AJIT SAMARAKOON
v
THE REPUBLIC
(Kobaigane Murder Case)

COURT OF APPEAL
JAYASURIYA, J.
KULATILAKE, J.
CA 8/97
H.C. KURUNEGALA 180/94
NOVEMBER, 17,23,30,1998
DECEMBER, 8, 17, 1998
FEBRUARY, 3,8,15,17,25,26,1999
MARCH, 2,9,15,25,1999
MAY, 10, 1999

Penal Code – Section 296 – Conviction – Credibility and Testimonial trustworthiness of a witness – Is the Court of Appeal the Jury or the trial Judge? – Test of Spontaneity–Test of contemporaenity – Test of promptness and Test of

improbability – Belated first Statement – Evidence of the handwriting expert – Dock Statement – Deliberate lies ? – Effect – Evidence Ordinance – section 5(2)(1), section 8(2) sections 17-38, section 32(1), section 60(1), section 60(2) Dying Declaration – Circumstance of the transaction? – Difference between evidential burden and legal burden? – Shifting of same – Hearsay Rule – Analysis of Evidence.

The accused-appellant – Officer-in-Charge of the Police Station, Kobeigane – was indicted with having caused the death the of one N., punishable under section 296. After trial the accused was sentenced to death.

HELD

Per Jayasuriya, J.,

"It is not the function of a Court of Appeal to retry a prosecution on the facts and indulge in a re-appraisal of the facts"

1) Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the test of spontaneity, the test of contemporanenity and the test of promptness the court ought to scrupulously proceed to exercise the reasons for the delay. If the reasons for the delay are justifiable and probable the trial judge is entitled to act on the evidence of a witness who had made a belated statement.

2) The Examiner of Questioned Documents has very correctly placed before the court and media the grounds and reasons for his opinion, placed before the Judge the photograph enlargements and demonstrated before Court the process of comparison thereby educating Court in regard to the points of similarity.

3) The accused had uttered a deliberate lie on a material issue – love letters written by the deceased to the accused–because he knew that if he told the truth he could be sealing his fate, if such was the motive the utterance of such lie would corroborate the prosecution case.

"The principle is that a lie on some material issue by a party may indicate consieousness that if he tells the truth he will lose."

4. Evidence volunteered by the mother of the deceased in regard to the entirety of what her daughter N narrated to her before she left the parental home on that day, is admissible in evidence – s. 32(1). The statement of the deceased to her mother is a fact inextricably interwoven and connected to the circumstances of the shooting and setting on fire which resulted in her death.

5. Expression circumstances of the transaction is not so wide as circumstances, which would constitute circumstantial evidence to the fact in issue in a case. Where there is a close proximate relationship between the happening of the event and the murderous assault such circumstances would constitute circumstances of the prosecution.

6. The dock statement is highly deficient. The incriminating circumstances established against him gave rise to presumptions and inferences which shifted the evidential burden as opposed to the legal burden to explain away the highly incriminating circumstances.
7. Hearsay documentary evidence could only be admitted if it could be brought within any one of the sections provided for the exceptions to the hearsay rule – sections 17–38 of the Evidence Ordinance.
8. Evidence which merely constitutes the motive for the commission of the crime and such incidents which take place during a period of time long prior to the commission of this criminal act would not constitute a circumstance of the transaction, particularly where the evidence is relevant otherwise than as motive alone and where there is a close proximate relationship between the happening of that event and the murderous assault, such circumstances would constitute a circumstance of the transaction.

Per Jayasuriya, J.

> "The Principles laid down in *R* v *Cochrane* and *R* v *Burdette* do not place a legal or a persuasive burden on the accused to prove his innocence or to prove that he committed no offence but these two decisions on proof of a *prima facie* case and on proof of highly incriminating circumstances shift the evidential burden to the accused to explain away the highly incriminating circumstances when he had both the power and the opportunity to do so."

9. Statements are made only logically relevant in as much as they stand in the relationship of cause and effect to the fact in issue by the operation of s. 8(2).

APPEAL from the High Court of Kurunegala.

Cases referred to:

1. *K* v *Endoris* – 46 NLR 498
2. *Ebert Silva* v *K* – 52 NLR 505
3. *Bhojraj* v *Sita Ram* – AIR 193 – PC 60 at 62.
4. *Pauline de Croose* v *Q* – (1968 –1968) 71 LR 169 at 180
5. *Narapal Singh* v *State of Haryana* – 1977 AIR SC 1066
6. *Haramanis* v *Somalatha* – 1998 3 Sri LR 365 st 371
7. *Popovic* v *Derks* – 1961 VR 413 at 433 and at 429–430
8. *Rwx* v *Lucas* – 1981 3 AER 1008
9. *Karunanayake* v *Karunasiri Perera* – 1986 2 Sri LR 17 at 33
10. *Credland* v *Knowler* – 35 CAR 46 at 55
11. *R* v *J.A.Knight* – 50 CAR 122 at 126

12. *Jones* v *Thomas* – 1934 – 1 KB 323 at 327
13. *R* v *Chapman* – 1973 2 AER 624
14. *Dawson* v *Mackenzie* – 1908 S.C.648
15. *R* v *Baldwin* – 1973 WLR 876
16. *M Nawaz* v *Khawn* v *Regina* – 1967 1 AER 80 at 82
17. *Pakala Narayanasamy* v *King* – AIR 1930 – PC 47
18. *K* v *Mudalihamy* – 47 NLR 139
19. *K* v *Arnolis Perera* – 26 NLR 581
20. *Dharmawansa de Silva* v *A.G.* 1981 – 2 Sri LR 439
21. *Somasiri* v *Republic of Sri Lanka* – 1983 2 Sri LR 229
22. *K* v *Marshall Appuhamy* – 51 NLR 272 at 275
23. *Somasiri* v *Q* – 75 NLR 172
24. *Regina* v *H.S. Perera* – 76 NLR 271
25. *Rex* v *Cochrane* – Gurneys Reports 479
26. *Rex* v *Burdette* – 1820 – 4B Alderman Reports 95 at 120
27. *Misnagollage Siriywathie* v *The Republic* – CA 156/95 – H.C.Avissawella 72/92 – CAM 8.9.99
28. *Kankanam Aratchilage Gunadasa* v *The Republic* – CA 121/95 – H.C. Chilaw 71/95
29. *Barwada Boghin Bhai Hirji Bhai* v *The State of Gujarat* – 1983 AIR SC 753 a 755

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Cur. adv. vult

October, 10th 1999

NINIAN JAYASURIYA, J.

The accused-appellant, Ajit Devapriya Samarakoon, who was at all relevant times, Officer-in-Charge of the Police Station at Kobeigane, was indicted in the High Court of Kurunegala with having caused the death of Mananlage Malini alias Nilanthi at Kobeigane on or about the 25th October 1989 and that he thereby committed the offence of murder punishable under section 296 of the Penal Code.

The said Malini alias Nilanthi was a very pretty and beautiful girl, of 18 years of age who had been crowned as the Beauty Queen (Ayurudu Kumari) at the New Year celebrations organised by the officers of the Kobeigane Police Station and the residents of Kobeigane in 1987. She was fair complexioned, pretty and having

long hair stretching towards her legs and was rather plump in her constitution. She was the daughter of witnesses who gave evidence at the trial named Mananalage Dingiriya and Mananalage Emalin. The father Mananalage Dingiriya was financially in dire straits bordering on poverty and he was employed as a coconut plucker on neighbouring estates.

The prosecution case was presented on the basis that the accused appellant had a love affair with the deceased Nilanthi and certain letters alleged to have been written by the accused appellant extolling his love for her, were produced at the trial. – (X3), marked at the trial as T4 and T5.

The accused denied the charge and in the course of his dock statement he denied categorically that he had a love affair with Nilanthi and he also denied that he ever wrote any letters to her. After the accused made his dock statement learned trial judge, heard submissions of the State Counsel and the Defence Counsel, and thereafter delivered his judgement on the 10th of October 1997 finding the accused guilty of the charge of murder and sentenced the accused to death. The accused has preferred an appeal to this court against the findings,conviction and sentence pronounced and imposed on him by the learned High Court Judge of Kurunegala.

An eye witness to this alleged incident named Karunanayake Mudiyanselage Chulasiri gave evidence against the accused incriminating him in relation to the charge preferred. At the argument of this appeal, learned President's Counsel appearing for the accused-appellant sought to impugn the evidence of the eye witness on the basis of shortcomings and contradictions in his evidence, which in the submission of learned counsel made him an untrustworthy and an incredible witness. However, it must be emphasized that the trial Judge who had the all important factor of the demeanour and deportment of the witness, has after giving his mind to the alleged contradictions and deficiencies in witness. Chulasiri's evidence, has arrived at the conclusion upholding the testimonial trustworthiness and credibility of the witness. Vide Judgment pages 587 onwards, page 627 and page 720.

At the conclusion of the argument in this appeal this court was unable to hold that the trial judge's findings in regard to credibility

and testimonial trustworthiness, were not justified or erroneous. As succinctly pointed out by Justice Soertsz, ACJ in *King* v *Endoris* (1), it is not the function of a Court of Appeal to retry a prosecution on the facts and indulge in a re-appraisal of the facts though enthusiastically encouraged by learned counsel who often preferred submissions as if the Court of Appeal is the jury or the trial judge. Both the provisions of the former Court of Criminal Appeal Ordinance and the provisions of the Criminal Procedure Code clearly spell out the jurisdiction of the Court of Appeal in hearing an appeal preferred by an accused-appellant. In this context Justice Soertsz in *King* v *Endoris* (*supra*) remarked thus:

> "Counsel appearing in support of this application addressed us as if we were the Jury in the Assize Court but our function has clearly been laid down by the Court of Criminal Appeal Ordinance, is to examine the evidence in the case in order to satisfy ourselves with the assistance of counsel that there is evidence upon which the Jury should have reached a verdict which they came to and also similarly to examine the charge of the trial Judge to satisfy ourselves that there has not been any mis-direction or non-direction.

For similar expression of view by the Judicial Committee of the Privy Council - Vide the judgment of Lord Tucker in *Ebert Silva* v *King* (2).

Although learned Counsel who appeared for the accused at the trial seemed to treat witness Chulasiri as an accomplice, Chulasiri steadfastly in the witness box, asserted that he was unaware of any plan on the part of the accused to kill the deceased when he accompanied the accused on the journey in the van on that disastrous night.

The Learned President's Counsel who appeared at the appeal submitted that on the evidence, Chulasiri cannot be treated as an accomplice and he argued the appeal on the footing that witness Chulasiri was not an accomplice. However, learned President Counsel impugned the evidence of witness Chulasiri as inherently improbable, on the ground that his statements were made after a long delay and therefore were belated and on the basis of contradictions, having regard to the contents of th statements made on

2.3.1991 by witness Chulasiri to his superior officers of the Army, to the evidence given by him in the non-summary proceedings in the Magistrate's Court.

Witness Chulasiri in the course of his testimony volunteered before the High Court of Kurunegala referred to the following salient facts: That the accused who was the Officer-in-Charge of the Kobeigane police station initially rented the front room of a house owned by as Grama Sevaka which adjoins the police station and thereafter the accused occupied a bungalow situated opposite the police station and that the witness had brought his meals at times from the police mess and at times from the witness's own home. On particular occasions, it is alleged, that when the witness brought his meals the accused was very particular in advancing right up to the door and accepting his meals. On the day Nilanthi met with her death, the witness had taken the accused's all three meals for the day in a basket and as the house was closed when he called out to the accused, the accused had come out in a semi dressed state covering himself with a towel and a hurriedly worn pair of shorts and had opened the door half way and had taken the basket on all three occasions, witness says, contrary to the normal routine followed the accused did not permit him to enter the house and leave the meals on the table. The witness had been working as a Grama Arakshaka Niladari, but attached to the Kobaigane police for about two years from the year 1987. The accused lived alone in this bungalow and the accused was not married at that time. A few days before the witness ceased to work at the police station, it is alleged that the accused had called him one evening and required him to bring the white coloured Toyota Hiace van owned by a person named Jothiratne from its driver S.R. Gunaratnehamy along with two tyres.

Gunaratnehamy lived at the Kuliyapitiya Co-operative Stores. Witness had proceeded to the Cooperative Store, met Gunaratnehamy and had conveyed the message of the accused to bring the said van with two tyres. Gunaratnehamy in pursuance of that message had brought the said van at about 6 p.m. to the police station after obtaining two tyres from the lorries which were parked at the Cooperative Society. Having parked the van at the police station, Gunaratnehamy had left at about 7.30 p.m. on that day. The

accused had invited the witness to get into the said van and the accused had driven the van from the police station to the accused's house. Thereafter the accused had reversed the said van right up to the front door of his house and had proceeded into the said house. Thereafter the accused and the deceased Nilanthi had come out of that house. Nilanthi seated herself on the front seat in the van on the left hand side, the accused sat at the driving seat and the witness had got into the rear seat of the van. On this occasion the accused had a LMG gun with him which he always carried and the accused had kept the gun on the floor of the van near the seat. Thereafter the accused drove the van with the two other passengers leaving the bungalow in the direction of Kithagama junction. Then the accused had stopped the van,turned it and had driven it further towards the junction and at that stage the accused had stated – "let us get out of the van and proceed on foot to Mr. Dunuwila's house situated on Amaton Estate". The accused had got down first from the van and had opened the front left hand side door to enable Nilanthi to get down and thereafter the accused and Nilanthi had proceeded about six to seven feet from where the van was halted. The accused had fired the gun which was in his hand at Nilanthi and the witness had seen fire emanating from the gun and heard the noise of the gun shots. Thereafter the accused had instructed the witness to bring the two tyres from the van. When he shouted again at the witness, the witness had brought the two tyres from the van. Thereafter the accused had lifted Nilanthi and placed her body on the top of the two tyres. The accused had thereafter placed some tubes over her body and had poured petrol over her body from the can which was transported in the van. Thereafter, the accused had directed the witness to set fire to Nilanthi's body. But when the witness refused to do so, the accused had lit a piece of paper and thrown it over her body with the result that her body caught fire and thereafter the accused and the witness had moved away from the scene in the van. Having returned to the police station, the accused had offered to transport the two officers who were scheduled to perform security functions at the Provincial Council Minister's house. Thereafter with those two officers and the witness in the van, the accused had driven the van to Gunaratnehamy's place of residence. The two officers who had relinquished security duty at the Provincial Council Minister's house had also boarded,

the van driven by the accused. After the accused had set fire to Nilanthi's body he had addressed the witness and requested thus:– "only you and I are aware of this incident. Do not tell anybody". Witness agreed because he was afraid that he too would be killed by the accused.

On the next morning the accused had summoned the witness again to his office and repeated his earlier request not to divulge the incident to anybody. Subsequent to this incident on another day in the evening the accused had directed the witness to get ready to proceed on a journey to apprehend a JVP suspect. The witness had proceeded in a vehicle driven by the accused together with two other officers towards Nikaweratiya. The accused had stopped the vehicle near the bridge and near a jam tree and waited in that position for a long time. At that stage the witness had inquired from a sergeant officer how long they would have to wait to accomplish their object and at that stage the sergeant had smiled in a suspicious unusual manner and directed the witness to inquire from the accused. The inquiry made from the other officer produced the same result, thereupon the witness's fears were alerted and he believed that the accused had brought him there to exterminate him. The witness thereupon pretended that he would proceed to the jungle for toilet purposes and thereafter had fled through the jungle and reached a friend's house, taken refuge in that house and induced the friend to inform his parents of his whereabouts. The witness did not proceed to his work place and report for duty after that incident. The accused persistently kept pursuing and following the witness thereafter wherever the witness proceeded. To be freed from the pursuit of the accused the witness conceived the idea of joining the army and he joined the army on the 12th of November 1989. After a training period at Diyatalawa for three and a half months and having worked at the Army Headquarters in Colombo for three months, the witness was posted to Batticaloa. The accused had telephoned the army officers stationed at Batticaloa and made inquiries about the witness. In view of these persistent inquiries the witness had narrated an account of the incident leading the Nilanthi's death to Major Raja Fernando. The accused had secured a transfer to the Batticaloa police while the witness was stationed at Welikande, Valachchenai.

Major Raja Fernando had instructed the witness to give the details in writing and the details were written out by the Chief Clerk and the witness had signed that document. Witness stated that he still afraid while making the statement due to his belief that anybody known to the accused may be working at the army camp at Batticaloa. On the 19th of March 1991 the army authorities sent the witness with another officer to the Criminal Investigation Department office in Colombo. On that occasion he made a statement to the Criminal Investigation Department. It is highly significant that the witness had not been contradicted at that trial in regard to the contents of this statement.

Learned President Counsel raised the issue in the course of his argument, though Chulasiri was not an accomplice, is not the version of Chulasiri so inherently improbable when he states that the accused had been so foolhardy as to take with him a mere witness against himself on this alleged mission, which he could have so conveniently achieved himself. Learned President's Counsel utilised the Test of Improbability to assail the version narrated by witness Chulasiri. This submission has to be viewed in relation to the attendant facts and circumstances of the case. This incident happened during the period of terror raised by the JVP insurgents who had held out threats to the lives of police officers. From the account narrated by Chulasiri, it is evident that the accused intended to use the witness as a parti-ceps criminis when he directed him to bring the tyres and place them on the ground, when he directed him to fetch the can of petrol which was inside the van, when he directed the witness to hold Nllanth's legs when he carried her body and placed it on the tyres and when he directed and requested him to set fire to Nllanthi's body which had been moistened with petrol. The accused had presumably believed and a expected that the witness would obey all his commands and therefore take an active part in the criminal act so as to render him an accomplice and a guilty associated in the crime, in which event the witness would assume the role of a guilty confederate and therefore would not divulge the incident to any third party and thereby refrain from incriminating himself. Viewed in this light, it could not be argued with justification that the course of action taken was extremely foolhardy on the part of the accused-appellant and therefore the version is intrinsically improbable.

The learned President's Counsel relied on the Test of Spontaneity and contended that the statement made to the CID made by witness Chulasiri was belatedly made after a lapse of a period of nearly one and a half years. It was argued that Chulasiri's first revelation was in a letter addressed to his superiors in the army on 2.3.1991 and even in that disclosure he has admitted at the trial that some aspects mentioned therein are incorrect and false. Learned President's Counsel also relied on the Test of Inconsistency between his testimony in Court and the contents of the statement made to the army officers and the evidence given before the learned Magistrate at the non summary inquiry.

In this context it is relevant to consider the issue of the credibility of the witness Chulasiri in the light of the principles enunciated by Lord Roch in *Bhojraj* v *Sita Ram* (3) – Lord Roche has set out the real test for rejecting or accepting on the basis of testimonial trustworthiness in these words:

> "How consistent is the story with itself? (consistency per se). How does it stand the test of cross-examination? (stability under cross examination) How far it fits in with the rest of the evidence and the circumstances of the case (inconsistency inter se)".

Witness S.R. Gunaratnehamy in his testimony has clearly stated that the witness Chulasiri conveyed a message from the accused that the accused wanted the Toyota Hiace vehicle driven by Gunaratnehamy with two tyres. Witness Gunaratnehamy has stated that he obtained the two tyres, put in into the van and brought the van to the police station and left it thereafter having had a conversation with the accused. He has stated that he took the two tyres off a lorry parked at the Cooperative. When he met the accused at the police station at about 7 to 7.30 p.m. the accused had asked him whether Gunaratnehamy could lend the van for about an hour. When he agreed to the request, the accused who was holding the post of Officer-in-Charge Kobeigana police station, had driven the van and dropped the Manager Gunatilake and Gunaratnehamy at the Cooperative and that he thereafter had driven away in the van. Gunaratnehamy also stated in evidence that the accused came back in the van with Chulasiri and two other police officers at

about 9 to 9.30 p.m. on that day and had returned the van. Gunaratnehamy has stated that before taking the van to the police station in compliance with the message sent by the accused, he had cleaned the van and removed the dust and dirt inside the van. Thereafter, after having received the van when he proceeded to wash the van, on the next day he had discovered two hair pins inside the van and he had thrown the hair pins away believing them to be items of no significance. This evidence narrated by witness Gunaratnehamy was not subjected to any challenge, impugnment nor assailment in cross examination by learned counsel who appeared for the accused at the trial. Thus the unassailed and un-impugned evidence of Gunaratnehamy corroborated a part of the material version volunteered by witness Chulasiri at the trial. Thus in certain material respects, the evidence of witness Chulasiri fits in with the un-assailed evidence given by witness Gunaratnehamy and the proved attendant circumstances upon this prosecution. This aspect of support and substantiation arising from the testimony of Gunaratnehamy has greatly influenced the trial Judge in accepting and acting upon the evidence of witness Chulasiri.

Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the Test of Spontaneity the Test of Contemporaenity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement. Vide in this context the pertinent observations of Justice T.S. Fernando in *Pauling de Cross* v *The Queen* (4) at 180 Vide also *Narapal Singh* v *The State of Hariyana.*(5)

Witness Chulasiri at the trial has referred to the repeated pleas and requests on the part of the accused, held out to him, not to divulge this incident to anybody and the fact that this incident was only known to the accused and the witness. He has also referred to the Nikaweratiya episode where he entertained reasonable apprehension and danger to his own life. In view of such danger emanating from the accused he had decided to join the Sri Lanka Army. He had referred to the persistent conduct of

the accused in pursuing him wherever he went, whether to the boutique or to the town. He has referred to the telephone inquiries which the accused had made about his movements even when he was stationed in the army camp at Welikanda and at Batticaloa. He states through fear of reprisals to his personal safety he refrained from disclosing this incident to the authorities and that he even made his statement to his superior officer in the army only on the 2nd of March 1991. He had not made a complete account of the incident and that he had made certain untrue assertions and facts because he genuinely feared that the person to whom he made the statement may be known or related to the accused. The accused was also transferred to the Batticaloa police station as Officer-in-Charge and he had been making several inquiries about the movements of the witness from officers in the army. In his statement which has marked D29 in describing the shooting he had stated that the accused instructed him to push the van and when he could not do so, the accused had asked Nilanthi to get down and push the vehicle and when he was behind the vehicle an trying to get out, the accused shot Nilanthi and thereafter that he got scared and ran away.

In his evidence at the trial the positions in which the parties were placed shortly before the shooting has been differently described by the witness and he has stated that after the entire incident he got into the van and proceeded away from the scene, when the van was being driven by the accused to the police station. This discrepancy in regard to the positions and the discrepancy of getting scared and running away was explained by the witness when he stated–

> "I did not write the truth in the letter (complaint) signed and handed over to the army. I did not know that the person I complained to was known or related to the accused. I did not run away as stated in that letter. But I came back to the police station with the accused."

The point to be emphasized is that the evidence that witness gave in the High Court that he got into the van after the incident and he came back to the police station when it was driven by the accused is substantiated and corroborated by the evidence of Gunaratnehamy. Gunaratnehamy has stated to Court

that the accused came to the Cooperative driving the van on that occasion and inside the van there was the witness Chulasiri and two other police officers. Thus, though Chulasiri's statement has been made after the lapse of nearly one and a half years after the happening of the incident,having regard to the explanation given by him to the trial Judge, that explanation cannot be adjudicated as being totally unconvincing as contended for by learned President's Counsel.

According to the evidence of Chulasiri it is the conduct and actions of the accused which had contributed both to the delay in making the statement and to the discrepancies in the statement as regards the events which immediately preceded the shooting. Vide the trial Judge's observations in his judgement at pages 587, 589, 590, 591. The reasons adduced by Chulasiri are equally applicable to the failure on his part to divulge this incident to Mananalage Dingiriya, the father of Nilanthi. It is true that Chulasiri in his deposition at the non-summary proceedings conducted in the Magistrate's Court had stated that he thought that Nilanthi was shot by the JVP – *vide* D32. However, the trial Judge who had the benefit of the demeanour and deportment of witness Chulasiri when he was giving evidence at the trial, has arrived at a favourable finding in regard to his testimonial trustworthiness notwithstanding the proof of the contradictions in his statement to the Army official made on 2.3.1991 which were marked as D28 – ride D30 and the contradictions in regard to the depositions which were marked D31 to D36. D33 however has not been proved. In regard to the contradictions arising in relation to the dispositions, the only material contradictions are D32, D33 and D35. In the circumstances, we are unable to say that the trial Judge has erred in arriving at a favourable finding in regard to the credibility of witness Chulasiri and we uphold his findings on the evaluation of Chulasiri's evidence, since he has given careful consideration to the alleged contradictions and discrepancies relied upon by the defence. (*Vide* pages 586 to 592 and 627 onwards).

There has been evidence led – elicited from witness Munasinghe Arachchige Mutu Menika, W.M. Sugathadasa, R.M. Jusie Appuhamy and A.M. Gunadasa who were residents living close to the scene of the incident, which had taken place near Kitagama junction. These witnesses collectively have stated that when they were listening to Bana preaching over the radio at about 8 p.m. on Wednesday, they had heard the noise of a gun shot emanating from the direction of Kitagama junction and shortly prior to that they had heard the noise of a vehicle being driven in that direction.

Witness Jusie Appuhamy states precisely that he was listening to Bana on Wednesday when he heard the noise of the movement of a vehicle and then he heard gun shots. Later when he came out and looked he had seen light emanating from a fire in the direction of Ematon Estate.On the next day when the witness proceeded to that point at about 10.a.m. they found a heap of ash and a strong smoke emanating from it. The 25th of October 1989 was in fact a Wednesday.

Witness Gunadasa states that on Wednesday at about 9.15 p.m. he saw a mass of fire underneath his door. Thereafter when about half an hour had lapsed, he had proceeded some distance towards the fire with Rajapakse and on seeing what was apparent he had believed that it was a human body burning. After some time he states that the corpse burst and he saw something like intestines coming out of the corpse and on the next day when he went there he found that the body is burnt except for about one foot of the corpse.

Sarath Gamini Dasanayake, Inspector of Police attached to the Criminal Investigation Department who conducted the investigations stated that Mananalage Dingiriya made a complaint to the Police Headquarters in Colombo on the 31st January 1991 regarding the killing of his daughter Malini alias Nilanthi by shooting her and later by burning her body. He has stated that he was directed to investigate the said complaint by the Deputy Inspector General of Police attached to the Criminal Investigation Department on 5.2.91 and that he undertook the investigation on 14.2.91 when the accused was still functioning and officiating as the Officer-in-Charge of the Kobeigane police

station. The accused was transferred from this post to the Batticaloa police as Officer-in-Charge only in March 1991.

Investigating the said complaint of Dingiriya, witness Dassanayake had proceeded to the point shown by Dingiriya to him. Witness Dassanayake states that he found at that place signs and marks that something had been burnt at that spot. He had discovered and taken into custody a piece of human skull near a coconut tree at a point 20 feet away from the scene of the incident. He had discovered a piece of burnt tyre near a hedge. On further careful examination the witness had discovered pieces of bones mixed with earth and a small talisman made out of white steel. (සුදු යකඩ සුරයන්) which was mingled with earth.This talisman was burnt and it was identified by witness Dingiriya as the talisman purchased by him to be worn by NIlanthi as she had developed a skin disease. Witness Dasanayake had handed over the piece of the skull, a sample of earth containing human bones and ashes and a piece of the under skirt recovered by him to the Medical Officer at the Medical Faculty.

On the 5th April 1991 he had taken into his custody the Information Book relating to this investigation. The accused's statement had been recorded by Assistant Superintendent of Police, P.A. de Silva on 5.4.91. Witness Dassanayake has filed a B report in the Magistrate's Court on the 26th of April 1991 and the learned Magistrate had visited the scene to conduct an inquiry on the 26th of April 1991 itself and a post mortem examination on what was discovered was held on the 29th of April 1991. The accused was arrested by Assistant Superintendent of Police, P.A.de Silva on the 15th of May 1991, and brought before the Magistrate on 16th of may 1991. The witness had moved the learned Magistrate and three letters marked as X1, X2 and X3, the specimen writing of the accused and the Information Book were sent with the orders of the Magistrate to the Examiner of Questioned Documents for examination and report. Witness has stated that the piece of the skull was discovered approximately 25 feet away from the place where the talisman was discovered.

At the trial it was suggested under cross-examination to the witness that the talisman, the piece of the skull and the sample of earth containing particles of bones were fabricated to fit the deceased. However, this suggestion particularly in regard to the skull was established to be wholly unsustainable at the trial. Senior Lecturer attached to the Judicial Medical Division of the Faculty of Medicine, Dr. H.N. Jean Martia Perera, in her evidence has clearly stated that the piece of skull sent for inspection by her was that of a person who had been burnt whose age was under 30 years and as there were insufficient bones it was not possible to state whether the skull pertained to a male or female person. Thus if this piece of skull was fabricated and introduced by the Inspector of Police as irresponsibly suggested by the defence the Inspector of Police would have had no means of perceiving the age of the person whose piece of skull was recovered. This medical evidence relating to this discovery belies the defence suggestion put to the Inspector under cross examination.

The letters which I have referred to above, had been originally taken charge by the Nikaweratiya police, who initially investigated into this matter, from Mananalage Dingiriya, the father of the deceased. The evidence led at the trial disclosed a clear malpractice on the part of the officers attached to that police station. The original of the letter alleged to have been written by the accused to Malini had been transcribed again at the police station using the identical words by another person so as to assist the accused to impugn the hand writing. However, witness Dharmasiri before handing over the original copy had been careful to obtain a photostat copy of that document.

The Examiner of Questioned Documents, C.D. Kalupahana having compared the writing on the photo copy MD_1 and (X3) has clearly vouched for the fact that it contains the hand writing of the accused. The expert witness has very correctly placed before Court the media, grounds and reasons for his opinion, placed before the learned Judge the photographic enlargements and demonstrated before Court the process of comparison, thereby educating the Court in regard to the points of similarity between the contents of the photo copy MD_1 and (X3) and the specimen hand writing of the accused. Though the accused denied that he had written the

original of the photo copy MD, (marked as T4) the learned trial Judge having been enlightened and educated by the expert witness, has arrived at a finding independently of the expert's opinion, but assisted by the expert that the photo copy MD, contains the hand writing of the accused

Notwithstanding the persistent denials of the accused-appellant, these revelations manifest the mischievous, but illegal activities of the officers of the Nikaweratiya police and their concerted endeavour to unlawfully and illegally assist the accused who was continuing to hold the post of Officer-in-Charge of the Kobaigane police station which was a neighbouring police station to the Nikaweratiya police station. This discovery manifests their undue partiality and propensity to illegally assist the accused by venturing even to fabricate documentary evidence. In the circumstances, as the trial Judge has rightly held, no reliance whatsoever can be placed on the statements recorded by the Nikaweratiya police of the prosecution witnesses. Though a concerted attempt was made by the counsel at the trial to rely on the alleged statements made by the prosecution witnesses to the Nikaweratiya police for purpose of contradicting the testimony of such witnesses at the trial, in view of this revelation and discovery we hold that the aforesaid contradictions marked by having recourse to the statements recorded by the Nikaweratiya police, have necessarily to be disregarded as being of no tangible significance in the discovery of the truth and ascertainment of the credibility of the witnesses.

The learned trial Judge has had the benefit of the media, ground and reasons fully placed before the Court by the Examiner of Questioned Documents, Mr. Kalupahana for his considered view and finding that the hand writing on the document MD1, and X3 (marked at the trial as T4 and T5) coincided and was identical to the specimen hand writing taken from the accused (the learned trial Judge has dealt with the evidence of the expert on these aspects at pages 505 to 508 of his judgment) and he has arrived at his adjudications independently, but assisted by expert evidence, that the accused had written out the contents of the love letters which were marked as MD1 and X3 and produced at the trial as T4 and T5. X3 and MD1 were read aloud before the Court of Appeal by

both President's Counsel and by the Additional Solicitor General. The Additional Solicitor General submitted that the expressions "දැන් කොහොමහරි වැඩේ සිදුවුනානේ, මටත් හොරා මාගේ ආදරය ඔබට ලැබුණා" used by the accused in 3 and MD1 were a pointed reference to an act of sexual intercourse which he has had with Nilanthi. Learned President's Counsel's placed a different interpretation on the words used by the accused in X3 and MD1. This Court holds that the interpretation put upon the words in T4 by learned Additional Solicitor General is the correct construction of the contents of that letter.

The accused made a dock statement in the course of which he denied the charge and he emphatically stated that he had held a high and exalted position of Officer-in-Charge of the Kobeigana police station and there was no necessity whatsoever for him to maintain and have a love affair with a daughter of Dingiriya who as a mere coconut plucker by profession and who resided in the same village. He also stated that there was no necessity whatsoever for him to obtain Gunaratnehamy's van when there were several jeeps and a requisitioned van at the Kobeigana police station for his use. He also stated in his dock statement – "If I visited Dingiriya's house, if Nilanthi came to the police station or in search of me, there was no necessity for me to write letters to her as I regularly visited that house". He has further stated that "he had no idea whatsoever to kill Nilanthi Malini or to have a love affair with her". This is the firm and definite position asserted by the accused in his dock statement. However, at the argument of this appeal, learned President's Counsel wisely admitted and conceded on behalf of the accused that the accused did have and maintain a love affair with Nilanthi, in view of the overwhelming evidence elicited in support of this fact at this trial.

The prosecution witnesses, M.M.Gunawathie and Sunethra Dilhani have also given evidence at the trial in regard to the love affair that existed between the accused-appellant and Nilanthi. Both witnesses under affirmation have stated that they had written on Nilanthi's instructions love letters on her behalf to the accused, even as late as two *months prior to her death. Thus it is patently and manifestly clear that the accused has in his dock statement uttered an international and deliberate falsehood.*

The question arises whether this falsehood was uttered on a material and relevant point upon this prosecution. There is no doubt that this lie was deliberately uttered on a highly material issue in this case. The next question is the consideration whether the motivating factor for the lie was a realization of guilt and the fear for the truth; if so, the utterances of the lie weakens the defence case and substantiates and advances the prosecution version narrated against him. We hold that the accused uttered this deliberate lie on this material issue because he knew that if he told the truth he would be sealing his fate as regards this legal proceedings. If such was the motive, the utterance of such a lie would corroborate the prosecution case. In the decision in *Haramanis* v *Somalatha* [6] at 371 I stated the rationale in regard to the motive for the utterances of a deliberate lie on some material issue by a party as follows:

> "The principle is that a lie on some material issue by a party may indicate a consciousness that if he tells the truth he will lose."

Justice Hall in *Popovic* v *Derks* [7] at 433 and at 429-430 (*per* Justice Sholi) remarked –

> "Matters which otherwise might be ambiguous are rendered corroborative by reason of the false denial."

I have referred in that decision to Chief Justice Lane's judgment in *Rex* v *Lucas* [8] and the judgment of Justice Athukorale in *Karunanayake* v *Karunasiri Perera* [9] at 33. Justice Athukorale remarked –

> "It seems to me that the tests which should be applied in determining whether a lie told by an accused or a defendant, whether in or outside Court, is capable of constituting corroboration or not, have been correctly set out by Lord Lane, CJ. in *Rex* v *Lucas* (*supra*). Under the circumstances I should adopt and apply the criteria formulated by him to local cases both criminal and civil in which the question arises for consideration.

Vide also the decisions in *Credland* v *Knowler* [10] at 55; *R* v *J.H. Knight* [11] at 126; *Jones* v *Thomas* [12] at 327; *R* v *Chapman* [13] *Dawson* v *Mackenzie* [14]; *R* v *Baldwin* [15]; *Navaz Khawn* v *Regina* [16] at 82 .

In regard to the tests laid down by Lord Lane, learned President's Counsel appearing for the accused-appellant conceded that the accused had intentionally and deliberately lied in his dock statement on a material issue, but he contended that the motive for the lie was not a consciousness on his part that if he speaks the truth in Court he will lose. Learned President's Counsel strenuously argued that the accused did not act with the consciousness that if he told the truth he would be sealing his fate as regards this criminal prosecution. He argued that because the accused held a high post in government service as Officer-in-Charge of the police station and because he held a high position in the social ladder, he spoke the untruth and denied his love affair with Nilanthi as she was the daughter of a mere coconut plucker who stood in a low social position. In analyzing and evaluating this submission of learned President's Counsel, one must necessarily take account of the lapse of time which had ensued prior to the date on which he uttered this lie. There was a non-summary proceedings in the Magistrate Court of Kuliyapitiya where evidence in regard to this love affair was led at an anterior point of time. The investigation conducted by the Criminal Investigation Department and, proceedings at the inquest and in the Magistrate Court which took place at an anterior point of time would have necessarily attracted the attention of the public as well as the recitors of verses (kavi kola karayas) at bus stands in the district. Thus this love affair would necessarily have been a widely publicized matter in the entire district.

Besides, witness Somawathie has given pertinent evidence in regard to this aspect of the matter. In her evidence which appears in the record, she has convincingly and affirmatively stated that on a day roughly about one month before Nilanthi's death, the accused who was the Officer-in-Charge of the Kobeigana police station had sent a message to her through a person called Martin, to call over personally at the police station. She has stated that when she went there the accused had stated thus to her:

> "When I was taking Nilanthi in my official jeep your daughter Sunethra Dilhani has mocked and laughed and stated certain things. Warn your daughter to be very careful and abstain from such conduct in the future."

After Somawathie had proceeded near the gate of the police station the accused again summoned her and had reiterated in Sinhala. The evidence given by Somawathie on this point has not been challenged or impugned in cross examination. This evidence of Somawathie contains an admission that the accused had taken Nilanthi in his open jeep along the town of Kobeigana. Had the accused entertained fears and apprehensions about the social standing of Nilanthi when he had taken her in his official jeep along Kobeigane town? This admission which was elicited is provable against the accused quo admission and this evidence militates against the acceptance of the explanation and the aforesaid submission preferred by learned President's Counsel at the hearing of argument on this appeal. Thus it is clear that the accused has uttered these deliberate lies due to his consciousness that if he stated the truth, his fate would have been sealed as far as this prosecution was concerned. Thus this lie weakens the defence case, advances in strength, corroborates and substantiates the prosecution case presented against the accused.

Equally, the accused falsely asserted in his dock statement that he did not obtain a Toyota Hiace van which was driven by Gunaratnehamy and that there was never a need for him to obtain that vehicle, as there were two jeeps and a requisitioned van available for his use at the police station. But the unimpugned evidence disclosed that the police vehicles were under repair and the police officers to perform security duties at the Provincial Council Minister's house were picked up into Gunaratnehamy's van at the police station on this day to be transported by the accused. The evidence of Guneratnehamy on this aspect was never challenged, impugned or assailed by counsel who appeared for the accused at the trial in cross examination. This manifest lie uttered by the accused in his dock statement too satisfies the three tests formulated by Lord Lane in *Rex* v *Lucas* (*Supra*). The borrowing of the said van was a material fact in this prosecution and the prosecution version is that Nilanthi was taken in this particular van on the 25th of October 1989 to be killed near Kitagama junction. The accused has uttered this falsehood deliberately with the consciousness that it he admitted the truth and the borrowing of this van, his fate would be sealed as far as this prosecution was concerned.

Mananalage Emalin testified before the High Court that on the 24th of October 1989 her daughter Nilanthi left home in the morning at about 7.30 a.m. or 8 a.m. stating to the witness that the Loku Mahataya of Kobeigane had requested her to come over to marry her and on that occasion Nilanthi had stated to the witness that she was expecting a child in her womb due to the actions of the said Loku Mahataya and that he wanted to get married to her on account of that fact. She also stated that her daughter told her not to look for her and it it is possible that she should come round about 4 o'clock or not come at all. The aforesaid evidence given by Emalin was sought to be admitted in terms of the provisions of section 32(1) of the Evidence Ordinance as a dying declaration.

Learned President's Counsel contended that the entirety of the said dying declaration alleged to have been made by Nilanthi to her mother (the witness) did not come within the ambit of section 32(1) and was therefore inadmissible. He contended the phrase "the circumstances of the transaction which resulted in her death" would relate only to that part of Nilanthi's statement wherein she stated in the morning that she was proceeding to meet the Loku Mahataya, but that the object or purpose for so proceeding was inadmissible.

The learned President's Counsel sought to rely on certain words use by Lord Atkin in *Pakala Narayanaswamy* v *King*[17]. However in the course of the argument this Court was constrained to draw the attention of learned President's Counsel to the effect of the judgment of the Privy Council in admitting as admissible the whole of the statement sought to be admitted by the prosecution against the accused-appellant and to the judgment of Justice Dias in *King* v *Mudalihamy* [18] where the learned Judge purporting to apply the principles laid down by the Privy Council in *Pakala Narayanaswamy's* case held that the statement made by the deceased to witness Mary Nona that he was proceeding to the jungle at the invitation of the accused to collect bee's honey in the jungle was admissible in terms of section 32(1) of the Evidence Ordinance. Thus both in *Pakala Narayanaswamy's* case and in *Mudalihamy's case* not only the fact of the invitation but the purpose of object of the invitation were determined to be a circumstance of the transaction which resulted in death.

At a later stage of his argument learned President's Counsel was constrained to accept the tenability of the said proposition of law enunciated by this Court in the healthy dialogue that took place so often between Judge and Counsel. At this stage he argued that part of the evidence of Emalin that Nilanthi was expecting a child on account of the activities of the Loku Mahataya and because of that fact the Loku Mahataya wanted to get married to her was clearly inadmissible as it merely constituted the alleged reason for the purpose of proceeding to meet Loku Mahataya which he characterized as being the REASON for the reason.

Alternatively, learned President's Counsel argued that the evidence given by Emalin, on this point was false and incredible as being inherently improbable. Dealing with the latter issue of improbability, this court observes that although witness Emalin as a mother was aware about her daughter's pregnancy about three months prior to the date, when she set out from her parental home on that morning, the significant fact is that a young girl aged 18 was leaving the parental home in the morning to get married alone, unceremoniously and unaccompanied by any other person and without the presence and the blessings of her parents. Especially, among the conservative village folk, daughters of young age do not go out of their homes to get married without the presence of their parents having regard to the practices, usages and the culture that prevails in the rural villages

In this context when Nilanthi reiterated that she was expecting a child by Loku Mahataya and that she was setting out alone to get married to him in terms of his directions, this Court discovers no intrinsic or inherent improbability as contended for by learned President's Counsel, when one relates this statement and the evidence to the attendant circumstances elicited upon this prosecution. Though her mother was aware of her pregnancy about three months prior to the date of her setting out, it is quite probable that Nilanthi was apologetic about the fact that she was setting out alone on this mission.

Now reverting to the issue of legal admissibility of that part of her statement that she was expecting a child on account of

the activities of the Loku Mahataya and that he wished to get married to her on account of this fact, this Court, proceeds to consider whether this part of the statement is sufficiently proximate to render it a part of the circumstances of the transaction which resulted in her death.

This expression "circumstances of the transaction" is not so wide as circumstances which would constitute circumstantial evidence to the fact in issue in a case. The setting out from home for the purpose of getting married to the Loku Mahataya has been subsequently conceded by learned President's Counsel to be part of the circumstances of the transaction which resulted in death.The fact that she carried the accused's child in her womb is certainly a reason for the marriage contemplated by the parties. Is not that reason sufficiently connected and proximate to the invitation to get married? The answer to that question has definitely to be in the affirmative. Hence the pregnancy is highly connected to the invitation to get married and is also closely connected to the alleged acts of shooting and the burning of Nilanthi.Viewed in this light this statement of Nilanthi to her mother shortly before she left the house that morning is a fact inextricably interwoven and connected to the circumstances of the shooting and the setting on fire which resulted in her death. In the circumstances this Court upholds the cogent contentions advanced by learned Additional Solicitor General and rejects the submissions preferred by learned President's Counsel and holds that the evidence volunteered by witness Emalin in regard to the entirety of what her daughter Nilanthi narrated to her before she left the parental home on the 24th of October 1989 is admissible in evidence in terms of the provisions of section 32(1) of the Evidence Ordinance, adopting the wide and extensive construction placed upon this provision by Lord Atkin in *Pakala Narayanaswamy's* case, as opposed to the restricted and limited construction put upon it by Justice Garvin in *King* v *Arnolis Perera.*[19]

The reference in the dying declaration to the fact of pregnancy is causally and closely related to the actual occurrence and there is a proximate relationship between the pregnancy and the actual occurrence. It is directly related to the occasion of the death. It is

possible that evidence which merely constitutes the motive for the commission of the crime and such incidents which have taken place during a period of time long prior to the commission of the criminal act, would not constitute a circumstance of the transaction. Vide *Dharmawansa de Silva* v *Attorney General.*[20] Particularly where the evidence is relevant otherwise than as motive alone and where there is a close proximate relationship between the happening of that event and the murderous assault, such circumstances would constitute a circumstance of the transaction – See *Somasiri* v *Republic of Sri Lanka* [21]; *King* v *Marshall Appuhamy*[22] at 275; *Somasiri* v *The Queen* [23] *per* Justice H.N.G.Fernando and *Regina* v *H.S.Perera.*[24] (where there was an interval of over two weeks between the fact relied upon as reason for the attack on the deceased and the causing of the death of the deceased).

Witness Mananalage Emalin has stated in her evidence that when her husband Dingiriya arrived at their home after work that she had related that Nilanthi left home in the morning and had not returned as yet. This witness also stated that she met the accused at the police station and requested the accused to take down her statement and had requested the assistance of the accused to find her daughter but the accused had failed to record her statement and had instead observed that her daughter may have got friendly with a boy and run away and therefore to investigate further before making a complaint.

Long prior to the 24th of October 1989 witness Emalin has stated that the accused had come to her compound to meet her daughter on two or three occasions and she had seen her daughter talking to the accused in their garden. She has also testified to the effect that a person named Dharmasiri had proposed to her daughter and that when Dharmasiri discovered that Nilanthi was having an affair with the accused on discovery of a love letter written by the accused to Nilanthi, he had terminated the relationship with Nilanthi. Under cross-examination she was confronted with the evidence that she gave at the non summary proceedings in the Magistrate Court. In parts of her statement made to the Criminal Investigation Department marked, D20 and D21, she has stated that her daughter Nilanthi when leaving the house on the 24th of October 1989 at about 7.30 a.m. had told her thus:

"Mother Kobeigane Loku Mahataya had wanted me to come. Do not look for me. If possible I will come around 4 o'clock or I will not come". The purpose in marking these statements as D20 and D21 was to pin point that in these statements there is no reference to the purpose of the mission which was to get married or a reference to the pregnancy at the hands of the accused. D24 had related to what the witness informed the Nikaweratiya police. We have already set our views in regard to that investigation and the recording of statements by the Nikaweratiya Police.

Another witness who testified at the trial was Mananalage Dingiriya the father of the deceased, in the course of his evidence he has stated that Dharmasiri ceased to come to their home to see Nilanthi about six months before her death. He has referred to the fact that he purchased a white steel talisman on the advice of the Veda Mahathaya as Nilanthi had developed a skin disease. According to his testimony on the 24th of October 1989 when he came back from work to his home, he had discovered from his wife Emalin that Loku Mahataya had wanted Nilanthi to come over to get married to her and his wife had stated that she had left the home in the morning at about 7.30 a.m. On the 25th of October 1989, the witness had proceeded to Kobeigane police station and had expressed a desire to make a written complaint to the accused that his daughter was missing. Whereupon the accused had dissuaded him from making a complaint in writing by observing that she may have run away with a boy and therefore to make further inquiries and after the lapse of two or three days to make the desired complaint. On the 26th of October 1989 when he proceeded to Kitagama junction he had discovered the corpse of a young girl burnt to death and when he looked closer he had seen a burnt talisman and believed the body to be that of his daughter. On his arrival at home he had narrated this discovery to his wife and thereafter proceeded to the police station to meet the accused and had again expressed a desire to lodge a complaint. On this occasion too the accused had dissuaded him from making a complaint stating that his daughter will come back home and to make the statement if necessary after the lapse of a few days. Thereafter when the witness insisted on making the complaint the accused had instructed the Reserve Officer, after coming out with a joke, to record his statement.

The Reserve Officer subsequently advised him to inquire from his daughter's friends and come back later to the police station and as a result the witness was unable to have his complaint recorded even on that day. On the next day when he was proceeding to work he had seen the burnt body again and he had observed the burnt part of a under skirt hidden under a bush. Subsequently he had proceeded to this spot and taken charge of this burnt under skirt and later handed it over to the officers of the Criminal Investigation Department. He had stated that he found letters written by the accused to his daughter and about three letters written by Nilanthi to the accused which were deposited in her suitcase.

On the 31st of January 1991 the witness had made a complaint to the Police Headquarters in Colombo and after the lapse of six days of making the said complaint his whole house had been burnt. The witness has not been contradicted at the trial in regard to the contents of this complaint. Later an officer of the Criminal Investigation Department arrived at his home and recorded his statement. The witness had taken the officer of the Criminal Investigation Department to the spot where he found the burnt body and the burnt talisman. Long before the CID officers came to meet him in his statement to the Police Headquarters, he has specifically referred to the burnt body and talisman.

In this factual background, learned Additional Solicitor General contended cogently that although the mother and father of his loved girl friend orally complained to the accused that their daughter Nilanthi was missing on the 24th of October and 25th of October 1989 and requested the accused to record their complaints, the accused had made every endeavour to dissuade them from making a written complaint observing that his girl friend Nilanthi may have eloped with a boy and had suggested to them to make further inquiries and in his capacity as Officer-in-Charge of the police station the accused took no steps whatsoever to investigate into these complaints, notwithstanding the fact that the person missing was an individual to whom he had written love letters. He urged this Court on proof of these incriminating facts to raise an adverse inference in regard to the callous conduct and failure of the accused to commence an investigation into these complaints.These complaints were made on the evening of the 24th of October 1989

(by the mother) and on the 25th of October 1989 (by the father of the deceased) and the very significant fact is that according to the testimony of Chulasiri, Nilanthi came out of the residential house of the accused together with the accused and got into the van, which was later driven by the accused, on the 25th of October 1989 at about 7.30 or 7.45 p.m.

The failure to record the complaints of the parents and the failure to commence an investigation into the said complaints coupled with the evidence of Chulasiri that he saw Nilanthi coming out of the accused's residence together with the accused to board the van, raises highly incriminating circumstances against the accused which the accused has failed to explain away, though it was in the power and dominium of the accused to do so when he had that unfettered and unrestricted opportunity to do so in his dock statement. His dock statement to this extent is highly deficient. The dock statement contains no denial of Dingiriya's visits to the police station and requests held out to the accused to have his complaint recorded. These incriminating circumstances established against him gave rise to presumptions and inferences which shifted the *evidential burden*, as opposed to the *legal burden*, to explain away these highly incriminating circumstances in terms of the speeches of Lord Ellenborough in *Rex* v *Cochrana* (25) and that of Justice Abbott in *Rex* v *Burdett* (26) at 120. The principles laid down in these two cases do not place a legal or a persuasive burden on the accused to prove his innocence or to prove that he committed no offence but these two decisions on proof of a prima facie case and on proof of highly incriminating circumstances shift the evidential burden to the accused to explain away these highly incriminating circumstances when he had both the power and opportunity to do so. Vide the judgment in *Misnagollage Siriyawathie* v *The Republic* (27) and *Kankanam Aratchilage Gunadasa* v *The Republic* (28).

We have held that the totality of the contents of the dying declaration made by Nilanthi, shortly before she left the parental home on the 24th of October 1989, to her mother is admissible and relevant in terms of sec 32(1) of the Evidence Ordinance.

Learned Additional Solicitor General alternatively argued that the statement relating to her going out to get married and the statement relating to her pregnancy at the hands of the accused

was also alternatively admissible under sec. 8(2) of the Evidence Ordinance as conduct of any party to any suit or proceeding and that when such conduct is relevant a statement made which accompanies and affects such conduct is also relevant. This same legal contention was advanced by learned Additional Solicitor General in regard to two other items of evidence led upon this prosecution. In the circumstances I will discuss the tenability of this contention in law after referring specifically to other items of evidence which were referred to by him in the course of the argument.

Witness Gunawathie giving evidence (recorded at page 160) stated that fourteen days prior to Nilanthi's death she wrote the letter dated 11th October 1989 at the dictation and at the instance of Nilanthi addressed to Ajith Samarakoon who functioned as the Loku Mahataya at the Kobeigane police station. The contents of this letter, *inter alia,* reads as follows:

"You have not sent me a letter presumably for the reason that you do not wish to meet me. Brother Ajit is your heart a gal katayak?" (ගල් කැටියක්ද?) Do you think and recollect about innocent Nilanthi?" The actual author of this letter is deceased Nilanthi and witness Gunawathie has merely transcribed the letter at the dictation and instance of Nilanthi. Thus if the author of the letter is not called as a witness, the contents of the letter dated 11.10.89 are hearsay. Although the contents of this letter are logically relevant to the facts in issue upon this prosecution, this hearsay documentary evidence could only be admitted if it could be brought within any one of the sections providing for the exceptions to the hearsay rule as spelt out in the Evidence Ordinance. Those exceptions are contained in our Evidence Ordinance in sec. 17-38 and the contents of this letter do not fall within the ambit of any of these sections. Thus Gunawathie's evidence on this matter has necessarily to be limited to the fact that Nilanthi dictated a letter to that effect. To that extent Gunawathie's evidence when so limited is direct evidence in terms of section 60 of the Evidence Ordinance. In the circumstances though the contents of this letter was marked in evidence, this letter is not admissible to establish the truth of the matters contained in the assertions of Nilanthi as embodied in that letter. In fact even to the third aspect of evidence relied on by the

learned Additional Solicitor General the principle of law enunciated by me would be equally applicable.

Witness Somawathie giving evidence (recorded at page 317) stated that when she was peeling ekels whilst seated on a bench positioned under a tree in her compound. Nilanthi, who often stepped in at her house on the way to sewing classes, requested for some water to drink and stated thus:

"Aunt, the Loku Mahataya requested me every day to come over to Kitagama junction. I accordingly proceed to that spot, but he daily disappoints me and is in the habit of getting me to waste my time at this place."

Somawathie alleged that this statement was made by Nilanthi to her one month before her death. In fact in relation to these three aspects of evidence, learned Additional Solicitor General strenuously argued that they are admissible as conduct and the accompanying statements which explain such conduct are also admissible under the provisions of section 8(2) of the Evidence Ordinance. We hold that in law these statements are made only logically relevant in as much as they stand in the relationship of "CAUSE AND EFFECT" to the fact in issue by the operation of section 8(2) and all three aspects of evidence which were referred to by the Additional Solicitor General are species or hearsay evidence, and are excluded by the general rule excluding hearsay evidence. To render these statements legally admissible in evidence, it has to be established that they fall within the ambit of sections 17-38 of the Evidence Ordinance which provide for the adoption of hearsay under well defined exceptions to the hearsay rule in Sri Lanka. These statements do not come within any of the recognized exceptions to the hearsay rule as set forth in the Evidence Ordinance. In the circumstances these statements are inadmissible in law to establish the truth of the assertions contained in those three statements. However, the persons to whom these statements were made namely witness Emalin, witness Gunawathie and witness Somawathie could give direct evidence to establish merely that such statements were made. (Vide Section 60(1) and 60(2) of the Evidence Ordinance), but they cannot give evidence of the statements with the object of proving the truth of the assertions contained in those statements. Thus Somawathie's

evidence that Nilanthi made such a statement and that she heard such a lament from Nilanthi is admissible only to prove that such a statement was made. *Vide* section 60 of the Evidence Ordinance.

However, it has to be emphasized that the learned trial Judge has nowhere in his judgment relied on these three statements (which were hearsay) for his adjudications and has not relied on the truth of the facts contained in those assertions to arrive at findings against the accused appellant. However, the whole of the statement made by Nilanthi to her mother shortly before she left her home is admissible in evidence in terms of section 32(1) of the Evidence Ordinance.

I wish to amphasize that the witnesses for the prosecution A.M. Gunadasa, R. M. Jusie Appuhamy, W. M. Sugathadasa and Munasinghe Aratchilage Mutu Menika have stated that they witnessed only one conflagration of the nature which they witnessed on the 25th of October 1989 night, in the area surrounding Kitagama junction and specifically that there were no other such conflagrations in the area. In regard to the evaluation of the evidence of witness Chulasiri, witness Emalin and witness Dingiriya, it is very pertinent to analyze their evidence in the light of the principles laid down by Justice Thackker in the celebrated decision in *Barwada Boghin Bhai Hirji Bhai* v *The State of Gujerat* (29) at 755, in regard to the sequence in which evidence is narrated by witnesses and the tendency on the part of the witness to mix up the sequence of events in narrating his evidence in Court.

I have patiently and fully considered the submissions advanced on behalf of the accused appellant and the Republic. We wish to express our appreciation of the devotion and dedication disclosed by learned President's Counsel on both sides in the argument of this appeal before this Court on several dates and we wish to record our gratitude to junior counsel appearing on both sides for their research and the carefully compiled written summary of evidence and written submissions prepared by junior counsel for the accused appellant.

For the reasons enumerated we hold that there is no merit in his appeal and the evaluation of evidence, the findings and the conviction indulged in, reached and imposed respectively by the

learned trial Judge is wholly justified and lawful. In the result, we proceed to dismiss the appeal of the accused-appellant.

KULATILAKA, J. - I agree

Appeal is dismissed.