KEERTHI BANDARA

v.

ATTORNEY GENERAL

COURT OF APPEAL.
JAYASURIYA, J.
DE SILVA, J.
CA NO. 157/96.
HC PANADURA 868/92.
MC HORANA 90666 NS.
03RD, 16TH, 18TH, 23RD, 24TH JUNE, 1998.
07TH SEPTEMBER, 1998.
30TH JULY, 1999.
17TH AUGUST, 1999.

Penal Code - Penal Code, S.364 - Rape - Issue of visual identification - Fleeting glance or fleeting encounter - Testimony of witness - Evidence Ordinance S.6, S.9, S.91, S.92, S.155, S.157 - Best Evidence rule - Information Book - Criminal Procedure Code, S.110(4), S.122(3).

Held :

(1) If the evidence voluntered by the prosecution witness is accepted as truthful, the identification is not an identification effected in a fleeting glance or a fleeting encounter.

(2) 'Turnbull Rules' apply, wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken"

Where the accused asserts and alleges that it is not a mistake but a frame up (like in this case) no useful purpose would be served by considering the 'Turnbull' guide lines.

(3) The Best Evidence Rule would totally exclude the oral evidence of a Police Officer in regard to the contents of a matter which is required by law and which in fact has been reduced to writing to be led after refreshing his mind from the document without the document being marked.

Quare :

'Do not the provisions of the Criminal Procedure Code expressly provide that the interpretation of a document is a question of law which falls within the exclusive province of the Judge.'

(4) It is for the Judge to peruse the Information Book in the exercise of his overall control of the said Book and to use it to aid the Court at the inquiry or trial.

(5) There is nothing in S.157 of the Evidence Ordinance which requires that before a corroborating witness deposes to the former statement, the witness to be corroborated must also say in his testimony in Court that he had made the former statement to the witness who is corroborating him.

(6) Evidence given by the witness at the trial relating to his identification of the accused at a parade is substantive evidence establishing identity in terms of Section 9 Evidence Ordinance. The proceedings of the identification parade including the evidence given at the parade by the witness would only be admissible to establish consistency on the part of the witness and thereby advance his credibility in terms of S.157 Evidence Ordinance.

APPEAL from the Judgment of the High Court of Panadura.

Cases referred to :

1. *Regina vs Turnbull* (1976) 3 All E.R. 549, Cr. Ap. Reports 132
2. *Rex vs Oakwell* (1978) 1 All ER 1223 at 1227
3. *Regina vs Curtnel* (1990) Cr. Law Review 115
4. *K.B. Muttu Banda vs Queen* 73 NLR 8 at page 11
5. *Queen vs Raymond Fernando* 66 NLR 1
6. *Sheela Sinharage vs Attorney General* [1985] 1 Sri.L.R. 1 at 17
7. *King vs Cooray* 28 NLR 83
8. *Ramratnam vs State of Rajasthan - AIR* (1962) SC 424 at 426
9. *Mt. Misni vs Emperor - AIR* (1934)
10. *Nazar Singh vs The State - AIR* (1951) Pepsu 66
11. *Queen vs Julis* 65 NLR 505
12. *Rex vs Christie* 10 Cr. Appl. Reports 141 at 159
13. *Matru vs State of Utar Pradesh* (1971) SCC (Criminal) 391
14. *Shindi vs State of Maharashra* (1974) SCC (Crim) 382
15. *State of Andra Pradesh vs K.V. Reddy* (1976) SCC (Crim) 448

16. *C.P. Fernando vs Union Territory of Goa* (1977) SCC (Crim) 154
17. *Satya Narain vs State* - AIR (1953) Allahabad 385 (1953) Cr. Law Journal 848

Ranjit Abeysuriya P.C., with *Priyadharshani Dias* and *M. Thalgodapitiya* for the Accused Appellant.

C.R. de Silva, P.C., Additional Solicitor General with *Sarath Jayamanne, State Counsel* and *H.M.D. Nawaz, State Counsel* for Attorney General.

Cur. adv. vult.

August 31, 1999.

NIMAN JAYASURIYA, J.

The accused appellant who was an Inspector of Police attached to the Horana Police Station was indicted on five counts before the High Court of Panadura and at the conclusion of the trial the High Court Judge acquitted the accused on counts one, four and five of the indictment and arrived at an adverse finding against the accused and convicted him on counts two and three of the indictment.

On count two, the accused was charged with having at Horana on the 7th of April 1990, committed rape on Willegoda Liyanage Lalitha Ranjini and thereby committed an offence punishable in terms of section 364 of the Penal code.

On count three, the accused was charged with having at the same place and time and in the course of the same transaction with having intentionally abetted persons unknown to the prosecution to commit the offence of rape on the said Wilegoga Liyanage Lalitha Ranjini and that he thereby committed an offence punishable in terms of Section 102 read with Section 364 of the Penal Code.

The learned trial Judge on the 14th of August 1996 has sentenced the accused to a term of twelve years rigorous imprisonment on count two of the indictment and to a term of five years rigorous imprisonment on count three of the indictment.

The following witnesses have given evidence for the prosecution and defence: The virtual complainant and prosecutrix Wilegoda Liyanage Lalitha Ranjani, the father of the prosecutrix Wilegoda Liyanage Robies Singho, the elder sister of the prosecutrix Wilegoda Liyanage Sunethra, the mother of the prosecutrix Karadana Gamage Somawathie, M. M. Tudor Dias the Assistant Superintendent of Police, Horana, the Chief Inspector, Herath Mudiyanselage Dharmasena, Sub-Inspector of Police Don Ekmon Wijesiriwardena who was attached to the Horana Police station Police Sergeant V. de Silva Jayasinghe P. S. 9422, Court Mudliyar M. M. Wijeweera Peiris, Duggath Mudiyanselage Tillekeratne, Police Sergeant 24560 and the boarding master of the accused appellant Danja Amarasena Walatara and the accused appellant.

At the argument of this appeal learned President's Counsel strenuously contended that the Learned High Court Judge had culpably failed to consider and apply the guide lines laid down in *Regina vs Turnbull*[1] in regard to the issue of visual identification testified to by the prosecution witnesses. The learned President Counsel argued that though the alleged identification was not in a fleeting glance, that the identification in the instant case was in difficult conditions and circumstances and therefore the consideration and application of the guide lines spelt out in the Turnbull case was of paramount importance. He referred to the guidelines italicized by him as B C and G and submitted that there is no finding in the judgment of the trial judge as to how long the witnesses did have the accused under observation and that the evidence led in regard to the recognition as opposed to identification was suspect and that a longer observation by the witnesses was necessitated in the instant case because the identification was effected in difficult circumstances and conditions. I have spot-lighted the thrust of the contention of learned President Counsel prior to referring to the basic facts volunteered by the witnesses at the trial against the accused.

The main prosecution witness who lived in the residential house of Robies Singho had testified to the following effect:

"On the 7th April 1990 at about 3.20 a. m. in the early hours of the morning there was thumping on the front door of Robies's residential house shouting out we are from the Police, open the door"

Robies Singho's wife, witness Somawathie was awakened by this knock at the door and she had woken up her three daughters who were sleeping in the same room as herself and she had thereafter lit a Kerosene oil bottle lamp and had left it on a teapoy in the drawing room and had thereafter taken a torch into her hand and had opened the front door of her house, when three persons entered her house and inquired about her husband Robies Singho and when she replied that he was not in the house one of such persons had stated that on the *previous occasion* too you have lied to us to us and today also you are uttering a palpable falsehood.

Thereafter the Police party had searched for Robies Singho by proceeding to all parts of the house and one person in this group was identified as a person who came previously to this house on the 30th of March 1990 *dressed in uniform.* On the instant occasion he had a gun flung over his shoulder and it is alleged that this individual had grabbed her second daughter Ranjini - the prosecutrix - by her hand and by her frock and had dragged her towards the kitchen. Witness Ranjini has stated thereafter that she was taken through the kitchen towards the building which housed the chimney and that she was placed against the wall by the person who dragged her and that she had been subjected to sexual intercourse against her will, whilst she was positioned against the wall and while she was in a standing position. Thereafter, she has asserted that this person who had a moustache and who on entry had a gun flung over his shoulder had after subjecting her to sexual intercourse, handed over her to the other members of the party, and two members of the party had thereafter placed her on a concrete slab (කොන්ක්‍රීට් ලෑල්ලක්)

and two of them had proceeded to have sexual intercourse with her against her will.

The mother of the prosecutrix Somawathie, and the elder sister of the prosecutrix, Sunethra, have stated that the entry of the Police into their house was on the 7th of April 1990 at 3.20 a. m. in the morning and the Police party had spent about 20 minutes in searching and looking for Robies Singho by proceeding to all parts of the house and they had spent sometime in smashing some glasses fixed to the window and opening certain cupboards and removing some articles and that thereafter the accused had grabbed Ranjini and taken her towards the kitchen.

Witness Sunethra stated that another member of this Police party had got hold of her, but she had shouted and struggled and had been successful in releasing herself from his hold and thereafter both she and her mother had run into the jungle in the premises and hid themselves in the thicket. Thereafter Somawathie and Sunethra had come out of their hiding places on hearing the shouts of Ranjini after the Police party had left the premises at about 4.30 a. m. in the morning.

Witness Sunethra at page 95 of the record refers to the actions of the Police party in looking for her father Robies Singho by proceeding to all parts of the house. There is also evidence in regard to the damaging of certain window glasses with the aid of the gun and the removing of some articles from certain cupboards in the house.

Witness Sunethra at page 92 of the record also testified to the search for her father and the examination of the rooms in the compound. Witness Somawathie at pages 60, 62 and 66 of the record states that after the Police party entered the house at 3.20 a.m. in the morning that they were observing what was happening inside the house for about 20 minutes and thereafter Ranjini was dragged away to the kitchen that they had proceeded towards the jungle and hid in the thicket and that

they stayed in the thicket for about 15 to 20 minutes till hearing the exhortations of Ranjini inviting them to come back; the evidence in the case is that the Police officers left the premises at about 4.15- 4.30 a. m.

In these attendant circumstances the question arises whether the evidence volunteered by these witnesses refer to an identification in a fleeting glance or a fleeting encounter or not. We hold that if the aforesaid evidence of the prosecution witnesses is accepted as truthful, the identification in the instant case is not an identification effected in a fleeting glance or a fleeting encounter. In *Rex vs Oakwell*[2] at 1227 Lord Widgery, CJ in dealing with a similar contention that the directions given in *Rex vs Turnbull(supra)* were not applied to the identification issue which is alleged to have arisen in that case, succinctly, observed:

> "This is not the sort of identity problem which *Rex vs Turnbull* is really intended to deal with. *Rex vs Turnbull* is primarily intended to deal with the *ghastly risk* run in cases of *fleeting encounters*. This certainly was not that kind of case".

We now proceed to consider whether the identification in the instant case having regard to the testimony of the prosecution witnesses has been accomplished in *difficult conditions and circumstances*. Witnesses have testified to the effect that the accused was recognized by them both in regard to what took place in Robies's house on the 30th March 1990 and on the 7th of April 1990. Their evidence is to the effect that when the Police party came on the 30th of March 1990 the accused was in uniform and therefore they concluded that the persons who came on the 30th of March were Police officers, Though the accused wore civil clothing on the 7th of April they had identified him as one of the members of the party who previously visited their house on the 30th of March. The witnesses have given the physical features and a description of the accused referring to his colour and the moustache which he carried. It is a strong point in the prosecution case that

when Robies was sent for on the 7th of April 1990 and arrived at his house, the witnesses have narrated to him what had happened in his absence and had specifically stated that these acts have been committed by members of the Police force attached to the Horana Police. The witnesses have reached this conclusion according to their versions because on the 30th of March this accused was dressed in Police official uniform and they had recognized him on the 7th of April too as being a member of the party that had visited their house on the 30th of March. In view of the narration made by these prosecution witnesses, Robies Singho decided not to proceed to the Horana Police station but proceeded to meet the Assistant Superintendent of Police, Horana to make a contemporaneous complaint against the officers attached to the Horana Police. This is a highly significant fact in this case and the learned trial Judge has specifically referred to this fact and concluded that the conduct of Robies Singho in proceeding to the Assistant Superintendent's office in Horana instead of proceeding to the Horana Police station to make his complaint; substantiated and advanced in strength the testimony of the prosecution witnesses to the effect that the accused came to their house on the 30th of March 1990 dressed in official uniform and therefore they were able to recognize him on the 7th of April 1990 as his being a member of the Police party that had visited them previously. (vide page 581- Judgment of the trial Judge)

If the testimony of the prosecution witnesses is true, is this an identification effected under difficult conditions or circumstances? In regard to the light and the opportunity for identification, there is evidence that Somawathie had lit bottle lamp and left it on the teapoy in the drawing room and that she had armed herself with a torch before opening the front door. She has stated that she identified the accused with the aid of the light which shed from the bottle lamp. There is some evidence given by a prosecution witness that there was another lamp burning in the bed room. Somawathie states that she identified the accused with the assistance of the light emanating from the bottle lamp.

Mr. Tudor Dias the Assistant Superintendent of Police who also investigated into the complaint has observed that he saw a bottle lamp which had been upset on the teapoy and that the smell of Kerosene oil was emanating from the surrounding area. This evidence substantiates the evidence of Somawathie and the other prosecution witnesses, in regard to the fact that the bottle lamp was burning and lit at the time of the incident.

According to the testimony of the witnesses, after the Police officer had entered the premises at 3.20 a. m. they had observed their movements in the house for about twenty minutes. One witness has stated that the process of examination of the rooms itself took five to ten minutes on the part of the Police officers.

Somawathie states in her evidence that she ran into the thicket and hid herself after twenty minutes subsequent to the entry of the Police officers into her house. In these circumstances can one legitimately contend that the identification was accomplished in difficult conditions and circumstances? There was no gathering of a multitude of persons in the immediate vicinity soon after the Police officers entered the house. There were only three members of the Police who entered the house and possibly the shadow of another was seen standing outside the house near a window and the other persons present at scene were Somawathie and her three daughters. Hence, the identification was not effected in the midst of a multitude of persons or in a crowd.

In this regard the evidence given by the accused is also highly pertinent and relevant. The accused's position was that the charges have been fabricated and foisted on him on account of a certain motive which had been specifically imputed by him. Thus the assertion of the accused in his testimony is that these charges have been falsely and fraudulently fabricated and framed up against him. In view of the persistent assertion of the accused of a frame up and

fabrication in regard to the charges levelled against him, the question arises in law whether the consideration and application of the Turnbull guide lines ever arises for consideration in these attendant circumstances.

In *Regina vs Curtnel*[3] the assertion of the accused in that case was that the identification involving himself was fabricated, His position was *not* one of mistaken identity but that the identification was fabricated and framed up by the prosecution witnesses. The accused was charged in that case with the offence of robbery and wounding. In view of the defence assertion that identification was fabricated the trial Judge purported to withdraw the issue of *mistaken identity* from the jury. A complaint on that score was urged at the argument of the appeal. The Court of Appeal observed that this withdrawal would have been a serious and possibly a fatal misdirection if mistaken identity had been an issue at the trial. Nevertheless counsel argued a substantial issue arose in the case on the accuracy of the identification and therefore the trial Judge should have directed the jury in accordance with the Turnbull guidelines, *whether or not* the identification was asserted by the defence to be fabricated. The Court held that the contention seemed to beg the question in that instant case because there was no substantial issue as to the *accuracy* of the identification, the sole issue being the veracity of the evidence of identification given by the virtual complainant. As the accused did not allege that the virtual complaint was *mistaken* in identifying, the Court of Appeal was of the view that a direction on Turnbull guide lines in those circumstances would only have *confused* the jury and there was no evidence or an assertion of *mistaken identity* in that case for the judge to leave the issue to the jury. This decision lays down the principle that where the accused asserts and alleges is *not a mistake but a frame up*, no useful purpose would be served by considering the Turnbull guide lines. In fact the Turnbull rules are expressly couched to apply in these circumstances only to wit:

"Wherever the case against the accused *depends* wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be *mistaken.*"

In these circumstances the issue arises whether a consideration and application of the Turnbull guide lines were necessary and whether such an exercise was an incumbent duty on the trial Judge. Our view is that the application of the said guide lines was not warranted having regard to the aforesaid attendant facts which have been already enumerated in our judgment. But we will assume for purposes of argument that such a consideration was necessary. The learned trial Judge in his judgment has described at length the light which emanated from the bottle lamp placed on the teapoy in the drawing room and has arrived at a finding that there was sufficient light for identification. There was ample evidence recorded before him that after the entry of the Police officers into the house, there had been an examination of the rooms by the Police officers, opening of cupboards and the process of breaking of the window panes by using the end of the gun. It was thereafter alleged, that the prosecutrix Ranjini was grabbed and taken through the kitchen into the rear compound of the house. I have already referred to the times and duration of time referred to by the witnesses. This evidence was prominently before the trial Judge. There was never a gathering or crowding of a multitude of persons, which fact at times renders identification difficult. I have already referred to the paucity of the number of persons present inside the house when the events spoken to by the witnesses are alleged to have taken place. In these circumstances the identification accomplished in this case is certainly not an identification in a fleeting encounter nor an identification in difficult circumstances.

The fact that Robies Singho proceeded on the 7th of April 1990 and made a contemporaneous complaint to the Assistant Superintendent of Police, Horana - Mr. Tudor Dias,

rather than at the Police station, Horana, was in consequence of what his wife and children had narrated to him. This fact manifests that this is not identification for the first time, but an identification due to the process of recognition.

On the issue of recognition, a pertinent issue raised was whether the accused had visited the house of Robies Singho on the 30th of March 1990. Witnesses Somawathie, Sunethra and Ranjini have testified to that issue in the affirmative. However, the trial Judge has not acted on the evidence of Ranjini because she had failed to identify the accused at the identification parade held on 10. 04. 1990 and as she had not been convincing in her explanation for failing to identify the first accused at the said parade and in view of the proof of D 1. Even if the evidence of Lalitha Ranjini - the prosecutrix is excluded as unacceptable on this issue, there is the testimony in Court of witness Somawathie and Sunethra on this particular point.

Learned President Counsel strenuously urged that there were omissions proved in relation to the statements they had made at the Assistant Superintendent's office at Horana. When the Assistant Superintendent of Police Mr. Tudor Dias was asked under cross examination as to whether these two witnesses had stated in their statements to the police that the first accused had come to this house on the 30th of March 1990, he has answered this question in the negative. The right to prove omissions emanated and was conceived after the delivery of the judgment in *K. B. Muttu - Banda vs Queen*[4] at page 11 pronounced by Justice Alles. His Lordship in the course of his judgment referred to the decision in *Queen vs Raymond Fernando*[5] where it was laid down that an omission to mention in a police statement a relevant fact narrated by the witnesses in evidence subsequently, does not fall within the ambit of the expression "former statement" in Section 155 of the Evidence Act. Having stated thus, Justice Alles proceeded to consider how such vital omissions could be brought to the notice of the jury and that in terms of Section 122(3) of the Criminal Procedure Code the Court has overall control over

statements recorded in the course of a police investigation and the court has a right to utilize the statements to aid it at the inquiry or trial and that for the intervention of the Court in the interests of justice and for the due administration of justice, the Court is entitled through its use of the information book to bring such vital omissions to the notice of the jury.

Thereafter Justice Alles proceeded to enumerate the procedure by which such vital omissions could be proved in a Court of law and remarked thus :

> "If a police officer who recorded the statement of a witness in the course of a police investigation was asked whether there was any mention in the statement of a material fact and he answers in the negative *after refreshing his memory from the written record*, we see *no* reason why the *oral* evidence so elicited should *not* be admissible *without* the necessity of the record *being* proved and marked".

We after due and respectful consideration, beg to dissent and record our total disagreement in regard to the procedure advocated by Justice Alles. The best evidence rule which is a fundamental tenet in the law of evidence would totally exclude the oral evidence of a police officer in regard to the contents of a matter which is required by law and which in fact has been reduced to writing, to be led after refreshing his mind from the document without the document being marked. Section 91 of the Evidence Ordinance would exclude such oral evidence and none of the Exceptions to Section 92 of the Evidence Ordinance are applicable to the situation under consideration. In the circumstances, we hold the procedure spelt out by Justice Alles is wholly irregular and illegal.

At this juncture I wish to place on record my experience in the trial Court. Often when a police constable who has been called as a prosecution witness is under cross-examination he is suddenly thrust with the Information Book, asked to read it in a short space of time and thereafter in terms of the

procedure advocated by Justice Alles, he is called upon to interpret the document and express an opinion whether there is omission on a particular point. This police constable at times has received an education only up to the eighth standard. Can he be safely entrusted with the process of interpreting a document? He is called upon to perform an arduous task at times in determining whether such a statement appears either *expressly* or by *implication*. Is he competent to do this onerous task? When he purports to do so, does he not violate the best evidence rule and violate the stringent provisions of Section 91 of the Evidence Ordinance? Is it not a matter *exclusively* for the trial Judge to interpret documents that arise for consideration upon a trial? Do not the provisions of the Criminal Procedure Code expressly provide that the interpretation of a document is a *question of law* which falls within the *exclusive province* of the Judge? We respectfully frown on and deprecate the procedure advocated by Justice Alles.

We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the *Court at the inquiry or trial*. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on *the law* in this respect is *binding* on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible *opinions* expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point.

Learned President Counsel did not accord his approval and acceptance of the aforesaid procedures spelt out by us at the stage of argument. Learned President's Counsel relied strongly on the judgment in *Sheila Sinharage vs Attorney-General*[6] particularly at page 17. We hold that the decision in that case has no application whatsoever to the issue which arises in the instant case. In *Sinharage's* case the learned High Court Judge proceeded to peruse the evidence given at the *non-summary* inquiry by Dr. Wass in regard to a statement made by the *deceased* to him and the trial Judge wrongly and illegally used the matter recorded at the non-summary inquiry as *substantive evidence* to arrive at his findings on the issue in the case and for his adjudication, without taking any steps to have such material placed before him as evidence. In those circumstances Justice Ranasinghe very correctly held that the procedure that was adopted was wholly illegal and unjustifiable in law. The process that we are advocating is certainly not the use of the statements *as substantive evidence.* The evidence of a witness is assailed as being testimonially untrustworthy on an account of an alleged vital omission, the trial Judge or the Court of Appeal merely looks into the statement, interprets that statement and thereafter decides whether there is a vital omission as urged by counsel? in indulging in such a process, certainly both the trial Judge and the Court of Appeal are not using the contents of the statements *as substantive evidence* to determine the *issues* arising in the case. Both Courts are looking into the statements only to ascertain whether there is a vital omission. According to the judgment pronounced by Justice Alles the very origin of the right to prove omissions is traceable and referable to the Judge's use of the Information Book to aid the Court at the trial. Therefore, there could be no valid and sustainable legal objection to the trial Judge and the Court of Appeal looking into the statements recorded in the Information Book for such limited purpose and the decision cited by a learned President's Counsel is clearly distinguishable for the reasons enumerated by us.

Though Tudor Dias the Assistant Superintendent of Police has stated his inadmissible opinion, on perusing the statements, that there is an omission in the statements of Somawathie and Sunethra on this point, the trial Judge would have necessarily done what this Court has performed in closely perusing the statement of Sunethra. Sunethra in her statement has referred expressly to the admission made by the accused and by narrating that admission she has incorporated and adopted the contents of that admission. This part of her statement reads as follows :

එවිට අම්මා කිව්වා එදා ඇවිත් ඇසුවාට පසු හයේ ගෙදරින් ගොස්ය කියා. (මොහු අපට තර්ජන කර ඇසුවා කෝ රොබියස් කියා). එවිට එම

Thus, the *admission of the accused that when he came previously* that they had lied and today too they are lying - this admission as to his previous visit to this house which was uttered by the accused, had been adopted by Sunethra in her police statement, - the doctrine of adoption by incorporation or reference. In these circumstances it cannot be justifiably and reasonably be asserted that there is a vital omission in regard to this point in her police statement and therefore her evidence ought to be deprived of testimonial trustworthiness and credibility.

Learned President's Counsel relied for his aforesaid contention on the decision in *Sheela Sinharage vs Attorney General,(supra)*. Having regard to the fact that the right to prove omissions emanates and is directly traceable to the rights conferred on a trial Judge over the use of the Information Book to aid the Court to an inquiry or trial. (Vide Section 110(4) of the Code of Criminal Procedure Act and the principles laid down by Justice Garvin in *King vs Cooray*[7] in regard to the exercise of such right by the Trial Judge in the interests of justice), the resulting position of the acceptance of the aforesaid contention would be that while counsel practising at the Bar have arrogated to themselves the right which was conferred on the Court, the trial Judge and the Court of Appeal

Judges would be prevented from looking at the Information Book *even* for the limited purpose of ascertaing whether there is in fact an omission on a vital point in the case. No one would grudge pleaders arrogating to themselves the powers conferred on the trial Judges as there are officers of Court assisting the Court to arrive at the truth and a correct adjudication in the interests of justice. But, would any contention which has the necessary effect of thwarting the exercise of the Judge's rights in the interests of justice and precluding him from perusing statements recorded in the Information Book for the limited purpose of determining and ascertaining whether there is an omission on a vital point, be ever adopted and accepted?

If the trial Judge has an undoubted right to do so, certainly the Judges in the Court of Appeal hearing an appeal would also have the undoubted right to peruse such statements for such limited purpose in the interest of justice and in determining whether there is an omission on a vital point or not. The Judges would in this exercise only be concerned with the issue of the credibility of the witness and they would not in that exercise be using the contents of the statement as substantive evidence to arrive at an adjudication on the main issues in the case. That is the significant distinction between the process indulged in by the High Court Judge in Sheela Sinharage's case and the issue that arises upon this appeal relating exclusively to the province of credibility.

Learned Additional Solicitor General has submitted that he is relying on the evidence given by witnesses - Somawathie and Sunethra - at the identification parade held on the 10th of April 1990 before the Additional District Judge/Magistrate of Horana to corrobate their testimony at the trial that the first accused has previously visited their house on the 30th of March 1990 and thereby advance their consistency and credibility. He contended that the evidence led in the identification parade which was produced and marked at the trial as Y1, witnesses Somawathie in particular and Sunethra have clarified details

with regard to the date of the previous visit by the first accused and have given description in regard to the first accused who visited their home on the 30th of March 1990 and on the 7th of April 1990. Evidence elicited at the identification parade :

"**ඉස්සර සුමානයේ** නොපිට රොබියෙස් දෙන්න කියලා ගියානේද? **ඉස්සර සුමානේ නොපි කිව්වා**"

"මම පෙන්වා දුන් තැනැත්තා ඇහුවා නාත්තා කෝ කියලා. අපි කිව්වා නාත්තා කරඳන ගිහින් කියලා කියා. බොරු නේද නොපි කියන්නේ, **එදත්** බොරු කිව්වා කියලා කිව්වා."

Sunethra in her statement to the police (ASP Tudor Dias) made on 06. 04. 90.

එක් අයෙක් අත යට දිග තුවක්කුවක් තබාගෙන සිටියා. මොහු අපට තර්ජන කර ඇසුවා - කෝ රොබියස් කියා - එවිට අම්මා කීවා **එදා ඇවිත්** ඇසුවාට පසුව හයෙන් ගෙදරින් ගොස් කියා. එවිට එම රාළහාමි කීවා **එදා අපි ආපු වෙලාවෙත්** නොපි අපට බොරු කීවා, **අදත්** බොරුනේද කියන්නේ කියා ඇසුවා."

When learned President's Counsel initially contended that learned Additional Solicitor General was not entitled in law to use the aforesaid evidence to advance the credit of the witnesses in regard to their testimony before the High Court, the learned Additional Solicitor General has very relevantly drawn the attention of this Court to a judgment of the Supreme Court of India in the decision in *Ramratnam vs the State of Rajasthan*[8] at 426 Justice Wanchoo delivering the Supreme Court judgment observed "The argument is that the corroboration that is envisaged by Section 157 of the Evidence Ordinance is that of the statement of the witness in Court, that he had told certain things to the person corroborating the witness's statement, and if the *witness did not say in Court* that he had told certain things to that person, that person cannot state that the witness had told him certain things immediately after the incident and thus corroborates him." We are of the opinion, that *this contention is incorrect*. Having regard to the

provisions of Section 157, it is clear that there are only two things which are essential for this Section to apply. First that the witness should have given testimony with respect to some fact. The second is that he should have made the statement earlier with respect to the *same fact* at or about the time when the fact took place or before any authority legally competent to investigate the fact. If these two things are *present* the former statement can be proved to corroborate the testimony of the witness in Court. The former statement may be in writing or may be made orally to some person. That person would be competent to depose to the former statement and corroborate the testimony of the witness in Court. *There is nothing* in Section 157 which *requires* that before a corroborating witness deposes to the former statement, the witness to be corroborated *must also say in his testimony in Court that he had made the former statement to the witness* who is corroborating him. But, in our opinion it is *not necessary* in view of the words of Section 157 that in order to make corroborative evidence admissible, the witness to be corroborated must also say in his evidence that he had made such and such a statement to the witness who is to corroborate him. It is not necessary that the witness corroborated should also say in his evidence in Court that he made some statement to the witness who is to corroborate him. We are therefore of the opinion that the decisions in *Mt Misri vs Emperor*[9] and *Nazar Singh vs The State*[10], were cases wrongly decided.

During the subsequent stages in his argument learned President's Counsel was compelled to admit that the correct legal position has been laid down by Justice Wanchoo in Ramaratnam's case.

The evidence of Somawathie in particular and of Sunethra in their evidence at the identification parade have sufficiently described, that the reference to the Sinhala expressions "ඉස්සරලා සුමානේ" and "එදා" were references to the visit made on the 30th of March and they have sufficiently described in detail particularising regard to the accused-appellant as the person

who came both on the 30th of March and on the 7th of April 1990. When all these matters are taken into consideration for the limited purpose of determining whether there is an omission on a vital issue, it is crystal clear that there is no such omission in the statements made by these witnesses to the police and in the evidence given by these two witnesses at the identification parade. We also hold the testimony in court of Somawathie and Sunethra is corroborated by the evidence given by them at the identification parade. In these circumstances, we are compelled to hold that there is no merit in the contentions urged on this score by learned President's Counsel.

It must be observed that the evidence given by Sunethra at pages 191 to 192 of the record and the evidence given by Ranjini at pages 95, 195 and 150 of the record in regard to the process of the search indulged in by the police party on that day, by proceeding to all the rooms and looking for Robies Singho, has not been challenged, impugned or assailed in any manner by learned counsel who appeared for the accused at the trial.

Dr. Jean Marita Perera, Assistant Judicial Medical Officer who had examined the prosecutrix on 08. 04. 90 at 2 p.m., has stated convincingly and in clear terms that there had been a recent rupture of her hymen and that there was an injury in the vaginal passage and having regard to the redness and the swelling in the surrounding areas she was able to say that it was a recent rupture and that prior to that rupture Ranjini had been a virgin. These injuries in the hymen and the vaginal passage, according to the medical expert, could have been caused by the insertion of some object into the vaginal passage and hence could have been caused by sexual intercourse and penetration. The medical expert has described that there were injuries on Ranjini's buttocks which, testimony substantiates the evidence of Ranjini when she stated that the subsequent acts of rape committed on her by other members of the police party were, after placing her on a concrete slab. The aforesaid

evidence of the medical expert has not been impugned or assailed at all at the trial. The position of the defence being though Ranjini may have been raped, that the charges against the accused were a frame-up and a fabrication and that the accused has no hand whatsoever in the acts of rape which were committed on Ranjini on the 7th of April, 1990.

Learned President's Counsel has complained in the course of his argument before this Court that the learned trial Judge has utilized the evidence given by witnesses Somawathie and Sunethra at the identification parade held on the 10th of April 1990 as substantive evidence and referred this Court to pages 596 to 599, 600, 609 and 612 where and 612 where extracts of the judgment appear. He relied on the judgment in *Queen vs Julis*[1]; in particular, he relied on the judgment pronounced by Chief Justice Basnayake, wherein the learned Judge has stated thus:

> "Both Judge and Counsel appear to have lost sight of the fact that the identification of the accused at a parade held before the trial is not substantive evidence at the trial. The fact that the witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification at the trial. The jury may act only on the evidence given before them. There is no section of the Evidence Ordinance which declares *proceedings* at an identification parade to be evidence of the fact of identity. The principal evidence of identification is the evidence of a witness given in court as to how and under what circumstances he came to pick out a particular accused person . . .".

It appears that Chief Justice Basnayake was dealing with *the adduction of proceedings* at an identification parade being adduced as substantive evidence at the trial. Certainly such a course is not warranted and the proceedings and evidence at the identification parade could only be used to corroborate the witness who gives evidence at the trial under Section 157 of the Evidence Ordinance.

The question arises whether a witness at the trial could state before the trial Court that he identified the accused at the parade. Such testimony, bereft of the contents of the proceedings and evidence led at the identification parade, would it be substantive evidence?

Senior Puisne Justice Weerasooriya in *Queen vs Julis(supra)* at 525 discussing this issue observed that:

> "Evidence relating to the identification of an accused at an identification parade by a witness who is subsequently called at the trial and gives evidence implicating that accused would be *relevant under Section 9* of the Evidence Ordinance as a fact establishing *the identity of the person* whose identity is relevant."

In so far as Justice Weerasooriya referred to the relevancy of such evidence under Section 9 of the Evidence Ordinance, it is implicit in that pronouncement that His Lordship was of the view that evidence relating to the identification of an accused at a parade by a witness is substantive evidence, establishing the identity of the person concerned, as Section 6-55 of the Evidence Ordinance inclusive of Section 9 relate to the adduction of *substantive evidence* before a Court of Law whilst Section 157 of the Evidence Ordinance relates to the adduction of evidence to corroborate the witness and thereby, show consistency on the part of the witness and thereby advancing his credibility. This pronouncement by Justice Weerasooriya is a pointer to the fact, that evidence given by the witness at the trial relating to his identification of the accused at a parade is substantive evidence establishing identity in terms of section 9 of the Evidence Ordinance. But certainly the proceedings of the identification parade, including the evidence given at the parade by the witnesses would only be admissible to establish consistency on the part of the witness and thereby advance his credibility in terms of Section 157 of the Evidence Ordinance.

Though Chief Justice Basnayake has relied on the judgment pronounced by Lord Moulton in *Rex vs Christie*[12] at

159 (H.L.). I have discovered that on a reading of that judgment, it does not support the proposition that the evidence, of a witness at the trial Court is not substantive evidence but is only a circumstance corroborative of the identification at the trial.

One must in this context draw a distinction between the evidence given by a witness at the trial that he identified the accused at an identification parade and the adduction in evidence of the proceedings of the identification parade, including the evidence given by the witness at the parade.

However, there is a *cursus curiae* emanating from the Supreme Court of India laying down the principle that the *results* of an identification parade do not constitute substantive evidence. *Matru vs State of Uttar Pradesh*[13]; *Shinde vs State of Maharastra*[14]; *State of Andhra Pradesh vs K.V. Reddy*[15]; *C.P. Fernandes vs Union Territory Goa*[16]; *Satya Narain vs State*[17].

Learned President's Counsel appearing for the accused appellant contended that the learned trial judge had over emphasized and stressed unduly the identification of the accused at the identification parade held on the 10th of April 1990. One must investigate the causes and factors which induced the learned trial Judge to lay much emphasis in regard to the identification at the said parade. Witness Tudor Dias, Assistant Superintendent of Police, on reading the statement of Sunethra expressed his opinion as to the omission in the said statement. The learned trial Judge had before him that particular answer. Nevertheless, he had himself perused that statement which was recorded in the Information Book. All these matters related to the issue of the testimonial trustworthiness and credibility of witness Sunethra. These matters did not pertain to the ingredients of the offence or to the fact in issue and the relevant facts on which the findings had to be reached by the trial Judge. Thus, dealing with the question of credibility, he has discussed at length

what took place at the identification parade and the evidence given by witnesses at the parade, to ascertain whether there was a vital omission or not and whether the evidence given by witness Sunethra at the identification parade, corroborated or not her evidence in terms of Section 157 of the Evidence Ordinance. Thus, the Judge's detailed analysis and discussion of the proceedings and the evidence elicited at the parade, was with a view to determining the credibility of Sunethra's evidence. If there was such corroboration it would disclose consistency in her evidence and thereby help the trial Judge to arrive at a favourable finding in regard to her testimonial trustworthiness and credibility. It is in this background that the observations pronounced and the findings of the learned trial Judge should be viewed. Nowhere in the judgment has the learned trial Judge used the Sinhala expression (සත්කාවී) which is a reference to substantive evidence.

The learned trial Judge was at all times engrossed with the answer given by the Assistant Superintendent of Police Tudor Dias, the conclusion he had reached on a perusal of the statement of Sunethra and therefore he looked into the proceedings and evidence given at the identification parade, (produced and marked as Y1) to ascertain whether there was an omission in those proceedings and whether that evidence did corroborate or not Sunethra's evidence at the trial.

Learned President Counsel was not justified in contending that the learned trial Judge had not reached a finding in regard to the testimonial trustworthiness and credibility of witness Sunethra. In his judgment at page 616, 580, 581 and 596 there is a clear implied finding upholding the credibility and testimonial trustworthiness of the evidence of witness Sunethra. Without arriving at such a finding the learned trial Judge could not have arrived at his ajudication that the prosecution has proved beyond reasonable doubt the charge of rape against the accused. The learned trial Judge in his judgment by necessary implication arrived at the adjudication and finding that witness Sunethra had given truthful evidence at

the trial when she stated under affirmation that the accused had come to their house on the 30th of March 1990 *and in the* early hours of the morning on the 7th of April 1990. In the circumstances the contentions advanced by learned President Counsel are unjustified and unsustainable.

Although the defence counsel at the trial has marked several other contradictions and omissions in an attempt to assail the credibility of the prosecution witnesses, learned President Counsel who appeared for the appellant at the argument of this appeal, did not refer to such contradictions and omissions except to those which I have so far specifically enumerated in my judgment. In the circumstances we do not propose to burden our judgment by recapitulating and adverting specifically to those contradictions and omissions. But we observe that the trial Judge in his judgment has adequately referred to the aforesaid contradictions and omissions and arrived at the conclusion that those discrepancies, contradictions and omissions do not relate to the core of the prosecution case which has been presented against the accused.

At this stage I would advert to the evidence given by the accused in the witness box under affirmation. The accused in the course of his evidence denied that he ever visited the house of Robies Singho on any day and specifically asserted that he had not gone to this house on the 30th of March 1990 and on the 7th of April 1990. The accused has further stated that on the 8th of April 1990, he was summoned by Tudor Dias to the Assistant Superintendent's office, when he was recording a statement and that he came into that office dressed in civil clothing, as he had suffered an injury about one year prior to the alleged incident referred to in the indictment.

Under cross-examination he has stated that he had not taken part in any official duty or investigation while he was attached to the Horana police station in relation to Robies. He has specifically stated in evidence that prior to the 10th of April 1990 that he has never proceeded *on any occasion* to the house

occupied by Robies, Sunethra and the other members of Robies's family. He persisted in stating that in regard to any official investigations or duty that he has never proceeded to the house of Robies situated at Kindelpitiya, Millewa. He has further stated that prior to his being summoned to the Assistant Superintendent's office, he had not ever known either in person or by name, either Robies, his children or any member of Robies's house and that he does not know where Robies's house is situated. At that stage he was confronted with a portion of the statement which the accused had made to Police Inspector Dharmasena. That part of the statement reads as follows:

> "I have on several occasions searched Robies's house on information received that he was distilling kassippu. In carrying out these search operations I came to know the witnesses who have given evidence in regard to the incident referred to in the indictment".

When the accused was confronted with this statement which was inconsistent with his evidence at the trial, he denied making any such statement and at that juncture the aforesaid statement was marked as 22 to contradict his testimony in Court.

The accused further, in his evidence stated that prior to the alleged incident narrated by the prosecution witnesses, that he had never known a person called Robies. At that stage the accused was confronted with a part of the statement he had made to Inspector Dharmasena which reads as follows:

> "I can remember that he (Robies) had been arrested and taken into custody".

When he was confronted with this part of the statement, the accused stated even if it has been so recorded in the statement that he would not accept the correctness of the fact so recorded. At this stage the relevant portion of his statement

referred to by me was marked as 23 to contradict his testimony in Court.

At page 394 of the record the accused gave his reason for witnesses Somawathie and Sunethra identifying him at the identification parade. Thereafter at page 395 the accused stated under affirmation that there was no animosity or disaffection towards him on the part of Robies or the members of his family. He further proceeded to state that there was no reason or cause attributable to animosity or disaffection which induced the witnesses to identify him at the identification parade. At this stage the accused was confronted with a part of his statement he had made to the Inspector of Police Dharmasena. That statement reads as follows:

> "I think the witnesses who identified me at the identification parade did identify me because the witnesses and Robies were harbouring feelings of animosity and disaffection towards me."

When the accused denied ever making such a statement this part of his statement was marked as 24 to contradict his testimony at the trial. These contradictions which greviously impair the credibility of the accused, have induced the learned trial Judge to reject the accused's version.

The accused has referred to the fact the on the 4th of May 1989 that he had suffered from a gun shot injury near the Horana police station at the hands of insurgents. He had been in hospital for six months and thereafter had reported for duty on the 4th of November 1989. The accused stated that he was put on light duty and entrusted with administrative duties and that he had donned the police official uniform on the 3rd of April 1990. The accused has stated in the course of his evidence that he made an oral application for authorisation to be dressed in civil clothing and that an oral order was made by the Superintendent of Police permitting him to work dressed in civil clothing.

The learned trial Judge has commented on the fact that no questions were put to Assistant Superintendent of Police Tudor Dias in cross-examination to elicit such authorisation to engage in official duty whilst being dressed in civil clothing. The learned trial Judge has observed that if the Superintendent of Police had granted such authorisation, such a communication having regard to the normal official routine would have been communicated by the Superintendent of Police to the Assistant Superintendent of Police and thereafter transmitted to the Inspector of Police and in the circumstances, the version of the accused in regard to the oral authorisation is inherently improbable, having regard to the proved attendant circumstances. No questions have been put to Assistant Superintendent of Police Tudor Dias as to whether the accused when summoned to the Assistant Superintendent's office on the 8th of April, came to that office dressed in civil clothing. Learned Additional Solicitor-General submitted that the evidence discloses that the accused was clad in trousers and that he wore shoes on all occasions and in the circumstances, learned Solicitor General queried - what was the impediment to the wearing of khaaki trousers on account of a previous injury to the thigh bone? He contended that material facts which were interwoven with his defence had not been put to witness Tudor Dias in cross-examination, at the first opportunity that presented itself and therefore the belated version of the accused that he wore civil clothing on the 30th of March 1990, certainly does not satisfy the Test of spontaneity/promptnes. The material part of the accused's evidence appears at page 391 of the record and the learned trial Judge indulges in an evaluation of the accused's evidence in his judgment at page 588.

Police officer Tillekeratne gave evidence for the defence at the trial. His evidence was directed at dis-crediting the evidence already adduced by witnesses Sunethra and Somawathie in regard to the visit of the accused to Robies's house on the 30th of March and it was also directed at

establishing that the accused was engaged in official work whilst being dressed in civil clothing. Witness Tillekeratne states that he left the Horana police station on 06th/ 07th April at midnight and that he came back in a lorry to the police station at 2 a.m. He has stated that the police party left on that occasion to make investigations in regard to a gun. Vide page 432. He does not state that on this occasion that they proceeded to Robies's house. The evidence in the case is that the accused proceeded to Robies Singho's house and knocked at the door at 3.20 a.m. Hence the evidence of Tillekeratne does not establish any impediment to the accused proceeding to the house of Robies at 3.20 a.m.

Witness Tillekeratne has stated that he made an entry in regard to his departure from the Horana police station on the 30th of March in his diary. He has failed to support his oral testimony by producing the diary in Court. Neither did he give a satisfactory explanation as to why he had failed to make an entry in regard to his departure in the official book maintained at the Horana Police station. At page 448 of the record (*ad finem*) answering a question in cross-examination he had given a palpably false answer that besides the 6th of April 1990 that he has engaged in official police duties and functions with other officers without making any entries. The material part of Tillekeratne's evidence commences at page 432 of the record and the learned Judge having carefully analysed and evaluated the evidence of witness Tillekeratne has very rightly rejected his evidence holding that his evidence does not satisfy the Test of Probability and the Test of Interest and Disinterestedness of the witness whilst holding that he is a partial and partisan witness. He stated that witness Tillekeratne made no entry anywhere in regard to his alleged official activity on the 6th of April but has falsely stated that he made an entry in regard to his departure from the Horana police station on the 30th of March *in his diary*. Vide page 437. He has also failed to produce his diary to support his bare oral statement to the Court.

The other defence witness who has given evidence is Dananja Amarasena Walatara in whose house the accused resided as a boarder. He has stated under affirmation that on the 6th of April 1990 the accused did not depart from his boarding house after 7.30-8.00 o'clock in the night. He has stated that he slept in the hall and if the accused had the necessity to go out, he would have had to proceed past him while he was sleeping in the hall. Although this witness attempted to state that after the accused came to his boarding house on 06. 04. 1990 that he did not get out of his house till 5 o'clock on the 7th of April, as the learned trial Judge has very rightly observed, this witness was compelled to admit that it was possible for the accused to have left the boarding house unseen and un-noticed by the witness and that if a certain highly confidential raid or detection had to be indulged in, that the accused would not have disclosed the fact of his leaving the house of the boarding master.

The learned trial Judge has applied the Test of Interest and Disinterestedness of a witness and proceeded to analyse and evaluate witness Walatara's evidence. He has observed though the witness was unable to recollect important events in his own life and his business activities, that the witness evinced a recollection of events and incidents relating to the accused and thereby, the learned trial Judge has applied the Test of Probability and also arrived at the conclusion that he is an interested and partisan witness. This witness had made a belated statement one month and seven days subsequent to the arrest of the accused. In the circumstances, the learned trial Judge has applied the Test of Spontaenity/Promptness and arrived at adverse findings in regard to his testimonial trustworthiness. The learned trial Judge has commented that in regard to the accused, the witness has admitted that he has kept in mind and recollected facts only after the accused was arrested. This witness had attempted to state that he had taken special interest and devoted special attention to the accused and therefore the accused could not have gone out on the 6th of April 1990 at night without his knowledge and notice.

The learned trial Judge has applied the Test of Probability and Improbability and has arrived at the conclusion that his testimony is replete with inherent and intrinsic improbability. He has observed though this witness was unable to remember and recollect the day when he closed up his business, the witness was able to recollect the day that this accused is alleged to have committed the offence and also the day he was arrested, The learned trial Judge has in arriving at this adverse finding on the credibility of the witness stated thus:

"සාක්ෂිය එක අතකින් බලන කල බලවත් අසම්භව්‍යතාවකින් යුක්ත වන අතර අනික් අතට එය ප්‍රමාද වී කරන ලද කට උත්තරයක් වන මත පදනම්වූ සාක්ෂියකි. ඒ නිසා සාක්ෂියේ විශ්වාසනීයත්වය කෙරෙහි බලවත් අභියෝගයක් තිබෙන බව ප්‍රකාශ කළ යුතුයි."

This Court is unable to say that the learned trial Judge, who had the benefit of the demeanour and deportment of the witnesses who had given evidence before him, has not indulged in a just and correct evaluation of the testimony of the defence witnesses. In these circumstances, this Court upholds the evaluation of the evidence indulged in by the trial Judge.

For the aforesaid reasons, we hold that there is no merit in the appeal of the accused-appellant and the submissions advanced by the learned President's Counsel who appeared for the accused-appellant are untenable and unsustainable. In the circumstances we uphold the findings, conclusions and adjudications reached and pronounced by the learned trial Judge on counts two and three of the indictment.

In regard to the sentence the learned trial Judge has sentenced the accused to a term of twelve years rigorous imprisonment on count two (charge of rape) and to a term of five years imprisonment in respect of count three of the indictment (charge of abetment of rape) and made order that the sentences do run concurrently. However, we observe that the accused had been convicted on the 14th of August 1996 and

that he has been in remand after conviction to the present day for a period of three years. Extending a hand of mercy to the accused-appellant we proceed to deduct the aforesaid period of three years spent in remand and thereby we reduce the term of imprisonment imposed on count two to a term of nine years imprisonment. We affirm the sentence of five years imprisonment imposed by the learned trial Judge on count three. We make order that both sentences do take effect and run concurrently. The accused is directed to serve these terms of imprisonment from today. Subject to this variation in the term of imprisonment on count two, we proceed to dismiss the appeal.

In conclusion, we wish to place on record our appreciation of the assistance rendered to this court by Learned Additional Solicitor General on the varied issues of fact and of law which arose for consideration during the protracted argument of this appeal.

J.A.N. DE SILVA, J. - I agree.

Appeal dismissed.
Sentence varied.