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

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(2) Can the Magistrate's Court make a valid order under the Maintenance Act for the continuous payment of maintenance for a person beyond the age of 18 years, who was a 'child' at the time of making the application but who had ceased to be a 'child' at the time of making the order?

(3) Whether it is sufficient in a petition of appeal filed under section 14 of the Maintenance Act No. 37 of 1999 to comply with the requirements of section 322(1) of the Code of Criminal Procedure Act No. 15 of 1979, namely, stating the grounds of appeal and that it be signed by the appellant or his Attorney-at-Law?

Held:

(1) In terms of section 2(3) of the Maintenance Act the Court can make an order allowing maintenance of adult-offspring.

(2) The Magistrate can make an order under the Maintenance Act for continuous payment of maintenance for a person even beyond the age of 18 years, but who was a 'child' at the time the application was submitted, as long as the evidence suggests that the child is unable to maintain him or herself.

per Sripavan, J. -

"The Courts have been in favour of interpreting the Maintenance Act in a flexible manner, so as to give effect to the intention of the legislature to provide a speedy remedy for evasions in the payment of maintenance. Thus when the Maintenance Act does not contain a provision on the procedure in the action, a practical procedure that will meet the ends of justice pertaining to the facts of the case will be followed. In this case, the just course of action is that the appellant should continue to support the child even after she turns 18, under circumstances set out in the Act."

(3) Even on restrictive interpretation of section 39 of the Judicature Act the petitioner is estopped in law from challenging the jurisdiction of the Magistrate as the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest opportunity implies a waiver of any objections to jurisdiction.

(4) In the event of any inconsistency between any two texts, the text in the official language shall prevail. As stated in Article 18 of the Constitution the official language of Sri Lanka shall be Sinhala and for this reason the Sinhala text should prevail over the English version.

Cases referred to:

Navaratnasingham v. Arumugam and another (1980) 2 SLR 1

APPEAL from the High Court, Panadura.

Faiz Mustapha, P.C. with *D. Weerasooriya* for the Respondent-petitioner-petitioner.

Kushan D. Alwis with *Kaushalya Navaratne* for the Applicant-respondent-respondent.

March 03rd 2009

SRIPAVAN, J.

The Respondent-Petitioner-Petitioner (hereinafter referred to as the 'Petitioner') sought special leave to appeal from the decision of the High Court dated 2nd March 2007 which dismissed the appeal of the Petitioner filed against the decision of the Magistrate, Horana. This Court granted Special Leave to Appeal on 4th September 2007.

The above named Petitioner was the Respondent in the Application for Maintenance bearing No. 21978 filed on 23rd of June 2003 in the Magistrate's Court of Horana byhis wife, Applicant-Respondent-Respondent (hereinafter referred to as the 'Respondent').

In the said application marked as P1 in X the Respondent sought maintenance for the following three children:

- Upeka: Date of Birth - 16-06-1981. Aged 22 years of age at the time of filing the above mentioned Application for Maintenance (P1).

- Pushpika : Date of Birth 13-10-1983. Aged 20 years of age at the time of filing the above mentioned Application for Maintenance (P1)
- Ireshika: Date of Birth - 26-11-1985. Aged 17 years 6 months and 27 days of age at the time of filing the above mentioned Application for Maintenance (P1)

The Petitioner states that even though the 1st and 2nd children were above the age of 18 years and were classified as 'Adult Offspring' in accordance with Section 22 of the Maintenance Act No. 37 of 1999, the above mentioned Application for Maintenance P1 did not state why they were incapable of making an Application for Maintenance for themselves under section 4(1) of the said Act. He further states that the said Application did not give any reasons as to why the Respondent was making the Application on behalf of the two Adult Offspring.

The Petitioner also draws attention to the fact that the 3rd child referred to above was within the classification of 'child' under Section 22 of the Maintenance Act at the time of the said Application for Maintenance. However, when the Order was made by the learned Magistrate on the 28th April 2005, she had ceased to be a 'child' in accordance with the said Act and therefore she should only receive maintenance for the period in which she was a 'Child' which was approximately 6 months.

Nonetheless the Learned Magistrate made Order (marked P2) directing the Petitioner to pay maintenance to the three above-mentioned children at the rate of Rs. 4500/= per child per month amounting to Rs, 13,500/= per month from the Date of Application for Maintenance, namely, 23rd June 2003.

The Petitioner further states that he filed an Appeal bearing No. 23/05 in the High Court of Panadura as he was not satisfied with the Order of the Learned Magistrate. He also filed a Revision Application in the High Court of Panadura bearing No. Rev 44/2005.

The Learned High Court Judge, with the consent of both the Petitioner and Respondent, took up the above mentioned Appeal and the above mentioned Revision Application together. The Appeal, however, was consequently dismissed on 2.3.07 on the basis that a proper appeal had not been filed in the High Court against the judgment of the Learned Magistrate.

Based on the above facts, the following issues of law were raised before this Court:

1. Whether an application under section 4(1)(b) of the Maintenance Act No. 37 of 1999 made on behalf of an 'Adult Offspring' should state the reasons as to why the said 'Adult Offspring' is incapable of making such an Application or should the said reasons be stated in evidence led in support of such Application and if such reasons are not given in the Application or in evidence, can the court make an Order for the payment of Maintenance in respect of such 'Adult Offspring'?

2. Can the Magistrate's Court make valid Order under the Maintenance Act for the continuous payment of Maintenance for a person beyond the age of 18 years, who was a 'child' at the time of making the Application but who had ceased to be a 'child' at the time of making the Order?

3. Whether it is sufficient in a Petition of Appeal filed under Section 14 of the Maintenance Act No. 37 of 1999 to comply with the requirements of section 322(1) of the Code of Criminal Procedure Code 15 of 1979, namely, stating the grounds of appeal and that it be signed by the Appellant or his Attorney-at-Law?

It is observed from the proceedings filed, that none of the above mentioned issues of law were raised before the High Court of Panadura in appeal.

The Respondent has submitted sufficient evidence to convince the Court that the adult offspring are unable to maintain themselves as they are in the process of receiving their higher education, are currently unemployed and unmarried. Section 4(1)(b) of the Maintenance Act No. 37 of 1999 states that:

An application for maintenance may be made where such application is for the maintenance of an adult offspring, by such adult offspring or where such adult offspring is incapable of making such application, by any person on his or her behalf

In this case, the Respondent suggests that she is making the application on behalf of her children so as not to interfere with the ongoing education of her children and that the nature of the legal process is such that if the adult offspring in question had made the Application themselves, they would have had to attend Court and testify to the matters in order to obtain an order. Recognizing the practical realities of Court proceedings, this Court finds the reason to be a valid

one. Thus, is shall be lawful for the Respondent to proceed to claim maintenance in terms of the Maintenance Act No. 37 of 1999.

Further, it is evident from the record of this case that the Appellant is seeking to evade his liability to pay maintenance by preferring appeals and raising various objections before Court. If the adult offspring concerned had been the ones to submit this Application, as one can reasonably assume that in the light of the prevailing circumstances in courts that they would indeed have had to take considerable time away from their education in order to receive the maintenance that they are entitled to, and we therefore find the concerns of their mother both relevant and valid.

Section 2(3) of the Maintenance Act No. 37 of 1999 states that

Where a parent having sufficient means neglects or refuses to maintain his or her adult offspring who is unable to maintain himself or herself, the Magistrate may upon an application being made for maintenance and upon proof of such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such adult offspring at such monthly rate as the magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the adult offspring.

It is clear from the above section, that the Court can make an order allowing maintenance for adult offspring. The Petitioner has failed to produce any evidence, documentary or otherwise, before the Learned Magistrate in order to rebut,

dispute, contradict or challenge the said evidence led on behalf of the Respondent. The evidence also supports the fact that prior to this occasion the Petitioner has neglected and refused to maintain his children and there is no evidence to suggest that he does not possess the means to comply with the order of the Learned Magistrate. The Petitioner is under a statutory obligation to pay a monthly allowance to the adult offspring and there appears no legal impediment or factual bar whatsoever which would reasonably impede the payment of this allowance.

In addressing the question of whether the Magistrates Court can make an order under the Maintenance Act for continuous payment of maintenance for a person beyond the age of 18 years, but who was a 'child' at the time of submission of the application, section 2(5) states without qualification that allowance shall be payable from the date on which the application for maintenance was made.

When the application was made, the child's age was 17 years, 6 months and 27 days, and the maintenance owed to her for approximately 6 months prior to her eighteenth birthday goes unquestioned as during this period, the child is still a minor. Attention should be drawn to the fact that regardless of the status of provision of maintenance for the adult offspring, there was undoubtedly no question as to the maintenance owed to this one child who was still under the age of 18 at the time the application was made.

On turning 18, the Magistrate can, in accordance with section 2(5) of the said Act *supra*, order the Petitioner to continue payment of maintenance as long as the evidence

suggests that the child is unable to maintain him or herself. Evidence clearly reflects that the Petitioner has not paid maintenance prior to this and this amounts to neglect or refusal and until the circumstances of the adult offspring changes and she is able to provide herself, the order of the Magistrate would remain in force.

The Courts have been in favour of interpreting the Maintenance Act in a flexible manner, so as to give effect to the intention of the legislature to provide a speedy remedy for evasions in the payment of maintenance. Thus, when the Maintenance Act does not contain a provision on the procedure in the action, a practical procedure that will meet the ends of justice pertaining to the facts of the case will be followed. In this case, the just course of action is that the Appellant should continue to support the child even after she turns 18, under circumstance set out in the Act and referred to above.

In addressing the question as to whether the Petition of Appeal filed under Section 14 of the Maintenance Act No. 37 of 1999 complies with Section 322(1) of the Code of Criminal Procedure Act No. 15 of 1979, this Court finds that analysis must focus on the language of Section 14(1) of the aforementioned Act: Sec 14(1) is reproduced below.

> *"Any person who shall be dissatisfied with any order made by a Magistrate under section 2 or section 11 may prefer an appeal to the relevant High Court established by Article 154P of the Constitution in like manner as if the order was a final order pronounced by Magistrate's Court in a criminal case or matter, and sections 320-330 (both inclusive)*

and sections 357 and 358 of the Code of Criminal Procedure Act, No. 15 of 1979 shall mutatis mutandis, apply to such appeal..."

As the procedure is explicitly laid down in Section 14, the content cannot be corrected and it is this procedure which the Petitioner would have had to resort to.

Section 322(2) of the Code of Criminal Procedure Act No. 15 of 1979 states where the appeal is on a matter of law, the Petition shall contain a statement of the matter of law to be argued. In the current case, the Petitioner has not fulfilled this requirement.

The Petitioner has further suggested that the Learned Magistrate of Horana did not possess the jurisdiction to make the impugned Order. Section 39 of the Judicature Act No. 2 of 1978 reads as follows:

Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.

Even on a restrictive interpretation of this section, one can conclude that the Petitioner is estopped in law from challenging the jurisdiction of the Learned Magistrate. It is evident that the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest opportunity implies a waiver of any objection to jurisdiction. To allow the petitioner to proceed with the above mentioned objection

would go against the purpose of the Act and appears to have been raised merely with the intention of evading the order of maintenance. In *Navaratnasingham vs. Arumugam and another 1980* wherein His Lordship Atukorale J with Soza J agreeing held inter alia that,

> in any event an objection to jurisdiction such as in the present case must by virtue of section 39 of the Judicature Act No. 2 of 1978, be taken as early as possible and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the Petitioner. Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will have the jurisdiction to proceed and make a valid order.

The final point that the Petitioner mentions is the inconsistency between the Sinhala and English versions of the Maintenance Act No. 37 of 1999. The Sinhala term "noheka" (නොහැක) appears in Section 2(2) and Section 4(b) which, inboth cases, would apply to a child who is 'unable' to maintain himself. The Petitioner has put forward the argument that the English text should be resorted to in the interpretation of the Sinhala version. Section 21 of the Maintenance Act No. 37 of 1999 states that "in the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text should prevail". Further, Article 23(1) of the Constitution provides that all laws shall be enacted and published in both National Languages, namely, Sinhala & Tamil together with the translation in the English Language. In the event of any inconsistency between any two texts, the text in the Official language shall prevail. According to Article 18, the

official Language of Sri Lanka shall be Sinhala and therefore the Sinhala text should prevail over the English version. The Petitioner's contention therefore is not tenable in law.

For these reasons this Court rejects the appeal of the Petitioner and affirms the Order of the Learned High Court Judge of Panadura dated 2nd March 2007. Costs of Rs. 15,000/- to be paid by the Petitioner to the Respondent.

TILAKAWARDANE, J. - I agree.

MARSOOF, J. - I agree

Appeal dismissed

THE ATTORNEY GENERAL V.
SANDANAM PITCHI MARY THERESA

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
SRIPAVAN, J., AND
IMAM, J.
S.C. APPEAL NO. 79/2008
S.C. (SPL.) L.A. NO. 153/2008
C.A. NO. 161/2004
M.C. COLOMBO NO. 818/2004
DECEMBER 10TH, 2009

Poisons, Opium and Dangerous Drugs Ord - Section 54(a)(c) Evidence Ordinance - Judicial evaluation and assessment of evidence in criminal cases - Section 3 - Relevant facts - Probative value - Receivability, materiality, relevance and admissibility - Credibility of a witness is a question of fact, not law - Judicial discretion - Duty to secure a fair trial - Code of Criminal Procedure Act - Section 351(a) - Supplementary power of an Appellate Court to order production of any document connected with the proceedings - Section 329 - Calling fresh evidence by an Appellate Court or direct it to be taken Evidence Ord. - Section 114 - Falsus in uno - Falsus in ominious -

An application for Special Leave to Appeal was preferred by the Respondent - Petitioner - Appellant (Appellant) against the Judgment of the Court of Appeal dated 20.05.2008 wherein the conviction and the sentence imposed against the Accused - Appellant - Respondent (Respondent) was set aside.

The Supreme Court granted Special Leave to Appeal on the following questions of law.

1. Did the Court of Appeal err in law by holding that "there was no reason to reject the evidence of the defence witness Matilda?"

2. Did the Court of Appeal err in law by holding that the prosecution has not proved its case beyond reasonable doubt without considering the prosecution evidence?

3. Did the Court of Appeal err in law by the failure to evaluate and consider the prosecution evidence and or the submissions made on behalf of the prosecution (State) in the Court of Appeal?

4. Did the Court of Appeal err by relying upon observations made by their Lordships of the demonstration conducted by an Officer of Court in the Court of Appeal?

In this appeal, the Supreme Court dealt with the proper analysis, evaluation and assessment of evidence.

Held:

(1) A key test of credibility is whether the witness is an interested or disinterested witness. The relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness.

(2) The overall consistency of evidence is a further test of creditworthiness. Consistency is not just limited to consistency inter-se but also consistency with what is agreed and clearly shown to have occurred.

(3) Credibility is a question of fact and not law. Appellate Judges have repeatedly stressed the importance of trial Judges' observations of the demeanour of witnesses in deciding questions of fact. Demeanour represents the trial Judges' opportunity to observe the witness and his deportment.

(4) Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.

Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.

(5) It is dangerous to presume or assume that because when two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The Judge has a duty to probe in to whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive.

(6) An Appellate Court has no jurisdiction to upset trial findings of facts that have evidentiary support. A Court of Appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace findings made by the Trial Judge.

(7) In terms of Section 351(1) of the Code of Criminal Procedure Act, while an Appellate Court may exercise its discretion to call for the productions connected with the proceedings, its power to call such productions is conditional upon it being necessary or expedient in the interest of justice. Section 329 of the Code of Criminal procedure Act stipulates that calling fresh evidence by an Appellate Court must occur only in very rare instances.

Cases referred to:

1. *Tudor Perera v. Attorney General* - (SC. 23/75 D.C. Colombo Bribery 190/B - Minutes of S.C. dated 1.11.1975)
2. *Hasker v. Summers* - (1884) 10 V.L.R. (Eq) 504 - Australia
3. *Leefunteum v. Beaudoin* (1987) 28 S.C.R. 89 - Canada
4. *Bhoj Raj v. Sita Ram* - AIR (1936) PC 60
5. *Boghi Bhai Hirji Bhai v. State of Gujarat* - AIR (1983) SC 753
6. *Dashiraj v. The State* - AIR (1964) Tri. 54
7. *State of UP v. Anthony* AIR (1985) SC 48
8. *A.G. v. Visuvalingam* - 47 N.L.R. 286
9. *Bandaranaike v. Jagathsena* - (1984) 2 Sri. L.R. 397
10. *Queen v. Julius* (1980) 2 SLR 1
11. *R. v. Tyler* - (1982) 96 Cr, App. R 332 (CA)
12. *Ajith Singh v. State of Panjab* - (1982) Cr. L.J. 522
13. *Dharmatilake v. Brampy Singho* - (1938) 40 N.L.R. 497
14. *Hapuganoralage Manikhamy v. Podi Menika* - (1978) 79 II N.L.R. 250
15. *Nishan Singh v. State* - AIR 1955 Punj. 65
16. *R. v. Gordon* (1989) 1 Leach 515
17. *R. v. Dhlumayo* - (1984) 2 SALR 677 (A)
18. *Merchand v. Butler's Furniture Factory* - (1963) 1 SALR 885
19. *King v. Endoris* - 46 N.L.R. 498
20. *Alwis v. Piyasena Fernando* - (1993) 1 Sri L.R. 119
21. *A.G. V. D. Senevirathne* - (1982) 1 Sri L.R. 302
22. *Kinloch v. Young* - (1911) S.C. (HL) 1

23. *Onnassi v. Vergottis* - (1968) 2 Lloyd's Report 403
24. *Valarshak Seth Apear v. Standard Coal Company Limited* - AIR (1943) PC 159
25. *Sris Chandra Nandi v. Rakhalananda* - AIR (1941) PC 16
26. *Case No. CA* 1161/82 dated 13.09.1989
27. *R. v. Paul* - (1977) 1 SCR 181

APPEAL from the Court of Appeal.

Palitha Fernando, A.S.G., with *Sarath Jayamanne, D.S.G.* for the Appellant.

Gayan Perera with *Ms. Praba Perera* for the Accused-Appellant-Respondent.

Cur.adv.vult

May 06th 2010

SHIRANEE TILAKAWARDANE, J.

An application for Special Leave was preferred by the Respondent Petitioner Appellant, the Attorney General, (hereinafter referred to as the Appellant) against the Judgment of the Court of Appeal dated 30/05/2008 wherein the conviction and the sentence imposed against the Accused Appellant Respondent (hereinafter referred to as the Respondent) was set aside.

This Court granted Special Leave to Appeal on 18/09/08 on the following questions of law:

1. Did the Court of Appeal err in law by holding that "there was no reason to reject the evidence of the defence witness Matilda?

2. Did the Court of Appeal err in law by holding that the prosecution has not proved its case beyond reasonable doubt without considering the prosecution evidence?

3. Did the Court of Appeal err in law by the failure to evaluate and consider the prosecution evidence and or the submissions made on behalf of the prosecution (State) in the Court of Appeal?

4. Did the Court of Appeal err by relying upon observations made by their Lordships of the demonstration conducted by an Officer of Court in the Court of Appeal?

The Respondent was indicted in the High Court for the allegations of possessing and trafficking, 45.72 grams of heroin, punishable under section 54(a) and (c) of the *Poisons Opium and Dangerous Drugs Ordinance*. In the High Court she was convicted under count 1 for possession, and imposed a sentence of life imprisonment, and was acquitted under count 2 for trafficking.

In terms of the submissions made, it is important at the outset of the case to consider the evidence that was presented in the High Court and whether on the relevant and admissible evidence the final count of possession was proved beyond reasonable doubt.

The Respondent was at the time admittedly in occupation of a room at 65/5, Cardinal Cooray Mawatha, Averriwatte, Wattala. Ostensibly her residence in this house which belonged to her brother was to facilitate the care of his children. Admittedly she had 4 children of her own and one was being educated in London at the time.

According to the detecting officer of the Police Narcotics Bureau (hereinafter referred to as the PNB), the detection took place at De Vos Lane in Colombo pursuant to information provided by an informant, who had pointed out the

Respondent. According to SI Tennakoon who apprehended her, at the time of her arrest the Respondent was carrying a black bag, a fact which was not contested. This bag according to the detecting officer contained a shopping bag containing 130,460 currency notes (9 Rs 1000/- notes, 22 Rs 500/- notes, 105 Rs 200/- notes, 501 Rs 50/- notes, 507 Rs 20/- notes and 587 Rs 10/- notes. Under this there was a till (referred to by both parties at times as a tin, which contained a shopping bag inside which there were 2868 wrapped packets of, what was later proved to be Heroin. When collected together the total weight of the heroin was indisputably 172.600 grams.

The officer further testified that subsequently the officers of the PNB had searched the house the Respondent was residing in and recovered a small weighing scale and 3 weights of 20, 50 and 100 grams from under her bed. There was no challenge to the procedure by which the productions were sealed, tested and subsequently duly produced in the High Court. These productions, perceived in open court, were examined by the High Court Judge as is evident from his judgment dated 19.11.2004.

The Respondent however denies the prosecution version of events and claims that she was arrested at her residence at Wattala. Both the Respondent and her sister, Matilda testified at the trial that Heroin was not recovered from the Respondent's possession. All that was recovered from the residence of the Respondent was Rs. 130,460 which she claimed to be the proceeds from the sale of a three wheeler.

The evidence of Matilda, the Respondent's sister, was assessed by the Judge of the High Court in his Judgment and

the evidence on the factual issues in the case were carefully considered, evaluated along with the general principles of law on assessment of witness credibility/testimonial trustworthiness. The learned High Court judge rejected the version put forward by Matilda as improbable in light of the totality of the evidence presented to the Court. The Court of Appeal however, took a different view and placed considerable weight on the evidence of Matilda, which the Court believed to have created a reasonable doubt in the prosecution case.

When considering the testimonial creditworthiness of Matilda, it is important to bear in mind established principles on witness credibility which may guide the Court in assessing the facts in a situation where conflicting evidence is presented. The Court must be conscious of the fact that not all witnesses are reliable. A witness may fabricate or provide a distorted account of the evidence through a personal interest or through genuine error (Vide, Emson, Evidence, 3rd Edition, 2006).

A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. *in Tudor Perera v. AG* [(1)] observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive and reliability have all to be weighed (*Vide, Halsbury Laws of England* 4th Edition para 29) Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not

prevail over the testimony of an indpendent witness (*Vide, Hasker v. Summers* [2] - Australia; *Leefunteum v. Beaudoin*[3] - Canada).

The overall consistency of evidence is a further test of creditworthiness. Consistency is not just limited to consistency *inter se* but also consistency with what is agreed and clearly shown to have occurred (*Vide, Bhoj Raj v. Sita Ram*[4]. The Court may also determine credibility based on the relative probability of the defence version taking place in light of the evidence before Court.

With respect to the currency notes found with the accused, the Court of Appeal accepted the defence version that the money was from the proceeds of the sale of a three wheeler. The Court surmised hypothetically, that the use of small value currency notes would be reasonable on the basis that the three-wheeler was purchased by an owner or driver of a three wheeler.

The High Court had rejected Matilda's evidence that the money was found in the respondent's cupboard and that it was the proceeds from the sale of a three wheeler. The Respondent initially, when she was produced before the magistrate, claimed the money as her own, but later shifted her testimony to state that the money belonged to her brother. The High Court held that if the money did indeed belong to the Respondent's brother, it was unlikely no doubt considering the quantum of the money, that it would be kept in her cupboard. The High Court also reasonably concluded that, the fact that the money was almost entirely in small value currency notes made it unlikely to have been obtained from the sale of a vehicle.

The witness Matilda had come forward for the first time in five years to give evidence in support of her sister, the Respondent. Generally, the spontaneity or the promptness in which a witness makes a statement to the police would accrue in favor of the creditworthiness of the witness, as it precludes the time needed for deliberate fabrication. It is relevant that the evidence disclosed that the witness has two previous convictions and two pending cases before the High Court on drug related offences.

Considering the relationship between the witness and the Respondent and the probability of her version being true in light of the independent evidence presented to court on the facts of the case, I find that the learned High Court has fittingly rejected the testimony of Matilda as not worthy of credit.

The next ground of Appeal is that the Court of Appeal has failed to consider the probative value of the evidence led on behalf of the Appellant. The Respondent highlighted contradictions in the statements of the two PNB officers. In the first instance, the officers statements on meeting the informant differ, in that according to SI Tennakoon, the junior officer got down from the vehicle and met the informant, before introducing him, whereas prosecution witness number 3, stated that both officers got down and met the informant and that they both knew the informant. On the recovery of scales and weights from the Respondent's residence, both officers claim to have made the recovery from under the Respondent's bed. Similar contradictions also appear with respect to the payment of the three wheeler fare from Orugodawatta, where they met the informant to De Vos Lane where the detection took place.

Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness' statement, it is well established that the Court must exercise its judgment on the nature tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (*Vide, Boghi Bhai Hirji Bhai v. State of Gujarat,*[5].

Witnesses should not be disbelieved on account of trifling discrepancies and omissions (*Vide, Dashiraj v. the State*[6]. When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (*Vide, State of UP v. Anthony* [7]; *A.G. v. Visuvalingam* [8]. It is dangerous to presume or assume that because two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive. (Vide, Colin Thome J in *Bandaranaike v. Jagathsena* [9].

In *State of UP v. Anthony* the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence... read as a whole appears to have a ring of truth'. The Court went on to elaborate further that 'Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the

matter would not ordinarily permit rejection of the evidence as a whole'.

Basnayake CJ in *Queen v. Julius*[10] observed 'that in applying the maxim of *Falsus in uno, falsus in omnibus* (he who speaks falsely on one point will speak falsely upon all) it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment must be distinguished from deliberate falsehood'.

In the instant case, the Court of Appeal considered the contradictions appearing in the testimony of the chief prosecution witnesses, particularly with respect to the recovery of scales from the Respondent's residence. The Court found that the contradictions and shifting testimony of the two PNB officers, created a serious dent in the testimonial trustworthiness of the prosecution witnesses.

The High Court dealing with this evidence in its analysis had concluded that the contradictions were due to honest mistakes by the police officers and did not affect the root of the case. The court noted that both officers had ample opportunity to correct their versions and ensure that their statements matched in every respect. No such collusion on the part of the detecting officers is apparent from the evidence before the Court. The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies.

Police officers are not infallible observers and may like any other witness make honest mistakes. However, they differ

from eye witnesses generally in that their training and experience encourages them to be more observant and to focus on detail and there is no reason why this shouldn't be taken into account when assessing the reliability of their evidence (Vide, *R v. Tyler*[11]. It is clear that the contradictions in the prosecution case are the product of human error and not due to any dishonest intent. Such slight discrepancies cannot be deemed to affect the probability of the Prosecution case in the totality of the probative value of the evidence presented on behalf of the prosecution.

Furthermore, both sides accept that the police officers are strangers to the Respondent and have no motive to fabricate a case against her. The prosecution witnesses were official witnesses with no personal interest in the arrest of the Respondent. In *Ajith Singh v. State of Panjab* [12] the court rightly observed that *'... The Significant thing herein is that these official witnesses are not held to have any animus or hostility against the petitioner'.* Unlike in the case of Matilda, both prosecution witnesses are independent and have faced no allegations of a possible motive to present false evidence against the accused.

There is also a general disposition in courts to uphold official, judicial and other acts rather than render them to be inoperative. Illustration D to Section 114 of the Evidence Ordinance contains the presumption that judicial and official acts have been regularly performed or done with due regard to form and procedure (*Vide, Dharmatilake v. Brampy Singho*[13]; *Hapuganoralage Menikhamy v. Podi Menika* [14]; *Nishan Singh v. State* [15]. While the presumption is used sparingly in criminal cases, it will be presumed even in a murder case that a man acting in public capacity has

properly discharged his official duties, until the contrary is proven (*Vide, R v. Gordan* [16]).

Finally, with respect to the appreciation of evidence by the Court of Appeal, the Respondent submits that the Court of Appeal examined the productions by placing the till inside the polythene bag in order to understand the possibility or probability of the evidence which was marked at the trial. Based on the demonstration of evidence conducted by an officer of the court, the Court of Appeal concluded that it was highly improbable that a person transporting Heroin would do so in such a prominent manner. The court therefore favored the Respondent's version that the detection has not in fact taken place at De Vos place as the Appellant suggests but rather that the money alone was recovered from the Respondent's residence in Wattala.

Credibility is a question of fact, not of law. Appellate judges have repeatedly stressed the importance of the trial Judges' observations of the demeanor of witnesses in deciding questions of fact (Vide, *R. v. Dhlumayo* [17] (A); *Merchand v. Butler's Furniture Factory* [18]. No doubt the Court of Appeal has the power to examine the evidence led before the High Court. However, when they go so far as to conduct a demonstration of the evidence, they observe the material afresh and run the risk of stepping into the role of the original court (Vide, *King v. Endoris*[19]; *Alwis v. Piyasena Fernando*[20]; *Fradd v. Brown and Co Ltd*; *Attorney General v. D. Senevirathne*[21]. The trial judge has a unique opportunity to observe evidence in its totality including the demeanor of the witness. Demeanor represents the trial judge's opportunity to observe the witness and his deportment and it is traditionally

relied on to give the judges' findings of fact their rare degree of inviolability (Vide, Bingham, 'The Judge as Juror' 1985 p. 67).

Lord Loreburn in *Kinloch v. Young*[22] observed that '. . . . this house and other courts of appeal have always to remember that the judge of first instance has had the opportunity of watching the demeanor of witnesses - that he observes, as we cannot observe the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any court of appeal. Even the most minute study by a court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say'.

Similarly, Lord Pearce in *Onnassi v. Vergottis*[23] stated that 'one thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a court of appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial judge and the court of appeal has not been occasioned by any demeanor of the witnesses or truer atmosphere of the trial (which may have eluded the appellate court) or by any other of those advantages which the trial judge possesses'.

Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court

should not ordinarily interfere with the trial courts opinion as to the credibility of a witness as the trial judge alone knows the demeanor of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candor or with doubtful plausibility and whether after careful thought or with reckless glibness and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination (Vide, *Valarshak Seth Apcar v. Standard Coal Company Limited* (24). But where the matter is one of inference from evidence, and the evidence is not well balanced the appellate court will set aside the finding of the trial court if it is against the weight of evidence (Vide, *Sris Chandra Nandi v. Rakhalananda* (25).

As rightly pointed out by the Appellant in terms of Sections 351 (a) of the Code of Criminal Procedure while an appellate court may exercise its discretion to call for the productions, its power is conditional upon it being necessary or expedient in the interest of justice. Section 329 of the Code of Criminal Procedure Act stipulates that calling fresh evidence by an appellate court must occur only in very rare instances. Thus according to the unreported case (No. CA 1161/82 dated 13/09/1989)(26) cited by the Appellant this piece of evidence being available at the stage of the original hearing precludes the Court of Appeal from recalling it as fresh evidence.

Having considered the evidence and testimonies adduced by both sides, and applying the several tests to determine testimonial creditworthiness, the Court finds that the proximity of the cash to the heroin packets recovered, the scales and the weights are all circumstantial evidence which when taken cumulatively result in a compelling body of evidence

having significantly strong probative evidential value on the charge of possession with intent to supply, and proves the case of the prosecution beyond a reasonable doubt.

There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support. A Court of Appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trial judge. It is also to be noted that State is not obliged to disprove every speculative scenario consistent with the innocence of an accused - *R v. Paul* [27].

In view of the facts elicited by the prosecution and indeed the real evidence discovered by the officers conducting the investigation, it cannot be said that the factual conclusion drawn by the trial judge are either unsupported or unreasonable.

This court accordingly allows the Appeal of the appellant, sets aside the judgment of the Court of Appeal dated 30.5.2008 and upholds the conviction and sentence of the High Court dated 19.11.2004. No costs.

The decision of this Court is to be communicated forthwith to the High Court to notice the Respondent and impose the sentence given in the judgment of the High Court dated 19.11.2004.

SRIPAVAN, J. - I agree

IMAM, J. - I agree.

Appeal allowed. Judgment of the Court of Appeal set aside. Conviction and sentence of the High Court upheld.

ABEYRATNE V. ANULAWATHIE MANIKE

SUPREME COURT
J.A.N. DE SILVA C.J.
RATNAYAKE, J AND
EKANAYAKE, J
S.C. APPEAL 29/09
P.H.C. KEGALLE: HCCA/KAG/40/2007
D.C. KEGALLE: 4688/L
OCTOBER 15TH, 2010

Debt Conciliation Ordinance – Section 43(1) – Application to Court for a decree in terms of a settlement and entry of decree nisi – Is a creditor entitled to pursue an action available to him under the law without having recourse to the provisions of Section 43(1)?

The Defendant had obtained a sum of Rs. 9,200/- from the Plaintiff and had executed deed of transfer in favour of the Plaintiff with a condition to retransfer on the payment of the said sum with interest within a period of two years. The Defendant went before the Debt Conciliation Board and the parties entered into a settlement before the Board. The Defendant failed to honour the said settlement, and the Plaintiff instituted action in the District Court seeking a declaration of title.

When the case was taken up before the District Judge, the parties raised issues and issue No. 7 was taken up as a preliminary issue which related to the maintainability of the action filed by the Plaintiff since the parties had entered into a settlement before the Debt Conciliation Board in view of Section 43 of the Debt Conciliation Ordinance.

The District Judge answered the said issue in favour of the Defendant and dismissed the Plaintiff's Action. The Defendant sought leave to appeal from the Supreme Court and leave was granted on the basis as to whether the Plaintiff who entered into a settlement before the Debt Conciliation Board could file and maintain the vindicatory action that he had instituted.

The question that arose for determination in this case was whether Section 43(1) deals with an 'exclusive' situation or an 'inclusive' situation.