THE

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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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Learned Senior State Counsel referred to the long line of cases, which had clearly stated the need to follow the Supreme Court Rules, when invoking the jurisdiction of this Court and drew our attention to the position taken by Tennekoon, C.J. in *C. Coomasaru v M/s Leechman and Co. Ltd. and others*(1) referred to in *Nicholas v O.L.M. Macan Markar Ltd. and others*(2)

> "Rules of procedure must not always be regarded as mere technicalities which parties can ignore at their whim and pleasure."

Several other judgments commencing from *K. Reaindren v. K. Velusomasunderam*(3) were referred to in support of the position that non-compliance with Rule 8(3) of the Supreme Court Rules, 1990 would result in the dismissal of the application for special leave to appeal.

Learned President's Counsel for the 4th respondent associated himself with the submissions of the learned Senior State Counsel and referred to several judgments of this Court, which indicated the need to give notice to the respondents in terms of Supreme Court Rules of 1990.

Learned Counsel for the petitioner contended that although the learned Senior State Counsel for 1st to 3rd and 28th respondents and the learned President's Counsel for the 4th respondent had raised the preliminary objection that the petitioner has not complied with Rule 8(3) of the Supreme Court Rules, 1990 that such errors could be rectified and that justice would be denied if the application is dismissed on such minor mistakes. In support of this contention, learned Counsel for the petitioner referred to Rule 30 of the Supreme

Court Rules and stated that the said Rule 30 is mandatory as the consequences of its non-compliance is specifically stated in the said Rule. Learned Counsel for the petitioner contended that the Supreme Court Rules do not indicate such consequence with regard Rule 8(3) and therefore if the petitioner has taken steps to communicate that an application is pending before this Court to other parties, then the requirement of the provisions in Rule 8(3) could be fulfilled. In such circumstances, learned Counsel for the petitioner stated that, any non compliance of Rule 8(3) of the Supreme Court Rules would be rectifiable. In support of his contention, learned Counsel for the petitioner relied on, the decisions in *Union Apparals (Pvt.) Ltd. v Director-General of Customs and others* [(4)], *Piyadasa and others v Land Reform Commission*[(5)], *Kiriwanthe and another v Navaratne and another*[(6)], *Priyani Soysa v Rienzie Arsecularatne*[(7)] and *Bank of Ceylon v The Ceylon Bank Employees' Union (on behalf of Karunatilake)*[(8)].

Having stated the submission made by all learned Counsel, let me now turn to consider the legal position with regard to the preliminary objection that was raised before this Court.

The contention of the learned Counsel for the petitioner is that although Rule 8(3) of the Supreme Court Rules, 1990 had laid down provisions that are mandatory, the non-compliance of such mandatory provision does not result in a dismissal of the application, as it is possible to cure that defect and the petitioner had taken such steps in order to rectify the mistake. He referred to the applicability of Rule 30 in support of this contention.

Rule 8(3) of the Supreme Court Rules is contained in part I(A) of the said Rules, which deals with special leave to appeal applications. The said Rule 8(3) is as follows:

"The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any, of the Attorney-at-law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."

It is to be noted that Rule 8(3) of the Supreme Court Rules, 1990, clearly provides for the need to tender the relevant number of notices along with the application for special leave to appeal. The said Rule also specifies the details that should be entered in such notices, with the requirement that stamped addressed envelopes for the service of such notices on the respondents also should be tendered along with the said notices. A careful examination of Rule 8(3) clearly shows that the purpose of the said Rule is to ensure that the respondents are given notice through the Registrar of the Supreme Court that there is a special leave to appeal application lodged in the Supreme Court. This position is clearly enumerated by the fact that it is stated in Rule 8(3) that in the event if there is any change in the particulars given by the petitioner along with the notices which were tendered, changes in such particulars has to be forthwith notified to the Registrar.

Rule 8 contains 7 sub-Rules and all of them deal with the purpose of serving notice and the steps that have to be taken by the petitioner, respondents and the Registrar of the Supreme Court. The sequence of relevant steps would commence with the tendering of notices with the relevant details as referred to in Rule 8(3). This position is emphasized in Rule 8(5), which clearly shows the need to issue notice in terms of Rule 8(3) of the Supreme Court Rules 1990; wherein it is referred to the need that the petitioner should attend at the Registry to verify whether notice has not been returned undelivered and the steps that should be taken if it had been so returned. Considering all these objections, in *Samantha Niroshana v Senarath Abeyruwan*(9) it was clearly stated that,

> "… the purpose of the Supreme Court Rules is to ensure that all necessary parties are properly notified in order to give a hearing to all parties and Rule 8 specifically deals with this objection."

Learned Counsel for the petitioner contended that the petitioner had fulfilled the objective and discharged the requirements of Rule 8(3), although it may not have been in such compliance with Rule 8(3) of the Supreme Court Rules, 1990. A similar argument was taken by the learned Deputy Solicitor General in *Fowzie and others v Vehicles Lanka (Pvt.) Ltd.*(10), where it was stated that in the event an applicant "fails to strictly, but manages to substantially comply with a Rule, and in doing so causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application."

In support of the said submissions, several decisions including the decision in *Kiriwanthe v Navarathna (supra)* was cited by the learned Deputy Solicitor General in *Fowzie's (supra)* case. Considering the rationale in *Kiriwanthe's (supra)* decision and the fact that **Kiriwanthe's** case was decided on 18.07.1990 on the basis of the Supreme Court Rule of 1978, it was decided in *Samantha Niroshana (supra)* the need to evaluate the provisions of the relevant Rule, before considering the effect of any non-compliance.

Rule 8(3) as stated earlier clearly specifies that,

> "The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself …"

The petitioner has filed his petition and affidavit on 31.03.2011 and had moved this Court to list this matter on one of the three (3) given dates. Admittedly there is no reference to the effect that the petitioner had tendered notices to the Registry along with the petition and instead it appears that the copies of the notices along with the documents were sent to the respondents directly by the petitioner. The said notice is as follows:

> "I tender herewith my appointment as Attorney-at-Law on behalf of the petitioner together with her petition, affidavit, documents marked X1 and the documents marked X2 which is the case record of the case number C.A. Writ 155/2011 will be filed in due course and respectfully move that Your Lordships Court be pleased to accept same and file of record (sic).

And I further respectfully move that Your Lordships Court be pleased to list this matter on 26th April, 2nd May or 3rd May.

Copies of this motion together with the petition, affidavit, marked documents were sent to the Respondent-Respondents by Registered post and the postal article receipts are annexed hereto.

Sgd.
Attorney-at-Law for the
Petitioner-Petitioner."

It is therefore evident that the petitioner had not tendered along with the application the required number of notices to the Registry in terms of Rule 8(3) of the Supreme Court Rules, 1990 to be served on the respondents. Instead, the petitioner had sent the relevant documents by registered post to the respondents.

There is another important aspect that is revealed through the aforementioned motion. It is obvious that the said motion is sent by the registered Attorney-at-Law for the petitioner, who had filed the special leave to appeal application. In that she had given 3 dates, convenient to the petitioner's Counsel for this matter to be taken for support. On the other hand, if the petitioner had complied with the Supreme Court Rules then she would have given these 3 dates to the Registry along with the motion as to when the matter is fixed for support. It is necessary at this point to take serious note of the fact that there is a significant difference between the notice tendered directly by a party to the others and the notice tendered by the Registrar of the Supreme Court to the relevant parties.

That is the difference, which is clearly stipulated through the provisions of the Supreme Court Rules in order to streamline and regulate the Court Procedure dealing with applications before the Supreme Court.

The importance of adhering to the several steps that has to be taken in tendering notices is emphasized by the provisions contained in Rule 40 of the Supreme Court Rules, 1990. In terms of Rule 40, where there is an application for extension of time for the purpose of Rule 8(3), the Registrar cannot entertain such an application, but he should submit it to a single Judge, nominated by the Chief Justice, in Chambers to decide on such grant of extension of time.

> "An application for a variation, or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single Judge, nominated by the Chief Justice, in Chambers:
>
> (a) tendering notices as required by rules 8(3) and 25(2);
>
> ....
>
> (d) furnishing the address of a respondent as required by rules 8(5) and 27(3);
>
> ...."

It is not disputed that at the time of the filing of the application, the petitioner had not issued notices on the respondents through the Registrar of the Supreme Court. It is also not disputed that the petitioner had not made any application in terms of Rule 40 for an extension of time. It is also common ground that only after the first date of

support the petitioner had served notice to the 4th respondent through the Registry. Therefore this matter had come up on two occasions for support without issuing notices to the other respondents and when it came up on 21.06.2011, the 5th to 27th respondents were absent and unrepresented and no notices had been issued on them.

It is therefore clearly evident that the petitioner had not complied with Rule 8(3) of the Supreme Court Rules, 1990.

The petitioner contended that even though the petitioner had not complied with Supreme Court Rules, since the respondents were notified, that the defect in not serving notices through the Registry had been rectified.

A careful perusal of Supreme Court Rules 8(3) and 40 indicates that the petitioner should tender notices to the Registry of the Supreme Court along with his application and in the event if there is a need for an extension of time to tender such notice that it should be done following the procedure laid down in terms of Rule 40 of the said Rules.

The decisions in *Union Apparels (Pvt.) Ltd. v Director-General of Customs and others (supra)*, and *Piyadasa and others v Land Reform Commission (supra)* were based on the preliminary objections raised in terms of Rule 30 of the Supreme Court Rules of 1990. In *Priyani Soysa v Rienzie Arsecularatne (supra)* the question arose clearly with Rules 2,6 and 8(6) of the Supreme Court Rules. In *Bank of Ceylon v The Ceylon Bank Employees' Union (on behalf of Karunathilaka (supra)*, the preliminary objection was based on the failure of the respondents to file a Caveat and had not considered the tendering of notices in terms of Rule 8(3).

Accordingly for the purpose of the preliminary objection based on this application, the petitioner cannot rely on the said decisions.

The provisions laid down in Rule 8 clearly deal with the need to issue notice on the respondents through the Registry and had set out clear guidelines to ensure that steps are taken at several stages to ensure that the respondents are so notified. The guidelines are given not only for the petitioner, but also for the Registrar of the Supreme Court and even for the respondents to see that the application is properly instituted, notices are correctly tendered and relevant parties are properly notified. It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules, 1990.

As clearly referred to in *L. A. Sudath Rohana v Mohamed Cassim Mohamed Zeena* (11),

> "Rules of the Supreme Court are made in terms of Article 136 of the Constitution to regulate the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure which guides the courts of civil jurisdiction, the Supreme Court Rules thus regulate the practice and procedure of the Supreme Court."

It is not disputed that even at the date the preliminary objection was raised, no notices were tendered to the Registry in terms of Rule 8(3) for service on the respondents.

Through a long line of cases decided by this Court, a clear principle has been enumerated that where there is non-compliance with a mandatory Rule, serious consid-

eration should be given for such non-compliance as such non-compliance would lead to a serious erosion of well established Court procedure followed by our Courts throughout several decades. (*K. Reaindran v K. Velusomasundaram (supra)*, *N.A. Premadasa v The People's Bank*[12], *Hameed v Majibdeen and others*[13], *K. M. Samrasinghe v R.M.D. Ratnayake and others*[14], *Soong Che Foo v Harosha K. De Silva and others*[15], *C.A. Haroon v S.K. Muzoor and others*[16], *Samantha Niroshana v Senerath Abeyruwan (supra), A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd. (supra)* and *Woodman Exports (Pvt.) Ltd. v Commissioner-General of Labour* [17].

The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatary Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections.

As correctly referred to by Dr. Amerasinghe,J., in *Fernando v Sybil Fernando and others* [18],

> "Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly."

If a party so decides to act recklessly it is needless to say that such a party would have to face the consequences which would follow in terms of the relevant provisions.

For the reasons aforementioned, I uphold the preliminary objection raised by learned Senior State Counsel for the 1st to 3rd and 28th respondents and the learned President's Counsel for the 4th respondent and dismiss the petitioner's application for special leave to appeal for non-compliance with Rule 8(3) of the Supreme Court Rules, 1990.

I make no order as to costs.

RATNAYAKE,PC.,J. - I agree.

DEP,PC.,J. - I agree.

Preliminary objection upheld.

Application dismissed.

GAMINI VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW. J
CHITRASIRI. J
CA 227/2008
HC GAMPAHA 24/2002
DECEMBER 12, 2011

Penal Code - Murder - Section 294 - Exception 4 - Section 296 - No defence of grave and sudden provocation taken up - Should the trial Judge consider such a plea?

Held:

(1) Though the accused-appellant in his defence did not take up the defence of grave and sudden provocation, the trial judge must consider such a plea in favour of the accused- appellant if it emanates from the evidence of the prosecution.

(2) Failure on the part of the petitioner or his Counsel to take up a certain line of defence, does not relieve a judge of the responsibility of putting to the jury such defence if it arises on the evidence.

APPEAL from the judgment of the High Court of Gampaha.

Cases referred to:-

1. *K vs. Bellanvithanage Withanage Edwin* - 41 NLR 345
2. *K vs. Albert Appuhamy* 41 NLR 505
3. *K vs. Withanalage Lanty* - 42 NLR 317

Indika Malawarachchi for accused-appellant

Haripriya Jayasundara SSC for AG

December 12th 2011

SISIRA DE ABREW J.

Heard both counsel in support of their respective cases. The accused appellant in this case was convicted of the murder of the man named Ranjith Premalal and was sentenced to death. Being aggrieved by the said conviction and the sentence the accused appellant has appealed to this court.

Facts of this case may be briefly summarized as follows:

On the day of the incident the deceased and his brother-in-law Jayarathne after consuming liquor came on to the road. The deceased whilst going on the road met the brother of the accused Siriwardana and thereafter the deceased started scolding said Siriwardana. After an exchange of words between the deceased and Siriwardana for about 10 minutes, Jayarathna who was with the deceased started separating both Siriwardana and the deceased. As a result of Jayarathna's action Siriwardana was pushed and he fell on the ground. The fight between Siriwardana and the deceased took place for about two minutes. This incident has taken place inside the land of the accused appellant. After the fight between Siriwardana and the deceased, Jayarathna was taking the deceased away from the place of fight. Just then the accused who was inside his house came and stabbed the deceased with a spear. He inflicted only one injury. When we consider all these matters we are of the opinion that the accused has acted under grave and sudden provocation. Although the accused appellant in his defence did not take the defence of grave and sudden provocation, the trial judge must consider such a plea in favour of the accused appellant if it emanantes from the evidence of the prosecution.

This view is supported by the judicial decisions. In *King Vs. Bellanavithanage Edwin*[1] wherein the Court of Criminal Appeal held thus:

> "In a charge of murder it is the duty of the judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis of such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused".

In *King Vs. Albert Appuhamy*[2] at 505 the Court of Criminal Appeal held thus:

> "Failure on the part of a prisoner or his counsel to take up a certain line of a defence does not relieve a judge of the responsibility of putting to the jury such defence if it arises on the evidence."

In *King Vs. Withanalage Lanty*[3] Court of Criminal Appeal observed the following facts:

> "There was evidence in this case upon which it was open to the jury to say that it came within exception 4 to section 294 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf. In the course of his charge the presiding judge referred to this evidence as part of the defence story but not as evidence upon which a lesser verdict possibly be based".
>
> Held that "It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of the lesser verdict".

Applying the principles laid down in the said judicial decisions, we hold that the learned trial judge should have convicted the accused appellant for the offence of culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of grave and sudden provocation. For these reasons we set aside the conviction of murder and the death sentence and substitute a conviction for culpable homicide not amounting to murder which is an offence under section 297 of the Penal Code under grave and sudden provocation.

In passing the sentence we are mindful of the fact that the incident took place inside the accused appellant's premises. Considering these matters and all the facts of the case, we sentence the accused appellant to a term of six years rigorous imprisonment and to pay a fine of Rs. 10,000/-. In default of the fine we sentence him to a term of one year simple imprisonment. Subject to the above variation of the conviction and the sentence appeal of the appellant is dismissed.

We direct the Prison Authorities to implement the sentence imposed by this court from the date of conviction (01.08.2008).

The learned High Court Judge is directed to issue a fresh committal indicating the conviction and the sentence imposed by this court.

CHITRASIRI, J - I agree.

Appeal dismissed.

Subject to Variation.

KUSUMADASA VS. STATE

COURT OF APPEAL
RANJITH SILVA. J
SISIRA DE ABREW. J
LECAMWASAM. J
CA 72/2005 (DB)
HC RATNAPURA 95/2001
FEBRUARY 2, 8, 2011.

Penal Code - murder - Section 296 - Conviction based on circumstantial evidence - Inference to be drawn? - Evidence Ordinance- Section 114 (g) – Ellenborough principle - only when a strong prima facie case has been made out?

The accused appellant was convicted of the murder of one J and was sentenced to death. The case for the prosecution depended on circumstantial evidence.

In appeal

Held:

(1) In considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased.

(2) To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. It cannot be used to give life to a weak case put forward by the prosecution.

(3) In a case of circumstantial evidence, if the proved facts are compatible with the innocence of the accused he cannot be convicted of the offence. Further if the proved facts are not consistent with the guilt of the accused he cannot be convicted for the offence.

In a case of circumstantial evidence, it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

(4) In the instant case, though there was some substance found inside the bottle, this was not sent to the Government Analyst. The substance found in the bottle was suppressed from Court. This attracts the presumption under Section 114 (g) of the Evidence Ordinance.

(5) In order to base a conviction on circumstantial evidence, the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent - with any reasonable hypothesis of his innocence.

Per Sisira de Abrew. J:

"The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

"Per Sisira de Abrew, J:

"I hold that the prosecution has not proved the charge against the appellant beyond reasonable doubt".

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to:-

1. *K vs. Appuhamy* - 46 NLR 128
2. *R vs. Lochrane and others* - 1814 Guinness Report page 478
3. *Podi singho vs. K* - 55 NLR 49
4. *K vs. Abeywickrama* - 44 NLR 254
5. *Emperor vs. Browning* - 1918 - 18 CrLJ 482
6. *Don Sunny vs. A.G.* 1998 2 Sri LR 1

Indika Mallawaarachchi for accused-appellant

Gihan Kulatunga SSC for Attorney General

October 03rd 2011
SISIRA DE ABREW J.

The accused appellant in this case was convicted of the murder of a woman named Katayagodage Vineetha Jayasinghe and was sentenced to death. This appeal is against the said conviction and the sentence.

Facts

The case for the prosecution depended on circumstantial evidence. According to the prosecution, the appellant who was having a love affair with the deceased woman, killed her. On 18.4.94 around 2.30 p.m. the appellant and the deceased left the house of the deceased to go on a trip to Adam's Peak. The appellant used to visit the deceased twice a week. The appellant also used to visit her sister who was living ½ a kilo metre away from the deceased's house. Around 4.30 p.m. on 18.4.94, the deceased who was on the way to Adam's Peak came to the house of Sethuhamy, an aunt of the deceased and put her things in a traveling bag which she took from Sethuhamy. She also took her chain and a pair of earrings from Sethuhamy. Sethuhamy says on this occasion the appellant went to his sister's house which was about 170 meters away from her house. There is no evidence to suggest that the accused took a separate bag. The deceased when going on the trip, had taken sweet meat, a can, two tooth brushes, clothes etc with her. Dharmasena a relation of the deceased had seen the appellant and the deceased boarding a bus bound to Imbulamura on 18.4.94. However the deceased did not return home. On 26th of April 1994 her decomposed body was found in the Government forest in Rukmalkandura in the Grama Sevaka division of Imbulamura. Vide pages 34 and 42 of the brief. Several parts

of her body were eaten by wild animals. To reach the place where the body was found one has to go on Imbulamura-Depamulla village Council road for ¾ of a mile, 200 yards on a foot path and thereafter about 10 yards on a hillock. The mother of the deceased on 21.4.94 went to the appellant's house in Rukmalkandura but did not find the appellant although she met the brother of the appellant. Vide pages 73 and 74 of the brief. She did not inform the brother that the deceased had not returned home. Prosecution had failed to lead any evidence with regard to the distance between the place where the dead body was found and the accused's house. On 21.4.94 Nihal Jayasinghe the brother of the deceased met the appellant in the appellant's sister's house but did not inform that the deceased was missing. The appellant who was arrested on 3.5.94 in his dock statement denied the allegation and said both of them with a crowd went to Adam's Peak in the month April. On their way back from Adam's Peak he got down at a place called Soragune to go to his mine where he worked. He further informed the deceased that he would come back to her house if he would not find work but would stay back if he would find work. He surrendered to the police when his mother informed him that the police were looking for him.

Items of circumstantial evidence relied upon by the prosecution

When one considers the submission of learned SSC it appears that he was relying on the following items of circumstantial evidence.

1. The love affair between the appellant and the deceased.
2. The fact that the appellant and the deceased left together on 18.4.94 and the fact that both of them left alone.

3. The body of the deceased was found in the accused's home town.
4. The recovery of a pair of shorts belonging to the appellant from the place where the dead body was found.
5. The appellant and the deceased were seen boarding a bus to Imbulamura on the 18th of April 1994.
6. The appellant was seen at the house of the sister of the appellant on 24th of April which was near the deceased's house (half a kilo meter from the deceased's house – 170 meters away from the deceased's aunt's house).
7. The appellant was seen on the 26th of April where the dead body was recovered.
8. The fact that the mother of the deceased went to the house of the appellant in search of the deceased.
9. The appellant did not help or assist in search of the deceased.
10. Failure of the appellant to visit the deceased's house after leaving for Adam's Peak.
11. On 18th of April prior to leaving for Adam's Peak the appellant avoided being seen by the others.
12. Non recovery of the watch, chain and earrings of the deceased. SSC tried to contend that it was possible for the appellant to steal them after killing.
13. The appellant was unemployed and did not have money.
14. His reluctance to get married to the deceased.

Analysis of circumstantial evidence.

Learned SSC, on the evidence of Dharmasena, tried to contend that the appellant and the deceased were seen

on 24th of April 1994. According to Dharmasena about five days prior to the news of death of the deceased, he met the appellant and the deceased at Balangoda bus stand and they boarded a bus bound to Imbulamura (page 133-134). The news of death was on 26th. Learned SSC therefore contended that this day should be 21st of April. But this contention is negated by the suggestion of the learned prosecuting State Counsel that this date was 18th of April. This suggestion was admitted by Dharmasena. This evidence therefore suggests that the appellant and the deceased were seen boarding a bus to Imbulamura on 18th of April 1994.

Prosecution tried to lead some evidence with regard to a message alleged to have been kept with a boutique owner on the 21st of April. Boutique owner was not called to give evidence. I will not consider this evidence as this is hearsay evidence. Learned SSC contended that the deceased was last seen with the appellant. The doctor who conducted the post mortem examination (PME) on 28.4.94 says that the death had taken place about one week prior to the PME. This shows that the death was on 21st of April 1994. Thus the fact that the deceased was last seen with the appellant on 18.4.94 does not strengthen the prosecution case.

Although the learned SSC contended that the dead body was found in the accused's home town, there was no evidence about the distance between the appellant's house and the place where the dead body was found. Mudiyanse a villager who saw the dead body does not talk about the appellant's house. The Grama Sevaka too does talk about the appellant's house. Therefore the fact that the dead body was found in the home town of the appellant (the third item relied upon by the SSC) cannot be considered against the appellant.

Finding a pair of shorts belonging to the appellant near the dead body

This was one of the strong items relied upon by the learned SSC. In considering this item one should not forget that both of them being lovers left for Adam's Peak together. Therefore it was possible for the appellant to have put his clothes in the bag of his girl friend. One should not forget here that that there were two tooth brushes near the dead body. Anura Kumara, the Grama Sevaka says that the bag had been ransacked. He noticed this when he went to the scene. Vide page 43 of the brief. IP Kodithuwakku says so many items such as clothes of the deceased, a pair of shorts of a male, two tooth brushes, a tube of tooth paste, a cup and a can etc were strewn near the dead body. This suggests that at the time of the death or soon after the death the assailant of the deceased had ransacked the bag. It is not possible to say that it was done by the wild animals since they would be more interested in decomposed flesh than the clothes. The appellant knew that his pair of shorts was in the bag. If the appellant is the assailant would he keep his pair of shorts near the dead body and go? This question has to be answered in the negative. If the appellant committed the murder of the woman he would have noticed his pair of shorts when the bag was ransacked. Then would he leave the scene after noticing his pair of shorts? I say no. I therefore hold that finding of a pair of shorts belonging to the appellant at the scene is compatible with the innocence of the appellant and not consistent with the guilt of the appellant. Further the above observation raises a very serious doubt in the truthfulness of the prosecution story. In a case of circumstantial evidence if the proved facts are compatible with the innocence of the accused he must be acquitted. Further if the

proved facts are not consistent with the guilt of the accused he must be acquitted. For these reasons I hold that item number four relied upon by the prosecution is not in favour of the prosecution but in favour of the appellant. The appellant must be acquitted on the above facts alone.

I shall now advert to the 6th item relied upon by the learned SSC. The appellant was seen at Kusumawathi's house (sister of the appellant) on 24th of April 1994. Kusumawathi's house was only half a kilometer away from the deceased's house. Gnanawathi, the mother of the deceased says that very often appellant visits Kusumawathi's house. Therefore it is seen that the appellant visiting Kusumawathi's house was a normal thing. Further if the appellant killed the deceased few days prior to 24th of April, would he come and spend time in the house of Kusumawathi which was ½ a kilometer away from deceased's house. Would he give an opprotunity for the members of the deceased's family to come and question him if he killed the deceased? I can't answer this question in the affirmative. It has to be noted here that on 24th of April Nihal Jayasinghe the brother of the deceased spoke to the appellant at Kusumawathi's house and he did not tell the appellant that the deceased was missing although he knew that his sister together with the appellant went on a trip to Adam's Peak. When I consider all these matters, I hold the view that 6th item relied upon by the learned SSC cannot be considered against the appellant. At this stage it is pertinent to consider 10th item relied upon by the learned SSC. That is to say failure of the appellant to visit the deceased's house after leaving for Adam's Peak. Learned SSC strongly contended that the appellant being the boy friend of the deceased should have made inquiries about the deceased. It has to be noted here that Nihal Jayasinghe did not inform the appellant that

the deceased was missing when he spoke to the appellant on 24th of April at Kusumawathi's house. (Vide page 55 and 61 of the brief). Then how can one argue that the fact that the deceased was missing was within the knowledge of the appellant. When the deceased's mother went to the appellant's house on 21st of April she did not meet the appellant. Then it appears even on 24th of April the fact that the deceased was missing was not within his knowledge. Under these circumstances one cannot say failure of the appellant to visit the house of the deceased was because he killed the deceased. Therefore 10th item relied upon by the learned SSC is not a strong item of evidence against the appellant.

I now advert to 7th item relied upon by the learned SSC which is as follows: "The appellant was seen on the 26th when the dead body was found". The evidence shows that the appellant went to see the dead body. Gnanawathi says that his son Nihal Jayasinghe went to see the dead body on 26th of April. She says that the appellant too went to see the dead body on this day. Nihal Jayasinghe says when he went to see the dead body in the jungle of Rukmalkadura, police officers were present. Then it is seen when the appellant went to see the dead body police officers were present at the scene. Therefore it appears that the appellant, like the other members of the deceased's family, had gone to see the dead body. When all these matters are considered 7th item relied upon by the learned SSC cannot be considered as an item of evidence against the appellant.

Learned SSC contended that the appellant did not help or assist in search of the deceased. This was the 9th item relied upon by him. It appears from the evidence of the prosecution that the appellant after 18th had come to the deceased's

village only on the 24th on which day Nihal Jayasinghe failed to say anything about the deceased. On 26th the appellant too went to see the dead body. Then it is only on 25th of April that he did not do anything to search the deceased. Even on 25th no one knew that the deceased had died. Thus the 9th item relied upon by the learned SSC is not a strong item of evidence against the appellant.

I now advert to 11th item relied upon by the learned SSC which is as follows: "On 18th of April prior to leaving for Adam's Peak the appellant avoided being seen by others. Learned SSC contended when the deceased went to Sethuhamy's house to collect a travelling bag the appellant did not go to this house. He therefore contended that the appellant avoided being seen by others. But Sethuhamy herself says that the appellant went to his sister's house (Kusumawathi's house) which was only 170 meters away from Sethuhamy. In my view it was quite natural for him to meet his sister before going to Adam's Peak. Then one cannot say that the appellant avoided being seen by others. When making submission on this point learned SSC lost sight of the fact that the appellant was spending time at the deceased's house from morning of 18th of April until they left for Adam's Peak (page 68 and 80 of the brief). For these reasons I hold that the contention of the learned SSC to be untenable and is rejected as devoid of merit.

I shall now advert to 12th item relied upon by the learned SSC which as follows: "Non recovery of the watch, chain and earrings." His contention was that it was possible for the appellant to steal these items after killing her. In my view non recovery of these items should be considered in favour of the appellant and not against him. I reject the said contention as devoid of merit.

I shall now advert to the 13th item relied upon by the learned SSC which is as follows: "The appellant was unemployed and did not have money." The deceased was working in a factory. Even for the trip it appears that it was the deceased who had spent money. Thus it appears that the appellant was benefited by the deceased. Then why should he kill her. Therefore 13th item cannot be considered against the appellant.

I now consider 14th item relied upon by the learned SSC which as follows: "The appellant's reluctance to marry the deceased." Somewhere prior to the incident (no evidence has been led about the period) the appellant had taken two rings and the wrist watch of the deceased for his mother to attend a wedding ceremony. When the appellant failed to return them an inquiry, on a complaint made by her, was held by the police. At the inquiry he told that he could not marry her until he would find a job. There is no evidence about the date on which he said this. But even after this incident the appellant continued to visit the deceased's home and the deceased decided to go on a trip to Adam's Peak. According to Sethuhamy they were behaving like a married couple (page 87 of the brief). Therefore it appears that the deceased had accepted him even after he expressed his reluctance to marry her. Therefore 14th item is not an item that can be considered against the appellant. I have earlier discussed 3rd, 4th, 6th, 7th, 9th to 14th items and expressed the opinion that they cannot be considered against the appellant. Prosecution is therefore left only with 1st, 2nd, 5th and 8th items. It has to be noted here even though the appellant and the deceased were seen boarding together a bus bound to Imbulamura on 18th of April, death was,

according to the doctor, on the 21st. Therefore the value of this item of evidence is very much less. In this connection I am guided by the judgment of the Court of Criminal Appeal in *The King Vs Appuhamy*(1) wherein His Lordship Justice Keunemen held: "In considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased." When I consider the items of circumstantial evidence led at trial, I am of the opinion that the prosecution had not put forward a strong case against the appellant. In my view the case put forward by the prosecution against the appellant is very weak. It is necessary to consider whether prosecution case attracts the dictum of Lord Ellenborough. In *Rex Vs Cochrane and others*(2) Lord Ellenborough remarked:

"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."

To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case against the accused. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. Dictum of Lord

Ellenborough cannot be used to give life to a weak case put forward by the prosecution. I therefore hold that in the instant case dictum of Lord Ellenborough cannot be applied.

Finding imitation bangles of the deceased in a bush near the dead body.

P.S Wijesinghe found an imitation bangle of the deceased in a bush near the dead body. This was identified by the mother of the deceased as that of the deceased (page 181 of the brief). If this bangle got thrown to the bush when the body was being eaten by wild animals, then one would expect to find at least small pieces of decomposed flesh in this bangle. Therefore it is difficult to conclude that the bangle got thrown to the bush when the body was being eaten by wild animals. The appellant had associated with the deceased for about five years as her lover. Therefore the appellant should know that this bangle was an imitation one. If the deceased died as a result of violence then one can come to the conclusion that her assailant had thrown imitation bangle and taken her wrist watch, chain and earrings. If the appellant killed the deceased and took away the said items then it was not necessary for him to throw the bangle because he knew that it was an imitation one. Police failed to recover the said items. These facts raise a reasonable doubt in the truth of the prosecution case. The above facts are compatible with the innocence of the appellant and are not consistent with his guilt. If these facts were considered the appellant could not have been convicted of the offence of murder. The learned trial judge has not considered these matters.

In a case of circumstantial evidence, if the proved facts are compatible with the innocence of the accused he cannot