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DIGEST

JAYASEKERA VS. PERERA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 311/95 (F)
DC COLOMBO 14588/P
MAY 7, 2007

Partition Law – Section 26 (2) (d) – Judgment not in compliance with Section 187 of the Civil Procedure Code – Amicable division – Family arrangement – Should it be accepted? Testamentary case – Section 545 of the Code – property in dispute not in the inventory – Fatal? Who is an heir? – Constitution Article 138(1)

In the partition action, the defendants relied on an amicable division. The plaintiff contended that the said document has not been notarially executed and as such invalid – and that the other co-owners had not signed same. It was also contended that, the corpus was not included in the testamentary case of the father of the plaintiff-respondent and it is a bar to a subsequent partition action. It was contended by the defendants – appellants that, the requirements in Section 187 of the Civil Procedure Code had not been satisfied.

Held

Per Anil Gooneratne, J.

> "Considering the totality of the evidence although there is no strict compliance with Section 187. I hold that the District Court is not in error in entering judgment for the plaintiff since no failure of justice has prejudiced the defendant."

(1) The fact that the inventory does not include the land in question should not be a bar to a subsequent partition action. A mere lapse in the inventory of not including a property should not deprive the plaintiff's real entitlement to succession. The plaintiff is entitled to her legal entitlement on the death of her mother.

(2) Heir is a person who succeeds by descent to an estate of inheritance on the death of a person his estate in the absence of will passes at once by operation of law to his heirs and that dominium

vests in them. Once it is so vested they cannot be divested of it except by several well known modes recognized by law.

(3) There is no proper deed or notarially executed document produced in the trial to prove an amicable arrangement. The document appears to be a proposal and not signed by all – as such no reliance could be placed on the document.

(4) Long possession may not be sufficient to prove ouster although one could argue that inference of ouster could be drawn from such possession.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

1. *Dona Lucihamy vs. Ciciliyanahamy* – 59 NL 214
2. *Warnakula vs. Ramani Jayawardena* – 1990 – 1 Sri LR 206
3. *Ceylon Transport Board vs. Ceylon Transport Workers' Union* – 71 NLR 158
4. *Fernand vs. Dabarera* – 77 NLR 127
5. *Hassen Hanjiar v. Levane Marikkar* 15 NLR 275
6. *Perera vs. Kriekenbeck* – 10 NLR 119
7. *Wijewardena vs. Abdul Hamid* – 12 NLR 243
8. *Silva vs. Silva* – 10 NLR 242
9. *Appuhamy vs. Premalal* – 1984 – 1 Sri LR 209
10. *Maria Perera vs. Albert Perera* – 1982 2 Sri LR 399

Gamini Marapana PC with *Navin Marapana* and *T. Palliyaguruge* for appellant.

Nihal Jayamanne PC with *Ajit Munasinghe* and *Dilhara de Silva* for respondent.

May 07th 2007

ANIL GOONERATNE J.

This was a partition action instituted in the District Court of Colombo in December 1986 to partition a land called

'Poththewela Owita' in extent of 2 Roods 3.4 perches. The prayer to the plaint seeks an order in terms of Section 26(2) (d) of the partition law. The Plaintiff claims an undivided half share of the land in question, and the relief sought is to demarcate the half share according to the said section.

The 1st and 2nd Defendants in their statement of claims disclosed two other parties. The Defendants in their statement of claims had prayed for a dismissal of Plaintiff's action and claimed shares in the entire corpus in the manner set out in the respective statement of claims filed by them.

At the trial held on 18.6.91 before the District Judge paragraphs 1 to 5 of the plaint were admitted and thirteen points of contests were raised. The proceedings of 2.10.91 indicates that points of contest Nos. 4 to 13 were corrected. The admissions recorded in paragraphs 3 and 4 gives an indication as to how the property in question devolved from the original owner B. M. Edward Walter Perera. The property of said B. M. Edward Walter Perera devolved on his daughter Vivien Leelawathie Perera and his second wife Mary Pinto, (after the demise of his first wife) in equal share. At the hearing of this appeal the learned President's Counsel for the Defendant Appellant submitted that the Plaintiff claims title through the above named Vivien Leelawathie Perera. He also submitted inter alia that there was an arrangement for an amicable division between the above named Vivien Leelawathie Perera and the said Mary Pinto. (2nd wife of B. M. Edward Perera). On or about 1948 as a result of this arrangement the said Vivien Leelawathie Perera gave up her rights to the half share which devolved (earlier) on her from the property in question and instead possessed, and owned three other properties, namely Pellangahawatta Pellangaha Owita and Bandiya Godallawatta. In fact this is the case of the Defendant Appellant and it was

strenuously argued by the said President's Counsel regarding the above points and that the judgment delivered in the District Court is also not a judgment in compliance with Section 187 of the Civil Procedure Code and submitted that this court should order a re-trial. He relied on the authorities referred to in *Dona Lucyhamy v. Ceciliyanahamu*[1], *Warnakula v. Ramani Jayawardena*[2] and *Ceylon Transport Board vs. Ceylon Transport Workers Union*[3] to support the view that the judgment of the District Court does not satisfy Section 187 of the Civil Procedure Code.

The President's Counsel who appeared for the Plaintiff Respondent submitted to this court that the arrangement referred to above for an amicable division relied upon by document marked 'D2" is not notarially executed and as such invalid. He also stressed that the other co-owners have not signed 'D2' and if at all it is only a proposal. Learned President's Counsel also referred to a portion of the judgment and emphasized the fact that the learned District Judge's findings on the above amicable division is that such arrangement within the family has not been proved, and invited this court to accept this position. Further evidence of the 3rd Defendant was also highlighted by counsel at pgs. 433 & 434 of the brief to support the position that after the 1948 arrangement there was a further transfer and after 1948 the 3rd Defendant is unable to state the ownership of the property.

The attention of this court was also drawn to the 1st Defendant's evidence at pgs 542 and 543 of the brief where it is stated that paragraph 5 of the statement of claim of the Defendants is incorrect and rejected the amicable division and the witness stated that Vivian Leelawathie Perera never owned the lands described as Pellangahawatta and Pellangaha Owita.

The Plaintiff according to paragraph 6 of the plaint is the daughter of the said Vivian Leelawathie Perera. The admission of paragraph 5 of the plaint indicates that all the properties of the said Vivien Leelawathie Perera on her death in 1958 devolved on Francis Joseph Boteju by last will (p 6) which was proved in testamentary case 18728/T (P7). In 14.6.1975 by last will 2601 of 30.7.72 the properties were bequeathed by Francis J. Boteju to the Plaintiff by last will 2601 which was proved in testamentary case 1005/PO paragraph 6 of the plaint has been denied.

The Appellant further fortify the argument that the above mentioned Testamentary Case No. 18728/T where last will P6 was proved and the properties of Leelawathie Vivian Perera devolving on Francis Joseph Boteju, did not include the property in question in the inventory filed in the said case No. 18728/T. The inventory is at Pgs. 660-663 of the brief ('D1').

Issue No. 10 seems to have been suggested on this basis on a perusal of the inventory, it appears that the inventory does not include the land in question. The other point raised by the Appellant is that 'P11' deed, which was produced by the Plaintiff which was executed by Francis Joseph Boteju refer to the family arrangement and renouncing of rights to the property referred to in the 1st schedule only of the Deed. This property is called Millagahawatta alias Kelirihenalansewatta in Talangama. The plaint described the land in question as Pottewalaowita in extent of 2 Roods 3.4 perches. The 1st schedule of Deed 'P11' is in extent of about 6 Acres 1 Rood and 5 Perches. The 3rd schedule of 'P11' refer to a land called Pellangahawatta Owita. Although renouncing of rights to property is referred to in 'P11' it is not certain on a perusal of the Deed as to whether it applies to the land described in the schedule to the plaint.

Section 547 of the Code was repealed and reintroduced as Section 545 of the Civil Procedure Code on the question of the property in dispute not being included in the inventory, the following case law may be noted. In *Fernando vs. Dabarera* [4].....

> When an action for declaration of title to a land belonging to a deceased person's estate is instituted by a person claiming to be a successor in title of the deceased, section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of the action on the ground that the name of the land is not included in the Inventory filed in the testamentary action relating to the estate of the deceased owner. In such a case the burden of establishing that the particular land was not included in the Inventory must lie on the party who takes such objection.

Hussen Hadjiar vs. Levane Marikkar[5], whilst this section penalizes, does not prohibit, transfer of a property which ought to have been, but has not been administrated. It may fairly be argued that the words in section 547 "no action shall be maintainable" mean only shall be capable of been proceeded with.

Perera vs. Kriekenbeck[6], Section 547 of the Code contemplates the transfer of the deceased's assets without the formality of taking out probate or letters of administration at all, and not a mere deficiency in stamp duty.

Another point stressed by the Plaintiff Respondent is that the alleged family arrangement in 1948, to renounce the right to the property in question, and in view of that three other properties were vested with Leelawathie Vivian Perera and one such property called Bandi Godella which was

partitioned according to 'P12' (final decree in case in 5593/P) and the parties in that action were Mary Pinto's heirs and Vivien Leelawathie Perera. (7th plaintiff) If by the arrangement in 'D2' in 1948, was to vest the three other properties in Leelawathie Vivian Perera, there was no need to partition the land called Bandigodellawatta in 1952 along with Vivien Leelawathie Perera and heirs of Mary Pinto, being Plaintiffs in that case. The response to this position of the Respondent by the Appellant is that 'D2' left Bandigodellawatta in common to both Vivian Leelawathie Perera and Mary Pinto's heirs. On this aspect of the case I wish to state that no reliance could be placed on 'D2' since it has not been signed by all the co-owners and not notarially executed. The points stressed by the Appellant that Bandigodellawatta was left in common seems to have been submitted merely to fill a gap and not with substance.

As regards the other two lands included in the alleged family arrangement namely Pellangaha Owita and Pellangahawatta, which were given to Leelawathie Vivian Perera as contended by the Appellant, there are two deeds of gifts marked 'D3' & 'D4' executed in 1963 & 1964 by the heirs of the said Mary Pinto which were gifted. It is the Respondent's position that by executing 'D3' & 'D4' the Appellants stand of not claiming any right or interest in the lands given to Leelawathie Vivian Perera proved to be false. Both deeds also include the land in dispute in schedule 5 of 'D3' & 'D4'.

In view of the objection raised by the Appellant that the judgment is not in compliance with Section 187 of the Civil Procedure Code, evidence in this case and the judgment will have to be examined very carefully. It is apparent that the findings of District Judge on the main issue is confined to about 2/3 paragraphs of the judgment which is contained immediately before answering the issues.

The evidence of the Plaintiff at the beginning confirm the matters referred to in paragraphs 3 – 5 of the plaint. Plaintiff was about 6 years old when her mother Vivian Leelawathie Perera died. Last will of her mother was produced as 'P6" and probate in favour of her uncle Francis Joseph Boteju was marked as 'P7' in case No. 18728/T. Her uncle died in 1975 and his last will was marked as 'P8' and probate marked 'P9' issued to Public Trustee. The land in dispute is itemized in clause 5 sub-section 3 in P8'. There is evidence of Plaintiff visiting the land in dispute with her uncle during his life time and reference is made to the plantation in the property concerned and cultivating by persons employed for the purpose by Francis Joseph Boteju. When 'P2' was prepared Plaintiff visited the land. Up to 1975 Francis Joseph Boteju visited the land and took the produce in this property. This evidence has been submitted to court, to prove prossession.

There is also evidence of the Plaintiff regarding the family arrangement. Plaintiff rejects that position and confirm that the arrangement was for three other properties described above and not concerning the land in dispute. She refers to 'P11' and states that the family arrangement was for three other properties described in the schedule of 'P11' and not for Poththewala Owitta, the land in dispute. This witness categorically states that as regards 'Bandigodallawatta' there was no arrangement for her mother to own it exclusively. That position of the Defendant is rejected by her.

In cross-examination of the Plaintiff I find that certain questions about her personal life, birth certificate, her father, mother's life etc. has been put to her by the defence to discredit her but the main issue pertaining to the family agreement which was rejected seems to have not been disturbed. The question posed to her about the inventory

and the land in dispute not being included in same, her answer to that question she admits that the land in question has not been inventorised or not included in 'D1'. In order to prove possession this witness mentions that as far as she can remember since 1962 she had visited the land with her uncle. This position has been maintained by this witness in cross-examination, and the attempts to demolish that position has not been successful. Witness had been questioned about the plantation and cultivation of trees. This court observes that after so many years it would be difficult for any witness to give the exact figure, dates and description. As long as a fair, reasonable, acceptable position is placed before court, I think the evidence on this aspect of the Plaintiff is more probable up to 1975 under Francis Joseph Boteju the land had been looked after on his behalf under his supervision by his employees. The family arrangement relied upon by the Appellant's party has been rejected by the witness and I observe that it is an unsuccessful attempt by the opposing party to displace the Plaintiff, and the Plaintiff version is more acceptable on this aspect of rejecting the family arrangement.

The other witness from the Public Trustee Department gave evidence on behalf of the Plaintiff who testified about the land in dispute from the file maintained in the Public Trustee's Department, and produced 'P10' the valuation report which refer to the land in question, in item No. 10 of 'P10'. He also testified that in 1986 he visited the land and one Mrs. Jayasekera was present and had reprimanded him.

Witness Sediris an employee of Francis Joseph Boteju also gave evidence for the Plaintiff. Several questions somewhat irrelevant questions had been put to this witness in cross-examination. This witness confirms possession of Francis

Joseph Boteju and the several visits made by Francis Joseph Boteju with the Plaintiff to the land in dispute, and confirm that cultivation on this land took place after 1962. He also testified that the 1st Defendant never possessed the land.

The Defence led evidence of several witnesses in the District Court to prove possession including that of the 1st and 2nd Defendant. The Grama Sevaka testified that the 1st Defendant's husband had employeed persons and cultivated the land during 1978 to 1986 and in 1986 the Plaintiff complained to him about construction of a house on the land. He also testified about the plantation in the land. However prior to 1986 he had not visited the land since he had no official business. He has seen the land prior to 1986 only when he passed this land by road. The 1st Defendant had never occupied the house on this land.

The 3rd Defendant claims that he knows this land for about 7/8 years and that he is aware that Jayasekera (1st Defendant's husband) put up a hut on this land. He testified that his ancestors possessed this land but he admits that Vivian Leelawathie Perera owned ½ share of the land. He denies any possession by the Plaintiff or her predecessors. He claims rights on the ½ share devolved on Mary Pinto.

The 1st Defendant in her evidence tries to establish long possession starting from the Pinto family construction of the hut on this land is also testified by her in evidence and that one Pabilis cultivated on their behalf. There is also evidence by her on the plantation. Tax receipts were also produced.

The judgment of the District Court has been criticized by the Appellant on the basis that the requirements set out in Section 187 of the Civil Procedure Code had not been satisfied. Considering the totality of evidence although strict non

compliance with Section 187, I hold that the District Court is not in error in entering judgment for the Plaintiff, since no failure of justice has prejudiced the Appellant.

However it would be pertinent to consider the decision of the Supreme Court in *Dona Lucihamy vs. Ciciliyanahamy (supra)*

Per LW. De Silva AJ at 216. . . . .

> "We are of the opinion that the failure of the trial judge to examine the title of each party has prejudiced the substantial rights of the parties. We accordingly order a new trial".

Though L. W. de Silva A. J. in the said judgment observed so, I am unable to hold the view that the learned Trial Judge in this case has totally failed to examine the evidence adduced at the trial and the title. Therefore no prejudice has been caused to substantial rights of the parties. In the light of the above I am inclined to take the view that the decision in Lucihamy's case would lend no assistance to the case at hand. I am also mindful of the provisions contained in the proviso to Article 138(1) of the Constitution.

Issue Nos 5, 6 & 8 refer to the family arrangement. Entire case of the Appellant rests on the above issues. Document 'D2' has not been signed by all the co-owners and one cannot merely suggest an arrangement by way of a proposal and stop at that if the parties intend to give validity to such arrangement. There should have been a notarially executed document. In the absence of such document this court cannot hold that 'D2' is a legally binding agreement. Issue No. (6) takes another turn. There is no evidence placed

before the District Court to even suggest renouncing of rights as indicated in issue 6, by Vivian Leelawathie Perera. As correctly pointed out by the Respondent if in fact rights of Vivian Leelawathie Perera were renounced there could not be a subsequent deed of gift as evidence by 'D3' & 'D4' by the successors of Mary Pinto. All this would confuse the issue.

Heir is a person who succeeds by descent to an estate of inheritance. *Wijewardena vs. Abdul Hamid*[7] on the death of a person his estate, in the absence of a will passes at once by operation of law to his heirs and the dominium vests in them. Once it is so vested they cannot be divested of it except by several well known modes recognized by law *Silva vs. Silva*[8]

The fact that the inventory does not include the land in question should not be a bar to subsequent partition suit. As observed in *Fernando vs. Dabarera (supra). . . .*

> When an action for declaration of title to a land belonging to a deceased person's estate is instituted by a person claiming to be a successor in title of the deceased, section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of the action on the ground that the name of the land is not included in the Inventory filed in the testamentary action relating to the estate of the deceased owner.

Plaintiff from the age of 6 years, was dependant on others due to her mother's demise, at that early age. She is entitled to her legal entitlement on the death of her mother. A mere lapse in the inventory of not including a property should not deprive plaintiff's real entitlement on succession.

The alleged amicable arrangement has confused the issue and in the absence of valid documentation it would not be safe to act on such arrangement where land is concerned.

Although the point was stressed by the Appellant about an amicable arrangement, there is no proper deed or notarially executed document produced in the trial court to prove such arrangement. The only document relied upon by the Appellant is 'D2' which appears only to be a proposal and not signed by all those concerned. As such no reliance could be placed on 'D2" and the position would remain the same without a change of title and will continue in the manner suggested in the admissions recorded in the trial court, without any arrangement to renounce title of a particular land, which is the subject matter of this case.

In *Appuhamy v. Premalal* [9]

Held -

(1) An amicable division to be recognized by law must be a division that puts an end to co-ownership of property

(2) An amicable division can be given effect to –

(a) by a deed of partition and a partition plan where all the co-owners sign agreeing to the division or by a cross conveyance executed by each of the co-owners whereby the notarial deeds would be the best evidence of the termination of the common ownership.

In *Maria Perera v. Albert Perera*[10]

Held -

An amicable partition can be a starting-point of prescription even though no deed of partition or cross deeds or other documents have been executed. But

> inclusive possession by a co-owner for a period of 10 years alone cannot give rise to prescriptive title. There must be the further important element of a "change of circumstances from which an inference could reasonably be drawn that such possession is adverse to and independent of" all other co-owners. There must be proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some date ten years before action was brought. Mere exclusive possession for 20 years (by taking the natural produce of the land) on a plan not signed by any of the co-owners to whom the plaintiff claimed lots were allotted cannot constitute proof of ouster. The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster.

Long possession may not be sufficient to prove ouster, although one could argue that inference of ouster could be drawn from such possession. Facts and circumstances of a particular case should be considered before accepting any adverse possession and ouster in favour of a party to a partition suit. That burden has not been properly discharged by the Defence, to claim more than their entitlement to land in dispute.

However when considering the totality of evidence placed before the District Court I cannot conclude that the Appellant has been prejudiced or some injustice had occurred. All the possible evidence on both sides had been adduced. This is a case which has a history and ownership of land originally goes back to the year 1918.

In the circumstances, on a consideration of the totality of the evidence both oral and documentary led in this case. I am of the view that notwithstanding the District Judge's failure to strictly comply with Section 187 of the Procedure Code there is no prejudice to the appellant or any injustice caused. As such on an examination of the evidence I hold that the District Judge is correct in pronouncing judgment in favour of the Plaintiff-Respondent. This appeal is dismissed. No order is made with regard to the costs of this appeal.

CHANDRA EKANAYAKE J. – I agree.

Appeal dismissed.

ARUNA ALIAS PODI RAJA VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J.
UPALY ABEYRATNE, J.
CA 71/2003
HC BADULLA 67/2000
AUGUST 31ST, 2009

Penal Code – Section 365 – Evidence Ordinance – Section 27 Recoveries – Dock Statement – Accused proved to be innocent – Is there burden on the accused to prove anything? When is he expected to offer an explanation? – Ellenborough principle – Exceptions?

The accused –appellant was convicted of the murder of a man called W and was sentenced to death.

In appeal it was contended that the trial Judge failed to judicially evaluate the items of circumstantial evidence and the reliance made by the trial Judge on Section 27 recoveries was erroneous.

Held:

(1) When an allegation of murder is leveled against a person if he had acquired the knowledge of the items he would have divulged the way he acquired such knowledge in his dock statement which is not even subjected to cross examination. This is the normal behavior. The conditions reached by the trial Judge that the appellant acquired the knowledge of the items recovered by an act done by him is not objectionable.

(2) An accused person against whom a criminal charge is leveled is always presumed to be innocent until his guilt is proved. There is no burden on the accused to prove anything but when strong and cogent evidence is established an accused person in a criminal case is expected to offer an explanation of the highly incriminating circumstances established against him.

As a rule a party's failure to explain damming facts cannot convert insufficient evidence into prima facie evidence, but it may cause prima facie evidence to become presumptive.

Per Sisira de Abrew, J.

> "When prosecution established a strong incriminating evidence against an accused in a criminal case the accused in those circumstances is required to offer an explanation of the highly incriminating evidence established against him and the failure to offer such explanation suggests that he has no explanation to offer".

APPEAL from the judgment of the High Court of Badulla.

Cases referred to:-

1. *Ariyasinghe vs. Attorney General (G.C. Wickrenasinghe abduction cave)* – 2004 2 Sri LR 357
2. *Rex vs. Cochrane and others* – 1814 – Gueney's Reports at 479
3. *King vs. Seeder Silva* 41 NLR 337 at 344
4. *Peiris vs. Appuhamy* 43 NLR 412 at 418
5. *King vs. Endoris* 46 NLR 499 (per Soertsz, J.)
6. *Inspector Arendstz vs. Wilfred Peiris* 10 CLW 121 at 123
7. *Queen vs. Seetin 68 NLR 160*
8. *Chandradasa vs. Queen* 72 NLR 160
9. *Beddavithana vs. A. G.* 1990 1 SLR 275 at 278
10. *Republic vs. Illangathilake* 1984 2 Sri LR 38
11. *Rex vs. Burdett* (1820) 4B and ALd 161, 162
12. *Chandradasa vs. Queen* 72 NLR 160
13. *Queen vs. Santin Singho* 65 NLR 445
14. *State of Tamil Nadu vs. Rajendran* 1999 Cri L.J. 4552
15. *Boby Mathew vs. State of Karanatake* 2004 Cri L.J. Vol 3P 3003 at 3015.

Dr. Ranjith Fernando for the accused-appellant.

Dappula de Livera DSG for the Attorney General.

October 09th 2009

SISIRA DE ABREW J.

The accused appellant in this case was convicted of the murder of a man named Illeperuma Archchilage Wimalasena and was sentenced to death. This appeal is against the said conviction and the death sentence. The second accused who was charged with the same offence was discharged at the end of the prosecution case. Learned Counsel for the appellant urged the following grounds of appeal as militating against the maintenance of the conviction.

1. The learned trial judge failed judicially to evaluate the items of circumstantial evidence.

2. Reliance made by the Learned High Court Judge on Section 27 recoveries was erroneous.

According to the prosecution case the deceased who was working in a mine in the morning of 3.11.95 left for his work place but he never returned home. At the time he left his home he was wearing a red coloured shirt and a blue coloured sarong. This red coloured shirt and a piece of the sarong which were recovered in consequence of a statement made by the appellant were later identified by the wife of the deceased. This was how the prosecution established the identity of the dead body. Since the deceased did not return home the wife of the deceased went and made inquiries from Thanagavelu and Gunasinghe who were working with the deceased in the mine and learnt that on 3.11.95 around 12.30 p.m. the deceased left with the appellant who had come to meet him. According to Thangavalu around 12.30 on 3.11.95 the deceased and the appellant were seen chatting at the bus stop and thereafter they went in a

bus and got down at Badalkumbura. When the wife of the deceased went and asked about her husband, the appellant told her that the deceased after watching a film went to his sister's place. The wife of the deceased thereafter did not see him for the next eleven months. The red coloured shirt of the deceased and a piece of a sarong worn by the deceased were found in a toilet pit of an uncle of the appellant. Remnants of a human skull and human bones were found in consequence of a statement made by the appellant arrested eleven months after the disappearance of the deceased.

Prosecution led following items of circumstantial evidence to prove the change.

1. All bones recovered in consequence of a statement made by the appellant belong to one person.
2. Gender of the said person was proved to be that of a male.
3. Age of the person whose bones were recovered in consequence of a statement made by the appellant was estimated to be between 24 and 36 years. According to the wife of the deceased, the deceased was a young person.
4. Evidence of violence on the body of the deceased was present. Fractures and gun shot injuries were found on the skull.
5. Cause of death was due to gun shot injuries or blunt trauma.
6. The appellant and the deceased were known to each other.
7. The deceased was last seen with the appellant on 3.11.95

8. The appellant visited the deceased at his work place (the mine) around 12.30 p.m. on 3.11.95 and spoke to the deceased for about half an hour.

9. The appellant and the deeased went in a bus and got down at Badalkumbura on 3.11.95.

10. The appellant left his house on 5.11.95 and was missing for about eleven months.

11. On the direction of the appellant who was arrested after about eleven months from the disappearance of the deceased, the investigating officer recovered remnants of a skull from a place which was 20 meters away from the appellant's house. The said remnants were found inside a shopping bag which was found in the appellant's garden. Some pieces of the skull which had come out of the shopping bag were found near the said shopping bag.

12. On the directions of the appellant, the investigating officer dug ground area of about 7 x 4 feet which was about 60 meters away from the appellant's house and found hair and bones of a human being.

13. On the directions of the appellant, the investigating officer went near the toilet pit of Gunathilake, an uncle of the appellant and discovered a blue coloured piece of a sarong and a red coloured shirt. These clothes were identified by the wife of the deceased as the clothes of the deceased.

14. On the directions of the appellant the investigating officer went near a pond extent of which was about 15 x 20 feet. After the pond was emptied the investigating officer dug the base of the pond and recovered human bones.

15. Medical evidence says that all the bones recovered were of one human being.

Learned trial judge when dealing with the evidence relating to Section 27 (of the Evidence Ordinance) recoveries considered the ways in which the appellant could have acquired knowledge about the remnants of a human skull and bones. According to the learned trial Judge there were three ways in which the appellant could have acquired such knowledge.

1. He acquired the said knowledge by an act done by him.
2. He saw another person disposing of the dead body.
3. A person who had seen another person disposing of the dead body told the appellant about it.

The learned trial Judge after considering the place where the human bones were found concluded that the appellant could not have acquired the knowledge through the 2nd and 3rd ways. Learned Counsel for the appellant contended that the said conclusion of the learned trial Judge was wrong. I now advert to this contention. It has to be noted here remnants of a human skull were found in the garden of the appellant. The red coloured shirt and a piece of a sarong were recovered inside the toilet pit of one Gunathilake, an uncle of an appellant. Some human bones were found after digging the base of a pond. The investigating officer had first emptied the pond. All these things were found in an area of 4 to 5 square miles. If the appellant acquired knowledge of the said items through the 2nd and 3rd ways described above, he would have without any hesitation said those ways in his dock statement. But the appellant failed to do so. When an allegation of

murder is leveled against him, if he had acquired the knowledge of the said items through the 2nd and 3rd ways described above, he would have divulged those ways in his dock statement which is not even subjected to cross examination. This is the normal human behaviour. When I consider all these matters, I hold that the conclusion reached by the learned trial Judge that the appellant acquired the knowledge of the items recovered by an act done by him is not objectionable. But on this conclusion one cannot decide that it was the accused who inflicted injuries on the deceased or committed the crime, leveled against him. In *Ariyasinghe vs. Attorney General (GC Wickramasinghe abduction case)*[1] the view expressed on Section 27 recoveries by the trial Judge was very much similar to the view expressed by the trial judge in the instant case. His Lordship Gamini Amaratunga at 386 and 387 upheld the view expressed by the trial Judge.

After leading the above items of circumstantial evidence the appellant made a statement from the dock. He, in his dock statement, said that he did not know anything about the case. I will reproduce his dock statement here. "I do not know anything about the case. That is all." I shall now consider whether an accused person should offer an explanation when strong and incriminating evidence has been led against him. An accused person against whom a criminal charge is levelled is always presumed to be innocent until his guilt is proved. There is no burden on the accused to prove anything. But when strong and cogent evidence is established against an accused person in a criminal case he is expected to offer an explanation of the highly incriminating circumstances established against him. I am guided by several judicial decisions on this point. Lord Ellenborough in *Rex vs Cochrane and others*[2] at 479 stated thus: "No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of

suspicion which attach to him, but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistent with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests." This principle has been cited with approval in a long line of cases:- *King vs. Seeder Silva*[3] at 344 (per Howard CJ); *Peiris vs. Appuhamy*[4] at 418 (per Howard CJ); *King vs. Endoris*[5] (per Soertsz J); *Inspector Arendstz vs Wilfred Peiris*[6] at 123 (per Justce Moseley); *Queen vs. Seetin*[7] at 321 (per T. S. Fernando J); *Chandradasa vs. Queen* [8] (per Justice Samarawickrama); *Beddavithana vs. A.G.*[9] at 278 (per Justice P.R.P. Pererea); *Republic vs. Illangathilake*[10] (per Justice Collin Thome).

In 1820 Justice Abbott observed in *Rex vs. Burdett*[11] :- "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

This principle was cited with approval by Samarawickrama J in *Chandradasa vs. Queen* [12]

In *Seeder Silva*'s case (supra) Howard CJ applying the dictum of Lord Ellenbourough stated:- "A strong prima

facie case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of some-one else having committed the crime. Without an explanation from the appellant the jury was justified in coming to the conclusion that he was guilty".

However Basnayake CJ in *Queen vs Santin Singho* [13] remarked:- "The direction that if a prima facie case is made out the accused is bound to explain is wrong and misleading."

T.S. Fernando J in *Seetin Vs. Queen (supra)* at 322 found it difficult to approve the above decision of Basnayake CJ. T. S. Fernando J referring to the judgment of Basnayake CJ in *Santin Singho's Case (supra)* stated:- "The material parts of the trial judge's directions to the jury in Santin Singho's case appear in the judgment of the Court and, with due respect, the majority of us find it difficult to agree that those directions were wrong or misleading." T. S. Fernando J, in the same case, held: "As a rule a party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive" In deed Basnayake CJ in *Santin Singho's case (supra)* observed the words reproduced below of Chief Justice Shaw in an American case – Commonwealth vs Webster – quoted in Ameer Ali's 'Law of Evidence': "Where probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstance is produced, tending to support the charge, and it is apparent that the

accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstance can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is such that the proof, if produced, instead of rebutting, would tend to sustain the charge."

In the case of State of *Tamil Nadu vs. Rajendran* (14) Indian Supreme Court (Justice Pittanaik) observed thus: "In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."

In the case of *Boby Mathew vs. State of Karanataka* (15) at 3015, the dead body of the deceased was found tied to a cot inside the room of the first floor of the house which was in exclusive possession and usage of the accused and the dead body bearing as many as 31 injuries out of which the injuries in region of the head being ante mortem and fatal in nature. Dismissing the appeal of the accused, Bannurmath J observed thus: "Accused failing to give any explanation as to how the body of the deceased came from his house or shown to be in his house, has to be held against the accused when there is no explanation. ..... No doubt it is true that under our Indian jurisprudence, accused has a right of silence and need not open his mouth as held in earlier pronouncements 'he can be a silent spectator watching the prosecution show to prove him guilty beyond reasonable doubt', views of the Courts have now changed to the limited extent that once the prosecution succeeds in prima facie showing number of circumstances pointing unerringly accusing finger towards the accused, it is for the accused to come out and say or at least

explain those circumstances which are shown to be against his innocence. If he still keeps his mouth shut and it is not explained or even where he tries to explain certain things which are found to be false, then the Courts are justified in drawing adverse inference against the accused as to his conduct."

Applying the principles laid down in the above judicial decisions, I hold that when prosecution establishes a strong incriminating evidence against an accused in a criminal case, the accused in those circumstances is required in law to offer an explanation of the highly incriminating evidence established against him and failure to offer such an explanation suggests that he has no explanation to offer.

In the instant case the prosecution established strong and incriminating evidence against the appellant and he did not offer an explanation except the bare statement that he does not know anything about the case. In these circumstances I hold that the appellant had no explanation to offer to the highly incriminating evidence established against him. Although the learned Counsel for the appellant contended that the learned trial Judge had failed judicially to evaluate the items of circumstantial evidence, I am unable to agree with this contention when I examine the judgment.

For the reasons stated above I hold that the prosecution has proved the case against the appellant beyond reasonable doubt and refuse to interfere with the judgment of the learned trial Judge. I therefore affirm the conviction and the death sentence and dismiss the appeal.

ABEYRATHNE J. – I agree.

Appeal dismissed.

BANDARA V. HON. ATTORNEY GENERAL

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, C.J.
AMARATUNGA, J. AND
IMAM,
S.C. APPEAL NO. 62/2008
SEPTEMBER 9TH, 2010

Penal Code – Section 293 – Culpable homicide – Section 294 – Culpable homicide is murder subjected to exceptions stated in Section 294 – Exception 4 – Plea of sudden fight

This was an appeal from the judgment of the Court of Appeal by which the Court of Appeal had dismissed the appeal of the Accused – Appellant – Appellant and affirmed the judgment of the High Court. The High Court convicted the appellant for murder and the death sentence was imposed.

The Appellant preferred an application to the Supreme Court for special leave to appeal and the Supreme Court granted leave on the following question.

"Did the Court of Appeal misdirect itself by failing to evaluate the possibility of sudden fight that spontaneously occurred between the parties."

Held :

(1) The offence of murder in terms of Section 294 of the Penal Code is reduced to culpable homicide not amounting to murder under Section 293 of the Penal Code, if any of the five exceptions to Section 294 could be shown to apply.

(2) The Exception 4 to Section 294, the plea of sudden fight indicates that the basis for investigation is purely depended on the fact that the murder had taken place in a sudden fight, which had occurred in the heat of passion upon a sudden quarrel. An important ingredient which is necessary in such instance would be that there was no malice or vindictiveness.

(3) In order to come within the Exception 4 of Section 294 of the Penal Code, it is necessary to satisfy the specific requisites referred to in Section 294 of the Penal Code. Viz :

1. It was a sudden fight
2. there was no premeditation
3. the act was committed in a heat of passion; and
4. the accused had not taken any undue advantage or acted in a cruel manner.

Per Dr. Shirani A. Bandaranayake, CJ.

> "A sudden fight cannot be premeditated as the word ' sudden' clearly means that there cannot be any such pre-arrangements. It should also be noted that the lapse of time between the initial argument and the final fight is material for an accused to come within Exception 4, since the lapse of time may grant the opportunity for an accused to premeditate and make arrangements for a fight. Such a fight is not spontaneous and therefore cannot be regarded as one that could be described as sudden."

APPEAL from a judgment of the Court of Appeal.

Cases referred to :

(01) Surinder Kumar V. Union Territory Chandigarh – AIR (1993) SC2426

(02) Kikar Singh v. State of Rajasthan – AIR (1993) SC 2426

(03) Bhagwan Munaji Pawade V. State of Maharashtra – AIR (1979) SC 133

(04) State of Himachal Pradesh V. Wazir Chend and Others – AIR (1978) SC 315

(05) Pandurang Narayana Jawalekar V. State of Maharashtra - AIR (1978) SC 1082

(06) Jumman and others V. State of Punjab - AIR (1957) SC 469

(07) Amrithalinga Nadar V. State of Tamil Nadu - AIR (1976) SC 1133

(08) Ahamed Sher and Others V. Emperor - AIR (1931) Lahor 513

(09) Gajanand and Others V. State of Utar Pradesh - AIR (1954) SC 695

(10) Dharman V. State of Punjab - AIR (1957) SC 324

Shanaka Ransinghe with *Suraj Rajapaksha* for Accused – Appellant – Appellant

A. Jinasena, SSC for Complaint – Respondent – Respondent

Cur.adv.vult