THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2012] Vol. 1 SRI L. R. - Part 3

PAGES 57 - 84

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at the Department of Government Printing, Sri Lanka

Price : Rs. 18.00
1 - CM 18073

DIGEST

CM 18073– 3,000 (2014/06)

SRI LANKA PORTS AUTHORITY
V
ATHAUDA SENEVIRATNE AND OTHERS

COURT OF APPEAL
SRIPAVAN.J
SISIRA DE ABREW.J
CA 521/2005
FEBRUARY 8, 2006
MARCH 15, 2006

Writ of Certiorari - Industrial Disputes Act - Sections 4 (1), 17 (1) -Reference by Minister - Could the reference be attacked - Could it be shown that, what was referred was not an industrial dispute ?

The petitioner and the fifth respondent are parties to an alleged industrial dispute which was referred to the fourth respondent by the Minister under Section 4 (1) of the Industrial Disputes Act (IDA).

It was contended by the petitioner that, though the reference is to the effect whether the non implementation of the recommendations of the Salaries Anomalies Committee 2001 with regard to the night allowance of the Pilot station Employees of the Ports Authority is justified ..... there were in fact no recommendations but only observations made by the Salaries Anomalies Committees 2001 and therefore the reference is bad.

The respondents contended that, the fourth respondent had to consider by giving his mind to divergent interpretations that may be placed on the report in respect of "Professional Pilot Fee" and therefore the Court cannot interfere with the duty cast on the fourth respondent by Section 17 (1) IDA.

Held :

(1) The fourth respondent is not entitled to act on the oral evidence of witnesses contravening and interpreting the Committee Report.

The Committee has failed to make any recommendation with regard to the Professional Pilot fee. The Committee has made only observations.

(2) Every question of legal interpretation which arises after the primary facts have been established is a question of law.
The petitioner is entitled to attack the reference to show that what was referred was not an industrial dispute.

APPLICATION for a Writ of Certiorari.

Cases referred to :

(1) *Collettes Ltd vs. Bank of Ceylon* 1982 2 Sri LR 514 at 515

(2) *Seneviratne vs. Ceylon Petroleum Corporation* 2001 3 Sri LR 15 at 16

G. Alagaratnam with *Rifa Musthapa* for Petitioner.

S. Igalahewa for 1st Respondant.

Cur. adv. vult.

July 07, 2006
SRIPAVAN, J

The petitioner is a body created by statute and has the capacity to sue and be sued in its corporate name. The petitioner and the fifth respondent are parties to an alleged industrial dispute which was referred to the fourth respondent by the first respondent Minister under the provisions of section 4 (1) of the Industrial Disputes Act. The matter in the alleged dispute as contained in the statement marked X2 is as follows:

"Whether the non - implementation of the recommendations of the "Salaries Anomalies Committee - 2001" with regard to the night allowance of the Pilot Station Employees of the Sri Lanka Ports Authority is justified and if not to what relief the said employees are entitled".

At the hearing before us, it was agreed between the petitioner and the fifth respondent that the term "Night Allowance" or "Professional Pilot Fee" refers to one and the same allowance. When the inquiry commenced before the fourth respondent, the petitioner raised a preliminary objection to the reference made by the first respondent on the ground that the reference itself was bad in law, in that there was no dispute relating to the non-implementation of the recommendation. Written submissions were filed before the fourth respondent by the petitioner and the fifth respondent marked X8 and X9 respectively.

The petitioner in its written submission took up the position that the Salaries Anomalies Committee deliberately and consciously avoided making any recommendation with regard to the Night Allowance ;that it made only observations and stated that the final resolution could be implemented by

increasing tariff of Professional Pilot Fee in order to avoid additional financial burden on the petitioner. Counsel for the petitioner therefore argued that the Committee only made a comment or suggestion and purposely avoided making any recommendations.

A perusal of the said report of the Salaries Anomalies Committee marked X7 shows that wherever the Committee considered recommendations to be made, the report specifically refers to such recommendations. For example, recommendations were made with regard to the increase of the consolidated basic salary (page 24), annual bonus payments (page 28), medical insurance scheme (page 30), tool allowance (page 31), fiber glass allowance (page 31), special allowance for Bungalow Keepers and Assistants (page 36) e.t.c. However with regard to the Professional Pilot Fee the committee at page 48 had made only observations and not recommendations. Counsel for the petitioner drew the attention of court to Chapter 16 of the report of the Committee and urged that the Committee at page 51 of the said report observed that "unless specific instructions are given in the recommendations, **date of implementation of the recommendations of this report is 01.01.2006."** (emphasis added)

Learned Counsel for the first respondent, on the other hand submitted that the fourth respondent had to consider by giving his mind to divergent interpretations that may be placed on the report in respect of "Professional Pilot Fee". It is on this basis, counsel strenuously contended that this court cannot interfere with the duty cast on the fourth respondent by Section 17 (1) of the Industrial Disputes Act to make all such inquiries into the dispute as he may consider necessary, and hear such evidence. It is common ground that the fourth respondent on 7th February 2005 made order marked X10 stating that the dispute as referred to by the first respondent is a mixed question of law and fact which could be inquired into by calling witnesses.

The question therefore arises for the consideration of this court as to the legal effect of the committee report marked X7. As observed by Sharvananda,J in the case of *Collettes Ltd Vs Bank of Ceylon*[1] at 515, "every question of legal interpretation which arises after the primary facts have been established is a question of law". This court in the case of *Seneviratne vs Ceylon Petroleum Corporation*[2] at 16 held that "the construction and interpretation of a document is a question of law which must engage the attention of the judge and this court is not entitled to delegate its functions to witness who attempted to testify in regard to the effect of such document".

In view of the authorities cited above, it would appear, that the petitioner is entitled to attack the reference made by the first respondent by trying to show what was referred was not an Industrial dispute within the meaning of the Industrial Disputes Act. In the instant application the fourth respondent had proceeded to inquire into the dispute. I hold that the fourth respondent is not entitled to act on the oral evidence of witnesses in construing and interpreting the committee report. It is abundantly clear that the Committee has failed to make any recommendations with regard to "Professional Pilot Fee". In the circumstances, the fourth respondent has no jurisdiction to proceed with the inquiry. Accordingly, a writ of *certiorari* is issued quashing the reference contained in the document marked X3 and the order made by the fourth respondent dated 7th February 2005 marked X 10. I make no order as to costs.

Sisira De Abrew, J - I agree.

Writ of Certiorari issued.

ABEYSEKERA
VS
ATTORNEY GENERAL

SUPREME COURT
GAMINI AMARATUNGA,J
SALEEM MARSOOF, PC.,J. AND
ANDREW SOMAWASA,J.
S.C. APPEAL NO. 95/2007
S.C. SPL.L.A. 162/2006
H.C. (APPEAL) NO. HAMCA. 277/2008
M.C. MALIGAKANDA 4505/C
FEBRUARY 7TH, 2008

Criminal Procedure Code - Section 439 - Power to summon material witness or examine persons present- Evidence Ordinance - Section 165 - Judge's power to put questions to witness or to order the production of any document or thing in order to discover or to obtain proper proof of relevant facts - Re-trial - When can a re-trial be ordered ?

This is an appeal from the judgment of the High Court of the Western Province, ordering a re-trial against the accused - appellant on a charge of misappropriation of Rs. 40,000/- from an Automated Teller Machine belonging to the Hatton National Bank. The Supreme Court granted special leave to appeal on the following question of law:

"The learned High Court Judge erred in ordering a re- trial of the case, when such an order is unwarranted on the totality of evidence led by the prosecution and amounts to a miscarriage of justice".

Held :

(1) There is no finding that the learned Magistrate's findings were perverse and that the record reveals legal evidence on which a properly directed judge could have come to a different conclusion; without such a finding a Court cannot order a re- trial.

Per Gamini Amaratunga, J.

"An examination of the Judgment of the High Court Judge reveals that there is no evaluation of the evidence led in the Magistrate Court and an examination of the correctness of the reasoning of the learned Magistrate which persuaded her to hold that the prosecution has failed to prove the charge beyond reasonable doubt".

(2) The provisions contained in Section 439 of the Code of Criminal Procedure Act and Section 165 of the Evidence Ordinance are provisions designed to give power to the judge to examine the witness for the purpose of ascertaining the actual facts relevant to the decision of a case. The use of a trial judge's right to have recourse to Section 439 to re- call a witness cannot be a ground to order a re-trial unless there is a finding that it has resulted in a failure of justice. There was no such finding by the learned High Court Judge.

Per Gamini Amaratunga, J. -

"A Criminal Judge's duty is to convict the guilty and acquit those whose guilt is not proved beyond reasonable doubt".

Case referred to :

R. Vs. Barnes, 60 Dominion Law Reports 623

APPEAL from the judgment of the High Court of the Western Province sitting in Colombo.

D. S. Wijesinghe, P. C. with *K. Molligoda* for the accused - appellant.

K. M. G. H. Kulatunga, S. S. C. for the Attorney General.

September 12, 2008
GAMINI AMARATUNGA, J.

This is an appeal against the judgment of the High Court of the Western Province sitting in Colombo ordering a re-trial against the accused appellant (the appellant) on a charge of misappropriation of Rs. 40,000 from an Automated Teller Machine of the Hatton National Bank, Darley Road Branch. This Court has granted special leave to appeal on the following question of law set out in the special leave to appeal application.

"the learned High Court judge erred in ordering a re- trial of the case, when such an order is unwarranted on the totality of evidence led by the prosecution and amounts to a miscarriage of justice."

The facts relevant to the charge of misappropriating a sum of Rs. 40,000/ - from the ATM of the Hatton National Bank (HNB) Darley Road Branch, an offence punishable under section 386 of the Penal Code, are as follows: The appellant was an employee of the Darley Road Branch of the HNB and one of his duties was to monitor the operations of the ATM installed in the premises of the Bank. The ATM consisted of two parts. The upper part was the software control section and the lower part had the cash vault containing currency notes and the internal computer. The lower part had two keys kept with two different officers and both officers had to use their respective keys to open the lower part. In the ATM there was a printing device by which all transactions were automatically recorded on paper and this printed statement was called the journal roll. The appellant and one Jayasinghe were the two persons who were in charge of monitoring the operations of the ATM. They worked on a shift basis. Jayasinghe worked from 7.00 a.m. to 3.30 p.m. and thereafter the appellant had to take over and continue until the bank finished its day's work, sometimes going up to about 11.00 p.m.

The date of the alleged offence was 3.5.1995. During this period a customer could obtain cash through the ATM once a day and the maximum amount of cash obtainable was Rs. 10000/-. The details of the last transaction was automatically recorded in the magnetic band of the ATM card. If a

customer attempted to use the ATM card for the second time on the same day, the computer, through the data of the last transaction recorded in the magnetic band could detect it. When a customer withdrew cash through the ATM, the transaction got recorded in the main computer and the customer's account got automatically debited. The cash vault had three cassettes, each containing currency notes of the values of Rs. 1000. Rs. 500 and Rs. 100 respectively. There were two keys to the vault of the ATM which were in the custody of two separate officers of the bank and both officers had to use their respective keys to open the cash vault. The appellant had no access to the vault keys.

According to the evidence of the prosecution, on 3.5.1995 around 2.57 p.m. currency notes were inserted into the respective cassettes in the cash vault. However there was no evidence that at the time the currency notes were put into the respective cassettes, there was a physical verification of the total number of currency notes found in the cassettes at the time the cash vault was opened. After inserting currency notes the ATM was re-activated and thereafter there was a complaint from a customer that it was not possible to obtain cash from the ATM.

According to the evidence of Senaratne, an engineer attached to Informatics (Pvt) Ltd. which had supplied the ATM, on a message received from the bank, he went to the bank to examine the ATM at 18.53. The message he got was that the machine did not properly dispense currency notes as the notes get jammed in the machine. According to the evidence of Jayasinghe, the bank Officer-in-charge of operations, when the ATM was opened consequent to the complaint of the customer, it was found that currency notes had got jammed inside the ATM. When those notes were removed, the machine functioned properly. Thereafter there was another complaint that the machine was not functioning properly and the Engineer of Informatics Ltd. was summoned again. On the second occasion it was found that there was a defect in the cassette containing Rs. 100 currency notes and as it was not possible to rectify the defect at that time that cassette was taken out of its slot and kept in a separate place inside the case vault. Thereafter on that night the ATM had currency notes of Rs. 1000 and Rs. 500 denominations.

On 9.5.1995, the bank had to again insert currency notes into the ATM. When the cash vault was opened the cash that was in it was physically counted. When the physical cash balance was compared with the details

recorded in the journal roll, a shortage of cash amounting to Rs. 40,000 was detected. When the journal roll was examined it was found that transactions under serial numbers 1688, 1689, 1691 and 1692 have not been recorded in the journal roll. All those serial numbers related to the period when the appellant was in charge of the machine on the night of 3.5.1995. When the journal roll was further examined the details recorded therein indicated that currency notes to the value of Rs. 58,000 had been dispensed by the ATM that night, and according to the details Rs. 18,000/- had been properly issued to the account numbers recorded in the journal roll. With regard to the balance Rs. 40,000, there were no details printed in the journal roll.

There is no dispute that at the time those transactions relating to Rs. 58,000 took place, the appellant was the person who was in charge of the ATM. He had the key to the upper part of the computer and with that key he could open the compartment which housed the journal roll. The prosecution relied on the evidence of two witnesses to attribute the shortage of Rs. 40,000 and the non recording of the details of four transactions to the appellant's conduct. One such witness was Revatha Abeyaratna. According to his evidence the person in charge of the ATM could open the compartment that housed the journal roll and manipulate the printing process of the journal roll. He has also said that in order to obtain cash four times on the same day by using the same card, the operator can change and adjust the date and time in the way he wants. This witness in the course of his lengthy evidence has reiterated the evidence I have summarized about but he has not demonstrated to court the exact mechanism through which such manipulation of the ATM could be carried out. This witness in cross examination had admitted that he did not possess any recognized academic or professional qualifications relating to computer technology. The learned Magistrate having considered the evidence of this witness in its totality has not considered him as an expert on computer technology.

The other witness Senaratne also has given evidence similar to the evidence given by Abeyaratne that the appellant had the possibility to tamper with the ATM and manipulate its printing process. However this witness too has not clearly demonstrated to court the exact manner in which such manipulation could be effected. Further he was not an expert on computer technology and he was only an electronics and electrical engineer. The learned Magistrate has not placed reliance on his evidence as he was not an expert in computer technology.

According to the prosecution evidence, on 3.5.1995 the machine did not properly function on two occasions and technicians from Informatics Ltd. had come and put the ATM in working order. There was also evidence that on some occasions the machine dispensed cash contrary to the commands given by the customer. There was evidence that when the customer commanded the ATM to dispense Rs. 500, only Rs. 100 was issued but Rs. 500 was debited to the customer's account. There was also evidence that when a customer wanted Rs. 100 the machine had issued Rs. 500. In the light of this evidence it is perfectly clear that on and off the ATM was not properly functioning. If the prosecution wished to pin responsibility for the 40,000 solely on the appellant, the prosecution was obliged to prove that the machine was in perfect working order and accordingly the cause for the shortage was nothing other than the manipulation of the ATM by the appellant. The prosecution evidence establish the contrary position. In this state of affairs even if we take the prosecution evidence at its highest, it establishes that the appellant had the opportunity to tamper with the machine which in turn give rise to a strong suspicion against him. In a case depending on circumstantial evidence this is not enough.

I also wish to advert to another matter referred to by the learned Magistrate in her judgment. According to the evidence when an ATM card is inserted into the ATM, the computer checks the account number and after cash is dispensed by the ATM, the customer's account is automatically debited. According to the evidence in this case in the night of 3.5.1995, the ATM had dispensed cash Rs. 58,000. Of this sum Rs. 18,000 is accounted for by the account numbers reflected in the journal roll. The ATM could not have dispensed Rs. 40,000 (shortage) without any reference to an account number or numbers and without debiting those accounts. The prosecution has failed to prove that this Rs. 40,000 had been debited on 3.5.1995 to anyone or more accounts of the bank. No evidence was led by the prosecution to show that a customer or customers had complained that their accounts had been debited although they did not draw any money from the ATM on 3.5.1995.

This also is a matter which supports the reasonable suspicion whether the alleged shortage and the non printing of the details of four transactions is due to any defect in the ATM. As I have already pointed out the prosecution had failed to take its case beyond this reasonable doubt.

The appellant had three ATM cards issued to him by the HNB. Two cards relate to his current account and the other card was in respect of his savings account. When the investigations into the shortage of Rs. 40,000 commenced he handed over all three cards to the Bank authorities. The magnetic band in the card relating to the savings account was blank and there was no data in it. According to the evidence the data could disappear if the magnetic band comes into contact with any other object having a magnetic force. However there is no evidence that the appellant had used his cards to withdraw Rs. 40,000 from the ATM without leaving any trace. There was no evidence that the appellant had any other ATM card not belonging to him.

After the prosecution case was closed, the learned Magistrate called for the defense of the appellant but he had decided not to testify in his defense on the basis that the prosecution had not made out a case for him to answer. On the day the judgment was due, the learned Magistrate, acting in terms of section 439 of the Code of Criminal Procedure Act had recalled prosecution witness Revatha Abeyaratna to clarify certain matters with regard to the ATM.

After his evidence the judgment was postponed and eventually the judgment was pronounced acquitting the accused on the basis that the prosecution had failed to prove the case beyond reasonable doubt. The Attorney General appealed to the High Court against the acquittal and after hearing the appeal the learned High Court Judge has set aside the order of acquittal and ordered a re-trial against the appellant. The appellant sought special leave to appeal against that judgment and this Court has granted special leave to appeal on the question of law I have set out in the earlier part of this judgment.

An examination of the judgment of the learned High Court Judge reveals that there is no evaluation of the evidence led in the Magistrate Court and an examination of the correctness of the reasoning of the learned Magistrate which persuaded her to hold that the prosecution has failed to prove the charge beyond reasonable doubt. The High Court Judgment contains an abbreviated narration of the evidence led in the Magistrate's Court. There is no evaluation of the evidence. There is no analysis or an examination to see whether the inferences drawn and conclusions reached by the learned Magistrate are reasonable, rational and in accordance with the law. There

is no finding that the learned Magistrate has misdirected herself in law or that she had failed to draw proper inferences from the proved facts or had come to a perverse finding in deciding to acquit the appellant. There is also no finding that a judge, properly in law, could not have, on the evidence available, come to the conclusion reached by the learned Magistrate. In short there is no finding that the learned Magistrate's findings were perverse and that the record reveals evidence on which a properly directed judge could have come to a different conclusion. Without such a finding a court cannot order a re-trial.

Then the question arises about the basis on which the learned Judge set aside the verdict of acquittal and ordered a re-trial ? I have already stated that before pronouncing judgment, the learned Magistrate had recalled Revatha Abeyaratne to clarify certain matters regarding the ATM. In the reasons given by her recalling Abeyaratna she has stated that in order to give a just decision in the case it was necessary to question Abeyaratna further and without such further examination, it would not be possible to give a just decision.

It appears from the judgment of the learned High Court Judge that his decision to order a re- trial arises from the learned Magistrate's decision to re-call Abeyaratna. He has stated that if the Magistrate did not re- call Abeyaratne, the resulting position would have been that up to that stage the charge had been proved beyond reasonable doubt. I cannot understand the logical basis upon which the learned High Court Judge came to this conclusion. If the learned High Court Judge read the order made by the learned Magistrate, he would have noted that the learned Magistrate's observation that she wished to examine Abeyaratna further as such a course of action was necessary to give a just decision in the case. The learned High Court Judge himself had accepted this position when he later said in his judgment that it appeared to him that when the judge decided to re- call Abeyaratna she was in two minds with regard to the prosecution case. The insinuation one can gather from the tenor of the learned High Court Judge's judgment is that if the learned Magistrate did not re-call Abeyaratna she had material before her which would have inevitably resulted in the conviction of the accused appellant. The learned High Court Judge has further gone on to state that at the end of the prosecution case, if the learned Magistrate was not satisfied of the guilt of the accused she should have acquitted the accused without re- calling Abeyaratna under section 439 of the Code of Criminal Procedure Act. With great respect I am unable

to agree with this view. A Criminal Judge's duty is to convict the guilty and acquit those whose guilt is not proved beyond reasonable doubt. "The administration of our laws is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety". *R. vs. Barnes* at 628 - per Rifflell J. The provisions contained in section 439 of the Code of Criminal Procedure Act and section 165 of the Evidence Ordinance are provisions designed to give power to the judge to examine the witness for the purpose of ascertaining the actual facts relevant to the decision of a case. The use of a trial judge's right to have recourse to section 439 to re - call a witness cannot be a ground to order a re- trial unless there is a finding that it has resulted in a failure of justice. There was no such finding by the learned High Court Judge.

The judgment of the High Court reveals another serious factual error which probably would have contributed to the learned Judge's decision to order a re- trial. In his judgment the learned High Court Judge has stated that the evidence revealed that several ATM teller cards not revealed to the Bank have been recovered from the appellant. If ATM teller cards not declared to the bank were found with the appellant the inference deducible there from is that the appellant would have used those cards to surreptitiously withdraw money from the ATM. However according to the evidence no unauthorized teller cards were found with the appellant. All three cards he had were cards legitimately issued by the bank. This serious error of fact which had the potential of influencing the mind of the judge to the detriment of the appellant is also another factor which vitiates the judgement of the High Court.

After considering the totality of the evidence led at the trial, the learned trial Judge's analysis of the evidence and the reasoning, I am of the view that the order of acquittal was correct and the order of the High Court setting aside that order and the order for re-trial are unwarranted and untenable in law. I accordingly allow the appeal and set aside the judgment of the High Court and restore the order of acquittal made by the learned Magistrate.

Marsoof, (PC) J. - I agree
Somawansa, J. - I agree

Appeal allowed.

PERERA
VS.
ATTORNEY GENERAL

COURT OF APPEAL
SRISKANDARAJA,J.
RANJIT SILVA,J.
CA 138/2003
HC NEGOMBO 179/2001
JANUARY 8, 16, 2007

Penal Code - Section 363 (e) - Amendment 22 of 1995 - Rape -What constitutes rape ? - Penetration - Credibility of victim — Corroboration and "Lucas principle" - Uttering falsehoods on material particulars — Abducting a girl of marriageable age — Natural presumption - Extension of it to all abductions? Evidence Ordinance - Section 11 (b).

The accused - appellant was indicted of having committed statutory rape on P - Section 364 (2) (e) - and after trial was found guilty. Sentenced to a term of 15 years R.I.

In appeal it was contended that the evidence led in the case was insufficient to prove penetration which is the all important element in a rape case.

HELD

Per **Ranjith Silva, J.**

"The slightest penetration of the penis within the vulva, such as the minimal passage of glans between the labia with or without the emission of semen or rupture of hymen constitutes rape. There need not be a completed act of intercourse. Rape can be committed even when there is inability to produce penile erection. Rape can occur without causing any injury and as such negative evidence does not exclude rape".

(1) It is inconceivable that one could apply the tests of contemporaniety or spontaneity in rape matters especially in child rape matters, a fair amount of coaxing and persuasion which is justified under the circumstances is needed to extract the evidence from the victim.

(2) There was independent corroboration that was supplied by the accused himself that augmented and strengthened the case for the prosecution. The accused himself corroborated the victim by uttering falsehoods on material particulars deliberately to escape liability.

The principle laid down in "Lucas" case - that the statements made out of Court or in court which are proved or admitted to be false in certain circumstances amount to corroboration - Lies proved to have been told in court by a defendant is equally capable of providing corroboration. A lie told out of Court or in Court will amount to corroborating if they satisfy the following requirements:

(1) it must be deliberate;
(2) it must relate to a material issue
(3) the motive for the lie must be realization of guilt and a fear of the truth.
(4) The statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated that is to say - admission or by evidence from an independent witness.

(3) The evidence if not corroborative - should at least show consistency of the evidence of the victim. Although corroboration is not a *sine qua non*, here there is negative evidence - like hymen intact - it would be discreet to look for corroboration.

Per **Ranjith Silva, J.**

"The natural presumption when a young man abducts a girl of marriageable age is that he abducted her with the intention of having sexual intercourse with her consent after seduction or after marrying her. I cannot see any reason why this presumption could not be extended *mutatis mutandis* to read as "when a male lures away a female to an isolated spot and then keeps her in wrongful confinement in order to gratify his sexual needs does so with the intention of having sexual intercourse - if any other intention is alleged to exist the burden is on the accused to prove it".

APPEAL from the judgment of the High Court of Negombo.

Cases referred to *:*

1. *Bandara vs. the State* 2001 2 Sri LR 63
2. *King vs. Burke* 43 NLR 465
3. *Rex vs. Lucas* 1981 2 All ER 4008
4. *Karunanayake vs. Karunasiri Perera* 1982 2 Sri LR 27
5. *Mohomed Sadiq vs. Emperor* 1938 AIR Lahore 474
6. *K vs. Wegodapola* 42 NLR 456

Dr. Ranjith Fernando with *Amita Udayanganie, Nirosha Dilhani* and *Yamuna Kumari* for accused - appellant.

S. Thurairajah, SSC with *Lakmini Girihagama SC* for respondent

Cur. adv. vult.

January 23, 2007
Ranjith Silva, J.

The accused was indicted in the High Court of Negombo of having committed statutory rape on Maduwanthie Poornima a female child below the age of 16 years on a date between May 1998 and September, 1998 an offence punishable under Section 364 (2) e of the Penal Code.

The High Court Judge after trial found the accused guilty of the charge and sentenced him to a term of 15 years rigorous imprisonment and imposed a fine of Rs. 5000/- in default one year jail sentence.

The counsel for the appellant confined himself to the question of penetration. The main contention of the counsel for the accused was that the evidence led in the case was insufficient to prove penetration which is the all important element in a rape case. He contended that since the Medico Legal Report was to the effect that the hymen of the victim was intact it was imperative on the part of the prosecution to lead cogent evidence to establish that there was at least inter labial penetration. He further argues that according to the Medico Legal Report marked P1 the victim had mentioned to the Medical Officer that the accused placed his penis between her thighs while she was standing in front of the accused and that there was no bleeding, although the Defence counsel attached much importance to this part of the evidence in the Medico Legal Report he maintained silence quite discreetly in regard to several other aspects apparent on the face of the same report. If I may advert to a few of them I would state that the history recorded by the Medical Officer reveals that the victim had told the medical officer the pain she endured during the process. Dr. Marasinghe in her evidence has stated that the victim mentioned to her that the accused summoned the victim to his office one day, threatened her, then opened his zip and inserted into her body between the legs. Although the victim has not stated what was inserted it is obvious in the context of the totality of the evidence that the accused inserted his penis.

According to the Medico Legal Report it appears that she had told the Medical Officer what happened last which was witnessed by her brother

through an opened door, who in turn informed their parents resulting in a complaint being lodged at the relevant police station by the parents which was the prelude to the present action filed against the accused.

When the victim gave evidence no contradictions were marked on the history narrated by her to the Medical Officer especially with regard to the position she was in at the time of the incident or in regard to the exact position or place of the sexual contact. In evidence the victim has categorically stated that the accused placed his private parts on her private parts and pressed. She has described the place as the place she urinates. (මුත්‍රා කරන තැන) She has further stated in evidence and to the Medical Officer that she experienced pain when the accused committed the act on her. (Vide pages 58,59 of the record). Therefore it is seen that as the statement made to the police by the victim is concerned a different position or description has not been suggested or proposed to the victim by the defence with regard to the description of the sexual act. The Defence was a total denial of any sexual contact.

What constitute Rape ? Penetration

As the Law stands at present having sexual intercourse with a woman under circumstances falling under categories (a) - (e) of section 363 of the Penal Code constitute rape.

In deciding this appeal it would be sufficient to deal with section 363 (e) of the Penal Code as amended by Act, No. 22 of 1995.

Section 363 (e) "with or without consent when she is under 16 years of age unless the woman is his wife who is over 12 years of age and is not judicially separated from the man."

Explanation :

i) Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape :

ii) Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.

"The slightest penetration of the penis within the vulva, such as the minimal passage of glans between the labia with or without the emission of semen or rupture of hymen constitutes Rape. There need not be a completed act of intercourse. Rape can be committed even when there is inability to produce a penile erection. Rape can occur without causing any injury and as such negative evidence does not exclude Rape." (vide page 308 of the Book entitled The essentials of Forensic Medicine and Toxicology by Dr. K.S. Narayan Reddy).

In the same book the author at page 313 in regard to the Rape of Children opines I quote: "In young children there are few or no signs of general violence, for the child usually has no idea of what is happening and also incapable of resisting. The hymen is deeply situated, and as the vagina is very small it is impossible for the penetration of the adult organ to take place. Usually the penis is placed within the vulva or between the thighs. As such the hymen is usually intact, and there may be little redness and tenderness of the vulva."

It is my view that one should analyze the evidence in this case in the light of the above mentioned expert medical opinion as the opinion expressed above is the opinion of almost all the text writers on Forensic Medicine and it has gained such notoriety that any court can take judicial notice of the same.

The Facts

The victim Maduwanthie Poornima gave evidence and her side of the story was that when she was a student of Wimalananda Junior School studying in grade 5 the Principal of the school (the accused) called her into his office room and asked her to lie down on a bench that was there at a dark spot behind a cupboard and after lifting her gown and removing her nicker kept his private parts on her private parts and performed an act that caused her some pain to her private parts; according to her evidence there was no bleeding because according to the medico legal report the hymen was intact and there were no injuries found on the victim (P1). Her evidence reveals that there had been other occasions where the accused had sexual contact with her in different positions and on one of these days the brother of the victim had witnessed the act through a door which was ajar and reported the matter to her parents. Obviously the victim had described to

the doctor the last mentioned act that was witnessed by her brother which resulted in action being initiated against the accused.

Credibility of the victim

It is inconceivable that one could apply the tests of contemporaniety or spontaneity in Rape matters especially in child rape matters. A perusal of the proceeding itself will give an indication as to how reluctant the victim was to come out with the story at the trial in the High Court. A fair amount of coaxing and persuasion which is justified under the circumstances, was needed to extract the evidence from the victim.

In Bandara Vs the State [1] it was held that if there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons or the explanation given no trial judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances.

But her credibility was not shaken. The evidence discloses that the accused had the opportunity to commit the offence. In this regard the accused even attempted to lie himself out of the predicament by uttering falsehood. I have dealt with this aspect elsewhere in my judgment. The story as narrated by the victim is probable. There is independent corroboration forthcoming by way of medical evidence such as P3 and P4 which clearly show that the accused was at the time suffering from Gonorrhoea and that inferentially the victim has contracted the same disease from the accused.

In King Vs Burke at 465 [2] it was held that, in a case of attempted rape, in which the prosecutrix was found to be suffering from gonorrhoea in the one week after the assault, the presence of gonorrhoea in the accused at the same time was relevant under section 11 (b) of the Evidence Ordinance.

Dr. Alahakoon confirmed that the child was positive of gonorrhoea. (vide 140 of the record). Further he expressed the view that infection of gonorrhoea is possible when there is a vaginal penetration.

This evidence if not corroborative should at least show consistency of the evidence of the victim. Although corroboration is not strictly necessary

(not a sine qua non) in a case like this, when there is negative evidence (eg : No injuries - hymen intact) it would be discreet to look for corroboration.

In fact, as I have observed earlier I find that the accused himself corroborated the victim by uttering falsehood on material particulars deliberately in order to escape liability.

The evidence of the accused

The evidence of the accused is riddled with contradictions. Even a half witted paralytic could see through the web of lies uttered by the accused. At page 5 of his evidence when the accused was questioned whether he summoned the students to the office to obtain their services when necessary especially when the classes were in progress without the permission of the class teacher the accused categorically denied having done so. (vide proceedings of 26.06.2003 at page 165). In cross examination he contradicted himself and admitted having summoned the students to his office to sweep and arrange his office room. (vide proceedings of 26.2.2003 at page 186 of the record). The accused even attempted to deny that there was a bench behind the cupboard that partitioned the office room and later admitted that there was one even before he assumed office and that bench continued to be there. Accused tried to hide the fact that there was a bench because according to the evidence of the victim the accused committed rape on the victim after she was made to lie down on this bench. The fact that there was a bench was corroborated by the evidence of the police officer who visited the scene to investigate the crime. (vide proceedings of 26.6.2003 at page 182 of the record). The accused even tried to deny that he taught the children who were preparing for the Scholarship examination and later admitted having conducted classes for them. (Vide pages 182, last few lines and the first few lines on page 183).

P3 and P4 were marked by the prosecution in order to show that the accused suffered from a venereal disease called Gonorrhoea and that this being a contagious disease was transmitted to the victim due to the sexual contact of the victim with the accused. Somewhat a bit of circumstantial evidence to corroborate the version of the prosecution (*King Vs Burke* (supra). The accused even tried to contradict the medical evidence and the report marked P3. In order to contradict the medical report the accused had to utter a web of lies (vide at pages 167, 168 and 169 of the record - proceedings of 26.6.2003).

Corroboration and Lucas Principle

Although I find that there is ample evidence to prove the charge leveled against the accused, quite independently and in addition to all that evidence I would like to mention that there was independent corroboration that was supplied by the accused himself that augmented and strengthened the case for the prosecution.

The principle laid down in *Rex Vs Lucas* [3] followed in a number of cases including *Karunanayake Vs Karunasiri Perera* [4]. The principle laid down in the "Lucas Case" was that statements made out of Court or in Court which are proved or admitted to be false in certain circumstances amount to corroboration. Lies proved to have been told in court by a defendant is equally capable of providing corroboration. A lie told out of Court or in Court will amount to corroboration if they satisfy the following requirements.

1. It must be deliberate
2. It must relate to a material issue
3. the motive for the lie must be a realization of guilt and a fear of the truth.
4. the statement must be clearly shown to be a lie by evidence other than of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

In this case the accused himself first denied and later admitted that he summoned and got the children to attend to certain work like cleaning and arranging his office room. The Investigating Police Officer corroborated the victim by stating that there was a 5 1/2 long bench in the office room behind the cupboard. This evidence contradicted the evidence of the accused on this point. The accused denied that he had Gonorrhoea and the medical evidence proved that the accused lied on that point too.

In the case of *Mohomed Sadiq Vs Emperor*[5] it was held that the natural presumption when a young man abducts a girl of marriageable age is that he abducted her with the intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her. If any other intention is alleged to exist, the burden is on the accused to prove it.

In the instant case the evidence was that when the victim although she was not of marriageable age when she entered the office of the accused, the accused forced her to lie down on the bench against her will and committed an act of gross sexual misconduct that amounted to rape on her. During that period she was wrongfully confined and thus she did not have the freedom to leave the office. This act also resembles and involves at least some of the elements that constitute the offence of abduction on kidnapping. (*vide the King Vs Wegodapola*[6])

Marriageable age used in these cases I believe is used in a loose sense. The term is rather vague and is a relative term. Why I say this is because it varies from community to community and time to time. The marriageable age for Muslims is 12 years or even below that depending on the sector and the marriageable age under the General Marriages Ordinance is now 18 years whereas it was 16 before that.

Further it is common ground that rape can be committed on any female irrespective of the age and thus even a child of very tender years like in the instant case is susceptible to rape. If so in the teeth of all this evidence I cannot see any reason why this presumption could not be extended *Mutatis Mutandis* to read as ; "where a male lures away a female to an isolated spot and then keeps her in wrongful confinement in order to gratify his sexual needs does so with the intention of having sexual intercourse. If any other intention is alleged to exist the burden is on the accused to prove it.".

It is my view under certain circumstances the said presumption could be applied *Mutatis Mutandis* to a situation where the child is neither of marriageable age nor she is abducted in the proper sense of the term. In conclusion I must state that there was ample evidence before the learned High Court Judge to convict the accused even without the aid of or resorting to any presumption.

For the aforesaid reasons I have adumbrated on the law and on the facts I find no justification to interfere with the findings, verdict or the sentence imposed on the accused. The conviction and sentence is affirmed. The appeal is dismissed.

Sriskandarajah J. - I agree.

Appeal dismissed.

PAN ASIA BANK LTD.
V.
KANDY MULTI PURPOSE CO-OPERATIVE SOCIETY AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J
BASNAYAKE, J
CALA 92/2004
DC KANDY X/12785
JUNE 20, 27, 2007

Bank guarantee - Injunction to restrain from honouring a Bank guarantee ?- Permissible - Exceptions ? - Effect of a guarantee depend on the terms of the contract ? - Fraud ?

The 3rd defendant - petitioner sought to set aside the order issuing an interim injunction restraining the People's Bank 4th Respondent from honouring a Bank guarantee.

Held :

(1) A Bank which gives a performance guarantee must honour that guarantee according to its terms. The Bank must pay according to the guarantee on demand if so stipulated without proof or condition - unless there is fraud of which the Bank has notice there is an obligation to honour the guarantee as regards the terms of the guarantee.

Per Eric Basnayake, J.

"The Judges who are asked to issue an injunction restraining payment by a Bank under a guarantee should ask whether there are any challenges to the validity of the guarantee itself. If there is not ..... *prima facie* no injunction should be granted and the Bank should be left free to honour its contractual obligations.

APPLICATION for leave to appeal from an order of the District Court of Kandy.

Cases referred to :

(1) *Edward Owen Engineering Ltd. v. Barclays Bank Int'l Ltd.* - 1978 1 QB 159
(2) *Infertec Contracting A/S v. Ceylinco Seylan Development Ltd. and another* - 2002 2 Sri LR 246

(3) *Hyderabad Industries Ltd. v. T. D. A. C. Trading (Pvt) Ltd. and two others* 1995 2 Sri LR 304 at 309
(4) *R. D. Harbottle (Mercantile) Ltd. V. National Westminister Bank* 1978 QB 146
(5) *Hemas Marketing (Pvt) Ltd. v. P. L. M. Chandrasiri and another* 1994 2 Sri LR 181
(6) *Smith v. Hughes* 6 QB 597 at 607
(7) *Bolovinter Oil SA v. Chase Manhatten Bank* 1984 1 All ER 351
(8) *Indica Traders (Pvt) Ltd. Vs. Seoul Lanka Construction (Pvt) Ltd.* 1994 3 Sri LR 387

S. A. Parathalingam PC with *Varuna Senadeera and K. Kaneshyogan* for 3rd defendant - petitioner

Gomin Dayasiri with *Murshad Maharoof* for plaintiff - respondent

Ronald Perera with *W. O. N. B. Gowinna* for 4th and 5th defendant - respondents.

Cur. adv. vult.

November 30, 2007
Eric Basnayake, J.

The 3rd defendant petitioner (hereinafter referred to as the 3rd defendant) filed this application to have the order of the learned District Judge, Kandy dated 17.02.2004 set aside. By this order the learned District Judge had issued an interim injunction as prayed for in prayer (d) to the plaint to restrain the 4th and the 5th defendant respondents (The People's Bank and its Manager) from honoring a bank guarantee.

This Court made order on 14.9.2005 after inquiry. By this order the Court held that the learned District Judge erred in issuing the interim injunction. However leave was refused on the ground that there was no valid affidavit tendered with the petition and therefore there was no valid application before Court. The 3rd defendant appealed against the order of the Court of Appeal in S.C. (Spl.) L.A. 236/2005. The Supreme Court on 31.3.2006 set aside the judgment of the Court of Appeal and thought it fit to send the case back to the Court of Appeal to adjudicate on the merits of the case. The Supreme Court specifically ordered the parties not to raise the question with regard to the validity of the affidavit referred to in the judgment of the Court of Appeal.

When this case was taken up for inquiry the learned Counsel appearing for the plaintiff and the 3rd defendant invited Court to dispose of this case by way of written submissions and tendered the same.

This case is based on a bank guarantee marked "Pld". The 1st and 2nd defendant - respondents (herein after referred to as the 1st and 2nd defendants) were in the business of distributing milk powder by the name of "Lakcow". The 3rd defendant was their bank. The 1st and the 2nd defendants entered into an agreement with the plaintiff respondent (plaintiff) (Plb) wherein the plaintiff was appointed the sole distributor of a specified area for the purpose of distribution and sale of the said milk powder. For this purpose the plaintiff was required to have a bank guarantee in a sum of Rs. 1 million in favour of the 3rd defendant bank. At the time of collecting the milk powder the plaintiff was required to issue a cheque for the entire value of the milk powder that would be ordered in favour of the 1st and 2nd defendants.

In terms of the above agreement, on the instructions of the plaintiff, a bank guarantee was issued by the 4th defendant respondent (herein referred to as the 4th defendant) in favour for the 3rd defendant in a sum of Rs. 1 million. On 11.9.2003 the 3rd defendant made a claim from the 4th defendant for a sum of Rs. 1 million on the above guarantee. The plaintiff filed action in the District Court of Kandy on 18.9.2003 seeking a declaration that the plaintiff owes nothing to the 1st and 2nd defendants and that the 3rd defendant therefore has no right to demand any payment on the bank guarantee from the 4th defendant. The plaintiff also prayed for an interim injunction restraining the 4th defendant from making any payment to the 3rd defendant on the said bank guarantee.

The 3rd defendant filed objections (P2) and the learned District Judge after inquiry, on 17.2.2004 issued an interim injunction as prayed for in the plaint. An English translation of the relevant passages of the order of the learned District Judge is as follows :

"the plaintiff had given a guarantee in a sum of Rs. 1 million through the 4th defendant bank with regard to the sale and the distribution of Lakcow milk powder. "

'The law relating to bank guarantees is clear. The bank guarantee was issued in respect of the milk powder supplied to the plaintiff by the 1st and

the 2nd defendants. If the plaintiff had defaulted payments in respect of the milk powder so supplied the 4th defendant is obliged to pay on demand on the said guarantee. The facts in this case are different. The bank guarantee is in respect of the milk powder supplied to the plaintiff by the 1st and the 2nd defendants.

The bank guarantee cannot be used to settle any other dues of the 1st and the 2nd defendants to the 3rd defendant".

The learned Counsel appearing for the plaintiff submitted that as no monies were payable by the plaintiff, it was unlawful for the bank to encash the bank guarantee .

The law relating to bank guarantee has been laid down in several cases. **"A bank which gives a performance guarantee must honour that guarantee according to its terms. It must not concern in the least with relation between the supplier and the customer nor with the question whether the supplier had performed his contractual obligation or not, 'nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand if so stipulated, without proof or condition. The only exception is when there is a clear fraud of which the bank has notice"** (Lord Denning M. R. in *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1] *Infertec Contracting A/S v. Ceylinco Seylan Development Ltd and another* [2] *Hyderabad Industries Ltd. v. TDAC Trading (Pvt) Ltd. and two others* [3] *R. D. Harbottle (Mercantile) Ltd. v. National Westminister Bank Ltd.* [4] *Hemas Marketing (Pvt) Ltd. v. P. L. M. Chandasiri and another* [5].

Unless there is a fraud of which the bank has notice there is an obligation to honour the guarantee as regard the terms of the guarantee. I will now set out some parts of the bank guarantee marked "Pld'.

"The principal (the 1st and the 2nd defendants) having requested from the Pan Asia Bank (3rd defendant, the beneficiary) for credit facilities amounting to Rs. 1 million for the distribution of "Lakcow" milk powder to the plaintiff - the 3rd defendant has-agreed to grant the said facilities on condition that the principle furnishes a bank guarantee from a reputed bank to the value of Rs. 1 million.

We (4th defendant) hereby guarantee and undertake to pay the beneficiary a sum of Rs. 1 million in the event the principle fails or

neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal.

This guarantee will be in force from 03.01.2003 until 02.01.2004... Claims if any under this guarantee should be submitted to us in writing to reach us on or before the expiry date 02.01.2004 ... (emphasis added)."

Although the bank guarantee was issued at the instance of the plaintiff by the plaintiff's bank, namely the 4th defendant, the liability could be attached only by interpreting the bank guarantee itself.

The effect of a guarantee like that of other contracts depends on the terms of the contract. In *Smith v. Hughes* (6) Blackburn J said "if whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that party upon that belief enters in to the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms". "the question to be answered always is "what is the meaning of what the parties have said ?" not "what did the parties mean to say" (6 QB 597 at 607).

The liability of the 4th defendant bank arises "in the event the principal fails or neglects to pay the sum or sums of money on the due date under credit agreement between the beneficiary and the principal". The plaintiff is not a party to the above guarantee. The parties to the guarantee are the 1st and the 2nd defendants (principal debtors), the 3rd defendant (beneficiary) and the 4th defendant (guarantor). Nowhere in the guarantee is it stated that the 4th defendant will be liable in the event the plaintiff defaults payment in respect of milk powder supplied.

"The Judges who are asked to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask **whether there is any challenge to the validity of the letter, bond or the guarantee itself. If there is not ... *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligations .... The wholly exceptional**

case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent'.

This was an observation made by the Court of Appeal in *Bolovinter Oil SA v. Chase Manhatten Bank*[7] The Court further observed that "if save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking ... by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined" (Paget's Law of Banking 12th edition at 736, S.N. Silva J (as he then was) in *Indica Traders (Pvt).v. Seoul Lanka Construction (Pvt) Ltd.*[8]

The plaintiff never challenged the validity of the guarantee and therefore the parties would be liable to give effect to the terms of the guarantee.

The learned Counsel appearing for the plaintiff also submitted that the 3rd defendant did not file the document marked 4 VI. This is a letter written by the plaintiff to the People's Bank setting out the purpose for which the bank guarantee was needed. The above document is not required while interpreting the bank guarantee. Therefore this document has no bearing on the case.

For the foregoing reasons it becomes clear that the learned District Judge erred in issuing an interim injunction. The order of the learned District Judge is hereby set aside. The application is allowed with costs.

WIMALACHANDRA.J - I agree.

Appeal allowed.

ARIYADASA

V

ATTORNEY GENERAL

COURT OF APPEAL
RANJITH SILVA, J
SISIRA DE ABREW, J
CA 142/2003
HC MATARA 143/96
SEPTEMBER 12, 13, 14, 2007

Penal Code -Section 294 - Section 296 - Section 315 - Eye witness not a credible witness ? - Disturbing a finding with regard to acceptance or rejection of a testimony of a witness ? - Section 294 Ingredients ? - Dock statement - Approach in evaluating ? - Constitution Article 138 - Criminal Procedure Code Section 334.

The accused - appellant was convicted, of murder and sentenced to death he was also convicted of causing hurt to one K and sentenced to 6 months rigorous imprisonment.

It was contended that, the eye witness was not a credible witness, and that injury No. I was not caused by the accused - appellant and further that the other 12 cut injuries have not caused the death of the deceased. It was further contended that the reason given by trial Judge in rejecting the dock statement was erroneous.

Held :

(1) Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanor and the deportment of a witness. The contention that the eye witness was not a credible witness is rejected.

Held further:

(2) The prosecution must prove the following facts before it can bring a case under Section 294.