mention of self-defence in it. However, the Court of Appeal, consisting of Lord Dilhorne, Lord Scarman' and Jupp, J., held that as the law stands no comment is permissible that implies that the jury may draw an inference adverse to the accused from his exercise of his "right to silence", disapproving of the decision to the contrary in R v. Ryan (supra). Inspite of the misdirection by the trial judge, the Court of Appeal held that, nevertheless, as no miscarriage of justice had actually occurred, the Court would, in its discretion, apply the proviso to section 2 (1) of the Criminal Appeal Act 1968, and dismissed the appeal.

The court indicated however, that the law is unsatisfactory and hinted that it was open to review in the House of Lords. If the House were to say that such comments were permissible, the Judges' Rules would have to be altered, particularly as to the wording of the caution.

In England under the Criminal Justice Act 1967, s. 11 (1)

"On a trial on indictment the defendant shall not without the leave of court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi."

The 'prescribed period' means the period of seven days from the end of the proceedings before the examining justices.

In R v. Lewis (10) the Court of Appeal held that a judge should not in his summing-up comment unfavourably on the fact that the defendant, after arrest and caution by the police, failed to say that he had an alibi, since under section 11 (6) of the Criminal Justice Act 1967 the time at which notice of alibi must be given has been prescribed by the legislature. The court, however, held that despite the misdirection there was no miscarriage of justice and applied the proviso to section 2(1) of the Criminal Appeal Act 1968.

The Court dismissed the appeal and the sentence was reduced.

The right to silence is a right against self-incrimination. This doctrine is an aspect of the rules of procedure and evidence which, in their application to criminal proceedings, are based on a compromise between the security of the community and the rights of the accused. A traditional feature of the "adversary" (as opposed to an 'inquisitorial') system of criminal jurisprudence is the privilege against self-incrimination. The origins of the doctrine against self-incrimination in the English Common Law are discernible in the pronouncement of the later Stuart Judges which echoed the revulsion of the community against the practice of the Court of Star Chamber of compelling persons brought before it to testify against themselves on oath. The use of the rack and other forms of torture to extort confessions or other incriminating statements from persons accused of crime contributed to this reaction. This privilege is also sacrosanct in the constitutional laws of the United States of America and finds expression in the Fifth Amendment to the American Constitution.

The condition of contemporary English law prompted far-reaching proposals by the Criminal Law Revision Committee in its Eleventh Report (June 1972). They made the following observations and recommendations: -

"28. We propose to restrict greatly the so-called 'right of silence' enjoyed by suspects when interrogated by the police or by anyone charged with the duty of investigating offences or charging offenders. By the right of silence in this connection we mean the rule that, if the suspect, when being interrogated omits to mention some fact which would exculpate him, but keeps this back till the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue. Under our proposal, it will be permissible to draw this inference if the circumstances justify it. The suspect will have the 'right of silence' in the sense that it is no offence to refuse to answer questions or tell his story when interrogated ; but if he chooses to exercise this right, he will risk having an adverse inference drawn against him at his trial.

30. In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated to mention a defence which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice."

The Report stated that Sir Norman Skelhorn (one of the members of the Committee) had argued for an amendment of the law for these reasons in his address "Crime and Punishment of Crime: Investigation of Offences and Trial of Accused Persons" delivered at the Commonwealth and Empire Law Conference in Sydney in. 1965. The present restriction on judicial comment was also strongly criticized by Salmon, L.J., in giving the judgment of the Court of Appeal in R. v. Sullivan (supra).

The Report added in paragraph thirty-one:

"31 . So far as we can see, there are only two possible arguments for preserving the present rule

(i) Some lawyers seem to think that it is somehow wrong in principle that a criminal should be under any kind of pressure to reveal his

case before his trial. The reason seems to be that it is thought to be repugnant-or, perhaps rather, 'unfair'-that a person should be obliged to choose between telling a lie and incriminating himself. Whatever the reason, this is a matter of opinion and we disagree. There seems to us nothing wrong in principle in allowing an adverse inference to be drawn against a person at his trial if he delays mentioning his defence till the trial and shows no good reason for the delay. As to the argument that it is 'unfair' to put pressure on a suspect in this way, what we said above about fairness in criminal trials generally applies. Bentham's famous comment (Treatise of Evidence, p. 241) on the rule that suspects could not be judicially interrogated seems to us to apply strongly to the 'right of silence' in the case under discussion. He wrote

'If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.'

(ii) It has been argued that the suggested change would endanger the innocent because it would enable the police, when giving evidence, to suppress the fact that the accused did mention to them the story which he told in court. But we reject this argument for two reasons. First, we do not regard this possible danger as a good enough reason for leaving the law as it now is. Second, it is already permissible to draw an adverse inference from the fact that a suspect told a lie to the police or tried to run away: and (as mentioned above) even silence can be taken into account in assessing the value of the evidence given by the accused in court. In neither of these cases is it considered a fatal objection that the police might say falsely that the accused told the lie or that he failed to tell his story.

32. We propose that the law should be amended so that, if the accused has failed, when being interrogated by anyone charged with the duty of investigating offences or charging offenders, to mention a fact which he afterwards relies on at the committal proceedings or the trial, the court or jury may draw such inferences as appear proper in determining the question before them. The fact

would have to be one which the accused could reasonably have been expected to mention at the time."

The Committee also recommended (in para. 40) that in any case where an adverse inference may properly be drawn from the accused's silence, it will be permissible to treat his silence as corroboration of the evidence against him for any purpose for which corroboration is material. Since the caution embodied in the Judges' Rules was inconsistent with this recommendation, it was proposed that the Judges' Rules should be abolished, to be replaced by administrative directions.

It would appear that many of the decisions of the Committee had not been unanimous and there have been differences of opinion and dissents from some of the members. There was also strong criticism of the recommendations from other quarters. We were shown a critique of the Report by Sir Brian Mackonna in the 1972 Criminal Law Review, 605, where most of the grounds for the recommendations have been critically examined and refuted. For the purpose of this case, I shall draw attention to one or two relevant observations made by Sir Brian.

Referring to the treatment of suspects by the Committee as falling into only two classes, the guilty and the wholly innocent, which is undoubtedly too simplistic, Sir Brian says at page 614

"That useful paper 'The Jury at Work' suggests that most suspects are in some way implicated in the offence under investigation, either through their presence at the scene of the crime, or through their commission of the actus reus, the only question being about the state of their mind, intention, knowledge and the like, or, in cases of violence, self-defence. All these would have something to explain away, and they might not all feel confident of their ability, without legal assistance, to select and state all the facts on which their counsel might afterwards wish to rely in their defence. Questioning by the police will not always be limited to an inquiry about the facts to be relied on by the suspect in his defence. It may take the form of an unfriendly cross-examination in the course of which even an innocent man might contradict himself or be induced to say something which he might afterwards wish to retract. It will be

conducted in the absence of any friend or adviser of the suspect who might be able to support him if later he should wish to challenge the police account of the interview I do not find it far-fetched to suppose that even an innocent man might wish to reserve his defence until his trial, or at least until he had an opportunity of being legally advised, and to postpone his cross-examination until he would be protected by an impartial judge. "

The following observations by Sir Brian regarding the Committee's assumption that police investigations are always above board may also have some bearing on this matter. After referring to a statement by Winn, L.J., in Nathan's case (11), to the effect that the police can now be trusted and that they "behave with complete fairness towards those who come into their hands or from whom they are seeking information-, Sir Brian states at page 617:

"The other view is expressed by three dissenting members of the Committee in paragraph 52 of the Report. They speak of the practice of questioning suspects in custody as being 'fraught with dangers'. They mention 'the danger of the use of bullying and even brutal methods by the police in order to obtain confessions' and continue

"As with the use of violence, it is impossible to assess the extent to which the police at present commit perjury, but there is a widespread impression, not only among criminals, that in tough areas a police officer who is certain that he has got the right man will invent some oral admission (colloquially known as a 'verbal') to clinch the case".

They cite this passage from the 1962 Report of the Royal Commission on the Police:

'There was a body of evidence, too substantial to disregard, which in effect accused the police of stooping to the use of undesirable means of obtaining statements and of occasionally giving perjured evidence in a court of law.'

They refer to the use of oppressive methods

'it is demonstrated from time to time that even ordinary questioning can produce false confessions, but the risk is greatly increased if oppressive methods are used.'

They criticize the present methods of recording statements:

One may not even be sure that the officer understood what the suspect said, or that the suspect understood the written statement when he read it through or had it read to him..:. The possibilities of error are multiplied if, as often happens, the statement is not reduced to writing at the time and signed by the suspect'."

In 1982, Professor G. L. Peiris in an article in the journal LAWASIA entitled "An accused person's privilege against self-incrimination", made a comparative analysis of the English, New Zealand and South Asian Legal systems and brought the wealth of his learning and knowledge in dealing with this same question. In Part III of his article, he sums up the position with his mature observations:

"The predominant criticism of the privilege is that it seriously impedes law enforcement and is, therefore detrimental to the well-being of the community. It has been argued that the obstacles it imposes in regard to the determination of guilt may prove insuperable. The Supreme Court of Canada has observed

'We have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by people in earnest to discover the actual facts for the sake of public safety.'

The most trenchant denigration of the privilege has been made by Bentham who derisively declared that the privilege rested on two pivots-'the old woman's reason' and 'the fox-hunter's reason.' The essence of the first reason is the harshness of the consequences attending on self-incrimination. The second reason, according to Bentham, purports to introduce into the law a spurious notion of fairness.

In the Commonwealth as in the United States of America, there is a growing body of informed opinion that the privilege against self-

incrimination confers on the accused too great a degree of protection at the expense of the community. It is submitted, however, that in the context of investigation of crime by the police in England, New Zealand and South Asian jurisdictions, legal recognition of the privilege is supportable cogently on several grounds:

(a) But for the existence of the privilege, persons who are subjected to police interrogation may be confronted with overwhelming difficulties repugnant to accepted notions of equity and fair dealing. If a deponent were compelled to answer questions truthfully and to provide incriminating evidence against himself, the effectiveness of his defence in court may be greatly imperilled.

(b) The use of the fruits of self-incrimination has a demoralising effect, at least potentially, on the prosecution. A profound truth is reflected in Wigmore's assertion that 'Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer thereby. The inclination develops to rely mainly on such evidence and to be satisfied with an incomplete investigation of the other sources. This danger is all the more real in the setting of the South Asian legal systems. The Privy Council, dealing with considerations of policy which militate against the reception in evidence of incriminating statements made to police officers, has stated

'Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and the law recognizes and provides against the danger of such persons making incriminating statements with the intention of placating authority.'

(c) Removal of the privilege is a potent disincentive to willigness on the part of persons to participate in an inquiry conducted by the police into the commission of an offence. The privilege may be seen as a means of securing for the police the fullest possible information for the successful conduct of the inquiry.

(d) Persons under interrogation by the police are often susceptible to direct coercion and to insidious pressure. The reminder by the Supreme Court of the United States that the police may accomplish

their objectives 'not only with ropes and a rubber hose, not only by relay questioning persistently, insistently, subjugating a tired mind, but by subtler devices' is of particular relevance in South Asian countries where popular attitudes to police authority still contain a substantial element of diffidence and apprehension. Consequently, survival of the privilege has the beneficial result that inhibition is minimized, if not eliminated, and candour encouraged, so that the reliability of statements made to the police during an investigation is enhanced.

(e) Recognition of the privilege contributes to the preservation of a just equilibrium between the individual and the State in the sphere of detection and punishment of crime. One implication of the privilege is to require the Government 'in its contact with the individual to shoulder the entire load' and 'to leave the individual alone until good cause is shown for disturbing him.' This ensures that the resources of the State are not exploited in a manner intolerably oppressive to the individual.

(f) The privilege against self-incrimination provides a palliative against the enforcement of harsh law and the application of unjust procedures. This is responsible in large measure for the popularity which the privilege enjoys.

The Royal Commission on Criminal Procedure in England and Wales (1981), in its Report had adopted the traditional attitude to the scope of the privilege and declined to recommend any change of the existing law as to the consequence of silence during the investigative stage and at the trial. The Commission attached considerable weight to the argument that the right of silence formed a vital issue in the whole constitutional relationship in a free society between the individual and the State. The Commission no doubt took into account the criticism of the- recommendations of the Criminal Law Revision Committee by professional and law organization.

The Police and Criminal Evidence Act 1984 gives a suspect in police custody a statutory right to have someone informed of his arrest and of his place of detention and the right to consult a solicitor privately if he so requests. There are, however, some

exceptions. There is a draft Code of Practice formulated by the Home Secretary in terms of the Act which recognise the right to silence. Paragraph 3 of the Code requires the officer authorising detention to notify the suspect of the above right and also of his right to consult the Code of Practice. Under paragraph 6, if the suspect is unable to nominate a solicitor, he must be advised of the availability of duty solicitors. It also states that-subject to certain exceptions-a suspect who asks for legal advice may not be interviewed until he has received such advice and that he can have his solicitor present when interviewed. The Code of Practice also continues the old caution rule although branches of the Code are rendered immune from criminal and civil proceedings. In all probability a court could in its discretion exclude evidence which had been unfairly obtained even in this regard.

We were also referred to an informative article by Professor Mong Hoong Yoo of the University of Singapore entitled "Diminishing the Right to Silence: the Singapore Experience' appearing in 1983 Criminal Law Review 89. This article tries to evaluate the Singaporean experience during the five-year period following the passing of the Criminal Procedure Code (Amendment) Act No. 10 of 1976. This amending Act embodied almost in to and even the identical phraseology and language of the recommendations of the Criminal Law Revision Committee's Eleventh Report on Evidence (1972). Prior to that, the legal position both in Singapore and England appears to have been almost identical, except for the fact that jury trials did not obtain in Singapore. The article deals with "the right to silence" in its two aspects-out of court silence and in-court silence-which are dealt with separately by the writer. From an analysis of statistics, the writer concluded that accused persons rarely remained silent out of court even before the amendments and that the percentage of cases where the accused testified in court was slightly more in the pre-amendment period than in the post-amendment period. The writer concludes as follows at page 100:

"The two studies described above indicate that the amendments have not materially assisted the Singapore police force and prosecuting officers in their combat against crime. The tentative results suggest that the practical value of the right to silence in court has hardly been effected by the amendment. Hence those who

regard the right to silence as 'golden' can rest assured that the amendments have done little to tarnish its sheen."

In Sri Lanka the procedure regarding the investigation of offences by any police officer or inquirer is laid down in Chapter X1, Part V, of the Code of Criminal Procedure Act, No. 15 of 1979. This Act repealed Chapters 11 and IV of the Administration of Justice Law, No. 44 of 1973. Chapter II of the Administration of Justice Law, section 55 to 92, dealt with Criminal Procedure. Section 70(4) stated:

S. 70(4). "it shall be the duty of a police officer before examining a person to inform him that he is bound to answer truly all questions relating to such case put to such person by him, except such questions as have a tendency to expose him to a criminal charge or to a penalty or forfeiture ; and such person shall be bound to answer truly all questions relating to such case put to him by such officer other than the aforesaid questions."

Section 70 of the Administration of Justice Law has now been replaced by section 110 of the Code of Criminal Procedure Act, No. 15 of 1979, which deals with the examination of witnesses by any police officer or inquirer. Section 110(2) states as follows:

S. 110(2). "Such person shall be bound to answer truly all questions relating to such case put to him by such officer or inquirer other than questions which would have a tendency to expose him to a criminal' charge or to a penalty or forfeiture."

Section 110(2) is almost identical with section 122(2) of the former Criminal Procedure Code (Cap. 16). The only change in the wording is that "or inquirer" has been introduced in s..110(2) after the words "such (police) officer." Section 457(2) of the Code of Criminal Procedure Act, No. 15 of 1979, states:

S. 457 (2) "Any appeal, application, trial, inquiry or investigation pending in any court on the day immediately preceding the appointed date may be disposed of, continued, held, or made as the case may be as nearly as may be practical under the provisions of this Code."

In the instant case the alleged offences were committed on 2nd December, 1975. The trial commenced on 7.4.1980. The trial in this case was pending when the Code of Criminal Procedure Act, No. 15 of 1979 was certified on 8th March, 1979. Therefore the applicable law at this stage of the case is section 110(2) of the Code of Criminal Procedure Act, No. 15 of 1979.

In Sri Lanka, unlike in England, the right to silence is restricted only to questions which would have a tendency to expose any person to a criminal charge or to a penalty or forfeiture. This has been the law in Sri Lanka for a considerable period of time. Under section 110 (1) the police are invested with powers during the investigations of offences of examining "orally any person supposed to be acquainted with the facts and circumstances of the case." In Sri Lanka, unlike in England, a reciprocal obligation is imposed on the person interrelated, in that such person is declared to be "bound to answer truly all questions relating to such case put to him by a police officer or inquirer other than questions which have a tendency to expose him, to a criminal charge or to a penalty or forfeiture.". In Sri Lanka the right to silence has been and is governed by statute and such questions are not determined by the English Common Law and the English decisions pertaining thereto.

The recognition of a general duty under our law to answer questions put by the police during the investigation of a crime represents a sharp contrast with English law which, as a rule, declines to impose an obligation to answer out-of-court questions of the police.

The refusal to answer a question which a public servant is legally authorised to ask constitutes an offence under section 177 of the Penal Code. In Van Culenberg v. Caffoor (12) the appellant was charged under section 177 of the Penal Code, that being legally bound under the provisions of section 122 (2) of the Criminal Procedure Code to answer truly the questions put to him by a Police Officer, relating to an offence, he refused to answer them on the ground that they would have a tendency to expose him to a criminal charge. It was held that in order to entitle a person to the privilege of silence under such circumstances, the Court must see that there is a reasonable ground to apprehend danger to such

person' from his being compelled to answer. See also Van Culenberg v. Sellamuttu (13) and Deheragoda v. Alwis (14). The danger to be apprehended must be real and not imaginary.

The distinction between the law in Sri Lanka and the English Common Law relating to the right to silence may be summarised as follows

(a) A person who is interrogated under section 110 of the Code of Criminal Procedure Act, No. 15 of 1979, is under statutory compulsion to answer all relevant questions other than those which have an incriminating character. In Sri Lanka the right to silence does not extend to an exculpatory statement. According to the Oxford Dictionary an "exculpatory" statement is a statement which clears a person from a charge. English law recognizes no duty to answer questions put by the police.

(b) There is no provision in Sri Lanka like the Judges" Rules in England for the administrating of a caution to the accused while he is under interrogation by the police;

(c) Under section 110(3) a statement made by any person to a police officer in the course of any investigation may be used for the purpose of impeachment of his credibility and not for the purpose of corroborating his testimony in Court. In England a statement made by the accused to a police officer after he has been cautioned is admissible as substantive evidence against him.

There is a statutory immunity in our law given to a suspect to decline to answer any incriminating questions put by the police. However, if he does make an incriminating statement in answer to questions by the police that statement shall not be proved against him at his trial as section 25 of the Evidence Ordinance expressly forbids it subject to the proviso in section 27 of the Evidence Ordinance.

At the trial in this case the appellant made a dock statement. His defence was that the Rs. 50 given him by Avis Singho was an advance fee for translating his appeal brief into English. He was authorised by law to charge a fee for translations.

The defence if believed exculpated the appellant completely under the proviso to section 19(C) of the Bribery Act which states:

".... that it shall not be an offence for a State Officer to solicit or accept a gratification which he is authorised by the law or the terms of his employment to receive."

In his dock statement the appellant gave an explanation why he did not state to a person in authority at the earliest opportunity that the money was an advance fee for translating an appeal brief.

He stated that he thought it was not proper to state this to Inspector Dharmapala as he was an officer who was connected with the raid and because police officers try to establish a case somehow or other. The appellant did not state that he expressly invoked the right to silence on the ground that his answers would expose him to a criminal charge.

There is also no precise evidence whether a question was asked by Inspector Dharmapala which would have given the appellant the reasonable apprehension that by answering the question it would have a tendency to expose him to a criminal charge. However, giving the appellant the benefit of the doubt on this matter he has yet to explain why he did not tell the Judge at the earliest opportunity, when taken to his residence, that the money he accepted was an advance fee for translating an appeal brief. After all on his own testimony, if he had opportunity and the time to tell the Judge: "He (Avis Singho) paid off a grudge against court" he could quite easily and briefly have told the Judge that the money was for translation of a brief.

A statement from the dock constitutes substantive evidence despite the lack of oath or affirmation and the absence of cross examination which effects the value of the statement: Sugathadasa v. The Rupublic of Sri Lanka (15), The Queen v. Kularatne (16).

In order to assess the probative value of the dock statement in the instant case it was necessary for the Court of Appeal to examine the infirmities in that statement. In the exceptional circumstances of this case the Court of Appeal correctly took into account the failure of the appellant to mention the exculpatory statement in his defence

at the earliest opportunity. The Court of Appeal correctly had not treated the appellant's silence at the investigative stage as corroboration of the evidence against him nor had it drawn an inference of guilt from his silence. The Court of Appeal had taken the appellant's silence into consideration in order to test the weight to be attached to his dock statement, which it was entitled to do in the circumstances of this case.

The accused under the Common Law systems has the assurance not merely that he is entitled to remain silent but that the exercise of this right will cause him no peril whatever. This consideration accounts largely for the hesitation shown by English Judges to permit any unfavourable inference from the silence of the accused at the time he is charged. The law in Sri Lanka is not a creature of the English Common Law but has received statutory expression in section 110 of the Code of Criminal Procedure Act which casts a duty on a person to answer truly all questions put to him by a police officer investigating an offence, except questions which would expose him to a criminal charge. The refusal to answer such questions may form the basis of a charge under section 177 of the Penal Code. In exceptional circumstances a judge should not be inflexibly debarred from commenting on the fact that the defence has not been divulged on a previous occasion, but propriety of the comment depends on the nature of the information that is withheld. In the circumstances of this case I hold that the Court of Appeal was justified in commenting on the appellant's failure to state his defence at the earliest opportunity at the pre-trial stage, and that there was no material misdirection as to the right of silence of the appellant.

The next submission of learned President's Counsel was that the Court of Appeal had misdirected itself on a vital point regarding the contents of the reply by the appellant to the question by Bissomenika "Sir, will my elder brother go to jail?"

Learned President's Counsel submitted that since the evidence of Avis Singho had been totally rejected by the Court of Appeal on the first charge the evidence of Bissomenika as to what the appellant told her when she questioned him about her brother's case

assumes great importance as it is the only independent item of evidence against the appellant.

The impugned passage in the judgment of the Court of Appeal reads:

"Then a female who had come with the complainant asked him whether her elder brother would go to jail and he replied: 'He will go to jail in today's case. Then it struck me that there was an earlier case. Thereafter, I told her that I would save him with a fine'."

Learned President's Counsel submitted that this was a serious misstatement of fact as the appellant had said in his dock statement:

"He will escape with a fine. I did not tell her that I would save him with a fine".

It should be noted, however, that the sentence following immediately after the impugned passage in the judgment in page 26 states:

"He said that he did not tell her that he would save her elder brother with a fine."

At page 23 of the judgment the dock statement of the appellant has been correctly quoted

"Then I told her he will escape with a fine."

The evidence of Bissomenika has been accepted both by the High Court and the Court of Appeal. Bissomenika stated that when she asked the appellant

"Sir, will my elder brother go to jail?" He replied: "he would save his brother with a fine without sending him to jail."

Taking into consideration all the circumstances connected with the conversation between Bissomenika and the appellant I hold that no prejudice was caused to the appellant.

The final submission of learned President's Counsel was that there was a misdirection by the Court of Appeal in acting on the findings of fact of the High Court Judge (who failed to separate the evidence relating to the two charges and to consider the two charges separately and whose judgment was not set aside on Charge 1) in the review by the Court of Appeal of the evidence against the appellant on Charge 2, without an independent review.

Section 19 of the original Bribery Act (Cap. 26) did not have subsection (c). It was introduced by section 13 of the Bribery (Amendment) Act No. 40 of 1958. The new amendment reads:

S. 19(c).

"Who, being a public servant, solicits or accepts any gratification, which he is not authorised by law or the terms of his employment to receive, shall be guilty of an offence etc."

In Mohamed Auf v. The Queen (17) it was held (per H. N. G. Fernando, C.J.) that where a public servant is charged under section 19 (c) of the Bribery Act, with having accepted a gratification which he was not authorized by law or the terms of his employment to receive, the burden of proving that the gratification was unauthorized lies on the prosecution.

In consequence of this judgment section 19 of the Bribery Act was further amended by section 8 of the Bribery (Amendment) Law, No. 38 of 1974 as follows:

(1) by the substitution, for paragraph (c) of that section, of the following paragraph:

"(c) who, being a state officer, solicits or accepts any gratification," ;

(2) by the substitution for the full stop at the end of the section, of a colon ; and

(3) by the addition, at the end of that section, of the following proviso:

"Provided, however, that it shall not be an offence for a state officer to solicit or accept any gratification which he is authorised by law or the terms of his employment to receive."

A "gratification" under section 90 of the principal enactment includes money. The relevant portion of section 105 of the Evidence Ordinance states:

S. 105.

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within.... any special exception or proviso contained in any other part of the (Penal) Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

The effect of the new proviso to section 19 of the Bribery Act, is to shift the burden to the accused to prove that any gratification received by him was authorised by law or the terms of his employment.

The Court of Appeal in its judgment in the instant case has stated:

"In respect of Count 2, it was conceded by Learned Counsel for the accused-appellant that the prosecution has proved beyond reasonable doubt that the accused-appellant was a State Officer and that he had accepted a gratification of Rs. 50, and that the burden was on the accused-appellant to prove on a balance of probablity that he accepted this gratification which he was authorised by law or the terms of his employment to receive."

The Court of Appeal and the High Court Judge had carefully scrutinized the dock statement of the appellant which was the only evidence elicited by him at his trial. For the reasons stated in the separate judgments the version given in the dock statement was held to be false. I agree with this finding. The result was that the appellant had failed to discharge the burden placed on him by the proviso to section 19.

For the reasons stated in this judgment the appeal is dismissed. We affirm the conviction of the accused-appellant under Count 2 of the

indictment by the Court of Appeal and we also affirm the sentence imposed on the accused-appellant by the Court of Appeal.

WANASUNDERA, J. - I agree.

RANASINGHE, J. - I agree.

TAMBIAH, J. - I agree.

L. H. DE ALWIS, J. - I agree.

Appeal dismissed.

Mannar Mannan v. The Republic of Sri Lanka - SLR - 280, Vol 1 of 1990 [1990] LKSC 9; (1990) 1 Sri LR 280 (30 January 1990)

MANNAR MANNAN
v.
THE REPUBLIC OF SRI LANKA

SUPREME COURT.
TAMBIAH, A. C. J., H. A. G. DE SILVA, J., G. P. S. DE SILVA, J., BANDARANAYAKE, J. AND JAMEEL, J.
S.C. APPEAL No. 27/87-C.A. No. 42/85-H.C. BATTICALOA 186/80.
NOVEMBER, 28 AND 29, 1989.
DECEMBER, 1 AND 4, 1989.

Criminal Law-Murder-Non direction amounting to misdirection-Burden of proof Applicability of proviso to section 334 (1) of the Code of Criminal Procedure Act-Burden of proof of denial by accused--Reasonable doubt-Dock statement.

In a trial on a charge of murder two eye-witnesses testified to seeing the accused appellant fire one shot with a gun at the deceased at night. The accused in a statement from the dock denied he was anywhere in the vicinity of the shooting. The trial judge failed to direct the jury that it was sufficient for the appellant to secure an acquittal if the statement from the dock raised a reasonable doubt in regard to the allegation of the prosecution that it was the appellant who shot the deceased.

Held:

1. The enacting part of sub-section (1) of section 334 ' mandates ' the Court to allow the appeal where

(a) the verdict is unreasonable or cannot be supported having regards to the evidence; or

(b) there is a wrong decision on any question of law ; or

(c) there is a miscarriage of justice on any ground.

The proviso dearly vests a discretion in the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view that the court is precluded from applying the proviso in any particular category of " wrong decision" or misdirection on questions of law as for instance, burden of proof.

There is no hard and fast rule that the proviso is inapplicable where there is a non direction amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and intent of the non-direction amounting to a misdirection on the burden of proof (b) all facts and circumstances of the case, the quality of the evidence adduced and the weight to be attached to it.

2. The appellant had been identified by the widow and daughter of the deceased. There was bright moonlight at the time and the appellant was known to them. Their story that the appellant shot the deceased from very close range after which the gun was re-loaded is corroborated by the burning, blackening, tattooing and singeing on the deceased's body and the Police recovering a spent cartridge at the scene. Further the accused and Dominic his son-in-law had gone to the Police Station and the accused had handed over a gun which was found to be smelling of burnt gun powder. Dominic had a boundary dispute with a brother of the deceased. Dominic who was also an accused in the case had died prior to the trial.

3. Despite the non direction in regard to the appellant's dock statement a reasonable jury properly directed would inevitably and without doubt have returned the same verdict.

De Alwis v. The Queen 75 NLR 337, 339 distinguished.

Cases referred to:

(1) De Alwis v. The Queen 75 NLR 337, 339.

(2) Lafeer v. The Queen 74 NLR 246.

(3) Dionis v. The King 52 NLR 547.

(4) Don Henry v The Queen 71 NLR 559.

(5) King v. Fernando 48 NLR 249.

(6) Karunaratne v. The State 77 NLR 527.

(7) Punchi Banda v. The State 76 NLR 293.

(8) Piyadasa v. The Queen 72 NLR 434

(9) Wyman v. The Queen 72 NLR 6.

(10) Yahonis v. The Queen 67 NLR 8.

(11) Martin Singho v. The Queen 69 CL W 21

(12) Kandakutty v. The Queen 75 NLR 457.

(13) Murtagh and Kennedy 39 Cr. App. Rep. 72.

(14) Weerasena v. The Queen 73 NLR 300.

(15) Gunapala v. The State CA 102/87 C.A. Minutes of 27.8.89.

(16) R. v. Landy, White and Key 72 Cr. App. Rep. 237.

(17) Nicholas Webb Edwards 77 Cr. App. Rep. 5.

(18) Bronlie David Oliva 46 Cr. App. Rep. 241.

(19) Slinger 46 Cr. App. Rep. 244. (20) Sparrow 46 Cr. App. Rep. 288.

(21) Stirland v. D. P. P. 1944 AC 315, 321, 1944 30 Cr. App. Rep. 40, 47.

(22) Rex v. Wijedasa Perera 52 NLR 29, 37.

(23) Queen v. Kularatne 71 NLR 529, 552.

(24) King v. Dharmasena 51 NLR 481 (P. C.)

APPEAL from judgment of the Court of Appeal.

Ranjith Abeysuriuya, P.C. with L. Wickrematunga and Missly de Silva for accused appellant.

Tilak Marapona, P.C. Additional Solicitor-General with C. R. de Silva, Senior State Counsel and K. Indatissa State Counsel for Attorney-General.

Cur adv. vult.

January 30, 1990.
TAMBIAH, A.C.J.

I agree with the judgment of G. P. S. de Silva, J., and the order made dismissing the appeal.

The appellant made a dock statement and his defence, in its essence, was one of denial of the commission of the murder, and it is not denied that the learned trial Judge had failed to give a direction to the jury that it is sufficient for the accused to raise a reasonable doubt as to the truth of the prosecution case. The leaned trial Judge has failed to direct the Jury on the impact of the dock statement on the prosecution evidence. It is settled law that the Jury must be directed that if the dock statement raised a reasonable doubt in their minds about the case for the prosecution, the accused is entitled to an acquittal (See Queen v. Kularatne, (23)).

It is the submission of Mr. Abeysuriya, P.C., that this non-direction was or. a fundamental point" which went to the "heart or the core of the case" and that the Court of Appeal should not have applied the proviso to s. 334 (1) of the Code of Criminal Procedure Act and dismissed the appeal. He also submitted that in such a situation,

the Court of Appeal should have ordered a re-trial in terms of the proviso to s. 334 (2) of the Code.

Mr. Abeysuriya, P. C., primarily relied on a passage in the judgment of G. P. A. Silva, S.P.J., in De Alwis v. The Queen (1)

"There has been no case where despite a clear misdirection on the burden of proof this Court has thought it fit to apply the proviso and dismiss the appeal and affirm the verdict of the Jury."

As was correctly pointed out by Mr. Marapone, A. S. G., the attention of that Court was not drawn to **Lafeer's case** (2) where despite a misdirection and also a non-direction on the standard of proof, the proviso was applied and the appeal was dismissed.

Mr. Abeysuriya, P. C., also relied on the judgments in the cases of Dionis v. The King (3) and of Don Henry v. The Queen (4). In the former case, the Court did consider the proviso but determined that it was not "an appropriate case for the application of the proviso" though there was a misdirection on the burden of proof. No doubt, the nature of the misdirection would have been relevant in this determination. In the latter case, the Court observed that "it is quite unnecessary to say here whether every case of misdirection in respect of the burden of proof precludes an application of the proviso." There is nothing in either of these cases to suggest that the Court was laying down an absolute and hard and fast rule that the proviso is not applicable where the misdirection relates to the burden of proof.

The corresponding provision in the English Law which was s. 4 (1) of the Court of Criminal Appeal Act of 1907 was in terms identical with s.334 (1) of our Code. In the case of Bronlie David Oliva (18), the trial Judge failed to tell the Jury that the burden was on the prosecution to prove the prisoner's guilt. The Court of Criminal Appeal quashed the conviction. Oliva was not followed in Slinger's case (19) where too the trial Judge omitted to say that the burden was always on the prosecution and that the prisoner never had to prove his innocence. The appeal was dismissed by the Court of Criminal Appeal as there was no substantial miscarriage of justice. In Sparrow's case (20) the summing-up was defective with regard to the burden of proof. The Court of Criminal Appeal considered both

the cases, Oliva and Slinger, and said that in an appropriate case, the proviso to s. 4 (1) of the 1907 Act can be applied. It dismissed the appeal as there was no substantial miscarriage of justice. In Nicholas Webb Edwards (17) the trial Judge failed to direct the Jury on the standard of proof which the Court of Appeal considered as a "serious defect in the summing-up." The Court considered the cases of Oliva, Slinger and Sparrow and concluded that there is no absolute rule excluding the operation of the proviso to s. 2 (1) of the Criminal Appeal Act of 1968. Though the grounds for allowing the appeal are not the same as in s. 4 (1) of the 1907 Act, the proviso is identical except that the word "substantial" has been dropped. The Court proceeded to say, "From those cases (Stinger& Sparrow) it appears that in such a case, as in any other, the Court must consider the operation of the proviso in the light of the particular facts of the case. There are various formulations in the cases of the principle uderlying the proviso. We shall adopt the words of Viscount Simon, L. C., in Stirland v. Director of Public Prosecutions (21) and ask ourselves whether on the evidence a reasonable jury, properly directed on the standard of proof, would without doubt have convicted the appellant." The Court then reviewed the evidence and came to the view that the evidence against the appellant was "overwhelming" and that despite the serious omission of the Judge, this was a case where beyond all doubt a reasonable jury, if property directed, would on the evidence have convicted the appellant, and dismissed the appeal.

Thus it would seem from a consideration of the English cases that in considering whether the proviso should be applied or not where there is a non direction is regard to the burden of proof, no absolute and hard and fast rule can be laid down ; the Court must consider the operation of the proviso in the tight of the particular facts of the case. I see no reason why the test formulated in the English cases in deciding whether the proviso should be followed or not, should not be followed in this country. In fact, the test formulated by Viscount Simon L. C., in **Stirland's** case has been adopted in the cases of King v. Dharmasena (24) and Rex v. Wijedasa Perera (22).

The facts have been discussed by G. P. S. de Silva, J., and I agree with his conclusion that the case against the appellant was a "formidable" and "everwhelming" one. It is significant that it is not

the contention of the appellant that the verdict of the Jury was "unreasonable" or that it "cannot be supported having regard to the evidence". So, I ask myself the question : "Whether on the evidence, a reasonable jury, properly directed on the burden of proof, would without doubt have convicted the appellant ?", and my answer is "Yes".

G. P. S. DE SILVA, J.

The appellant along with one Dominic was indicted on the charge of having committed the murder of K. Kanapathipillai on 27th October, 1977. Dominic had died prior to the trial and the case proceeded only against the appellant. After trial, the jury found the appellant guilty of murder by a divided verdict of 6 to 1. The appellant preferred an appeal against his conviction to the Court of Appeal. The Court of Appeal dismissed the appeal. The appellant obtained leave to appeal to this Court from the Court of Appeal on the question whether the proviso to section 334(1) of the Code of Criminal Procedure Act, No. 15 of 1979 is applicable where there is a non direction amounting to a misdirection in regard to the burden of proof. When the appeal came up for hearing before a Bench of three judges of this Court, His Lordship the Chief Justice directed in terms of Article 132 (3) (i) of the Constitution that this appeal be heard before a Bench of five Judges.

I shall deal with the facts more fully later, but for the present it would be sufficient to state that this was a case of shooting by night. The prosecution relied on two eye-witnesses who testified that they saw the appellant fire one shot with a gun at the deceased who immediately died of the injuries. On the other hand, the appellant made a statement from the dock and took up the position that he did not shoot the deceased and that he was not even in the immediate vicinity of the scene at the time of the shooting. Thus the essence of the appellant's defence was one of denial and further, that at the time of the shooting he was not at the scene.

In this state of the evidence, Mr. Abeysuriya for the appellant quite rightly submitted that it was sufficient for the appellant to have raised a reasonable doubt as to the truth of the case for the prosecution, namely that it was the appellant who shot and caused

the death of the deceased; that there was no burden whatsoever on the appellant to prove his denial " or to prove that he was elsewhere at the time of the shooting. Admittedly, the trial Judge failed to direct the jury that it was sufficient for the appellant to secure an acquittal if the statement from the dock raised a reasonable doubt in regard to the allegation of the prosecution that it was the appellant who shot the deceased. This non direction, Mr. Abeysuriya argued, was on the burden of proof which is a matter, to use Counsel's own words, "that goes to the core of the case and the root of the ultimate decision of the jury". Mr. Abeysuriya further contended that once it is shown that there is a non direction on so fundamental a matter as the burden of proof, it was not open to the Court of Appeal to have had recourse to the proviso to sub-section 1 of section 334 of the Code of Criminal Procedure Act, No. 15 of 1979, and to have dismissed the appeal. In other words, Counsel maintained that where there is non direction relating to the burden of proof in a charge to the jury, there is a bar to the Court of Appeal applying the proviso to section 334(1) of the Act. It was urged that the only matter which remains for the Court to consider in such a situation is whether a re-trial should be ordered in terms of the proviso to sub-section (2) of section 334 of the Act.

Section 334 (1) reads as follows :

" 334(1). The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal

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

Section 334 (2) reads as follows :

"334(2). Subject to the special provisions of this Code the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered

Provided that the Court of Appeal may order a new trial if it is of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed. "

As submitted by Mr. Marapone, Additional Solicitor-General, the enacting part of sub-section (1) of section 334 " mandates " the Court to allow the appeal where (a) the verdict is unreasonable or cannot be supported having regard to the evidence, or (b) there is a wrong decision on any question of law, or (c) there is a miscarriage of justice on any ground. We are here concerned only with ground (b) set out above. As regards the proviso, it is relevant to note, first, that it clearly vests a discretion in the Court and, secondly, that recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. Moreover, it seems clear that on a plain reading of the sub-section there is no warrant for the view that the Court is precluded from applying the proviso in any particular category of " wrong decision " or misdirection on question of law as, for instance, burden of proof.

Mr. Abeysuriya, however, strenuously contended before us that there is a " cursus curiae " in Sri Lanka which shows that when there is a misdirection on the burden of proof the proviso to section 334(l) is never applied and that the Court of Appeal was in error in applying the “proviso" in the instant case. The principal authority upon which he relied was De Alwis v. The Queen, (1) and the passage in the judgment upon which he placed the utmost reliance reads as follows :

" There has been no case where despite a clear misdirection on the burden of proof this court has thought it fit to apply the proviso and dismiss the appeal and affirm the verdict of the jury and that is what it should be for a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned for the reason that the jury in addressing themselves to the task of

returning a verdict in the case may set about it with a complete misconception as to the burden of proof ".

The statement that there has been no previous case where the proviso has been applied despite a clear misdirection on the burden of proof is incorrect, as pointed out by the Court of Appeal. Moreover, the judgment itself cites no authority for such a broad proposition. Further, a close reading of the judgment suggests that the court was influenced by "concessions " made by counsel for the Crown.

There was the important decision in Lafeer v. Queen (2) (not referred to in De Alwis v. The Queen, (supra) where the only matters which arose for consideration were, firstly, the standard of proof required of the prosecution and secondly, "the standard applicable for the proof of facts which might establish that the accused had acted under grave and sudden provocation ". It was held that there was a misdirection in regard to the first matter and a nondirection in regard to the second matter. In the concluding paragraph of the judgment, H. N. G. Fernando, C.J. stated:" There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal. "(The emphasis is mine) This, therefore, is a case where the Court of Criminal Appeal applied the proviso despite misdirection and nondirection in regard to the standard of proof.

The next case heavily relied on by Mr. Abeysuriya was Dionis v. King, (3). That too was a case where there was a clear misdirection on the burden of proof by the trial Judge. Counsel appearing for the Crown invited the Court to dismiss the appeal, acting under the proviso to section 5(1) of the Court of Criminal Appeal Ordinance (which is in the same terms as the present proviso to section 334 (1)). Gunasekera, J. delivering the judgment of the Court of Criminal Appeal stated: "We have considered this submission but we are unable to agree with the view that this is an appropriate case for the application of the proviso notwithstanding that there

has been a misdirection on such a fundamental point as the burden of proof ". (The emphasis is mine) As rightly submitted by Mr. Marapone, this decision is not an authority for the proposition that where there is a misdirection on the burden of proof, the court is precluded from applying the " proviso ". There is nothing in the judgment to suggest that the Court was laying down any such rule.

Another case cited by Mr. Abeysuriya in support of his contention is Don Henry v. Queen (4). Here too there was a misdirection on the burden of proof and Crown Counsel invited the court to apply the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance. Pursuant to this invitation T. S. Fernando, J. expressed himself thus : "it is unusual to apply the proviso where the ground upheld is one of misdirection on the burden of proof..... it is quite unnecessary to say here whether every case of misdirection in respect of the burden of proof precludes an application of the proviso. It is sufficient to say that in our opinion we are unable to say that granting a misdirection, the prosecution has satisfied us that no substantial miscarriage of justice has actually occurred." The above dicta, in my view, tends to negative the proposition contended for by Mr. Abeysuriya, rather than to establish it.

Mr. Abeysuriya also referred us to the following cases : King vs. Fernando (5) Karunaratne v. State (6) Punchi Banda v. State (7) Piyadasa v. The Queen (S) Wyman v. The Queen, (9) Yahonis Singho v. The Queen (10) Martin Singho v. The Queen (11) Kandakutty v. The Queen (12), Murtagh and Kennedy (13) and Weerasena v. Queen (14). In all these cases, however, the court had no occasion to address its mind to the question of the applicability of the "Proviso" and hence they are of little assistance in deciding the point in issue in the appeal before us. The decision in Gunapala v. The State (15) has followed the case of De Alwis v. The Queen (supra). Moreover, Lafeer v. Queen (supra) has not been cited before the Court of Appeal.

In the subsequent written submissions Mr. Abeysuriya has drawn our attention to yet another case which he submits supports him, vis. R. v. Landy, White and Key, (16). However, I find that there was no clear ruling in this case that the proviso is inapplicable where there has been a "fundamental" misdirection. Dealing with the

submission of Mr. Hazan (on behalf of Landy) "that where there has been a fundamental misdirection ..... the proviso should never be applied", Lawton L. J. stated "We do not intend in this judgment to express any opinion as to when the proviso can be applied and when it cannot. We are concerned with the facts of this case and nothing more".

On the other hand Mr. Marapone cited the case of Nicholas Webb Edwards (17) which has considered some of the earlier English cases touching on the applicability of the "proviso". This was a case where the appellant was convicted of rape and the sole ground of appeal was that there was a failure to direct the jury on the standard of proof. Goff L. J., in the course of his judgment stated : "It is plain that the failure of the Judge to direct the jury on the standard of proof was a serious defect in the summing up ..... That being so, we have to consider whether we should exercise our powers under the proviso to section 2 (1) of the Criminal Appeal Act of 1968 to dismiss the appeal if we consider that no miscarriage of justice has actually occurred. We consider this question on the basis that there is no absolute rule excluding the operation of the proviso In a case of this kind. Counsel for the appellant did not submit that there was any such absolute rule. With this we agree': (The emphasis is mine) Having referred to the cases of Oliva, (18), Slinger, (19) and Sparrow, (20) the learned Judge proceeded to state, "From those cases it appears that in such a case, as in any other case, the court must consider the operation of the proviso in the light of the particular facts of the case. There are various formulations in the cases of the principle underlying the proviso. We shall, adopting the words of Viscount Simon L. C. in Stirland v. D. P. P., (21) ask ourselves whether on the evidence, a reasonable jury properly directed on the standard of proof, would without doubt have convicted the appellant". Thus it is seen that this judgment delivered in 1983 is an authority for the proposition that there is no absolute bar to the application of the "proviso" where there is a no direction on the standard of proof. The case of Oliva, (18) was not followed.

It is to be noted that our Court of Criminal Appeal in Rex v. Wijedasa Perera, (22) has adopted as the proper test to determine whether the "proviso" should be applied, the following test formulated by

Viscount Simon L. C. in Stirland v. D. P. P., : "A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict" (1944 A. C. 315 at 321).

On a consideration of the cases cited before us, I am of the view that there is no hard and fast rule that the "proviso" is inapplicable where there is a nondirection amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and extent of the nondirection amounting to a misdirecton on the burden of proof, (b) all facts and circumstances of the case, the quality of the evidence adduced, and the weight to be attached to it.

This brings me to a consideration of the evidence in the instant case. The case for the prosecution rested upon the testimony of Nesaratnam, the widow, and Wijayaluksamy, the daughter of the deceased. According to Nesaratnam, they had dinner at about 8.45 p.m. and had retired to bed at 9 p.m. Around mid-night she heard a voice calling out the name of her husband. She opened the door and came out to the compound. She identified the appellant who was armed with a gun. There was moonlight that night. She had asked "who it is ?" and the appellant had replied "is it you ?". Shortly thereafter the deceased who was also sleeping inside the house, had come up to the spot where she was standing. The deceased too had asked "who are you "whereupon the appellant had shot the deceased. The deceased had touched his chest and fallen on the ground. At the time the shot was fired, the deceased was about 6 feet away from the appellant. She and her daughter Wijayaluksamy started raising cries. The appellant had then breached the gun and had taken a cartridge from the belt around his waist and re-loaded the gun. Then she and the daughter had run into the house. She kew that the appellant had a licensed gun. Under cross-examination she stated that there was a land dispute between her brother and the son-in-law of the appellant, namely, Dominic. It was her position that Dominic was standing inside the

compound, a little away from the appellant at the time of the shooting. she further stated that the deceased had not consumed liquor that day.

The daugher Wijayaluksamy was also an eye-witness to the shooting by the appellant. Her evidence provided strong corroboration of the evidence of her mother. Apart from the evidence of the two eye-witnesses who had made prompt statements to the Police, there was the medical evidence which corroborated the version of the prosecution witnesses that the shooting was at very close range. The post mortem report revealed that there was one entry wound with "burnig, blackening, tatooing and singeing". The doctor stated that the assailant would have been 5 to 6 feet away from the deceased and that one shot could have caused all the injuries.

The evidence of Police Sergeant Paramanandan was that the appellant along with Dominic had come to the police station at 1.20 a.m. on 28.10.77. The appellant had handed over a gun which was found to be smelling of burnt gun powder. The Inspector of Police had visited the scene in the early hours of the morning and had seen the body of the deceased lying in the front compound of his house. Near the body he found a spent cartridge which supports the evidence of the eye-witnesses that the appellant breached the gun. The Inspector further stated that it was a poya day and "at that time there was moonlight like sunlight".

The appellant made a statement from the dock. According to him, the deceased was a good neighbour and a friend of his whom he had always helped. There was a dispute between his son-in-law Dominic and a brother of Nesaratnam over a boundary fence. The essence of his position was that it was not he who shot the deceased, and a; the time of the alleged shooting he was sleeping at home. Dominic had told him that the deceased who was drunk that night had called him into his compound and had an "argument" with him over the boundary dispute. Dominic had a gun with him as he had gone shooting "wild boar" that night. Dominic had further told the appellant that he (Dominic) got involved in a "scuffle" with the deceased and the deceased got shot accidentally.

On a consideration of the totality of the evidence it seems to me that the case against the appellant was a formidable one. The firing was at very close range and the incident took place within the compound of the deceased. There was bright moonlight that night. The appellant was a neighbour and well known to both Nesaratnam and the daughter. Thus there was ample opportunity for the two eye-witnesses to accurately and properly identify the assailant: According to the appellant, the deceased was on very cordial terms with him. Why then should the widow and the daughter falsely implicate the appellant, din truth he was not even at the scene ? There is nothing in the evidence to suggest a reason for the prosecution witnesses to falsely implicate the appellant. If the gun which Dominic had with him went off accidentally, why should the appellant be implicated and not Dominic ? On a scrutiny of the evidence, I am satisfied that there was an overwhelming case against the appellant. The appellant's story, as set out in the statement from the dock, is altogether unworthy of credit.

While the general directions in the summing up on the burden of proof and the standard of proof were adequate, yet, as rightly submitted by Mr. Abeysuriya, there was a total failure to direct the jury on the impact of the dock statement on the evidence led on behalf of the prosecution. Nevertheless, I am of the view that a reasonable jury properly directed would inevitably and without doubt have returned the same verdict. The judgment of the Court of Appeal is accordingly affirmed and the appeal is dismissed.

I wish to place on record my deep appreciation of the full assistance given by Mr. Abeysuriya and Mr. Marapone, the Additional SolicitorGeneral.

H. A. G. de SILVA, J.- I agree.

JAMEEL, J.- I agree.

BANDARANAYAKE, J.

I have had the advantage of reading the judgments of my Lord the Acting Chief Justice Tambiah, J. and my brother G. P. S. de Silva, J. and I agree with their conclusions. As the facts have been dealt with in the judgment of my brother de Silva, J. and the law and

authorities cited have been exhaustively considered in both judgments suffice it to say that in the course of submissions learned President's Counsel for the accused appellant sought to argue that wherever there has been a wrong decision on a question of law in the course of a criminal trial and that question of law related to the burden of proof, then, the proviso to section 334(1) of the Criminal Procedure Code, Act 15 of 1979 ought never to be applied. In effect Counsel sought to compartmentalise the area of law relating to " burden of proof ", as being an area so fundamental and vital to a proper and fair trial that an error made therein must have the effect of vitiating any verdict of conviction ; which conviction must then of necessity be struck down regardless of whether a substantial miscarriage of justice has not actually occurred. I see nothing in the text of section 334(1) aforesaid or in the objects of the Procedure Code to warrant such a view. Nor am I able to agree with appellant's Counsel that upon the authorities cited by him there exists in Sri Lanka a cursus curiae supporting such a proposition.

Learned President's Counsel for the respondent has demonstrated that even in the United Kingdom the correctness of the decision in B. D. Olivia s case (18) which is a decision favouring the appellant's arguments, has been doubted in Slinger's case (19), Sparrow's case (20) and Edward's case (17) and not followed. The case of Rex v. Landy, White and Key (16) does not help the appellant. In my view the proposition of law as formulated on behalf of the appellant in this appeal is too sweeping in nature and if adopted might actually introduce an undesirable element of rigidity into the law besides resulting in mischief.

The judgment of the House of Lords in Stirland v. D. P. P. (21) has been received and adopted in Sri Lanka for many years, and the tests suggested there have influenced the development of the law in this area in this country. It provides for a flexible and sensible approach to the facts and circumstances of each case which must be the underlying criteria of decision and is consonant with the language of section 334(1) of the Criminal Procedure Code. I am satisfied that this is an appropriate case where the exception could be applied. For these reasons I dismiss this appeal.

Appeal dismissed.

University Council of Vidyodaya University v. Linus Silva - NLR - 505 of 66 [1964] LKSC 11; (1964) 66 NLR 505 (5 November 1964)

[IN THE PRIVY COUNCIL]

1964 *Present:* **Lord Cohen, Lord Morris of Borth-y-Gest, Lord Hodson, and Lord Guest**

UNIVERSITY COUNCIL OF THE VIDYODAYA UNIVERSITY and others, Appellants, and LINUS SILVA, Respondent

PRIVY COUNCIL APPEAL No. 42 OF 1962

S. C. 378 of 1961-In the matter of an Application for the issue of mandates
in the nature of a Writ of Certiorari and a Writ of Mandamus in terms of
Section 42 of the Courts Ordinance (Cap. 6)

Certiorari-Master and servant-Wrongful dismissal-Remedy of servant- Teacher in Vidyodaya University-His status as servant of the University-Vidyodaya University and Vidyalankara University Act, No. 45 of 1958, ss. 5, 11, 13, 17, 18, 31, 32, 33, 61, 62.

Where there is a contractual relationship of master and servant, the servant, if he is wrongfully dismissed, cannot normally, and apart from the intervention of statute, obtain an order of Certiorari. He can only pursue a claim for damages.

The respondent held a teaching appointment as Professor and Head of the Department of Economics and Business Administration in the Vidyodaya University. At a meeting of the Council of the University (appellants) it was unanimously resolved on the 4th July 1961 to terminate his appointment. He thereupon petitioned the

Supreme Court on the 8th. August 1901 for writs of Certiorari and mandamus to quash the order of the Council and re-instate him. He stated that one member of the Council who participated in the meeting of the Council on the 4th July was biased against him and that the decision was therefore wrongful and illegal and that the order of the Council was made " maliciously, unlawfully and for reasons extraneous to those contained in section 18 (e) of the Vidyodaya University and Vidyalankara University Act No. 45 of 1958". He further submitted that the Council in ordering his dismissal in terms of section 18 (e) of the Act " acted wrongfully and unlawfully and in violation of the rules of natural justice by not making me aware of the nature of the accusations against me and also by not affording me an opportunity of being heard in my defence ".

Section 18 (e) of the Vidyodaya University and Vidyalankara University Act No. 45 of 1958 is as follows :-" Subject to the provisions of this Act and of the Statutes, Regulations and Rules, the Council shall have and perform the following powers and duties :-to appoint officers whose appointment is not otherwise provided for, and to suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University."

Held, that, having regard to the facts concerning the respondent's appointment and having regard to the provisions of the Act, the present case was not one in which there was a failure to comply with statutory provisions enforceable by *Certiorai and mandamus.* A " teacher " who has an appointment with the University is in the ordinary legal sense a servant of the University unless it be that section 18 (c) gives him some altered position. The circumstance that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18 (c) are other than ordinary contracts of master and servant. It was not open to the respondent to contend that in terminating his appointment the University Council were bound to " act judicially" and should therefore have given him an opportunity to be heard after being

made aware of the grounds upon which the termination of his appointment was to be considered. In the circumstances the remedy of certiorari was not available to the respondent.

APPEAL from a judgment of the Supreme Court reported in (1961) 64 N. L. R. 104.

Dingle Foot, Q. C., with Dick Taverne and M. I. H. Haniffa, for the appellants.

J. G. Le Quesne, Q. C., with Gerald Davies, for the respondent.

Cur. adv. vult.

November 5, 1964. *[Delivered by* **LORD MORRIS OF BORTH-Y-GEST**]-

In order to decide the issues which are raised in this appeal it is necessary to consider the nature of the position which the respondent held in the Vidyodaya University. He had a teaching appointment in that University. At a meeting of the Council of the University it was unanimously resolved to terminate his appointment. He thereupon petitioned the Supreme Court to grant a mandate of a writ of certiorari to quash the " order " of the Council. His petition was based upon the contention that in terminating his appointment the University Council were bound to " act judicially " and should therefore have given him an opportunity to be heard after being made aware of the grounds upon which the termination of his appointment was to be considered. The Supreme Court directed " that the order of the University Council of 4th July 1961 terminating the petitioner's appointment as from that day be quashed ". On appeal from the judgment of the Supreme Court it has been submitted that the relationship between the University and the respondent was that of master and servant, and that the contract of employment was terminated by the University, and that in those circumstances it was not competent for the Supreme Court to issue a mandate of a writ of certiorari. In effect it was contended that the proceedings were entirely misconceived and that even if, contrary to the appellants' contention, the respondent had any ground of complaint it could be raised only in an action and not by seeking the remedy of certiorari.

The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. If the master rightfully ends the contract there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages.

A recent statement of principle is to be found in *Ridge v. Baldwin1[* [1964] A. C. 40 *].* In his speech in that case Lord Reid at page 65 said :-

" The law regarding master and servant is not in doubt. There cannot be specific

performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

To a similar effect were the words of Viscount Kilmuir L.C. in his speech in Vine v. National Dock Labour Board 2[[7957] A. C. 488.]. Vine was a registered dock labourer who as such was employed under a scheme embodied in an order made under a section of the Dock Workers (Regulation of Employment) Act, 1946. He was invalidly dismissed. Because this was so his name had not been validly removed from the register of Dock Workers and he continued to be in the employ of the National Board. At page 500 Lord Kilmuir said :-

" This is an entirely different situation from the ordinary master and servant case ; there, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is therefore right that, with the background of this scheme, the court should declare his rights."

In the same case Lord Keith (at page 507) said :-

" This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

The House of Lords approved the dissenting judgment which had been given by Jenkins L.J. in the Court of Appeal. In the course of his judgment Jenkins L.J. said ([1956] 1 Q. B. at page 674)-" But in the ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract and the contract having been wrongfully put an end to a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more." See also the judgment of their *Lordship's Board in Francis v. The Municipal Councillors of Kuala Lumpur 1.***[**1 [1962] 1 W. L. R. 1411.**]**

It becomes important to consider therefore whether the respondent had any other position or status than that of an employee or servant of the University. The Vidyodaya University is a Corporation established by the Vidyodaya University and

Vidyalankara University Act No. 45 of 1958 which was assented to on the 19th December 1958. The University has power (see section 5 of the Act) to institute Professorships, Lectureships and any other posts or offices which may be required and to make appointments thereto. The Vice-Chancellor (see section 11) is a whole time officer of the University and is the principal executive and academic officer of the University : he holds office for a term of five years but he may be re-appointed. The Authorities of the University (see section 13) are the Court, the Council, the Senate, the Faculties, the General Board of Studies and Research, and such other bodies as may be prescribed by Statute as Authorities o: the University.

Section 17 of the Act relates to the Council. Its provisions are as follows:-

" 17. (1) The University Council shall be the executive body of the University.

(2) The Council shall consist of the following persons :-

(a) The ex-officio members who shall be-

(i) the Vice-Chancellor,

(ii) the Director of Education, and

(iii) the Deans of the Faculties.

(b) Other members who shall be-

(i) three members appointed by the Chancellor,

(ii) two members elected by the Court from among its own body,

(iii) two members elected by the Senate from among its own body, and

(iv) in the case of the Vidyodaya University of Ceylon five members elected by the Vidyadhara Sabha from among its own body, and in the case of the Vidyalankara University of Ceylon five members elected by the Vidyalankara Sabha from among its own body.

(3) Members of the Council ether than ex-officio members shall hold office for a period of three years :

Provided that the members of the Council elected under the provisions of sub-paragraphs (ii) and (iii) of paragraph (b) of sub-section (2) shall retain their membership so long only within the said period of three years as they continue to be members of the body which elected them.

(4) The quorum for a meeting of the Council shall be prescribed by Statute."

Section 18 defines the powers and duties of the Council: some of these call for mention :-

" 18. Subject to the provisions of this Act and of the Statutes, regulations and Rules, the Council shall have and perform the following: powers and duties :-

(d) after consideration of the recommendations of the Senate, and subject to ratification by the Court, but without prejudice to anything done by the Council before such ratification,-

(i) to institute, abolish, or suspend Professorships, Lectureships, and other teaching posts, and

(ii) to determine the qualifications and emoluments of teachers;

(e) to appoint officers whose appointment is not otherwise provided for, and to suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of net less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University;

(f) to appoint, and to suspend, dismiss or otherwise punish persons in the employ of the University other than officers and teachers ; "

It is provided by section 31 that every appointment to a post of Professor or Lecturer in the University is to be made by the Council after considering the recommendation of a Board of Selection and by section 32 it is provided that every appointment to a post of teacher other than that of Professor or Lecturer is to be made by the Council after considering the recommendation of a Selection Committee.

Section 33 is in the following terms :-

" 33. (1) Every appointment of a teacher, Registrar or Librarian shall be upon an agreement in writing between the Corporation and such teacher, Registrar or Librarian. Such agreement shall-

(a) In the case of experienced persons who have already gained distinction in their subjects, be for such period and on such terms as the Council may resolve, and

(b) in other cases, be for a probationary period of three years which may be extended by the Council by resolution for a further period not exceeding one year, if the Council thinks fit.

(2) In the case of agreements entered into by the Corporation under sub-section (1) (b), any renewal thereof upon the expiration of the probationary period

shall be expressed to be and remain in force, subject to the reservations hereinafter referred to, until the teacher, Registrar or Librarian appointed thereby has completed his sixtieth year, or, if he completes his sixtieth year in the course of an academic year, until the last day of such academic year, and in any such agreement there shall be expressly reserved-

(a) a right for the Corporation to annul the agreement on any ground on which it shall be lawful for the Council, under the provisions of section 18 (e), to dismiss a teacher, Registrar or Librarian ; and

(b) a right for the teacher, Registrar or Librarian to terminate the agreement at any time upon three months' notice in writing to the Vice-Chancellor."

By the Interpretation Section (section 61) " officer " means the Vice. Chancellor, the Registrar, the Dean of any Faculty, the Librarian, or the holder of any office created by Statute and " teacher " includes Professor, Lecturer and any other person imparting instruction in the University and who is in receipt of an annual salary, or, in the case of a Bhikku, an allowance.

The first Vice-Chancellor of the University had power (see section 62) to make such appointments as he might think necessary for the purpose of bringing the University into being and for such purpose to exercise any power which the Act conferred on any Authority of the University.

Pursuant to this power the Vice-Chancellor by letter dated the 15th May 1959 appointed the respondent to "the post of Lecturer Grade I in the Department of Economics ". The letter was in the following terms :-

"15th May 1959.

Linus de Silva, Esqre.,

Dear Sir,

Post of Lecturer-
Department of Economics

With reference to the discussion you had with my Administrative Assistant, I am pleased to appoint you to the post of Lecturer Grade I in the Department of Economics of this University. You will continue to be the Head of the Department and will represent it at the various University bodies.

The scale of salary attached to the post is Rs. 8,880/- to Rs. 13,200/-.

Please acknowledge receipt of this letter.

Dharmasastronnatikami,
Vice-Chancellor."

On the 1st September 1960 the Vice-Chancellor wrote to the respondent in the following terms :-

" Vidyodaya University of Ceylon,
Colombo 10.
1st Sept., 1960.

Linus Silva, Esq.,
Head of the Dept. of Economics,
Colombo.

Post of Professed and Head of the Dept. of Economics & Business Administration

In pursuance of the decision of the Council to establish a Dept. of Business Administration in order to widen the scope of the Dept. of Economics, I am pleased to promote you to the Pest of Professor and Head of the Dept. of Economics and Business Administration with effect from the 1st October, 1960. The salary scale attached to the post is Rs. 15,000/- 4 of Rs. 600/- and 4 of Rs. 900/-Rs. 21,000/- You will be entitled to cost of living special living and rent allowances according to Government Rates. You will continue to be a contributor to the University Provident Fund.

This promotion is, however, subject to the passage of the University Budget for J 960/61.

Please acknowledge receipt of this letter. I shall be glad if you will please undertake the reorganization of the Departments immediately so that the two Departments will commence academic work from the beginning of the Third Academic Year.

Sgd. Dharmasastronnatikami,
Vice-Chancellor."

By letter dated the 2nd September 1960 the respondent accepted the appointment.

On the 4th July 1961 the Vice-Chancellor sent a letter to the respondent terminating his appointment. The letter was in the following terms :-

" Vidyodaya University of Ceylon,
Colombo 10.
4th July 1961.

Mr. Linus Silva,
P. 0. Box 1342,
Colombo 1.

Dear Sir,

Termination of Appointment

You are hereby informed that the Council at its meeting held on the 4th of July 1961 has unanimously resolved to terminate your appointment in the University as from to-day.

The Council has also decided to pay a sum equivalent to three months' salary less whatever amounts are due from you. The total now due is Rs.],151.15, as shown in the Schedule hereunder.

I am hereby conveying to you the decision of the Council. I enclose the cheque No. D/9 207613 for Rs. 3,346.15 (Three thousand three hundred and forty-six Rupees and Cents Fifteen only) ; being the balance due to you in terms of the decision of the Council.
Any books, answer scripts or other property of the University now in your custody should be returned by you.

Sgd. Dharmasastronnatikami,
Vice-Chancellor.

Schedule referred to :-

	Rs. c.
Allowance as Head of Department overpaid since	900 0
Cost of Telegrams, paid from	5 65
Due on account of sale of	10 0
Lectures delivered by Mr. K. T. R. de Silva in Feb.	235 50
Total Due	**1,151 15 "**

The respondent thereupon made application to the Supreme Court of Ceylon by Petition dated the 8th August 1961. He sought mandates in the nature of writs of certiorari and mandamus to quash the order of the Council and to direct the members of the Council (whom he made respondents to his Petition) to recognise him as Professor and Head of the Department of Economics and Business Administration. In his Petition and in his Affidavit he stated that one member of the Council who was present at and participated in the meeting of the Council of the 4th July was biased against him and that the decision was therefore wrongful and illegal and that the order of the Council was made " maliciously, unlawfully and for reasons extraneous to those contained in section 18E " of the Act. He further submitted that the Council in ordering his dismiss?] in terms of section 18E of the Act " acted wrongfully and unlawfully and in violation of the rules of natural justice by not making me aware of the nature of the accusations against me and also by not affording me an opportunity of being heard in my defence ."

In the statement of objections of the members of the Council it was submitted that

the application was misconceived in that the Council was not a judicial or quasi-judicial body but was the executive body responsible for the administration of the University which did not maintain, a record and did not make orders capable of being reviewed or questioned by means of a writ cf certiorari aid that a decision to terminate an employment could not be reviewed by way of certiorari. It was further submitted that it was not a fit case for the exercise of a discretion to grant either certiorari or mandamus.

In an Affidavit of the Vice-Chancellor it was stated that there was a form of agreement for use on the appointment of teachers in the University and it was stated that the respondent had been given a draft agreement in the usual form in order that he should sign it but that he had failed and neglected to sign it. The paragraphs in the form of agreement included the following :-

" 1. The Professor agrees diligently and faithfully to perform such duties as the Vidyodaya University may require him to undertake in accordance with the Act and the Statutes, Acts and Regulations made thereunder and shall obey the lawful orders of the Vice-Chancellor."

" 4. (i) The Professor may terminate this agreement by giving to the Vice-Chancellor three months' notice in writing ending at the end of a term.

(ii) If the Professor terminates this agreement otherwise than in accordance with this agreement, the Vidyodaya University may not be bound to pay to him any salary to which he would otherwise have become entitled.

5. The appointment shall continue subject to this agreement until the end of the session after the Professor completes his fifty-fifth year but may by resolution of Council be extended for a further period until the Professor attains his sixtieth year.

6. The Vidyodaya University may annul this agreement on any ground on which it may be lawful for the Council, under the provisions of Section 18 of the Act to dismiss a teacher provided that the terms of that paragraph are complied with.

7. The Professor shall, as long as he is employed by the Vidyodaya University and has not completed his fifty-fifth year contribute to the Vidyodaya University Provident Fund in accordance with Part VIII of the Act."

In an Affidavit in reply the respondent denied that any draft agreement was sent to him and stated his belief that no form of agreement was in existence at any material time.

At their meeting on the 4th July the Council had before them a memorandum prepared by the Registrar and also various other documents but it is common ground that the respondent was not shown these and was not told the nature of the accusations against him and was not given an opportunity of being heard in his own defence. In a joint Affidavit it was stated by a number of members of the Council who were present on the 4th July that they were satisfied that the respondent's

conduct was such that he was unfit to continue in the employment of the University and that they were satisfied that the best interests of the University would be served by the termination of the respondent's appointment. They emphatically denied that their action was in any way actuated by malice or that it was not within the powers and duties imposed by section 18 (e) of the Act.

Their Lordships have in no way been concerned to consider the matters referred to in the various Affidavits in reference to the conduct of the respondent. The sole issue raised in the appeal is whether it was appropriate and competent for the Court to issue a mandate in the nature of a writ of certiorari. In the Supreme Court the appellants submitted that even if it were competent for the Court to proceed to quash the " order " of the University Council there were various reasons why the Court should not so proceed. Thus for example it was submitted that the appellant had acquiesced in the discontinuance of his services. The submissions here referred to were however not advanced before their Lordships' Board.

On behalf of the respondent it has not at any time been suggested that less than two-thirds of the members of the Council concurred in the decision reached.

In his judgment in the Supreme Court the learned Judge (T. S. Fernando J.) recorded that learned Counsel appearing for the appellants admitted that the respondent was not informed of the accusations against him and was not afforded any opportunity of defending himself against them but had contended that those circumstances were of no relevance because the Council were not acting in a judicial or quasi judicial capacity but purely in an administrative capacity. The learned Judge said :-

" Learned counsel for the petitioner, while not disputing that in deciding whether the petitioner was unfit to be a teacher of the University the Council acts in an administrative capacity argued that in making that administrative decision as to unfitness the relevant law required the Council to ascertain the existence of certain facts: objectively, and that in the ascertainment of these facts the Council was required to act judicially. It can hardly be doubted that, if in the process of arriving at a decision as to unfitness of the petitioner to remain as a teacher the Council is throughout acting in an administrative capacity, there is no room for the requirement of the observance of the rules of natural justice. The application therefore turns on the question whether at any stage in arriving at the administrative or subjective decision as to unfitness the Council is required to consider certain matters judicially. If so, the Council would be amenable to certiorari. If not, this application must-fail."

After referring to various authorities the learned Judge came to the conclusion that the Council was " under a duty to act judicially at the stage of ascertaining objectively the facts as to incapacity or misconduct " and that as they had not acted judicially (in the sense of giving a hearing after notifying the grounds of complaint) the respondent was-entitled to succeed. The sole issue involved in the appeal is whether there was as a matter of obligation a duty in the Council to give the respondent an opportunity to be heard and a duty to do all that in law is denoted by the words " act judicially ".

Certain of the authorities referred to by the learned Judge were cases dealing with other relationships than that of master and servant and their Lordships do not find it necessary to discuss those cases in detail. Some of them were referred to in the speeches in the House of Lords in Ridge v. Baldwin (supra). The case of Vine v. National Dock-Labour Board (supra) depended upon the special position of Dock Workers under the Dock Workers (Regulation of Employment) Act 1946 and! the Regulations which were made. As Lord Kilmuir L.C. said there was " an entirely different situation " from the ordinary master and servant case : and as Lord Keith said there was not a " straightforward, relationship " of master and servant.

Under the Dock Workers (Regulation of Employment) Order S. R. & 0. 1947 No. 1189 deck workers are in the employment of the National Dock Labour Board (see Clause 8 (2) of the Scheme) but are then allocated (see Clause 4) to work for individual employers. There are however certain statutory limitations on the power of dismissal (see Clauses 16, 17 and 18 of the Scheme).

Vine was allocated work with a stevedoring company but failed to report to them. There was a complaint lodged with the National Dock Labour Board. The complaint was heard by a disciplinary committee appointed by the local dock labour board. They upheld the complaint and, purporting to act under Clause 16 of the Order, gave Vine notice to terminate his employment with the National Dock Labour Board-He appealed to a tribunal set up under the scheme. The appeal was dismissed. He then brought an action claiming damages and claiming a declaration that his purported dismissal was illegal, ultra vires and! void. It was held that his dismissal was invalid inasmuch as the local dock labour board had no power under the scheme to delegate the disciplinary powers to a disciplinary committee. The decision of the disciplinary committee was therfore a nullity. The House of Lords held that in the circumstances of the case and having regard to the background of the scheme it was proper that the Court should declare the plaintiff's rights. His name had not been validly removed from the register and he continued to be in the employ of the National Board.

In that case therefore there was a statutory scheme which gave a number of rights and imposed a number of obligations going far beyond any ordinary contract of service and, in his judgment in the Court of Appeal, Jenkins L.J., having examined the scheme said :-" In the face of those provisions, to my mind, it becomes plain that no analogy to this case can be found in the case of master and servant'.

No case was cited to their Lordships in which an order of certiorari has been made directing the quashing of an "order" of dismissal of a servant and their Lordships do not consider that support for the respondent's contentions is to be derived from the case of *Fisher v. Jackson1* **[**1 [1891) 2 Ch. 84.**]** upon which reliance was placed. It was rather a special case. A deed of trust establishing an endowed school provided that the master of the school should be appointed by the vicars of three specified parishes and power was given to the three vicars to remove the master for certain specified causes. The plaintiff was appointed master

of the school in April 1890 and in December 1890 two of the vicars served on him a notice of dismissal signed by themselves which stated certain reasons for his dismissal. No meeting of the vicars had been summoned to consider the question of the plaintiff's dismissal and he had not had any opportunity of being heard in his defence. There was no evidence that the third vicar had been consulted. The Court granted an injunction restraining the defendants from removing him from his office until after the holding of a meeting of the vicars in accordance with the terms of the Deed of Trust and until he should have had an opportunity of being heard at such meeting. That case was referred to in the House of Lords in Ridge v. Baldwin (supra) and was treated (see page 67) as a case where the plaintiff was the holder of an office.

In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and if the contract is terminated there are ordinarily no questions affecting status or involving property rights, it becomes necessary therefore to consider whether in the present case there are any features which suggest a relationship other than that of master and servant. It was submitted on behalf of the respondent firstly that if someone has the power to determine what the rights of an individual are to be then a duty to act judicially arises simply from the nature of the power, and secondly that where the power is a power to dismiss from an office (and it was contended that the respondent could be said to be the holder of an office) and to dismiss not at discretion but by reason of misconduct then there is a duty to act judicially. In their Lordships' opinion the first of these submissions is too wide and cannot be accepted. The second calls for an examination of the position which the respondent occupied having regard to the facts concerning his appointment and having regard to the provisions of the Act. It was contended that the respondent had certain statutory rights and that certiorari could be granted in order to enforce them and in order to ensure obedience to the provisions of the Act.

It appears to be common ground that the respondent did not sign the form of agreement which was referred to in his Affidavit by the Vice-Chancellor. The respondent was undoubtedly a " teacher ". Was his appointment within the scope of section 33 (1) (a) or was it within section 33 (1) (b) ? There may not be adequate evidence to enable a conclusion to be reached as to this or as to whether the appointment could have been terminated by the giving of some specific period of notice. No such notice was however given. What took place was that the respondent was dismissed in purported reliance upon the power of dismissal reposed in the Council by section 18 (e) of the Act. The provisions of that section make a distinction between an " officer or teacher " (see section 18(e)) and " persons in the employ of the University ether than officers and teachers " (see section 18 (f)). In regard to persons within the latter grouping the ordinary law of master and servant would apply. An officer or teacher on the other hand may be suspended or dismissed " on the grounds of incapacity or conduct which, in the opinion if not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University." These are solemn powers with which the Council is entrusted. It may be assumed having regard to the composition of the Council that the legislature had confidence that the powers would be exercised with

a full sense of responsibility and with a desire to do what was right and fair. In many situations doubtless the Council would wish, quite apart from any question as to any obligation, to give an opportunity to anyone whose capacity or conduct was in question to offer explanation or justification. It is not for their Lordships to say whether or not that course would have been desirable 01 helpful in the present case. The limited and rather narrow question for their Lordships is whether there was an obligation to take the course of acting judicially.

Though the groups of " officers and teachers " are both liable under and within section 18 (e) to be dismissed or suspended by the Council it does not follow that the relationship towards the University is the same in the case of both groups. Thus for example it may be that the Vice-Chancellor or some other " officer " is in a different position from that of a " teacher ". Their Lordships do not have to decide that question or to express any opinion in regard to it. Nor does the definition of an " officer " which is contained in section 61 necessarily and of itself bring it about that for the purposes now being considered an " officer " is not within the ordinary relationship of master and servant. It is to be observed further that there is no provision in the Act giving a right to be heard nor any provision as to any right of appeal to any other body. The present case is not one therefore in which there has been a failure to comply with statutory provisions.

The circumstances in the present case differ from those which existed in the cases of *Suriyawansa v. The Local Government Service Commission1* **[**1 (1947) 48 N. L. R. 433. **]** and *Abeygunasekera v. Local Government Service Commission 2* **[** 2 (1949) 51 N. L. R. 8.**]** and their Lordships do not find it necessary to discuss those cases ; there were Rules which laid down the manner in which charges against someone in the service of the Commission were to be examined.

It seems to their Lordships that a " teacher " who has an appointment with the University is in the ordinary legal sense a servant of the University unless it be that section 18 (e) gives him some altered position.

The circumstance that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18 (e) are other than ordinary contracts of master and servant. Comparison may be made with the case of *Barber v. Manchester Regional Hospital Board 3.***[**3 [1958] 1 W. L. R. 181.**]** In his judgment in that case Barry J. (at p. 196) said " Here despite the strong statutory flavour attaching to the plaintiff's contract I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more."

It may be said that if those or some of those who are " officers " of the University have a special position which takes them out of the category of employed servants, as to which matter their Lordships express no opinion, and if as a result the Council would in their case have to act judicially in exercising the power of dismissal under section 18 (e), it would seem strange if it were different in the case of " teachers" who are linked with " officers " in section 18 (e). Any difference

would however only be a consequence of the application of the law to the facts. The present case depends therefore upon ascertaining the status of the respondent. He invoked a procedure which is not available where a master summarily terminates a servant's employment and for the reasons which have been expressed their Lordships do not consider that the respondent was shown to be in any special position or to be other than a servant.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and that the Order of the Supreme Court dated the 22nd November 1961 be set aside. The respondent must pay the costs before the Supreme Court and the costs of the appeal.

The respondent must have his costs of the consent petition to enable the appeal to be set down for hearing without further Orders of Revivor and there will be a set-off.

Appeal allowed.

Ehelepola v. Officer In Charge, Police Station, Kandy and Another - SLR - 295, Vol 1 of 1998 [1998] LKSC 51; (1998) 1 Sri LR 295 (3 April 1998)

EHELEPOLA
v.
OFFICER-IN-CHARGE, POLICE STATION, KANDY AND ANOTHER

SUPREME COURT
PERERA, J.,
ANANDACOOMARASWAMY, J. AND
BANDARANAYAKE, J.
S.C. APPEAL NO. 62/97
H.C. KANDY NO. 61/95
DECEMBER 19, 1997.
JANUARY 10, 1998.

Offences against Public Property Act, No. 12 of 1982 - Theft of Public Property - meaning of 'Public Property" - Sections 3 and IS of the Act - Section 366 of the Penal Code - Evidentiary value of the dock statement of accused.

Five accused including the appellant were convicted of theft of an underground cable drum belonging to Sri Lanka Telecom, an offence punishable under section 3 of the Offences against Public Property Act, No. 12 of 1982. In his judgment, the Magistrate observed that the dock statement made by appellant had no evidentiary value. In appeal, the High Court set aside the conviction and sentences imposed on the accused and ordered a retrial before another Magistrate.

Held:

1. The cable drum which was the subject matter of the charge of theft was "public property* within the purview of section 12 of the

Offences against Public Property Act.

2. The Magistrate had misdirected himself when he stated that the dock statement made by the appellant had no evidentiary value.

Cases referred to:

1. *King v. Sittamparam* 20 NLR 257.

2. *The Queen v. Kularatne* 71 NLR 529.

3. *The Queen v. Mapitigama Buddharakhita* 63 NLR 433.

APPEAL from the judgment of the High Court, Kandy.

Mohan Peiris with Ms. Nuwanthie Dias for the appellant.

Buwaneka Aluvihare, S.S.C for respondents.

Cur. adv. vult.

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April 3, 1998.

PERERA, J.

The petitioner and four others were charged in the Magistrate's Court of Kandy on the following counts :-

(a) That the petitioner with four others did on or about 6.4.1994 fraudulently remove from the possession of Ariyaratne Serasinghe of Werallagama an underground cable drum valued at Rs. 125,000/- belonging to the Department of Telecom and thereby committed an offence punishable under section 3 of the Protection of Public Property Act as amended by Act No. 76 of 1988.

(b) That the aforesaid persons did on or about the 6th of April, 1994, fraudulently dispose of the said underground cable drum belonging to the Department of Telecom which was in the possession of

Ariyaratne Serasinghe and thereby committed an offence punishable under section 3 of the Protection of Public Property Act as amended.

After trial, the learned Magistrate found all five accused guilty on the 1 st count and sentenced the accused to serve a term of six months rigorous imprisonment and imposed on each one of them a fine of Rs. 5,000/- in default six months' rigorous imprisonment.

All the accused appealed against the conviction and the sentences imposed to the High Court of the Central Province holden in Kandy. At the conclusion of the argument of the said appeal, the learned High Court Judge set aside the convictions and sentences imposed on the accused-appellants and ordered a retrial on the same charges against the accused-appellants before another Magistrate (vide P2).

The appellant-petitioner - hereinafter referred to as the appellant (the 2nd accused-appellant in the High Court appeal) has lodged the present appeal against the judgment of the High Court ordering a retrial in this case. No appeals have been filed by the other four accused to this Court.

Both counsel for the appellant and counsel for the State agreed that this was a fit matter to be decided upon the written submissions filed in this case.

This Court granted special leave to appeal to the appellant on the 9th of May, 1997 on the following questions :-

(1) Can the conviction for theft of public property be sustained in the absence of evidence that the subject matter of the transaction was public property?

(2) Can the conviction of the 2nd appellant for theft be sustained in the absence of evidence of any participation by him in the theft?

(3) Did the learned Magistrate misdirect himself when he held that the unsworn statement of the appellant from the dock was of no evidentiary value?

(4) Did the learned High Court Judge act correctly in sending the case for retrial, having held that the learned Magistrate was-

(a) wrong in disregarding the dock statement,

(b) the insufficiency of evidence to hold that the subject matter was public property, and

(c) the absence of the 2nd accused-appellant at the time the theft took place on 6.4.1994 in Kandy?

The first question arises for determination by this Court therefore is whether there is evidence to establish that the underground cable drum which was the subject matter of the theft constituted public property within the meaning of the definition set out in the Offences against Public Property Act, No. 12 of 1982.

The aforesaid Act defines **Public Property** as follows:-

"Public Property means the property of the government, any department, statutory board, public corporation, bank, co-operative society or a co-operative union."

Further this Act defines a Public Corporation in the following terms:-

"Public Corporation means any corporation, board or other body which was or is established by any written law other than the Companies Ordinance with funds or capital wholly or partly provided by the government by way of grant, loan or otherwise-It would also be relevant to advert to the preamble to the Sri Lanka Telecommunications Act, No. 25 of 1991, which reads thus:

"To provide for: transfer of property, rights and liabilities of the Department of Telecommunications to the Corporation named Sri Lanka Telecom established by Order under section 2 of the State Industrial Corporations Act, No. 49 of 1957 . . ."

At the trial, the Deputy General Manager of the Sri Lanka Telecom, Merril Perera has testified to the effect that the Telecommunications

Department was converted into a State Corporation in September, 1991. He has also identified the cable drum in question as the property of the Sri Lanka Telecom. It is his evidence that the Sri Lanka Telecom is a State Corporation which was previously a department of government. The testimony of Merril Perera stands uncontradicted on this matter.

Having regard to the evidence set out above and the definition of the term "Public Property" in section 12 of the offences against Public Property Act, No. 12 of 1982, I hold that sufficient evidence has been adduced to establish that the cable drum which was the subject matter of the charge of theft was indeed public property and falls within the purview of the said Act.

The next question on which leave has been granted by this Court is whether the conviction of the appellant on the charge of theft could be sustained in the absence of evidence of any physical participation on the part of the appellant in the actual theft itself in Kandy. It is the petitioner's contention that at all times material to the commission of the "alleged theft" he was in Colombo. The allegation is that the theft of this cable drum was committed at No 360, Werallagama, Padeniya in Kandy.

It was contended on behalf of the appellant that the offence of theft under the provisions of Offences against the Public Property Act has been given the same definition as in the Penal Code in terms of the amendment. It was counsel's submission that having regard to the evidence in this case, the prosecution has failed to prove a charge of theft against the appellant as there was no material to establish any participation on the part of the appellant in the commission of the alleged theft on 6.4.94.

The offence of theft is defined in section 366 of the Penal Code as follows :

The following ingredients have thus to be proved to establish the offence of theft:-

(a) an intention to take dishonestly

(b) any movable property

(c) out of the possession of any person

(d) without that person's consent

(e) moves that property

(f) in order to such taking.

The essential feature of the offence of theft undoubtedly is that it is an offence against possession as opposed to ownership.

Hence it is imperative to identify the person against whom the offence of theft has been committed or the possessor. Then if the evidence discloses that any person with the requisite intention moves any movable property out of the possession of the possessor in order to taking such property he commits the offence of theft.

"**Salmond** in his book on **Jurisprudence**" (12th ed. pp. 270-273) states thus:

"I possess, roughly speaking, those things which I have; the things which I hold in my hand, the clothes which I wear, and the objects which I have by me. To possess them is to have them under my physical control."

"Now to say that something is under my control is not to assert that I am continuously exercising control over it. I can have a thing in my control without actually holding or using it at every given moment of time."

"All that is necessary is that I should be in such a position as to be able in the normal course of events to resume actual control if I want."

"The test then for determining whether a man is in possession of anything is whether he is in **general control** of it." at p. 273.

It would be necessary in the circumstances to briefly refer to the evidence adduced in this case. On 6.9.94 when witness Wijeratne, a driver attached to the Sri Lanka Telecom (who had been assigned the lorry 43-4949) has reported to the Telecom Office in Kandy after work, Wijeratne had been instructed by the first accused to proceed to Wattegama and collect a cable drum from the Telecom warehouse at Wattegama. He had complied with those instructions and when he brought the drum to Kandy, the 1st accused-appellant had instructed Wijeratne to transport this drum to Colombo on the following day -7.4.94 and to meet another Sri Lanka Telecom employee Ehelepola (the present appellant) near the Sugathadasa Stadium.

Accordingly when he reached Colombo on 7.4.94, he had met the appellant Ehelepola near the Sugathadasa Stadium. Ehelepola had been waiting there in a Hiace Van belonging to the Sri Lanka Telecom. The appellant had walked up to Wijeratne's vehicle and had inquired from him whether there was any message from Wickremasekera (the 1st accused) and Wijeratne had1 replied that the 1st accused had instructed him to hand over the drum to the appellant Ehelepola. The lorry had been driven to a place at Bloemendhal Road and the drum had been shifted from Wijeratne's lorry and loaded into a private lorry which was brought there by the appellant. Wijeratne had thereafter returned to Kandy.

According to Liyanawaduge, the Storekeeper of Sri Lanka Telecom warehouse at Wattegama, he was directed by the 1st accused on the telephone to issue a cable drum when witness Wijeratne's lorry calls for it at the stores, and as instructed by the 1st accused, he had ordered the release of the cable drum to Wijeratne.

The virtual complainant in this case is one Ariyaratne Serasinghe who at the time of the alleged theft held the office of Telecommunications Engineer, Central Province. It is his testimony that both the 1st accused and the ware housekeeper were answerable to him in regard to any issues from the warehouse. As regards all requisitions made by the 1st accused, it was Serasinghe who had immediate authority to sanction the same. The storekeeper was permitted to dispatch goods only in respect of such requisitions

as had been duly authorised by the complainant. The complainant however was answerable to the Deputy General Manager who was also the head of the North-Central Branch of the Sri Lanka Telecom. Requisitions could also be sanctioned by the Deputy General Manager, but it is therefore, clear that no movement of goods in the warehouse was possible without the sanction of the complainant being first obtained.

On the evidence adduced at the trial therefore it is manifestly clear that the complainant was in general control of the goods in the warehouse and therefore may rightly be said to have been in possession of the said goods.

According to the evidence, the ware housekeeper was answerable to the complainant. In point of fact the position of the warehouse-keeper in relation to the complaint would be that of a clerk, agent or servant. The position is the same in regard to witness Wijeratne who transported the cable drum to Colombo.

Section 25 of the Penal Code provides thus:

"When property is in the possession of a person's wife, clerk or servant on account of that person, it is in that person's possession within the meaning of the Penal Code".

Therefore, the ware housekeeper and subsequently, the driver Wijeratne had only custody in respect of the goods entrusted to him. In regard to this aspect of the matter, namely, the interpretation of section 25 of the Penal Code, Dr. G. L Peiris observes thus:

"The purpose of this provision is to obviate an anomaly which could otherwise have characterised the law governing theft. Where the master's property was in the keeping of his servant and the servant dishonestly converted the property to his own use, a conviction of theft would not be possible against the servant if possession of the property was held to be with the servant. To eliminate this difficulty, the law construes the situation as involving merely custody in the servant, where the master retains the possession of the property derivatively through his servant".

(Vide offences under the Penal Code - Dr. G. L Peiris, p. 372.)

In the present case, the movement of the movable property to wit the cable drum was caused as follows:

On the 6th of April, 1994, the 1st accused informed the warehouse-keeper of the Wattegama warehouse to despatch the impugned property to a team headed by the 3rd accused. The 1st accused was a District Telecommunications Inspector whose work came under the supervision of the complainant. Being an officer, he was vested with the implied authority to requisition goods from the Wattegama warehouse in the event of an emergency. The evidence however, discloses that there was no such emergency on the 6th of April, 1994, which necessitated the dispatch of impugned property. Therefore, there was no 'source' from which the 1st accused could derive the implied authority to requisition goods. He nevertheless held out to the ware housekeeper that he did so properly possessing the implied authority to do so.

The ware housekeeper acting in good faith in accordance with the implied authority vested in him by the complainant despatched the goods according to the wishes of the 1st accused believing the latter to be duly authorised to requisition the impugned property. The impugned property was received by Wijeratne on the instructions of the 1st accused.

The ware housekeeper by virtue of his office was a servant of the complainant and therefore had only the custody and not possession in respect of the goods entrusted to him. Since the 1st accused had by his act of requesting the impugned property from the ware housekeeper held out to the latter that he was acting with due authority, the ware housekeeper proceeded to despatch the same on the premise that he had the implied consent of the complainant so to do.

Inasmuch as the transfer of the impugned property was executed with the consent and co-operation of the ware housekeeper, though wrongfully procured, the said transfer is a 'delivery' as opposed to a taking'.

The person who took receipt of the impugned property, namely, witness Wijeratne (3rd accused) too was by virtue of his employment, answerable to the complainant, his acquisition of the impugned property can in no way amount to an acquisition of possession, but merely amounts to an acquisition of custody. Accordingly, despite the transfer of the property from one person to another, the complainant, at this juncture still retained possession of the subject property. It must also be observed that the impugned property was loaded onto a lorry which belonged to the complainant's office. In my view, therefore, in the absence of 'a moving out of the possession of the possessor1 and 'a dishonest taking1 by a recipient as well as the presence of the implied consent of the possessor, the aforesaid '1st movement' of the subject property cannot amount to a theft. According to the evidence, it was on the instructions of the 1st accused that the impugned property was moved, by a team headed by the 3rd accused from Kandy to Colombo on the 7th of May, 1994, in the same lorry belonging to the Sri Lanka Telecom - Central Province used for the purpose of transporting the said property from Wattegama to Kandy.

Inasmuch as the 3rd accused and his party, by virtue of their employment were all answerable to the complainant and therefore could only claim custody of the impugned goods, and by virtue of the fact that they were acting under the instructions of the 1st accused who had held himself out to have been authorised by the complainant, this '2nd movement1 of the impugned property too like the '1 st movement1 referred to above does not suffice to constitute a theft. This is clearly illustrated in illustration 'N' to section 366 of the Penal Code. " 'A' asks charity from 'Z' 's wife. She gives 'A' money, food and clothing. Which 'A' knows to belong to T, her husband. Here it is probable that 'A' may conceive that 'Z1 's wife is authorised to give away alms. If this was W 's impression, 'A' has not committed theft."

The evidence discloses that when the impugned property reached Colombo, it was transferred from the 3rd accused's custody to the 2nd accused on the instructions of the 1st accused.

As has been observed earlier, the 3rd accused and his party by virtue of their employment were answerable to the complainant. Accordingly, they merely had custody in respect of the subject property. Furthermore, since they were acting solely on the instructions of the 1st accused, who held himself out to have been authorised by the complainant to do so, they, in good faith believed themselves to have had the implied consent of the complainant to deliver the custody (as opposed to possession) of the impugned property to the 2nd accused.

The 2nd accused (the present appellant) however though an employee of the Sri Lanka Telecom, was not be virtue of his employment answerable to the complainant, nor to the 1st accused. Therefore, he could not, at any time be considered a clerk, agent or servant of the complainant or the 1st accused. Therefore, when the impugned property was transferred from the 3rd accused to the 2nd accused, the 2nd accused was not obliged to recognize the superior right of the complainant, and accordingly acquired possession of the impugned property as opposed to mere custody.

In so acquiring the possession of the impugned property, the 2nd accused had done so without the consent of the former possessor, namely, the complainant.

Further, according to the evidence, the impugned property was loaded onto a private vehicle which had been procured for this purpose by the 2nd accused on the instructions of the 1st accused.

The '3rd movement could not have been effected without the participation of both the 1 st and 2nd accused. While the 1st accused, by his display of apparent authority caused the subject property to be released from the possession of the complainant, the 2nd accused by his act of procuring the same, acquired possession anew on behalf of both himself and the 1st accused. The said '3rd movement1 resulted in the impugned property being moved out of the possession of the possessor, namely, the complainant without his express or implied consent. Therefore, in my view the actus reus of the offence of theft was properly constituted by this '3rd movement'.

Having regard to the facts stated above, I am unable to agree with the submission that there was no participation by the appellant in the alleged offence of theft.

The third matter on which leave to appeal has been granted is on the question whether the learned Magistrate misdirected himself when he observed that the dock statement of the appellant had no evidentiary value. I have examined the judgment of the learned Magistrate and find that the Magistrate has indeed stated that the dock statement made by the appellant had no evidentiary value. On this matter the learned Magistrate has clearly misdirected himself. It is indeed well settled law that when an unsworn statement is made by an accused from the dock, that such statement must be looked upon as evidence subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. Though there is no statutory provision for it, the right of an accused to make an unsworn statement from the dock has been recognized by our Courts for many years. (See The King v. Sittamparam (1)) and is now part of the established procedure in our Criminal Courts. If such statement is believed, it must be acted upon, if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed. However, it should not be used against another accused. (Vide The Queen v. Kularatne (2)). In the instant case, the learned Magistrate had admittedly given no consideration whatsoever to the unsworn statement made by the appellant from the dock and has specifically stated that such statement had no evidentiary value. In The Queen v. Mapitigama Buddharakhita Them and two others (3), the Court of Criminal Appeal has observed that the right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value, unless such a statement is treated as evidence on behalf of the accused, subject however to the infirmity it attaches to statements that are unsworn and have not been tested by cross-examination.

I am in respectful agreement with this view and I am of the opinion that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony.

Having regard to the evidence adduced in this case, I am of the view that there was sufficient evidence before the Magistrate upon which the appellant might reasonably have been convicted, but for the erroneous view taken by the Magistrate that an unsworn statement from the dock made by an accused person has no evidentiary value. The conduct of the Magistrate in disregarding altogether the unsworn statement made by the accused from the dock, in my view, has caused prejudice to the appellant. I therefore hold that the learned High Court Judge has rightly ordered a retrial in this case. In the circumstances, I affirm the judgment of the learned High Court Judge directing a trial de novo in this case before a different Magistrate. The appeal is, accordingly, dismissed.

ANANDACOOMARASWAMY, J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal dismissed.

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of the Article 138 (1) of the Constitution read with the Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

CA. HCC 149 / ABC / 2014

Case Number of the High Court of Kandy: HC 15 / 2007

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

01. Pattiya Vidanalage Ruwan Perera

02. Wijesinghe Mudiyanselage Brian Abeysinghe

03. Baalayalage Anura Prasanga Udaya Kumara

04. Habarakade Roshan

05. Arukkwaththa Patawala Gedara Ketwala Muhandiranlage Nuwan Priyadarshana (Deceased)

Accused

And Now in Between

01. Pattiya Vidanalage Ruwan Perera

02. Wijesinghe Mudiyanselage Brian Abeysinghe

03. Baalayalage Anura Prasanga Udaya Kumara

04. Habarakade Roshan

Accused Appellants

Vs.

The Hon. Attorney General Attorney General's Department, Colombo 12.

Complainant Respondent

Before:	**N. Bandula Karunarathna J.**
	&
	R. Gurusinghe J.
Counsel:	Neranjan Jayasinghe for the 01st & 02nd Accused – Appellants
	Rienzie Arsecularatne for the 03rd Accused – Appellant
	Dr. Ranjith Fernando with I.B.S. Harshana for the 04th Accused – Appellant
	Anoopa de Silva, SSC for the Complainant-Respondent
Written Submissions:	By the 01st & 02nd Accused – Appellant on 06.12.2017
	By the 03rd Accused – Appellant on 09.01.2018
	By the 04th Accused – Appellant on 11.12.2017 & 19.04.2021
	By the Complainant-Respondent on 12.01.2018
Argued on:	30.03.2021
Decided on:	30.07.2021

N. Bandula Karunarathna J.

The accused-appellants have preferred this appeal against the decision, given by the learned Judge of the High Court of Kandy on the 24th of July 2014, by which, the accused-appellants who are now before this Court, were convicted and sentenced to, rigorous imprisonment for twenty years and death, for having, robbed a van bearing the registration number 252-0121 which was in the possession of one Balasuriya Arachchige Chanaka Perera (the deceased) and caused his death.

The accused-appellants, together with the 5th accused (who had died before the trial commenced), were indicted on five counts that charged them with,

1. having been members of an unlawful assembly, the common object of which was to rob the van aforementioned, thereby committing an offence punishable under section 140 of the Penal Code,

2. having robbed the van aforesaid, in prosecution of the said common object thereby committing an offence punishable under section 383, read with section 146 of the same,
3. having committed murder by causing the death of the deceased, in prosecution of the common object thereby committing an offence punishable under section 296, read with section 146 of the same,
4. having robbed the van aforementioned thereby committing an offence punishable under section 383, read with section 32 of the same and
5. having committed murder by causing the death of the deceased thereby committing an offence punishable under section 296, read with section 32 of the same.

The trial commenced on the 29th of April 2014, during which the prosecution, led evidence of nine witnesses, marked documents, of the statement made by the fourth accused-appellant under section 27 of the Evidence Ordinance (P5), of confessions made by the third and the fourth accused-appellants (P6 and P7) and of the statutory statements made by the accused-appellants (P9) and produced a mobile phone, a cassette player, three speaker baffles and two fog lights; (P1 to P4).

The narrative below unfolds the story of the prosecution.

After seeing a dead body fifty metres below the road level, in a culvert at a bend in the Kandy-Nuwara-Eliya road, one Sumith Kannangara had made the first complaint to the Police in Pudalu-Oya.

B.A. Dayananda Perera (PW1), the father of the deceased, had stated in his evidence that the deceased was his only son and was a self-employed taxi driver stationed at Awissawella, who went on hires in the van bearing number 252-0121, which belonged to him. On the 2nd of September 1999, the deceased had left home at around 14.00h stating that he was going on a hire to Nuwara-Eliya. Although the deceased was in the habit of informing the family if he stayed overnight, that fateful night the deceased had failed to do so. All attempts made by the said witness to contact him had failed. As such, a complaint had been made by him to the police. Later, upon receiving information to the effect that the van was said to be somewhere in Pelmadulla, the police had searched and found the same at a filling station.

Soon after the van was found, it had been observed that the numbers in the number-plate had been changed from 0121 to 8121. Nevertheless, by looking at the other features of the vehicle, the said witness had been able to confirm that it was his van, which was last seen with and driven by the deceased. The police had made some arrests immediately and a short while after. Subsequently, the dead body of the deceased son who was 21 years of age at the time of the incident had been identified by the said witness at the mortuary in Kandy Hospital. It had also been observed that, the cassette player, the speakers and the fog lights of the van were missing.

Those items had been identified by PW1 at the police after they were recovered. The mobile phone of the deceased, marked P1, had been found inside the van and the same had been identified by the said witness at the trial. The cassette player, speakers and fog lights that were missing from the van had been recovered by the police, were identified by the witness and marked P2, P3 and P4. These items as well as the van had been handed over to the witness on an order of Court. The van had later met with an accident and had been condemned. The witness had been consistent in his evidence under cross-examination and had stated further that he was able to identify the van with a special security light that he had fixed under the carriage.

Chaminda Prasad Dias Wickremanayake (PW4), is a relative of the fourth accused-appellant whom he identified as Roshan. He was also known to the other accused-appellants as they used to come to his fruit stall. He could only recollect the name of the first accused-appellant as Ruwan, who was also known as 'Cell' but he could not recall the names of the second and third accused-appellants although they too were known to him. He had further stated that the second and third accused-appellants were from the adjoining village. Somewhere in September in the year 1999, he had observed a white Toyota Caravan at the house of one Percy and the latter had informed him in the presence of the first accused-appellant that it belonged to the uncle of the first accused-appellant. As it was brought to the notice of this witness that the van did not start, the witness had made an attempt and he had succeeded in doing so. Thereafter, they had taken the van to someplace to wash. Since few digits were missing from the number plate of the said van, the witness had written them with paint using his finger. He had stated that he recalled writing the digit '8'. Later, with the said Percy, the accused-appellants and another person, this witness had gone to see a musical show in Ratnapura, by the said van driven by him. This witness had been consistent in cross examination.

M.A. Osmund (PW3) was a mechanic at a garage in Ratnapura. On the 5th of September 1999, the fourth accused-appellant had brought a Sony cassette player and a fog light and had asked him to fix them to a three-wheeler. While those were lying at his garage, the police had, come with the fourth accused-appellant and recovered the said items from him. This witness had identified the cassette player marked P2 but had not been able to identify the fog lights as they were inside a bag. During cross-examination the witness had said that the fourth accused-appellant and his brother were friends. As regards the special feature that had been observed in the cassette player, the witness had stated that he observed that the wires at the back of the player were missing.

Sub-Inspector of Police, Govindasamy Kannan (PW10) of the police station in Pudalu-Oya had recovered the dead body from a culvert above an estate in Wedamulla down Pelmadulla -Nuwara -Eliya road on the 6th of September 1999 at around 19.30h. At the time of recovery, the body, only had an underwear on and had been partially putrefied. The dead body had been later identified by the father of the deceased PW1 at the post mortem examination on the 9th of September 1999.

Lionel Weerasinghe (PW8) was the Officer In-Charge of Crimes of the police station in Awissawella. He had received a complaint from PW1 on the 5th of September 1999 about a missing son and his vehicle. While they were conducting investigations into the matter, on the 9th of September 1999 the vehicle had been spotted by the complainant at a filling station in Pelmadulla with the number plate 252-8121. Upon seeing the police, the three persons in the van had made attempts to flee, but later all had been arrested by the police. The police had also recovered a mobile phone from the van. At the police station, both the van and the mobile phone had been produced under PR 182. At the trial, the witness had identified the first, second and third accused-appellants as persons who were arrested in the course of the search. The witness had identified the mobile phone marked P1 as the phone that was found inside the van. Later, the three accused-appellants, the van and the mobile phone had been handed over to Inspector of Police, Chulani Weeraratne (PW9) of the police station in Pudalu-Oya for further investigations on the same day. At the cross-examination, the witness has reiterated what he said at his evidence-in-chief.

PW9 was the Officer In-Charge of the police station in Pudalu-Oya. Upon receiving information about an unidentified dead body at 19.00h, he had visited the scene at 23.00 h on the 6th of September 1999. Thereafter, he had taken over three suspects, the van along with the mobile phone from the police in Awisawella. The witness had identified the first, second third accused-appellants as the suspects whom he took over from the police station, Avissawella on the 9th September 1999. Subsequent to this taking-over, he had arrested the fourth accused-appellant at the office of an Attorney-at-Law in Pelmadulla on the 19th of September 1999. Consequent to a statement made by the fourth accused-appellant, the police had recovered a cassette player, speakers and fog lights from the garage of one Osmund in Ratnapura. This witness identified the cassette player, speakers, fog lights and the mobile phone. (P1 to P4)

The confessions made by the third and the fourth accused-appellants were produced and marked as P6 and P7, through Hon. Tudor Gunaratne, former Magistrate of Gampola.

The post mortem examination had been done on the 9th of September 1999 and it had been observed that putrefaction had set in. The Judicial Medical Officer (PW11) had observed five external injuries on the dead body which were mainly lacerations on the hands. Upon dissecting the dead body further, he had observed contusions on the soft tissues and muscles on the neck and the cartilages were found to be ruptured. When the skull was opened, it had been observed that there were contusions on the head. The Judicial Medical Officer has opined that the cause of death was due to strangulation. The post mortem report was marked and produced as P8. He had stated that the death had taken place roughly three to five days prior to the post mortem examination.

At the end of the trial, the statutory statements of the accused-appellants were marked as P9.

All accused-appellants made exculpatory statements from the dock.

The first accused-appellant stated that when he was about to board a bus on the 9th of September 1999, he was arrested by a police officer clad in civil and brought to the police station in Awissawella; the second accused-appellant stated that he was arrested at home and was brought to the police station in Awissawella where he was assaulted and later handed over to the police in Pudalu-Oya; the third accused-appellant denied the fact that he went to see a musical show with PW4 and the fourth accused-appellant stated that he surrendered to the police in Pudalu-Oya through an Attorney-at-Law; he further stated that he was asked by the police to make a statement to the Magistrate of Awissawella . The relevant portions of his statement deposed under section 27 of the Evidence Ordinance was marked as P5; moreover, the fourth accused-appellant stated that he agreed to make a confession at the behest of the police officers, under duress and was later handed over to the police in Pudalu-Oya.

The accused-appellants were found guilty by the learned Judge of the High Court on charges three and five and were thereby convicted and sentenced as mentioned above.

Counsel for the accused-appellants opposed the said verdict on following grounds.

The counsel for the first and second accused-appellants contended that,

1. the items of circumstantial evidence on which the learned Judge of the High Court had based the conviction were not sufficient to come to a conclusion that the one and only irresistible and inescapable inference was that the accused-appellants committed the offences of robbery and murder,
2. the prosecution had failed to prove the identification of the corpse beyond reasonable doubt and that,
3. the learned Judge of the High Court had, failed to evaluate the dock-statement of the accused-appellants and refused the same on wrong grounds.

Contentions of the counsel for the third accused-appellant were that,

1. the learned Judge of the High Court had delivered his judgment in violation of section 203 of the Code of Criminal Procedure Act No.15 of 1979,
2. the learned Judge of the High Court had disregarded and had not considered P6 and P7 on the basis that they were exculpatory and not confessions,
3. the learned Judge of the High Court had applied a dictum called the Ellenborough Dictum without specifying what that is,
4. the learned Judge of the High Court had failed to apply principles pertaining to circumstantial evidence and that,
5. the learned Judge of the High Court had failed to consider the ingredients that the prosecution ought to have proved to establish the offences set out in counts three and five.

The counsel for the fourth accused-appellant argued his case by pointing out,

1. that the items of circumstantial evidence were wholly inadequate to support the convictions and
2. the infirmities in the judgment of the learned Judge of the High Court.

The question that seems to be of paramount importance is, whether the accused-appellants were convicted by the learned Judge of the High Court based on adequate evidence, since the conviction entirely hinges on circumstantial evidence.

The learned counsel appearing on behalf of the first and second accused-appellants submitted that the sole conviction of the said accused-appellants were based on three items of evidence, namely, the evidence that the accused-appellants were taken into custody when they were attempting to flee which was contradictory when considering the testimonies of PW1 and the police, the evidence as to whether the first accused-appellant was seen with the van that had been robbed prior to the date of arrest, as regards which, the counsel stated that the evidence was not clear as to that fact and as to whether the witnesses of the prosecution were referring to the same van.

The evidence which indicated that the number of the number-plate of the van had been altered, in relation to which the counsel argued that, the evidence of PW4 had not suggested that the number “0” was changed to number “8”, the altered number plate was neither produced nor identified by this witness and that the evidence of PW1 and PW4 contradict on the fact of whether the numbers of the number-plate at the front or the rear had been altered.

The counsel for the third accused-appellant asserted that, the evidence pertaining to a single instance of the third accused-appellant running away from the van in question at the time of his arrest did not support his conviction for murder.

The counsel for the fourth accused-appellant reiterating the facts stated by the counsel for the first second and third accused-appellants on this matter, contended that there hadn’t been any evidence to say that the accused-appellants had asked PW4 to alter the number plate and went on to contend that the learned Judge of the High Court had erroneously concluded that the accused-appellants had frequently travelled by the said van. In addition, the counsel made lengthy submissions stating that,

i. in relation to the testimony given by PW4, it is doubtful as to whether it was the same van that PW4 had driven and had been seen to be with the accused-appellants,
ii. if PW4 had seen the van in question in the company of the accused-appellants before the alleged incident, then there was no value of the evidence given by him,
iii. PW4 could not remember the names of the accused-appellants who were said to have watched a musical show with PW4,

iv. the learned Judge of the High Court had failed to consider the weaknesses in the testimony of PW4 and such weak evidence should have been corroborated to prove veracity,

v. as regards the productions said to have been discovered in consequence of the statement recorded by the police form the fourth accused-appellant in terms of section 27 of the Evidence Ordinance, the contradictions present in the evidence of PW9 as to the date, the fourth accused-appellant was arrested and was made to make the statement mentioned above were not considered by the learned Judge of the High Court,

vi. the identification of productions marked P1 to P4 was not genuine since those items were in possession of PW1 as they were ordered to be released to PW1 by the Magistrate of Awissawella on a bond, therefore, he had the opportunity to unnecessarily get acquainted with the productions,

vii. the productions had no precise attributes for PW1 to have identified the same with certainty,

viii. vital contradictions that go to the root of the case in relation to the number of speakers that were fixed to the van prior to the incident in question had not been considered by the learned Judge of the High Court and reasons were not given for disregarding the same,

ix. the fact that the cassette player had no wires attached at the trial had only been divulged by PW3 at the trial and the same had not been revealed to the police by his statement at the inception of this case,

x. the fog lights and baffles were not identified by PW3 at the trial,

xi. PW9 had stated during his cross-examination that the said productions bore no special marks and that type of articles could have been available at the market as well,

xii. the learned state counsel who conducted the evidence-in-chief had not even followed proper way of submitting the said productions for the identification of the same by PW1, PW3 and PW9 as the learned state counsel had failed to firstly question them as to the nature and appearance of the said productions, thus, the identifications were mere identifications without precision,

xiii. the statement marked P5 which was said to have been recorded by the fourth accused-appellant cannot be connected to the articles claimed to have been fixed to the said van of the deceased in the absence of proper identification of the productions P2 to P4 and the learned Judge of the High Court had failed to consider the above deficiencies with reference to the said identification,

xiv. the learned Judge of the High Court had come to a flawed conclusion that the fourth accused-appellant was guilty on counts three and five set out above on the basis that the said accused-appellant too had been present at the time of committing robbery of the said Toyota Caravan and murder of the deceased as

the aforesaid production were discovered consequent to the aforementioned statement made by the fourth accused-appellant and that,

xv. on the issue of the applicability of section 114 of the Evidence Ordinance with the aforementioned section 27 of the same to extend the liability of the fourth accused-appellant upto conviction for robbery and murder, the learned Judge of the High Court had failed to consider, the ownership of the articles in question, establishing of which would have failed for the want of identification of the same and the recent and exclusive possession of the said articles by the fourth accused-appellant.

The items of circumstantial evidence considered by the learned Judge of the High Court to arrive at his decision, as arrayed by the learned Deputy Solicitor General are as follows.

1. The deceased informed PW1 that he was going on a hire to Nuwara-Eliya on the 2nd of September 1999, in their Toyota Caravan bearing number 252-0121
2. As there was no news of the deceased, on the 5th of September 1999, PW1 made a complaint to the police of Avissawella that both the deceased and the van were missing.
3. Upon receiving information that the van had been seen in Pelmadulla, PW1 had gone with the police to look for the van.
4. On the 6th of September 1999, while on the lookout, the van was seen at a filling station in Pelmadulla and the police arrested the first, second and third accused-appellants when they had tried to escape getting arrested.
5. From the security light under the carriage and from the other features, PW1 identified it to be his van.
6. PW1 also observed that the digits 0121 had been changed to 8121 in the number plate.
7. The mobile telephone of the deceased was found inside the van.
8. A Sony cassette player, speakers and fog lights were missing at the time the van was found and the deceased was still missing.
9. In the meantime, a dead body was found by the Pundalu-Oya police on the 6th of September 1999 in a culvert below the road level down Pelmadulla – Nuwara-Eliya road.
10. The dead body was identified by PW1 to be of his son, i.e. the deceased.
11. At the post mortem examination, it was revealed that the cause of death was strangulation.
12. PW4 had seen a Toyota Caravan at the place of one Percy and was told that it belonged to the uncle of the first accused-appellant.
13. As one or two digits were missing in the number plate, PW4 had written the digit '8' with paint using his finger (this corroborates the evidence of PW1 who found the registration number altered from 0121 to 8121.)

14. PW4 knew all four accused-appellants and the fourth accused-appellant was his cousin.
15. With the four accused-appellants and said Percy, PW4 had gone to see a musical show by the said van to Ratnapura and he had driven it.
16. PW4 admitted that this incident happened in September 1999 and this fact was not challenged in cross examination by the defense.
17. According to PW3, who was a mechanic working in a garage in Ratnapura, the fourth accused-appellant had handed over a Sony cassette player, speakers and fog lights to him on the 5th of September1999 to fix them on to a three-wheeler.
18. Later the police came with the fourth accused-appellant and recovered the said cassette player, speakers and the fog lights.
19. His evidence corroborated the evidence of PW9 wherein he stated that he recovered the Sony cassette player, speakers and the fog lights from the garage of PW3 based on the statement made under section 27 of the Evidence Ordinance by the fourth accused-appellant.

The legal principles pertaining to convictions based on circumstantial evidence are laid out in the following judicial decisions.

Keuneman J in King Vs. Appuhamy; 46 NLR 128**,** held that,

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

Similarly, in King Vs Abeywickrama; 44NLR 254**,** Soertsz J stated that,

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

In the case of C. Chenga Reddy and Others Vs State of A.P. 8 (1996) 10 SCC 193**,** it had been observed by the Indian Supreme Court thus:

> 'In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.'

When applying the law to the facts stated above, the learned Judge of the High Court could not have arrived at any other the conclusion rather than one that is in accordance with the guilt of the accused-appellants. The Toyota Caravan bearing the number 252-0121 which was the subject matter of robbery, belonged to PW1 at the time it was robbed, which he had been using for over a year. Thus, he was familiar with the vehicle. There was a special security light that he had fixed onto it. As stated above, PW4 was known to all four accused-appellants and the fourth accused-appellant was his cousin.

He admitted that he wrote the digit '8' on the number plate using his hand with paint and the vehicle was a Toyota Caravan. At the time the vehicle was recovered by the police, it was observed that the number had been changed from 0121 to 8121. Therefore, his testimony corroborated the evidence of PW1 and further confirmed the fact that both witnesses were speaking about the same vehicle. PW4 stated that he saw this van with the accused-appellants somewhere in September 1999; this timeline tallied with the duration the van remained missing.

Ultimately, the van was recovered from the possession of the first, second and third accused-appellants on the 9th of September1999. It was revealed from the evidence of PW1 that the vehicle was last seen on the 2nd of September 1999 which was finally recovered by the police on the 9th of September 1999 from the possession of the first, second and the third accused-appellants. Taking the entirety of the evidence into consideration, it can be concluded that, the van that was used by the four accused-appellants and PW4 between the 2nd and the 9th of September 1999 was one and the same vehicle. Later, the police recovered items belonging to the van, i.e. a Sony cassette player, speakers and fog lights on the statement of the fourth accused-appellant from a garage in Ratnapura.

On the issue of securing a conviction solely on indirect evidence, Jagath Premawardene Vs. The Attorney General; CA Appeal 173/2005 observed thus;

> 'although there was no judicial evaluation of evidence, then the learned trial judge on the evidence led at the trial, could not have arrived at any other decision other than the conclusion reached by him,'

thereby confirming the stance taken by the learned Judge of the High Court.

During the course of the trial, none of the issues raised at length by the learned counsel for the accused-appellants, in relation to vital evidence that had been led to clinch the case of the prosecution, had been challenged in a considerable manner rendering the said evidence to have been accepted by the defence.

The evidence of PW1 and PW4 were not challenged by the defence regarding the identity of the vehicle, nor did they challenge the evidence of PW4 who claimed that he wrote digit '8' on the number plate using paint with his hand clearing any doubt whatsoever about the identity of the vehicle in question. Handing over the recovered productions to PW3 by the fourth accused-appellant had not been challenged at all during the cross-examination by the

defense; moreover, the fourth accused-appellant had not denied at any point the recovery of the production via his statement to the police and the evidence of PW3 with regard to the recovery of the said productions from his garage too had not been challenged.

In setting out the law in this regard, the decision in Dadimuni Indrasena & Dadimuni Wimalasena Vs. The Attorney General (2008) provides insight whence the following can be extracted.

> 'Whenever the 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.'

This principle was echoed in Pilippu Mandige Nalaka Krishantha Kumara Tissera Vs. The Attorney General (2007) and is line with the approach adopted by the Indian Courts as well, as evidenced by the decisions in Sarwan Singh Vs. State of Punjab (2002) (AIR SC 111) where it was held that,

> '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,' and

in Motilal Vs. State of Madhya Pradesh (1990) (CLJ NOC 125 MP) which held that,

> 'the absence of cross examination of prosecution witnesses of certain facts leads to inference of admission of that fact.'

In a similar vein, Edrick de Silva Vs. Chandradasa de Silva; 70 NLR page 169 and 170, had held that,

> '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 a trial judge or court must necessarily take that fact into consideration in adjudicating the issue before it.'

In light of the above premise, there is no difficulty in connecting the items recovered to the statement given by the fourth accused-appellant under section 27 mentioned above thus, establishing the fact that the fourth accused-appellant had knowledge of the existence and whereabouts of the said items.

This connection can be well established going by Ariyasinghe Vs, The Attorney General (2004) 2 SLR 357 at page 386, which sheds light on three inferences that can be drawn about an accused person in consequence of a statement made by him in relation to recovery of a thing. They are as follows.

1. The accused himself hid the thing found in the place where it was found.
2. The accused saw another person concealing the thing in that place.

3. A person who had seen another person concealing the thing in that place had told the accused about it.

The missing things of the van the deceased drove prior to his death were found in a garage through the statement of the fourth accused-appellant. This fact was never challenged as observed above, hence, the plausible deduction in this regard would certainly be that the accused-appellant himself handed over the said things in question to PW3.

The deceased had set out to go to Nuwara-Eliya in the van belonging to PW1. Few days later, the body of the deceased was found dumped below Pelmadulla-Nuwara-Eliya road whilst the said van was found in Pelmadulla in the possession of the first, second and third accused-appellants, with, the mobile phone of the deceased, an altered number plate and few things missing. The missing things were recovered through the confession made by the fourth accused-appellant and were identified by PW1 and PW3. The said van was identified by PW1 and PW4 who had altered the numbers in its number plate.

The fact that the accused-appellants were in possession of the van was evinced by the testimonies of PW4 and PW3. In establishing a link between the said evidence and the offences alleged to have been committed by the accused-appellants, the learned Judge of the High Court had rightly relied on the presumption explained in section 114 of the Evidence Ordinance.

Section 114 of the Evidence Ordinance states the following.

> 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.'

A presumption that is indeed material to the instant matter, which had been made avail of by the learned Judge of the High Court in his deliberation is found in illustarion (a) which states that,

> 'The court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.'

It was explained in Ariyasinghe Vs. The Attorney General (2004) 2 SLR 357 at pages 392-399 that, in order to attract the above presumption given in the above illustration, the criteria below must be established.

1. Proof of ownership of the property in question.
2. Proof of theft of that property.
3. There must be evidence of recent possession of that property by the accused.

The testimony of PW1 in identifying the van in the instant situation and the missing things therein and the fact that it belonged to him satisfy the first requirement.

The offence of theft is as good as proved provided that, the following elements are satisfied in terms of section 366 of the Penal Code namely,

(a) The property in question must be movable property.
(b) There must be a moving of the property by the accused in order to the taking of such property.
(c) The property should be moved out of the possession of another.
(d) The moving of the property should have been done without the consent of the person possessing the property.
(e) The accused should have the intention of taking the property dishonestly.

It is evident that the van was taken out of the possession of the deceased dishonestly and without his consent given the fact that the offenders had gone to the extent of committing murder in order to its taking. The statement made by the fourth accused-appellant with reference to the recovery of the missing things of the van, the fact that the accused-appellants went to see a musical show in the said van and the fact that the van was found at a filling station with the accused-appellants being present therein establish the recent possession of the van by the accused-appellants.

The next issue that comes into being is, whether the presumption aforementioned can only be applied in relation to offences of property.

Discussing the said presumption at length, Amaratunga J in the case of Ariyasinghe v AG (2004) 2 SLR 357 at pages 392-399 held that,

> 'the circumstances in which the presumption under section 114 may be drawn are not limited to cases of theft and retention of stolen property. The decided cases indicate that a presumption of fact, under section 114, may be drawn in connecting accused persons to other offences as well.'
>
> 'When section 114 of Evidence Ordinance is closely examined, a very significant feature, which is highly relevant to the exercise of the discretion available to Court, becomes apparent. In deciding to presume the existence of any facts, the Court can take into account the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Those highlighted words indicate the guiding factor. Those words clearly indicate that the reasonableness and the correctness of the Court's decision to presume the existence of any fact would depend on the particular facts of that case.
>
> The question of drawing a presumption of fact is a matter to be considered on a case by case basis. The use of the words 'in their relation to the facts of the case' prevents

the courts from laying down any general guidelines regarding the situations in which a Court may be justified on drawing a presumption under section 114 of the Evidence Ordinance. When a trial Judge has presumed a fact under section 114 of Evidence Ordinance, it is the unenviable task of an appellate Court to examine the validity of the trial Judge's conclusion in the light of particular facts of the case.'

In the Indian case of Saundraraj v The State of Madya Pradesh; (1954) 55 Cr. L.J 257, it had been held that,

'in cases where murder and robbery were shown to be part of the same transaction, recent and unexplained possession of stolen articles, in the absence of circumstances tending to show that the accused was only a receiver, would not only be presumptive evidence on the charge of robbery but also on the charge of murder.'

In Cassim v Udaya Mannar (1943) 44 NLR 519, Wijeyawardene J cited with approval a passage from Taylor on Evidence which laid out the following.

'The presumption is not confined to cases of theft but applies to all crimes even the most penal. Thus on indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner has been held to raise a probable presumption that he was present and concerned in offence. A like inference has been raised in the case of murder accompanied by robbery, in the case of burglary and in the case of possession of a quantity of counterfeit money.' (12th Ed; para 142)

Owing to the above the learned Judge of the High Court had not erred in, applying the said presumption to the instant matter before this Court and accordingly, convicting the accused-appellants. Furthermore, since the accused-appellants had not made any attempt to rebut the above presumption during the course of proceedings of the High Court, it can be taken to have become invariably conclusive.

Counsel for the first, second and fourth accused-appellants submitted that the learned Judge of the High Court had not considered the vital contradictions and omissions marked at the trial. It was argued that, the evidence of PW1 and the police as to whether the accused-appellants were arrested with the robbed van or not were contradictory, PW1 and PW4 gave contradictory evidence regarding whether the alteration of the number had been done on the number plate at the front or the rear of the said van, the evidence of PW1 was contradictory to evidence of PW8 on how the police officers were clad when they had gone to arrest the accused-appellants and that the evidence of the police in relation to when the fourth accused-appellant was arrested were contradictory. In addition, counsel for the fourth accused-appellant asserted that PW3 had failed to mention in his statement to the police about the missing wires in the recovered cassette player and that this and the above evidence seep to the root of the case of the prosecution.

Counsel appearing on behalf of the third accused-appellant too submitted that the positions of PW1 and PW 8 in their evidence had contradicted with regard to the arrest of the third accused-appellant. However, in the backdrop of the circumstantial evidence and the law relating to the same illustrated and discussed above in this judgment, such contradictions and omissions can be disregarded since, undoubtedly human memory tend to fail, when undergoing mental and physical strain and with time. The most sensible approach Courts could have taken to evaluate evidence when tainted with contradictions and omissions is to appreciate such evidence in their entirety and arrive at a conclusion on whether the flawed evidence as against the rest of the acceptable evidence significantly affects the heart of the matter in question. The said line of thinking was propounded by the Supreme Court of India in Bhoginbhai Hirjibhai Vs. State of Gujarat; AIR 1983 SC 753**,** whence it can be concluded that,

> 'discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. More so, when the all-important probabilities factor echoes in favour of the version narrated by the witnesses. The reasons are: By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is overtaken by events the witness could not have anticipated the occurrence of which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
>
> The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.'

The decision of the Indian Supreme Court in State of U.P Vs. M.K. Anthony; AIR 1985 SC 48 is significant in stating that,

> 'appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence attaching importance to some technical error committed by the

investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as whole.'

Learned counsel for the third accused-appellant contended that the learned Judge of the High Court had convicted the third accused-appellant since he provided no explanation in stating that he was not a party to the robbery and murder. The counsel was of the view that the learned Judge of the High Court had applied a dictum called the Ellenborough Dictum without specifying what it was and averred that such a dictum did not contain in the case of Rex Vs. Cochrane (1814) (Gurneys Reports 479) and is not known to law.

Learned counsel for the fourth accused-appellant argued stating, that the learned Judge of the High Court had erroneously applied the said dictum and in the absence of a strong and prima facie case in support of the prosecution, there was no duty cast upon the fourth accused-appellant to provide explanation as to what happened to the deceased after the said deceased was said to have been last seen with the fourth accused-appellant. The counsel further argued that this legal principle cannot be called to aid to compensate the laxity, negligence, ignorance and lethargy on the part of the investigators and went on to assert that weaknesses in the case of the defense cannot be used to benefit the case of the prosecution when the case of the prosecution against the fourth accused-appellant was full of infirmities.

In this contention, reference to this dictum is made below, which is encompassed in the judgment delivered by Lord Ellenborough. The relevant section that is applicable in this instance can be extracted thus.

'No person accused of crime is bound to offer any explanation of his conduct of circumstances of suspicion which attach to him, but nevertheless, if he refused to do so where a strong prima facie cases has 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 inexplicable 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.'

Although an accused has the right to remain silent and is not bound to offer any explanation as to his conduct, when confronted with a strong prima facie case against him, his failure to do so would amount, the evidence that had been led, to operate adversely to his interest. The third accused-appellant had not challenged the incriminating evidence adduced against him at the trial. After the said accused-appellant was arrested with the van that had been robbed few days after the van went missing whilst attempting to flee, had he wished to suggest that he was not a party to offences explained in count three and four he would have explained his conduct to Court. He owed an explanation to Court as to why the stolen van was in his possession soon after

the said van went missing and his failure to offer any explanation had led to the said evidence being operated against his innocence.

As regards the case of the fourth accused appellant, the learned counsel seemed to have come to an erroneous understanding about the strength of the case of the prosecution. The connection of the fourth accused-appellant to the instant case has already been fortified elsewhere in this judgment, therefore, in this regard it can be concluded that the fourth accused-appellant owed an explanation to Court as to how he ended up possessing the missing items of the van. Thus, the laxity on the part of the fourth accused-appellant in failing to do so can indeed be used to the benefit of the prosecution.

the essence of this dictum had been encompassed in a series of decisions in Sri Lanka. The Ellenborough Dictum was cited by Howard CJ in The King Vs. L. Seeder de Silva (1940) (41 NLR 337) and the learned Judge went on to hold that,

> 'a strong prima facie case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the jury were justified in coming to the conclusion that he was guilty.'

Furthermore, in Inspector Arendstz Vs. Wilfred Pieris (1938) (10 Ceylon Law Weekly 121), the Supreme Court of Ceylon held that,

> 'a strong prima facie case, — and when it is within his own 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.'

Sailing along with the above, the issue on the applicability of this dictum to Sri Lankan cases was emphasized in The Attorney General Vs. Potta Nauffer and Others (2007) 2 SLR 144 in the following manner.

> '…While the judgment in Cochrane's case provides the basis for the development of the law in this area, the principle attached has undeniably evolved far beyond its roots in the statement of Lord Ellenborough. This Court is not prepared to halt the development of the law through a deliberate and regressive step in the opposite direction to the march of the Law in this field…'
>
> '…I reject the learned President's Counsel's submission that there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the Law of Sri Lanka…'

The counsel for the first and second accused-appellants took up the position that the prosecution had failed to prove the identification of the corpus beyond reasonable doubt. The counsel was of the understanding that since the corpus was in a decomposed state PW1 was only able to identify it from the yellow colour underwear, which was different in colour to what was taken into custody by the police.

With reference to what had been stated by the respondent, at the examination-in-chief PW1 had stated that he was able to identify the dead body of his son, the deceased from a particular pigmentation on the skin. This evidence was not challenged by the defense in cross-examination with regard to the identity of the dead body. According to the evidence of PW11, putrefaction had set in. However, he did not state that the corpus had putrefied to the extent that it could not have been identified. PW11 in his evidence stated that the dead body was duly identified before the post mortem examination, which evidence, was not challenged by the defense and it was never suggested to either of the witnesses that the dead body had changed beyond recognition.

On the question of whether the learned Judge of the High Court had flawed in refusing the dock-statement of the third accused-appellant on a wrong footing, what the accused-appellant had stated to exculpate himself needs to be looked into. The third accused-appellant had flagrantly denied that he had gone to watch a musical show with the rest of the accused-appellants in his dock statement and had not provided any other explanation. Moreover, the fact that the third accused-appellant had gone to the said musical show had been established by the prosecution via the evidence given by PW4 and the said evidence hadn't been challenged by the defense in any significant way.

The law pertaining to evaluation of dock-statements is examined below. A dock-statement, though considered as evidence, is subjected to the infirmity that it was not given under oath and thus cannot be subject to cross-examination.

In The Queen Vs. Buddharakkitha Thera and 2 Others [1962] [63 NLR 433], it had been held that,

> 'the right of an accused person to make an unsworn statement from the dock is recognized by our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination.'

The manner in which such a statement should be evaluated was analyzed in The Queen v. Kularatne [1968] [71 NLR 529] as follows.

> 'We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(a) If they believe the unsworn statement it must be acted upon,
(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed, and
(c) That it should not be used against another accused '.

The Supreme Court in Karunanayake v. Karunasiri Perera [1986] [2 SLR 27] held thus with regard to the facts that should be taken into account in rejecting a dock-statement.

'These principles must be satisfied in order to reject a dock statement and can be summarized as follows:

1. It must be deliberate;
2. It must relate to a material issue;
3. The motive for the lie must be realization of guilt and a fear of truth;
4. 4. The statement must be clearly shown to be a lie other than that of the accomplice who is to be corroborated.'

The case Sarath Vs. Attorney General (2006) 3 Sri L.R. 96 too had shed light on the issue of how a dock- statement must be evaluated, wherein, it had been held that,

> 'one must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?'

The case Kumara de Silva and two others Vs. Attorney General; [2010] 2 SRI. L.R elucidated the fact that, dock-statements that seem to have nothing but blanket denials in substance can conveniently be rejected. The relevant extract states the following.

> 'There has been no attempt to explain the incriminating circumstances against the accused. The dock statements have not introduced fresh material or evidence into the case formulating novel issues other than bare denials of involvement. In the light of cogent incriminating evidence adduced by the prosecution against the accused, the learned trial Judge has the duty to decide whether such dock-statements create a reasonable doubt as to the veracity of the prosecution version. Even though the learned trial Judge has not formally rejected the above dock-statements in so many words, a perusal of page 266 of the original record would reveal that impliedly she has rejected the dock statements. Even though it is desirable that the learned triad Judge should have specifically stated her findings as to the credibility of the dock-statements, in my mind, this alone has failed to constitute a failure of justice taking into consideration the direct evidence adduced against the accused. Therefore, this contention too should fail.'

Taking note of the extract above, the contention that the learned Judge of the High Court had erroneously rejected the dock-statement is inconceivable.

Counsel for the third accused-appellant expressed that, by delivering his judgment after two months hence the trial, the learned Judge of the High Court had acted in violation of section 203 of the Code of Criminal Procedure Act, which stipulates that,

> 'when the cases for the prosecution and the defense are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor and if the verdict is one of conviction pass sentence on the accused according to law.'

There had been two schools of thought on the interpretation of the term 'forthwith'. One approach had been to give a literal interpretation to the term and interpret it to be 'at once' or 'immediately' whereas the other approach had been to take up the purposive approach of interpretation and hold the term to mean 'within a reasonable time' or 'as soon as practicable'. Having regard to the number of cases that are being dealt with by Courts on a daily basis at present, adherence to strict interpretation would not only be impractical but also would affect the quality of justice that is served.

Following authorities underpin the above premise.

The case of Dayaratne Vs. Bowie; S. G. 947—M. G. Colombo, 23020/A held thus,

> 'I prefer to interpret the word "forthwith" to mean "within a reasonable time" or "as soon as practicable."'

This question was elaborated in depth in the case of Anura Shantha alias Priyantha and Another Vs. Attorney General; (1999) 1 Sri.L.R.299 and the following extract is material to the present case.

> 'I am of the view that the provisions of s. 203 are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non-compliance would not affect-the individual's rights unless such non-compliance occasioned a failure of justice. As such, I am reluctant to hold that such provisions should be blindly adhered to - and indeed where such adherence may cause a miscarriage of justice in itself. The right of the accused is to a just and fair trial and the returning of a just and fair verdict. To interpret the law as operating to automatically disqualify a verdict and vitiate a full trial merely on the basis of non-compliance with a procedural directive issued to the judge to my mind is unsound. But, I must hasten to add that non-compliance with statutory provisions by Courts themselves is disturbing and should not be encouraged.'

The case of Singha Ranatunga Vs. The State; (2001) 2 Sri.L.R 172**,** similarly held that,

> ‘despite the large volume of evidence to be considered, the trial Judge with commendable speed has delivered, his verdict giving reasons. Provisions of S. 203 CEC are directory and not mandatory. This is a procedural objection that has been imposed on the court and its non-compliance would not affect the individual’s rights unless such compliance occasions a failure of justice.’

Being mindful of the above, it is the view of this Court that the learned Judge of the High Court had not acted in violation of section 203 of the Code of Criminal Procedure Act.

Counsel for the fourth accused-appellant submitted that the state counsel had not followed acceptable procedure in submitting the productions for identification. Although such mistakes are not to be encouraged, such technical faults can be disregarded if no prejudice had been caused to neither of the parties involved for,

> ‘a criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny,’

as justly stated in Himanshu Singh Sabharwal Vs. State of M.P. and Ors; (2008) 3 SCC 602, by the Supreme Court of India.

Next submission by the counsel for the third accused-appellant is about the alleged confessions made by the third and fourth accused-appellants to the Magistrate in Kandy. Counsel averred that the learned High Court Judge had disregarded the alleged confessions on the basis that they were exculpatory and not confessions and had not considered the contents of same that were favourable to the case of the third accused-appellant.

As correctly pointed out by the learned Deputy Solicitor General for the respondent, a trial judge is the sole trier of facts in a case when seated without a jury. In those circumstances, it is the duty of the learned trial judge to analyse and evaluate the evidence presented before him. He is not bound to accept every item of evidence. He is required to judicially evaluate such evidence and act upon it accordingly. In support of this contention, section 230 (a) of the Code of Criminal Procedure Act states that,

> ‘it is the duty of a Judge to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.’

The duty of a Judge is to work towards ascertaining the truth and nothing but the truth in order to deliver justice. This point had been reiterated time and again by Courts in India. The Supreme Court of India in Mohan Singh Vs. State of M.P.;(1999) 2 SCC 428**,** as follows.

> ‘Effort should be made to find the truth; this is the very object for which Courts are created. To search it out, the Court has to remove chaff from the grain. It has to disperse the suspicious, cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the Court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. There is no mathematical formula through which the truthfulness of a prosecution or a defense case could be concretized. It would depend on the evidence of each case including the manner of deposition and his demeans, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So Courts have to proceed further and make genuine efforts within judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt.’

And in Zahira Habibullah Sheikh Vs. State of Gujarat, (2006) 3 SCC 374, as follows.

> ‘the Supreme Court observed that right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice.’

In the instant case, the learned Judge of the High Court upon considering the contents of the alleged confession of the third accused-appellant, had come to the conclusion that it was an exculpatory statement. As stated above, the learned Judge is not bound to accept every item of evidence without judicially evaluating the same. In the circumstances, he had correctly not acted upon the confession that was marked and produced by the prosecution. It is also to be noted that, in as much as all such statements made to Magistrates do not necessarily become confessions, hence all that is said by accused in such statements is not necessarily true. In this instance, by refusing to accept the alleged confession, no prejudice has been caused to the third accused-appellant as he had ample opportunity to discredit the

prosecution witnesses and/or to place evidence on his behalf at the trial. It is discussed elsewhere in this judgment that whenever the opponent had 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.

The final ground of appeal that requires deliberation is on the elements of the offences whereupon the accused-appellants had been convicted. Counsel for the third accused-appellant argued that the learned Judge of the High Court had failed to consider that section 383 of the Penal Code only sets out aggravated punishment for robbery and does not set out the offence of robbery and as such the third accused appellant could not have been convicted on the third count of the indictment.

For the purpose of clarity, sections 379 and 383 of the Penal Code are reproduced below.

Section 379 states thus:

> 'Theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.'

Section 383 states that,

> 'if, at the time of committing robbery, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished may be extended to twenty years.'

Since the definition of section 383 begins with the wording, 'if, at the time of committing robbery' it is common sense that when the stipulated penal section in the indictment is section 383 of the Penal Code, the corresponding offence should undoubtedly be robbery, elements of which has been laid out above. Moreover, the definition of robbery in section 379 clearly indicates the possibility of death and the evidence adduced were in relation to the death of the deceased and the van that had been robbed during the course of the same transaction, since, the deceased and the van went missing together at about 14.00h on the 5th of September 1999, i.e. on the same day and at the same time. With reference to the evidence that had been led at the trial, the offence that should have been considered and thus had been considered was in fact robbery in its aggravated form as regards the third count. The fact that the accused-appellants were sentenced to rigorous imprisonment for twenty years by the learned High Court Judge further clarifies that the elements of the offence that were considered against the accused-appellants were in relation to robbery.

As it has already been examined intensely and established above in this judgment, the operation of the presumption stipulated in section 114 of the Evidence Ordinance and the

Ellenborough Dictum in favour of the prosecution, the actus reus and mens rea in relation to the charges of murder and robbery are as good as proved against the accused-appellants. Thus, the contention that the learned Judge of the High Court had not considered the offence of robbery is not acceptable.

Counsel for the third and fourth accused-appellants stated in their submissions that the legal principles in relation to common intention had never been considered and applied and whether there is evidence pertaining to common intention had not been considered by the learned Judge of the High Court.

It is indisputable that whoever committed the murder of the deceased had indeed entertained murderous intention given the fact that the deceased was strangled to death and his corpus was dumped in to a culvert. As regards the offence of robbery, the requisite mental element would be the *mens rea* of theft which is dishonest intention. The mere fact that the van was missing for a few days and was found elsewhere with some items missing and the numbers of its number plate being altered proves that the offender had intended wrongful loss or wrongful gain.

The question then to be considered is whether the third and fourth accused-appellants entertained common murderous and dishonest intentions along with the first and second accused-appellants.

It had been rightly held by the Privy Council in Mahbub Shah Vs. Emperor (1925) (A. C. 118), that,

> 'it is no doubt difficult if not impossible to procure direct evidence to prove the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case.'

Common intention is defined in section 32 of the Penal Code in this manner.

> 'When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.'

With reference being made to King Vs, Asappu (1950); 50 NLR 324, a summary of the law relating to common intention has been spelt out in S.C. TAB Appeal No.02/2012 as arrayed below.

'It is noteworthy that the law pertaining to common intention has developed greatly since the decision in The King v. Asappu (1950) (50 NLR 324), and thus must be updated prior to consideration. In this regard, the Court endeavours to summarise the law relating to common intention as follows:

(a) The case of each accused must be considered separately.

(b) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
(c) Common intention must not be confused with same or similar intention entertained independently of each other.
(d) There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.
(e) It must be noted that the common intention can be formed in the 'spur of the moment'
(f) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.
(g) The question whether a particular set of circumstances establish that an accused person acted in furtherance of common intention is always a question of fact.
(h) The prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred
(i) The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.'

It had been held by the Supreme Court of India in Rishideo vs. State of Uttar Pradesh (1955) (AIR 331) that,

> 'the existence of common intention said to have been shared by the accused is, on an ultimate analysis, a question of fact.'

In consideration of the above, evidence of PW1 and the police had already established that the third accused-appellant along with the first and the second accused-appellants was arrested with the stolen van when he was trying to flee. Recovery of the missing things of the stolen van, made consequent to the confession made by the fourth accused-appellant under section 27 of the Evidence Ordinance has already been proved against him.

The third accused-appellant as well as the fourth accused-appellant together with the other accused-appellants were seen to have travelled in the said stolen van to watch a musical show as per the evidence of PW4. Since both accused-appellants failed to offer any explanation as to how the stolen van came into their possession, common intention entertained by them along with the other accused-appellants is deemed to have been proved as regards the offence of robbery.

As mentioned above, it is clear that the deceased had been murdered. He was last seen travelling to Nuwara-Eliya in the said van and since he never returned with it, it had been rightly presumed that at the time of his death he was still in possession of the stolen van and he was murdered to its taking.

In the backdrop of the evidence which proved that the third and the fourth accused-appellants were travelling in the stolen van and was in possession of the same with the other two accused-appellants, the manner in which they came into possession of the van without the deceased being present, ought to have been explained by the third and the fourth accused-appellant, hence they had failed in that regard, they were fairly presumed to have committed the murder of the deceased along with the other two accused-appellants with the common murderous intention in mind.

In light of the facts and applicable legal principles peculiar to this matter in question, this appeal has failed to hold any merit. The conviction therefore is affirmed and the appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal