# WIMALARATNE SILVA AND ANOTHER
# V
# ATTORNEY - GENERAL

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

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

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

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

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

**Held**

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

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

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

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

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

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

*Per* Sarath Abrew, J.

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

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

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

**Appeal** from the judgment of the High Court of Ampara.

**Cases referred to**

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

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

*Sarath Jayamanne*, DSG, for Attorney-General.

November 11, 2008

**SARATH DE ABREW, J.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) In applying the test of spontaneity and belatedness, Siriyawathi has failed to adduce a justifiable and plausible reason to justify the belated and involuntary nature of her statement to the police.

(1) *Sumanasena* v *Attorney-General* (3)

(2) *Queen* v *Pauline de Croos* (4)

(d) Siriyawathi's evidence as to the involvement of the appellants in the death of the deceased is not corroborated by any other conclusive, direct or circumstantial evidence.

In view of the foregoing reasons, I am firmly of the view that Siriyawathie lacked creditworthiness and it would have been unsafe to have founded a conviction on the uncorroborated testimony of Siriyawathie. In view of the above the first contention adduced on behalf of the appellants should succeed.

I now proceed to dwell on the 2nd contention raised on behalf of the appellant as to the sufficiency of evidence to base a conviction for murder against the appellants either on individual liability or by way of joint liability on the basis of the concept of common intention. On a perusal of the judgment it is quite confusing and ambiguous as to on what basis the convictions were founded. At the outset the learned trial Judge opines that the prosecution should prove the presence of common intention but the last passage of the judgment concludes by convicting the appellants on the basis of individual liability.

At page 43 of the judgment (Page 262 of the original record), the learned trial Judge quite emphatically declares "චූදිතයන් දෙදෙනාට එරෙහිව ඉදිරිපත් කර ඇති චෝදනාවේ පදනම පොදු අදහසයි. ඒ අනුව චූදිතයන් දෙදෙනාගේ පොදු අදහස ඉෂ්ඨ කර ගැනීමේ දී මෙම අපරාධය සිදු වූ බවට පැමිණිල්ලේ සාක්ෂි ඉදිරිපත් කළ යුතු ය. මෙම මිනිමැරීමේ සිද්ධියට ඇසින් දුටු සාක්ෂිකරුවන් නොමැති හෙයින් අපරාධය සිදු වූ අවස්ථාවේ දී චූදියන් දෙදෙනා ක්‍රියා කලේ පොදු චේතනාවකින් හෝ අදහසකින් බව පෙන්විය හැක්කේ චූදිතයන් පසුව පවසන ලද වචනවලින් අභවන අදහස් මාර්ගයෙනි. මේ ගැන රජු එරෙහිව අසප්පු (58 වන නීති වාර්තා 389) නඩුවේ කියවේ." and proceeds to hold that the 1st accused-appellant was activated with a murderous intention at the time of the commission of the offence, based firstly on the utterance of the 1st accused to Chandrakanthi the following day and secondly on the failure of the 1st accused to produce

evidence that would consolidate his innocence and contradict the prosecution evidence. In the last paragraph of the judgment (Page 264 of the record), the learned trial Judge has finally held:-

"පැමිණිල්ල විසින් මෙම නඩුව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කර ඇති බවට මම තීරණය කරමි. and proceeded to convict both appellants for the offence of murder.

The judgment of the learned trial Judge is flawed for the following reasons.

(1) A conviction has to be founded either on individual liability or vicarious liability or sometimes both. It should be based on concrete evidence and not on surmise and conjecture.

(2) Due to the absence of evidence as to the commission of the actus reus in this case, a conviction cannot be based on individual liability as against each accused-appellant, due to the lacuna of evidence as to which blow dealt by which accused caused fatal injuries on the deceased which directly caused his death. There is no evidence whatsoever, circumstantial or otherwise, to decide beyond reasonable doubt that each of the accused-appellants dealt fatal blows on the deceased directly causing his death. It could very well be that only one of the appellants dealt fatal blows on the deceased, in which event the other accused-appellant cannot be held liable on the basis of individual liability, unlike on the basis of vicarious liability and the concept of common intention.

(3) Whatever the influx of circumstantial evidence as to motive, opportunity, previous conduct and subsequent conduct cannot fill this lacuna of evidence as to the commission of the *actus reus* itself, unless there is clear-cut circumstantial evidence as to which accused dealt which fatal blow in order to base a conviction on individual liability.

(4) The alleged confession to Siriyawathie by the 2nd appellant cannot be proved against the 1st appellant under section 30 of the Evidence Ordinance. As the testimonial creditworthiness of Siriyawathie is questionable, it is not safe to convict the 2nd appellant on the basis of individual liability on this uncorroborated testimony alone.

For the above reasons, the decision of the learned trial Judge to convict both appellants on the basis of individual liability cannot be sustained.

It is now left to examine whether there was sufficient evidence to convict the appellants for the offence of murder on the basis of vicarious liability and common intention. Here too, the judgement is flawed for the following reasons, as the learned trial Judge had failed to observe the following rules.

(1) The acts and complicity of each accused must be considered separately. *King* v *Assappu*(5) Justice Dias.

(2) The inference of common intention must not be drawn unless it is an irresistible and necessary inference from which there is no escape. *W. Richard* v *The Republic* (76 NLR 534).

(3) The Prosecution must prove that each of the accused were harboring a common murderous intention at the time of the commission of the offence.

*Punchi Banda* v *The Queen*(6) Justice Sirimanne.

It is now opportune to examine the circumstantial evidence available against each accused separately in compliance with the above guidelines in order to determine whether a conviction for murder can be sustained against them on the basis of common intention.

Evidence against the 1st accused-appellant

(1) Presence at Siriyawathie's house on the night of 03.08.97, the last time the deceased Piyaratne was seen alive:- (Siriyawathie and Oliver De Silva) This would constitute evidence of opportunity only.

(2) Being assaulted by the deceased Piyaratne at Siriyawathie's house:- (Siriyawathie) This would constitute evidence of motive and provocation only.

(3) "අයේ ජීවත්වන්නේ නැහැ. ටෝච් එක අරන් ගියා." (1st appellant's utterance to witness Chandrakanthi on the following day 04.08.97). This would imply that by the next day after the disappearance of the deceased, the 1st appellant was aware that the deceased had died. It may be through his own personal knowledge or from what was told to him by another such as the 2nd appellant. It does not prove beyond

reasonable doubt of the complicity of the 1st appellant in the death itself of the deceased.

(4) Recovery of the axe (P3) on the Evidence Ordinance section 27 statement (P4) made by the 1st appellant. There is no evidence to connect the axe to the crime. The fact that a sharp-cutting weapon was used to kill the deceased does not necessarily mean that this same axe was used. If human blood which tallies with that of the deceased was detected on the axe by the Government Analyst, it would have constituted a strong piece of circumstantial evidence against the 1st appellant. When part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is only evidence that the accused knew where the article discovered could be found, and nothing more.

*H. M. Heen Banda* v *The Queen* (7)

The totality of the above circumstantial evidence certainly does not give rise to an irresistible inference that the 1st appellant was harboring a common murderous intention with the 2nd appellant to kill the deceased Piyaratne. Therefore the charge of murder under section 296 of the Penal Code against the 1st appellant, even on the basis of common intention, should fail.

Evidence against the 2nd accused-appellant

(1) Evidence of Siriyawathie of the repeated utterances by the 2nd appellant as to the deceased leaving the village, that the deceased will not come back and do not be afraid, and finally the confession that the 2nd appellant together with the 1st appellant attacked the deceased with a rice-pounder and killed and buried him in the marshy canal near their paddy field. In this regard the following salient features have escaped the attention of the learned trial Judge.

(a) The existence of a serious doubt as to the creditworthiness of Siriyawathie.

(b) The alleged rice-pounder has not been recovered.

(c) Though suppressed by Siriyawathie, as the evidence points to a sexual intimacy, Siriyawathie had with the 1st appellant and not with 2nd appellant, and as it was the 1st appellant and not the 2nd appellant who intervened to

save Siriyawathie from the clutches of the deceased on the night of 03.08.97 and got assaulted by the deceased into the bargain, in applying the test of probability and improbability, it would be more reasonable to presume under section 114 of the Evidence Ordinance, that if at all a confession has to be made, in all probability it would have been the saviour the 1st appellant, and not the 2nd appellant, who would intimately disclose the gruesome details of the murder to Siriyawathie.

(2) The discovery of the body consequent to information provided to the police by Siriyawathie and the 2nd appellant.

This item of evidence, admissible against the 2nd appellant under section 8(2) of the Evidence Ordinance by way of subsequent conduct, would only prove that the 2nd appellant was aware where the body was buried and nothing more. It does not prove his complicity in the crime beyond reasonable doubt. It would very well be that the 1st appellant or Siriyawathie herself could have informed the 2nd appellant where the body was. In view of the above, a conviction for murder under section 296 of the Penal Code cannot be sustained against the 2nd appellant, even on the basis of common intention.

For the aforesaid reasons the 2nd contention raised on behalf of the appellants too should succeed.

In view of the above findings in favour of the appellants with regard to the contentions A and B already dealt with I do not propose to dwell at length on contention C as to the effect of the accused persons being seated in wrong places in the dock, except to comment that the proper procedure would have been, after discovery of the error, for the learned trial Judge to recall the prosecution witnesses already led and rectify the confusion. Fortunately, the accused persons were known to the witnesses by their aliases namely "Appu" and "Putha" which would have redeemed the situation to a certain extent so as to avoid a confusion as to the identity of each accused.

However, I cannot refrain from adding a few comments of disapproval with regard to the last contention D as to how the learned trial Judge has misdirected himself on the question of burden of proof and the application of the *Ellenborough* principle. In

evaluating the defence evidence, the learned trial Judge had commented on the evidence adduced by the accused persons to the effect that. "චුදිතයන් දෙදෙනාගේ ම සාක්ෂි ප්‍රතික්ෂේප කිරීමට තවත් හේතුවක් වන්නේ ඔවුන් විසින් ඉදිරිපත් කරන ලද කරුණුවලින් ඔවුන්ගේ නිර්දෝෂිභාවය හා සැසඳෙන කිසිදු කරුණක් සඳහන් නොවන සාක්ෂියක් වන බැවින් ද එකි සාක්ෂි තුළින් පැමිණිල්ලේ නඩුවේ සාවද්‍යභාවය හෙලිදරව් කරන කිසිදු කරුණක් අවංගු නොවන සාක්ෂියක් ද වන හෙයිනි. In other words, the learned trial Judge has gravely misdirected himself by imputing a burden on the accused to prove their innocence and to disprove the prosecution evidence. Further, commenting on the evidence of the two defence witnesses who have impliedly set up a defence of alibi, the learned trial Judge has commented. "චුදිතයන් දෙදෙනා වෙනුවෙන් අමතර සාක්ෂි දෙකක් කැඳවුව ද ඒ තුළින් මෙම නඩුවට අදාල කිසිදු කරුණක් පිළිබඳ ව වචනයක්වත් සඳහන් නොවීම නියා වටිනාකමකින් තොර සාක්ෂියක් බව මගේ හැඟීමයි." (Page 262 of the record). The learned trial Judge has again misdirected himself by failing to evaluate the evidentiary plea of alibi in order to determine whether it would create a doubt in the prosecution case whether the accused persons were present at the scene at the time of the commission of the offence.

*Lionel alias Hitchikolla* v *A. G.*[8]

Furthermore, at page 263 of the record, the learned trial Judge had commented " කෙසේ වෙතත් පළමු චුදිතට එරෙහිව ශක්තිමත් නඩුවක් ඉදිරිපත් කර තිබුණ ද, පැමිණිල්ලේ නඩුවේ සාවද්‍යභාවය හෝ ඔහුගේ නිර්දෝෂිභාවය හා සැසඳෙන කිසිදු කරුණක් පිළිබඳ ව තම සාක්ෂියේ පවසා නැත. පළමු චුදිතට එරෙහිව එම කරුණ සැලකිල්ලට ගත හැකි බවට ඉල්ලා ගනිලක නඩුවෙන් තීරණය කර ඇත.

Apparantly, the learned trial Judge was referring to the dictum of *Lord Ellenborough in Rex* v *Cochaine*[9] which is followed in our law and succinctly quoted as follows:-

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

Eg:- (1) *Sumanasena* v *A. G.* (*Supra*)

(2) *Geekiyanage John Singho* v *The King* [10]

(3) *Sirisena alias Cyril Baas* v *A. G.*[11]

It must be emphasized that the *Ellenborough* dictum should not be drawn haphazardly in order to bolster the sagging fortunes of an otherwise weak prosecution case as in the present case. Prosecution should as a pre-requisite establish strong and incriminating evidence against the accused. The rationale behind this is to afford an opportunity for an innocent accused person to explain away the circumstances of guilt which was in his own power to do so. In the present case, the learned trial Judge had failed to perceive, that the chain of circumstantial evidence against the accused persons was impregnated with lacunas on several vital aspects in that it was insufficient to point an unwavering finger of guilt at the accused on a charge of murder, in which event the evidence falls short of the requirements to apply the *Ellenborough* dictum.

On the basis of the above, the contention D too raised on behalf of the appellants has to be resolved in their favour.

It is the paramount duty of courts to act well within the bounds of admissible evidence and not to act on mere conjecture and surmise. Where the prosecution has failed to establish the charge beyond reasonable doubt, the benefit of the doubt should always be given to the accused.

For the foregoing reasons, I allow the appeal and set aside the conviction and sentence under section 296 of the Penal code imposed on the 1st accused-appellant and the 2nd accused-appellant by the learned High Court Judge of Ampara on 18.03.2002 and acquit the accused-appellants of the charge of murder under section 296 of the Penal Code.

The registrar is directed to inform the prison authorities accordingly and to forward a copy of this order to the High Court of Ampara forthwith.

**IMAM, J.** - I agree

Appeal allowed.