RESEARCH ON SRI LANKAN COURT CASES ON DIFFERENT TOPICS FOR SPECIAL EVENT:

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TABLE OF CONTENTS

CASES AND ARTICLES LIST

1. AMBAGALA MUDIYANSELAGE SAMANTHA SAMPATH *VS.* ATTORNEY GENERAL
2. THILAKARATNE *VS.* ATTORNEY-GENERAL
3. KALUPERUMA KELUM DUSHMANTHA DE SILVA AND ORS. *VS.* THE HON. ATTORNEY-GENERAL
4. HIRIMUTHUGODA SANJEEWA SHANTHA *VS.* ATTORNEY GENERAL
5. DINGIRI BANDA *VS.* THE ATTORNEY-GENERAL
6. GUNAWARDENA *VS.* OFFICER-IN-CHARGE, KAHAWATTA POLICE
7. MANAWADU *VS.* THE ATTORNEY- GENERAL
8. UKKUWA *VS.* THE ATTORNEY GENERAL
9. HIRIMUTHUGODA SANJEEWA SHANTHA *VS.* ATTORNEY GENERAL
10. MARTIN *VS.* THE KING
11. REX *VS.* MARTHELIS PERERA
12. WEERAWARDANE *VS.* STATE
13. RASNEGGE JAYARATHNA *VS.* THE HON'BLE ATTORNEY GENERAL
14. SHAMANTHA JUDE ANTHONY JAYAMAHA *VS.* ATTORNEY GENERAL
15. THE QUEEN *VS.* MAPITIGAMA BUDDHARAKKITA THERA AND 2 OTHERS
16. THAVANAYAKI *VS.* MAHALINGAM
17. RASNEGGE JAYARATHNA *VS.* THE HON'BLE ATTORNEY GENERAL
18. PAULINE RUTH DE CROOS *VS.* THE QUEEN
19. GUNAWARDENA *VS.* THE REPUBLIC OF SRI LANKA
20. NUWAN DE SILVA *VS.* THE ATTORNEY GENERAL
21. P.P. PETERSINGHAM *VS.* THE QUEEN
22. SOMASIRI *VS.* ATTORNEY-GENERAL
23. NUWAN DE SILVA *VS.* THE ATTORNEY GENERAL
24. A. GUNATUNGA-SUSPECT *VS.* THE ATTORNEY-GENERAL
25. OBIYAS APPUHAMY *VS.* THE QUEEN
26. M. DON HEMANTHA KUMARA PERERA *VS.* ATTORNEY GENERAL
27. KING *VS.* BILINDA ET AL.
28. KAHANDAGAMAGE DHARMASIRI *VS.* THE REPUBLIC OF SRI LANKA
29. THE ATTORNEY GENERAL *VS.* SANDANAM PITCHI MARY THERESA

30. ADLIET RATNAYAKE *VS*. RATNAYAKE ET AL.
31. JANASHAKTHI INSURANCE CO. LTD. *VS*. UMBICHY LTD.
32. Appreciation of digital evidence in Sri Lankan Law- By Talwant Singh, Additional District & Session Judge Delhi District Court, India- Published on Feb 01, 2014.
33. Case Study

    The 2013 Salzburg Workshop on Cyber Investigations: Digital Evidence and Investigatory Protocols- By Tommy Umberg and Cherrie Warden, Page 6.
34. UNITED STATES *VS*. GANIAS
35. Symposium on the Challenges of Electronic Evidence– The Philip D. Reed Lecture Series.

SESSION 1

DISPARITY AND DISCRIMINATION IN SENTENCING PRACTICES

AMBAGALA MUDIYANSELAGE SAMANTHA SAMPATH

VS.

ATTORNEY GENERAL

Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 17/2013

Decided on- 12.03.2015

Citation- LEX/SLSC/0003/2015

Hon'ble Judges-

Eva Wanasundera, P.C.J., Sarath de Abrew, J. and P. Jayawardena, P.C.J.

Facts-

The Appellant, a laborer in occupation had married the victim's sister. They had no children in that marriage. The victim's sister had left the country without the consent of the husband about an year after the marriage. The Appellant was then invited by the victim's parents i.e. his mother in law and father in law, to come and live with them in their house. The victim was a 15 year old girl attending school. Only four of them lived in that house. The girl (victim) was found to be pregnant when her mother took her to the hospital when she was unwell. Then the pregnancy was 5 months old. The parents stopped her from going to the school; told the Appellant not to come home again; took her to another village and kept her there, with an older married couple who had no children, having in mind to hand over the baby to them when it is born. The parents did not go to the Police. The victim girl did not make any complaint at that time to the Police.

Most unexpectedly, some outsider had informed the Police of the area that the Appellant and the victim were mysteriously missing from that house. It is only then that the Police had launched an investigation and found that the girl was away in another house whereas the Appellant was living with his parents in his village close by. The statement made to the Police revealed that the girl was only 15 years old, and then the Appellant was taken into

custody and was later enlarged on bail. The victim gave birth to a baby girl on 19.07.2004 in the Kuliyapitiya Base Hospital.

Later, when the appellant was charged of 'statutory rape', he pleaded guilty.

Then, he was sentenced to 2 years rigorous imprisonment with 10 years of suspension with a fine of Rs. 5000/- along with Rs. 200,000/- as compensation to the victim.

The respondent later went on appeal to Court of Appeals against the punishment, where the punishment was substituted from 2 years rigorous imprisonment to 10 years rigorous imprisonment in accordance with the 'mandatory minimum sentence' imposed under Penal Code Section 364(2) (e)

Against this order, the appellant filed a Special Leave Petition to the Hon'ble Supreme Court of Republic of Sri Lanka.

Issue-

Whether a mandatory minimum sentence imposed by statute i.e. Section 364(2) (e) of the Penal Code stifles the hands of the Court imposing the punishment thus taking away the judicial discretion in sentencing or whether Court is bound to impose the mandatory minimum sentence?

Decision-

< Eva Wanasundera, P.C.J.>

"Every Judge who sits in a Court and hears the case in the Court of first instance gets the opportunity not only to hear the case but also to see the case with the physical eye, to smell the case, to feel the case and to fathom the case with the present mind. The Judge could hear the words of evidence and observe the body language of those who give evidence."

Here, the Supreme Court held that:

The Bills before Parliament in the respective determinations which tried to impose 'mandatory minimum sentences' **are inconsistent** with Articles 4(c), 11 and 12(1) of the Constitution.

Any mandatory minimum sentence imposed by the provisions of any ordinary law, in my view is in conflict with Article 4(c), 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the Judge hearing the case.

Reason given-

(a) The imposition of mandatory minimum sentences would result in legislative determination of punishment and a corresponding erosion of a judicial discretion and a general determination in advance of the appropriate punishment without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender and his age, and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence and the likelihood of reform and rehabilitation.

(b) The imposition of mandatory minimum sentences would result in imposing identical sentences in case where court thinks it appropriate and where Court thinks it most inappropriate which amounts to treating un-equals as if they were equals, in violation of Article 12(1).

(c) The effect of imposition of mandatory minimum sentences would amount to an erosion of an essential judicial discretion in regard to sentencing. There would be gross disparities in sentences, which will not only violate the principles of equal treatment but may even amount to cruel punishment.

Further, it held that, when a minimum mandatory sentence is written in the law, the Court loses its judicial discretion. That part of the law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer. The Judge who has seen, felt and smelt the case should be given the discretion in sentencing, considering all the circumstances of the case, the consequences of a sentence, whether it serves as cruelty to the wrong doer, the victim or any other person affected by that sentence etc. Sentencing is the most important part of a criminal case and I find that provision in any law with a minimum mandatory sentence goes against the judicial discretion to be exercised by the Judge.

Hence, in this case, judicial discretion of the Court was upheld and the Supreme Court affirmed the judgment of the High Court dated 28.10.2008.

THILAKARATNE

VS.

ATTORNEY-GENERAL

Court of Appeal
C.A. No. 106/87
Decided on- 27.04.1989
Citation- (1989)(2)SLR(191)

Hon'ble Judges-
Ramanathan, J., W.N.D. Perera, J. and Wijeyaratne, J.

Facts-

There were three accused in this case, who were charged on two counts, that is:

(1) With having on 21.1.1983 at Halmillakulama committed robbery of cash Rs. 18,552/40 and a bicycle valued at Rs. 600/-, property in the possession of Ukkubanda Semasinghe and having caused hurt to the said Semasinghe in committing the said robbery, an offence punishable under sections 380 and 382 read with section 32 of the Penal Code.
(2) With having at the same time and place aforesaid and in the course of the same transaction committed robbery of a bicycle valued at Rs. 700/-, property in the possession of Punchi Bandage Ratnayake, an offence punishable under section 380 read with section 32 of the Penal Code.

All the accused were given bail on surety.

When the case was called up for the trial, the accused no. 1 was absent, but the other accused were present. The 2nd and 3rd accused took the plea of not guilty and with that, their trial

started, but as soon as 1st witness started giving the evidence, they both took the plea of guilty and were punished by the court with 3 years' of rigorous imprisonment and fine of Rs. 100/- (each).

Further, the date for trial of accused 1 was re-fixed for some other date. On that day, when the surety of the accused no. 1 was called to produce accused 1, he told the court that the accused came with him to the court, but later he could not be spotted by him. This led the court to issue a warrant against him, as he absconded his trial, and the court also ordered to begin the trial in accused's absence. After that, the accused 1 was sentenced with 10 years Rigorous Imprisonment on 1st count and 7 years Rigorous Imprisonment on 2nd count.

Later, when the accused 1 was found and arrested, he took the plea of bad health and applied for bail, which was refused by the court.

Issue-

Whether the order for trial in absence of the accused 1 was made on sufficient ground?

Whether the trial of the accused 1 in his absence without any defense vitiated the conviction?

Whether the difference in the sentence of the accused 1 from accused 2 & 3 bad in law?

Decision-

<Wijeyaratne, J.>

On considering the first issue, the court held that the trial judge had correctly recorded the evidence on sufficient ground, and also that, the order made by the Court regarding absconding by accused is correct.

Further, while considering the second issue, the court held that assigning a counsel to such an absent accused without his consent would deprive him of the valuable right of having the proceedings re-opened under section 241(3) of Criminal Procedure Code and also that, the trial was not vitiated.

Similarly, on dealing with third issue, the court held that, there is a disparity in the sentences passed on the 1st accused and those passed on the 2nd and 3rd accused. Generally speaking, uniformity in sentencing is desirable, but not where the facts and circumstances against each accused are different. The evidence in this case revealed that the 1st accused was armed with a pistol, fired a shot with it, and then proceeded to cause extensive injuries with a knife on Semasinghe (victim) during the course of this robbery. Further, the 1st accused has previous convictions. Therefore, I see no reason to interfere with the sentences passed on the 1st accused-appellant.

Hence, in this case also, judicial discretion of the Court was upheld by the Court of Appeal and it dismissed the appeal and the conviction and sentences were affirmed.

KALUPERUMA KELUM DUSHMANTHA DE SILVA AND ORS.

VS.

THE HON. ATTORNEY-GENERAL

Court of Appeal

C.A. (PHC) Application No. 04/2014

Decided on- 26.05.2014

Citation- LEX/SLCA/0251/2014

Hon'ble Judges-

A.W.A. Salam, J. and W.M.M. Malini Gunaratne, J.

Facts-

The Petitioner to this case, acting on behalf of his father (Accused-Appellant) moves this Court to revise the Order made by the High Court Judge, Kalutara, refusing to grant bail pending Appeal to this Court against the sentence in that Court.

The Accused-Appellant had been indicted on three (03) counts before the High Court of Kalutara, having committed Grave Sexual Abuse on a male child of 18 years of age, on the 24th of July, 26th of July and 27th of July 2004, an offence punishable under Sec. 365(B)(2)B of the Penal Code as amended by Act No. 22/1995 and 28/1998.

At the trial, the Accused-Appellant tendered a plea of guilty in respect of all three (03) counts and the learned High Court Judge convicted him and sentenced seven (07) years Rigorous Imprisonment on each count (to run concurrently) together with a fine of Rs. 2,500/- and an order of compensation in a sun of Rs. 200,000/- on each count payable to the victim with default terms in the event of non-payment. Against the said sentence the Accused-Appellant had preferred an Appeal.

Issues-

Whether the ground of no previous conviction is considered by the court when an application for bail is pending?

Whether there is any exceptional ground on which bail could be granted to the accused?

Decision-

< W.M.M. Malini Gunaratne, J.>

The Court held that, no previous conviction of the accused, is not a matter that could be taken up and decided by the Court in granting of bail. It is an insufficient ground for the granting of bail.

Further, the court held that, while considering the decisions referred in the case and the legal provisions thereon, the general principle is that an exceptional circumstance must be established by an Appellant if he wants the Court to exercise the discretion vested in it to grant him bail. And in Court's view there no sufficient case of exceptional circumstances that has been made out by the appellant.

The Court also added that, in Attorney General vs. Ediriweera, S.C. Appeal No. 100/2005, Shirani Thilakawardana J. held, "In an application for bail after conviction the Appellate Court should not preempt the hearing of the substantive appeal and pronounced upon the merits of the appeal. The merits of the conviction are therefore a matter solely to be determined by the Appellate Court hearing the Appeal". Therefore, the judicial disparity in sentencing cannot be regarded as exceptional circumstances to warrant the granting of bail.

There by, giving supremacy to judicial discretion that the courts have during the sentencing of an accused.

HIRIMUTHUGODA SANJEEWA SHANTHA

VS.

ATTORNEY GENERAL

Court of Appeal

C.A. 150/ 2010

Decided on- 16.07.2014

Citation-LEX/SLCA/0539/2014

Hon'ble Judges-

Anil Gooneratne, J. and Malinie Gunaratne, J.

Facts-

This is an appeal preferred by the Hon. Attorney General to set aside the non-custodial sentence imposed by the learned High Court Judge of Balapitiya in a case of grave sexual abuse by the trial Judges' judgment of 20.8.2010. The Accused-Respondent was indicted for a grave sexual offence in terms of Section 365(B)(2)(B) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998, on a victim called Kudaudage Tharindu Danushka on 24.4.2002.

It is pleaded in the Petition of Appeal that the trial commenced on 3.9.2003 in the High Court and continued till 19.12.2010. Evidence of prosecution witness Nos. 1, 2, 3 & 4 had been led during the said period. However on 30.7.2010 when the case was fixed for further trial the Accused-Respondent pleaded guilty to the charge. On 20.8.2010 the learned High Court Judge imposed a sentence of 2 years rigorous imprisonment and suspended it for 10 years and

fined Rs. 2000/- which carries a default sentence of 6 months simple imprisonment. Court also ordered that compensation in a sum of Rs. 60,000/- should be paid. The sentence imposed by the learned High Court Judge is illegal as its contrary to the mandatory sentence prescribed by the penal code, which necessarily has to be a custodial sentence.

Issue-

Whether the sentence given to the accused shall be given as per judicial discretion or minimum mandatory sentence that is prescribed by law?

Decision-

<Anil Gooneratne, J.>

The provisions relating to offences affecting the human body of offences affecting life is contained in Chapter XVI of the Penal Code. The Penal Code itself was enacted according to the material available to this court on 1st January 1885 and originally as described in the long title "an ordinance to provide a General Penal Code for Ceylon."

In the years 1995, 1998 and 2006 amendments were made to the Penal Code, which expanded the scope of sexual offences and the punishments applicable to same. Section 365 and Section 365A of the Penal Code which deals with "of unnatural offences" made it wide enough with amendments to include "of unnatural offences and grave sexual abuse". The Code made the offences punishable and a sentenced to be imposed between 10 to 20 years (Section 365, 365A, 365B). By these amendments a minimum sentence had been introduced which would be mandatory. Prior to the above amendments to the Penal Code there were no minimum mandatory provisions.

The Court held after perusing S.C. No. 03/2008 H.C. Anuradhapura 334/2004 and S.C. Appeal 179/2012 that-

What is paramount is the nature of the offence/age and the judicial discretions that need to be exercised by a court of law, in the circumstances and the context of the case before court and I think the decision in S.C. 03/2008 cannot bind any other court where the offence is of a very serious nature as in that judgment (S.C. 03/2008) court emphasis the fact of the nature of the

offence and judges' discretion. It could be used in an appropriate case to impose a sentence below the minimum mandatory sentence, but not in each and every case of grave sexual offence.

Also, it would be incumbent upon the Judge to set out, with clarity, all the reasons which are relevant and salient for not imposing the mandatory statutory minimum period of 7 years or in the case of a person under 18 years, a mandatory period of 10 years, and the Court would have the power to do so as only where the accused is under 16 years of age, as the Court in its capacity of the upper guardian of each and every child has the inherent power to consider such matters and reduce the statutorily mandated minimum sentence. However, the facts in this case can be clearly distinguished from the facts in S.C. Appeal No. 179/2012, as in the present case, the Accused-Appellant was 28 years of age at the time the offence was committed.

It is the Courts belief that the legislation, as found in the Penal Code, reflects the law as it should be, as it is a result of the will of the Parliament and the will of the people.

The Court accepts that with regard to sentencing, the view of all parties involved in the case must be considered in a balanced manner, in particular where violations are carried out with impunity, even after the Legislature has placed minimum mandatory sentences.

Therefore, on the basis of above reasoning, the Court imposed a sentence of 10 years rigorous imprisonment, and a fine of Rs. 10,000/- which carries a default sentence of 01 year rigorous imprisonment.

Hence, the Court of Appeal limited the judicial discretion of the judges against the minimum mandatory sentence.

SESSION 2

SENTENCING IN ECONOMIC OFFENCES (CRIME AGAINST STATE)

DINGIRI BANDA

VS.

THE ATTORNEY-GENERAL

Court of Appeal

C.A. Appeal 289/83

Decided on- 08.05.1986

Citation- (1986)(2)SLR(356)

Hon'ble Judges-

Siva Selliah, J. and Goonewardena, J.

Facts-

On 15.09.1982 in the Magistrate's Court of Mawanella. In terms of section 136of Chapter XIV of the Code of Criminal Procedure Act No. 15, I, Sub-Inspector Wickremasinghe, Officer-in-Charge of the Crimes Branch of the Mawanella Police, do hereby report this day to Court that Gondiwela Ralalage Dingiri Banda of Hingula, Mawanella did on or about the 26th day of August 1982 at Mawanella within the jurisdiction of this Court cause damage to the value of Rs. 7,056 by striking the front windscreen of lorry No. 28 Sri 257 property in the possession of Wijesinghe Etampolage Gunatilleke of Girandurakotte, Mahiyangana of the Mahaweli Authority and thereby committed an offence punishable under section 410 of the

Sri Lanka Penal Code read with section 2 of the Offences Against Public Property Act No. 12 of 1982.

The events which led to this prosecution were very briefly as follows: This lorry belonging to the Mahaweli Authority was proceeding along the main road at Mawanella when the accused who was after liquor compelled it to be brought to a halt, wrenched off its windscreen wiper and with it be labored the windscreen causing age to it estimated at Rs. 7,056.

The learned Magistrate at the conclusion of the trial found the accused guilty of the charge and whilst sentencing him to undergo a term of one years rigorous imprisonment also imposed upon him a fine Rs. 21,168 being three times the amount of the loss or damage caused under the provisions of section 2 of the Offences Against Public Property Act No. 12 of 1982 and it is against this conviction and sentence that this appeal has been preferred.

Issue-

Whether the defense of intoxication leads to exoneration of chargers to any extent regarding his responsibility?

Whether the accused was properly charged through a commonly known charge sheet or not, which would lead to failure of justice?

Whether the Magistrate had the jurisdiction in law to impose the punishment and fine which he did?

Decision-

< Goonewardena, J.>

The court held that, the accused's evidence was not that his state of intoxication was involuntary. Indeed his evidence had been that he consumed this liquor of his own volition. the imputation of knowledge authorised by section 79 should be confined to those cases in which knowledge and intention are specifically stated as alternative mental elements of an offence. It will be seen having regard to the definition of the offence of mischief that even in such narrower view that accused cannot escape liability assuming again that he was

intoxicated. This assumption as to his state of intoxication itself is I think without proper foundation although adopted for the purposes set out above. The accused's own evidence was that he was in possession of his senses. Thus if he did not possess the requisite intention he had at least the requisite knowledge so as to make him liable for the act he committed. Accordingly the defence based upon intoxication I think must fail.

While dealing with second issue, court held that, the object of the charge is to give the accused the information he is entitled to have is clarified by section 165(6) of the Code of Criminal Procedure Act No. 15 of 1979 which reads "the charge shall..... be read to the accused in a language which he understands". Further, in the case before us it cannot I think be said that there was such a failure of justice. The accused faced his trial and cross examined the witnesses on the basis of the charge which he then must be deemed to have understood, and even tendered his own evidence on that basis. Thus, the court took the view that the accused was not misled or prejudiced in his defence. As per the Court, this argument too does not succeed.

The Offences Against Property Act No. 12 of 1982 nowhere enlarges the punitive jurisdiction of the Magistrate's Court conferred by the said section 14. In the absence of clear words to the contrary I am of the view that the Magistrate's power was limited by this section. Instances are not wanting where when the legislature intended to enlarge such jurisdiction it did so by the use of words to that effect. When the Magistrate invoked the provisions of section 2 of the Public Property Act No. 12 of 82 in my view he came up against the barrier limiting his jurisdiction to the imposition of a fine not exceeding Rs. 1500, and could not impose anything beyond that.

The Court therefore affirm the conviction but vary the amount of the fine imposed by him to one of Rs. 1500 in default of payment of which the accused will undergo a further term of 3 months rigorous imprisonment which will be in addition to the one years rigorous imprisonment ordered by the Magistrate.

Hence, the Court during sentencing cannot go beyond the prescribed power it has regarding the imposition of fine on accused.

GUNAWARDENA

VS.

OFFICER-IN-CHARGE, KAHAWATTA POLICE

Court of Appeal

C.A. 307/83

Decided on- 28.08.1986

Citation- (1987)(1)SLR(125)

Hon'ble Judges-

Abeywardena, J. and P.R.P. Perera, J.

Facts-

The Kahawatta Police filed a report in the Magistrate's Court of Pelmadulla, on 10.9.1983, seeking an order under section 81 of the Code of Criminal Procedure Act, directing certain persons to execute a bond to keep the peace. The learned Magistrate issued notice on the parties on this date returnable on 3.10.1983. On 3.10.1983 the Magistrate re-issued notice returnable on 24.10.1983. On 24.10.1983, the parties were present, and the learned magistrate ordered the parties to show cause, if any on 14.1.1984, against the making of such order.

The journal entry dated 24.10.1983, bears out that the 2nd respondent M. E. D. Perera who was present in court when this case was called, addressed the court in a threatening manner and asked that he be given a date. The magistrate observes that his conduct was in contempt of the court, as he made certain utterances in a loud tone in an agitated manner. The magistrate has fined the suspect a sum of Rs. 200 for contempt of court, purporting to act

under section 388 of the Code of Criminal Procedure Act. The suspect has been directed to show cause against the application for an order under section 81 on 16.1.1984. He has also been ordered to pay the fine imposed under section 388 on the same date. This appeal is against the order of the magistrate made under section 388 of the Code of Criminal Procedure Act.

Issue-

Whether the learned Magistrate had adopted the correct procedure before sentencing him under section 388 of the Criminal Procedure Code?

Whether the conduct of the appellant in fact constituted contempt of court?

Decision-

<Perera, J.>

The Court while interpreting Section 381 of the old Criminal Procedure Code, (section 388 of the present Code), observed in Mahotta v. Pula (1878) 2 SCC 8 observed thus, "It may be useful here to remark that the Privy Council not long ago In Re Pollard (1868) 16 ER 47; 5 Moore N.S. III. affirmed the elementary and well established principle that 'no person would be punished for contempt of court which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him".

This case has been quoted with approval in Daniel Appuhamy v. the Queen (1962) 64 NLR 481, 484 (P.C.). It is clear from the decision in Daniel Appuhamy v. the Queen (supra) that a formal charge is not necessary but the suspect must specifically be told of the matter on which he is to be punished.

It seems to be settled law that a suspect charged with contempt must be given an opportunity to show cause. I have perused the proceedings in this case but find that the learned Magistrate in this case has failed to inform the appellant of the specific offence charged against him and has deprived the appellant of an opportunity of answering it.

In the circumstances I am of the view that it is desirable to remit this case for a fresh trial, in accordance with the proper procedure. I therefore set aside the conviction and sentence imposed in this case and acquits the accused-appellant and remits this case to the Magistrate's Court of Pelmadulla for a re-trial in accordance with the proper procedure.

Hence, when a person is charged with an economic offence, he shall be given a reasonable opportunity to be heard.

MANAWADU

VS.

THE ATTORNEY- GENERAL

Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. No. 77/85

Decided on- 26.03.1987

Citation- (1987)(2)SLR(30)

Hon'ble Judges-

Sharvananda, C.J., Atulkorale, J. and Seneviratne, J.

Facts-

One Ekmon Wijesuriya was charged on 17.5-1983 in the Magistrates Court, Nuwara Eliya with having on 15.5.83 at Gorden in Pussellawa transported out of this area a load of rubber timber to the value of Rs. 600 in lorry No. 26 Sri 2518, without a permit from an authorized officer, in contravention of Regulations made under section 24(1) (b) of the Forest Ordinance (Cap. 451) and with thus having committed an offence punishable under section 25(1) read with section 40 of the Forest Ordinance. The accused pleaded guilty to the said charge and was sentenced to term of three months rigorous imprisonment suspended for five years and to a fine of Rs. 500. The Magistrate also ordered the confiscation of the lorry No. 26 Sri 2518, in which the timber was alleged to have been transported.

The appellant-petitioner (hereinafter referred to as the petitioner) is the owner of the said lorry bearing No. 26 Sri 2518. He was not a party to the proceedings in which the order of the

confiscation of his lorry was made, nor was he given an opportunity by the Magistrate of showing cause against the order of confiscation. He states that the said lorry is worth approximately Rs. 350,000.

The petitioner moved the Court of Appeal to revise the order of confiscation made by the Magistrate, on the ground that he was not given an opportunity of showing cause against the confiscation of his lorry, that there was a violation of the principle of 'audi alteram partem' and consequential denial of justice to him. The Court of Appeal held that the order of confiscation by the Magistrate was valid in law in that section 40 of the Forest Ordinance as, amended by section 7 of the Act No. 15 of 1982, provided that any vehicle used for the commission of a Forest Offence (whether such vehicle was, owned by the person charged or not) shall by reason of his conviction be forfeited to the State and that the legislature had, expressly withdrawn any right of the owner to show cause against forfeiture of the lorry. Accordingly, the petitioner's application for Revision was dismissed.

The petitioner has preferred this appeal against the judgment of the Court of Appeal.

Issue-

Whether the amended section (section 40 of the Forest Ordinance as amended by Section 7 of Act No. 13 of 1982) dispense with the maxim of audi alteram partem when it mandates the forfeiture of the vehicle used in committing the forest offence in the case where the said vehicle is not owned by the accused who is convicted of the offence?

Decision-

<By Sharvananda, C.J.>

The Court while considering, Inspector Fernando v. Marther (1932) 1 CLW 249 Akbar, J. observed that, in construing section 51 of the Excise Ordinance, which corresponded to section 40 of the Forest Ordinance Cap. 451, quoted with approval the following statement of Schneider J., in Sinnetamby v. Ramalingam (1924) 26 NLR 371: Where an offence has been committed "under the Excise Ordinance no order of confiscation should be made under

section 51 of the Ordinance as regards the conveyance used to commit the offence e.g. a boat or motor car unless two things occur.

(1) That the owner should be given an opportunity of being heard against it; and

(2) Where the owner himself is not convicted of the offence, no order should be made against the owner, unless he is implicated in the offence which renders the thing liable to confiscation.

In the case on Rasiah v. Thambiraj (1951) 53 NLR 574 Nagalingam, J. stated: The main question is whether the learned Magistrate was right in ordering the confiscation of the cart without an inquiry having been held by him before making the order. The order in this case would appear to have been made in terms of section 40 of the Forest Ordinance. That section, it is true does not prescribe for an inquiry or for any special proceedings to be taken by the Magistrate before ordering the confiscation of the property. Learned State Counsel contended that an order of confiscation can automatically follow an order of conviction. This contention can be upheld if one limits the rule to property of the person who has been convicted of the offence..... In these cases where the accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without the previous inquiry would be tantamount to depriving the person of his property without an opportunity being given to him to show cause against the order being made.

Further, after observing various judgments, the Court held that, “Having regard to the above rules of construction, I am unable to hold that the amended subsection 40 excludes by necessary implication the rule of 'audi alteram partem'. On this construction the petitioner, as owner of lorry bearing No. 26 Sri 2518 is entitled to be heard on the question of 44orfeiture and if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

I set aside the judgment of the Court of Appeal. I set aside also the Order of the Magistrate declaring lorry No. 26 Sri 2518 forfeited and direct him to hear the appellant-petitioner who is the owner of the said lorry on the question of showing cause why the said lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause so shown, he shall restore the said lorry to the appellant-petitioner. The Magistrate may consider the question of releasing the lorry to the petitioner, pending inquiry, on the petitioner entering into a bond with sufficient security to abide by the order that may ultimately be binding on him.

Hence, the court while sentencing an accused or while charging any property, in relation to economic offence cannot do away with the principles of natural justice.

UKKUWA

VS.

THE ATTORNEY GENERAL

Court of Appeal

C.A. No. 90/99

Decided on- 10.10.2002

Citation- (2002)(3)SLR(279)

Hon'ble Judges-

S. Tilakawardane, J. and Wijeyaratne, J.

Facts-

The accused-appellant in this case was indicted on the charge of possession of 28.4 grams of heroine, an offence punishable under section 54 (A) (D) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act, No. 13 of 1984. After trial he was convicted by the High Court of Colombo and sentenced to a term of life imprisonment. The accused - appellant has preferred this appeal on three separate grounds.

Issues-

Whether the learned trial Judge has erred in law in admitting an inadmissible evidence in so much as his finding of proof beyond reasonable doubt and finding of guilt was based on the document P14, which is the Government Analyst's Report dated 29.11.1996 and thereby

admitted evidence that was inadmissible in terms of sections 59 and 67 of the Evidence Ordinance?

Whether the learned trial Judge had erred in so much as he has not considered relevant sentencing policies on a consideration of the age of the accused-appellant which admittedly was approximately seventeen and half years at the time of the commission of the offence?

Whether the learned trial Judge had failed to act in terms of section 330(5) of the Code of Criminal Procedure Act, No. 15 of 1979?

Decision-

<S. Tilakawardane, J.>

It is to be borne in mind that the Government Analyst's report is a contemporaneous recording of findings by the Government Analyst who had carried out certain tests and who had made certain observations of which he made an immediate report. In these circumstances, to exclude the possibility that he might subsequently forget matters pertaining to this particular detection, his observations are contemporaneously recorded and in that sense the contents of the Government Analyst's report are important because it is a contemporaneous recording of the findings of the Government Analyst at the time the analysis of the substance was carried out.

It must also be borne in mind that is merely a document that bears a contemporaneous record that is maintained in the ordinary course of business of the Government Analyst's Department and there is a presumption which operates in favour of such records, that is they are genuine and maintained by public officers in the course of their duty.

This presumption can only be assailed by tangible evidence, through cross-examination of the witness or through other reliable evidence that has been placed before the original trial court. This has not been done so in this case. In fact, contrary to this, the Senior Government Analyst, Mr. Sivarasa, who gave evidence referred to his own notes and clarified the position that he had indeed made notes at the time of an analysis and that these notes were consistent with the report that he had produced in court. In this sense, he not only identified his report, but also affirmed the fact of his authorship of that report and the fact that he indeed carried out an analysis of the substance which he found to be heroin. In these circumstances, the

proof that was envisaged in terms of sections 59 and 64 of the Evidence Ordinance have been complied with. Furthermore, it also proves that as he has admitted the preparation of the said document that this document cannot be assailed on the grounds it is not in compliance with section 67 of the Evidence Ordinance. In these circumstances, we find that the submissions of counsel pertaining to the initial matter raised by him are untenable and not borne out by the provisions of the Youthful Offenders Act.

While considering second issue, the Court held that, the section adverted to under the Youthful Offenders (Training Schools) Act is a discretionary remedy.

On a consideration of the fact that the Poisons, Opium and Dangerous Drugs Ordinance as amended was a special Act enacted specially to deal with this kind of offences and as the sentencing is mandatorily as provided for by this Act, it must necessarily be complied with by the Judge. Furthermore, it is also important to remember that the provisions of the Youthful Offenders (Training Schools) Act, No. 28 of 1939 as amended gives discretion to court under certain circumstances. The circumstances are, that in the mitigation of sentence, the assertion is made by or on behalf of the accused that there are matters which must be considered by the Judge in the sentencing. In this case, this had never been brought to the attention of the learned High Court Judge, nor was any matters placed before the learned High Court Judge for him to even consider the submissions of counsel pertaining to youthful persons. However, it is important to note that in sentencing him, the learned High Court Judge has adverted to on 03.12.1999 (page 368) that the person is a youthful person and it has been a matter that he had considered. However, no other matters had been placed before him on behalf of the accused-appellant and in these circumstances we see no reason to interfere with the sentence given even though there are provisions in the Youthful Offenders (Training Schools) Act which may grant an opportunity for youthful offenders to be treated in a special manner.

Further, on perusal of third issue, the Court held that the period of his incarceration had not been considered and therefore that this court should reduce the sentence of the accused-appellant. However, in the proceedings of 03.12.1999 at page 368, the learned High Court Judge has considered several matters prior to the sentencing of the accused-appellant as adverted to earlier and he has considered the fact that the accused-appellant was 18 years old. He has also considered the fact that the accused-appellant has no previous convictions. He has specially considered the fact that he has been remanded for a period of 4 years prior to his conviction and having considered these matters, he has sentenced him to life imprisonment.

In all these circumstances, we see no reason to interfere with the sentencing of the accused-appellant by the High Court Judge. Accordingly, the appeal is dismissed.

Hence, while raising an issue in relation to the admissibility of any evidence, proper question should be raised during cross-examination.

And also that, in matters of serious economic offences, the age of offender might not be considered, depending upon the judicial discretion of the court.

SESSION 3

SENTENCING IN GENERAL OFFENCES (CRIME AGAINST HUMAN BODY)

HIRIMUTHUGODA SANJEEWA SHANTHA

VS.

ATTORNEY GENERAL

Court of Appeal

C.A. 150/ 2010

Decided on- 16.07.2014

Citation-LEX/SLCA/0539/2014

Hon'ble Judges-

Anil Gooneratne, J. and Malinie Gunaratne, J.

Facts-

This is an appeal preferred by the Hon. Attorney General to set aside the non-custodial sentence imposed by the learned High Court Judge of Balapitiya in a case of grave sexual abuse by the trial Judges' judgment of 20.8.2010. The Accused-Respondent was indicted for a grave sexual offence in terms of Section 365(B)(2)(B) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998, on a victim called Kudaudage Tharindu Danushka on 24.4.2002.

It is pleaded in the Petition of Appeal that the trial commenced on 3.9.2003 in the High Court and continued till 19.12.2010. Evidence of prosecution witness Nos. 1, 2, 3 & 4 had been led

during the said period. However on 30.7.2010 when the case was fixed for further trial the Accused-Respondent pleaded guilty to the charge. On 20.8.2010 the learned High Court Judge imposed a sentence of 2 years rigorous imprisonment and suspended it for 10 years and fined Rs. 2000/- which carries a default sentence of 6 months simple imprisonment. Court also ordered that compensation in a sum of Rs. 60,000/- should be paid. The sentence imposed by the learned High Court Judge is illegal as its contrary to the mandatory sentence prescribed by the penal code, which necessarily has to be a custodial sentence.

Issue-

Whether the sentence given to the accused shall be given as per judicial discretion or minimum mandatory sentence that is prescribed by law?

Decision-

<Anil Gooneratne, J.>

The provisions relating to offences affecting the human body of offences affecting life is contained in Chapter XVI of the Penal Code. The Penal Code itself was enacted according to the material available to this court on 1st January 1885 and originally as described in the long title "an ordinance to provide a General Penal Code for Ceylon."

In the years 1995, 1998 and 2006 amendments were made to the Penal Code, which expanded the scope of sexual offences and the punishments applicable to same. Section 365 and Section 365A of the Penal Code which deals with "of unnatural offences" made it wide enough with amendments to include "of unnatural offences and grave sexual abuse". The Code made the offences punishable and a sentenced to be imposed between 10 to 20 years (Section 365, 365A, 365B). By these amendments a minimum sentence had been introduced which would be mandatory. Prior to the above amendments to the Penal Code there were no minimum mandatory provisions.

The Court held after perusing S.C. No. 03/2008 H.C. Anuradhapura 334/2004 and S.C. Appeal 179/2012 that-

What is paramount is the nature of the offence/age and the judicial discretions that need to be exercised by a court of law, in the circumstances and the context of the case before court and I think the decision in S.C. 03/2008 cannot bind any other court where the offence is of a very serious nature as in that judgment (S.C. 03/2008) court emphasis the fact of the nature of the offence and judges' discretion. It could be used in an appropriate case to impose a sentence below the minimum mandatory sentence, but not in each and every case of grave sexual offence.

Also, it would be incumbent upon the Judge to set out, with clarity, all the reasons which are relevant and salient for not imposing the mandatory statutory minimum period of 7 years or in the case of a person under 18 years, a mandatory period of 10 years, and the Court would have the power to do so as only where the accused is under 16 years of age, as the Court in its capacity of the upper guardian of each and every child has the inherent power to consider such matters and reduce the statutorily mandated minimum sentence. However, the facts in this case can be clearly distinguished from the facts in S.C. Appeal No. 179/2012, as in the present case, the Accused-Appellant was 28 years of age at the time the offence was committed.

It is the Courts belief that the legislation, as found in the Penal Code, reflects the law as it should be, as it is a result of the will of the Parliament and the will of the people.

The Court accepts that with regard to sentencing, the view of all parties involved in the case must be considered in a balanced manner, in particular where violations are carried out with impunity, even after the Legislature has placed minimum mandatory sentences.

Therefore, on the basis of above reasoning, the Court imposed a sentence of 10 years rigorous imprisonment, and a fine of Rs. 10,000/- which carries a default sentence of 01 year rigorous imprisonment.

Hence, the sentencing in crimes against body is done after perusal of the nature of the offence and other mitigating/aggravating factors.

MARTIN

VS.

THE KING

High Court of Sri Lanka

Appeal No. 16 of 1951

Decided on- 07.05.1951

Citation- (1951)(52)NLR(381)

Hon'ble Judges-

Dias, S.P.J. (President), Gratiaen, J. and De Silva, J.

Facts-

This was an appeal, with leave obtained, against sentences of ten years rigorous imprisonment and twelve years rigorous imprisonment (to run concurrently) imposed on the appellant for offences of robbery and attempted murder respectively. The appellant and the first accused, who was his elder brother Podi Appu, were jointly tried and convicted of these offences at the Kandy Assizes and identical sentences were passed on both of them. Podi Appu's application for leave to appeal against his convictions and sentences was refused. The appellant was granted leave to appeal, but only against the sentences passed on him.

It is apparent that the appellant had in a sense played a secondary part in the concerted attack on the injured man Hendrick. It was the appellant's elder brother Podi Appu, the first accused, who had first set upon Hendrick and caused him grievous injury which, but for medical skill, would necessarily have caused his death.

Issue-

Whether the sentence passed upon the accused justified in law?

Decision-

<Gratiaen, J.>

the appellant's conduct, both by reference to his individual acts and the common intention which the jury must have deemed to have imputed to him, clearly justified his conviction on both charges. We think that, under normal circumstances, the learned presiding Judge, in passing sentence, would have been entirely justified in refusing to differentiate between the cases of the appellant and Podi Appu. Our sole reason for varying the sentences passed on the appellant is that one particular circumstance of fundamental relevancy to the determination of the question of sentence had not been brought to the learned Judge's notice by either the prosecution or the defence.

The relevant circumstance which had not been brought to the learned Judge's notice was that whereas Podi Appu, the chief author of the crime, was 24 years of age, the appellant (whose birth certificate was produced. before us by learned Crown Counsel) was only, 15 years and 9 months old at the time of the commission of the offence and under 17 years of age at the date of his conviction. The appellant did not give evidence at the trial and the learned Judge could have had no-opportunity of even making his own assessment of the lad's age before passing sentence unless his attention was directly drawn to the matter by either the prosecution or the defence. This was not done.

The Court held that, in these circumstances the order for imprisonment, involving as it does, association with adult criminals, was not expedient and we accordingly substituted in its place an order for Borstal-detention under section 4 (1) of the Ordinance. We believe that, had he been informed of the relevant circumstances which have influenced us, the learned Judge would have-shared our view that a prolonged period of training and discipline in a Training School for youthful offenders is better calculated to give the appellant an opportunity of rehabilitating himself as a useful member of society.

This concludes the appeal, but I desire to add, on my own account, that this case seems to illustrate how desirable it is that the prosecuting authorities should, in fairness both to the

accused and to the presiding Judge, adopt the practice, long since established in England, of placing all the relevant material before the Court, after conviction, "as an aid to determining the appropriate punishment ".

Hence, when a case is being tried in the Court, both the parties should work in order to provide all the necessary material/things required for the proper passing of the sentence on the accused.

REX

VS.

MARTHELIS PERERA

Court of Appeal

Decided on- 26.08.1925

Citation- (1925)(27)NLR(163)

Hon'ble Judges-

Maartensz, A.J.

Facts-

The accused in this case was summarily tried and convicted under section 316 of the Penal Code for causing grievous hurt to one Kariawasamage Peter, and on November 29, 1924, he was sentenced to three months' simple imprisonment. On December 19, 1924, the Solicitor - General moved the Supreme Court in revision to enhance the sentence passed on the accused or to make such order as to it shall seem meet. Notice on the accused was ordered for January 23, 1925. On February 6, 1925, order was made setting aside all the proceedings in the case and directing that non - summary proceedings be taken with a view to the case being committed for trial before a higher Court. This order was made on the assumption that the accused had received notice of the Solicitor - General's application. Non - summary proceedings were taken and the case came on for trial before the District Court on May 4, when the objection was taken that the accused could not be tried again for an offence of which he had been charged and convicted. The learned District Judge overruled the objection. Thereupon the accused pleaded guilty and was sentenced to three months' simple

imprisonment. The District Judge in passing sentence took into consideration the fact that he had already served the full term of three months imposed by the Police Court. The accused appeals from the order of the District Judge.

Issues-

Whether the notice was served on the accused as contended or not?

Whether the failure to serve the notice vitiate the proceedings?

Decision-

<Maartensz, A.J.>

The return to the notice shows that the accused was not served with the notice of the Solicitor - General's application. As it is contended that the order made by the Supreme Court on February 6 is ineffective, as section 357 (2) of the Criminal Procedure Code enacts that no order under that section shall be made to the prejudice of the accused, unless he has had an opportunity of being heard either personally or by advocate in his own defence. Section 357 vests this Court with power to revise proceedings of the Courts of original jurisdiction. I allowed Crown Counsel an opportunity of meeting this objection, as I understood when the case was argued yesterday that he was not aware that the order of February 6 had been made without notice to the accused. Crown Counsel informs me to – day that he is not prepared, in view of the fact that the accused had no notice, to support the order of the District Court sentencing the accused to three months' simple imprisonment. I am of opinion that the terms of section 357 (2) are imperative and that an order made under that section without notice to the accused is ineffective, and that at the date the accused pleaded to the indictment before the District Court the conviction and sentence by the Police Court had not been set aside. I am, therefore of opinion that this is a case to which section 330 applies, ' and that the conviction and sentence of the accused not having been set aside by the Supreme Court his plea that he could not be tried again should have been upheld.

The Court accordingly set aside the sentence of three months' imprisonment and discharge the accused.

WEERAWARDANE

VS.

STATE

Court of Appeal

C.A. No. 52/98

Decided on- 21.10.1999

Citation- (2000)(2)SLR(391)

Hon'ble Judges-

Hector Yapa, J. and Kulatilake, J.

Facts-

The accused-appellant in this case was indicted in the High Court of Negombo under two counts. In the first count he was charged with having committed the murder of Kankani Arachchi Appuhamilage Suwarnalatha Rajani on 26.12.1993, an offence punishable under Section 296 of the Penal Code. In the 2nd count the accused-appellant was charged with having committed the attempted murder of Patikiri Arachchige Roslin Nona an offence punishable under Section 300 of the Penal Code.

This case was taken up for trial on 24.09.1998 and when the indictment was read over and explained to the accused-appellant, he pleaded guilty to both counts in the indictment namely, the charge of murder and attempted murder. When the accused-appellant pleaded guilty to the said charges, in the indictment, the learned High Court Judge proceeded to read and explain the two charges to the accused-appellant for the second time. Thereafter when the accused

appellant was questioned as to whether he was guilty or not guilty to the said charges in the indictment, he pleaded guilty. Thereupon the High Court Judge convicted the accused-appellant on the plea tendered and sentenced him to a term of life imprisonment on the 1st count and to a term of 4 years rigorous imprisonment on the count. He further ordered the sentences to run concurrently. It is difficult to understand why the learned High Court Judge after having accepted the plea tendered by the accused-appellant to the charge of murder set out in count No. 1 decided to sentence him to a term of life imprisonment when the only punishment permitted by law is death. The accused-appellant has appealed against the said conviction and the sentence.

Issue-

Whether the learned trial Judge has erred in law by accepting and entering a plea of guilty to a charge of murder?

Decision-

<Hector Yapa, J.>

According to thr Court, it was erroneous for the High Court Judge after having very correctly made the observation that provision has not been made to provide for a situation where a plea of guilt is tendered by an accused person for a charge of murder before a High Court Judge sitting without a jury, to have ignored completely the principle enshrined in the proviso to Section 205 of the Code of Criminal Procedure Act.

In this case the Court should have also acted on the premise that the legislature could never have intended preferential treatment being given to a murder suspect who opted to be tried by a jury and not when such a suspect opted to be tried without a jury. It is to be noted that even in the case of a trial by jury, the accused is required to plead guilty or not guilty to the indictment before the jury is empanelled in terms of Section 204 of the Code of Criminal Procedure Act. Thus it would appear absurd to have a situation where a plea for murder can be accepted only when there is to be a trial by a Judge without a jury but not when there is a trial by jury. However in both situations the plea is tendered before the High Court Judge only.

It is also pertinent to mention here that the sentence passed by the learned High Court Judge on the accused-appellant after he pleaded guilty to the charge of murder clearly indicates that the High Court Judge has entertained a doubt in his own mind with regard to the question whether the accused-appellant had rightly comprehended the effect of his plea in terms of Section 197 of the Code of Criminal Procedure Act. Otherwise one cannot understand the reason as to why the High Court Judge decided to impose a term of life imprisonment on the accused-appellant without sentencing him to death as required by law.

Finally it must be mentioned here that the assigned Counsel in this case has failed to provide the necessary legal aid to the accused-appellant. In fact the learned High Court Judge has observed that the assigned Counsel remained silent at the stage when the accused appellant pleaded guilty to the charges in the indictment. In the circumstances it would appear as contended by learned Counsel for the accused-appellant, that he (accused-appellant) was virtually unrepresented and undefended. Therefore doubt arises as to whether the accused appellant in fact had a fair trial.

For the aforesaid reasons, we are of the view that the learned High Court Judge was in serious error when he decided to accept the plea tendered by the accused-appellant for the offence of murder. In fact in this case, we are of the considered view that the learned High Court Judge should have refused to receive the plea tendered by the accused-appellant and proceeded with the case as if he has pleaded not guilty. Therefore we set aside the conviction and the sentences imposed on the accused-appellant and order a fresh trial against him on the same indictment.

Hence, when an accused plead guilty to the charge of murder, it shall not be accepted by the court, and the trial should continue as if, the plea of not guilty is taken.

SESSION 4

USEFULNESS OF DEATH PENALTY

RASNEGGE JAYARATHNA

VS.

THE HON'BLE ATTORNEY GENERAL

Court of Appeal

C.A. No. 147/2012

Decided on- 06.10.2015

Citation- LEX/SLCA/0249/2015

Hon'ble Judges-

H.N.J. Perera, J. and K.K. Wickramasinghe, J.

Facts-

The accused-appellant (herein after referred to as the 'appellant'), Rasnegge Jayarathna, who was at all relevant times, a police officer who served under the P.S.D. (Presidential Security Division), was indicted in the High Court of Kurunegala with having caused the death of Mohomed Aliyar Mohomed Munaz at Wewagedara on or about the 07th of March 1991 and that he thereby committed the offence of murder punishable under Section 296 of the Penal Code. After service of the indictment to the appellant on 24.01.1997, the appellant had opted for a non-jury trial.

After the inquiry, the learned Trial Judge was satisfied that the appellant had left the Island and therefore on 03.12.2001 he had made an order to proceed the trial in absentia. At the trial the prosecution had led evidence of several witnesses (PW 1 to PW 16) to prove the prosecution case. However, there were no eye witnesses. The case was based only on circumstantial evidence.

Thereafter on 12.06.2012 appellant was arrested on open warrant and produced before the learned High Court Judge of Kurunegala and remanded. Then on 13.06.2012 the learned Trial Judge imposed the death penalty on the appellant.

Issue-

Whether the prosecution has not proved the charge beyond reasonable doubt and has failed to prove each item of the chain beyond reasonable doubt?

Decision-

<K.K. Wickramasinghe, J.>

After analysing all the evidence before the court, it is evident that each and every item of the chain is interconnected and matches with each other.

Further, it is evident that there is no reasonable doubt on the part of the prosecution's case. The evidence led by any of the prosecution witnesses had not been contradicted by any other evidence. The deceased had been last seen with the appellant and also all the circumstantial evidence for the prosecution corroborates with each other creating a chain of circumstances that leads only to the guilt of the appellant.

The learned Counsel for the appellant also pointed out that after the appellant was brought before Court, the Judge has not acted under sec. 241(3) of the Criminal Procedure Code of No. 15 of 1979 to hold an inquiry. It is evident that at the commencement of the trial the appellant was present, but thereafter he had absconded. It is an obvious fact that the appellant deliberately evaded facing the trial and I see that there is no reason to interfere with the findings of the learned Trial Judge.

Even after he was produced in Court, he opted not to give reasons to Court. Therefore the learned High Court Judge was unable to act under sec. 241(3)(b) of the Criminal Procedure Code.

Considering the above there is no reason to interfere with the findings of the learned High Court Judge.

Hence, the death penalty was awarded in accordance with law, and also because the accused being a public servant had more responsibility to act reasonably, which he failed to comply with.

SHAMANTHA JUDE ANTHONY JAYAMAHA

VS.

ATTORNEY GENERAL

Court of Appeal

C.A. 303/2006 and C.A.L.A. 321/06

Decided on- 11.07.2012

Citation- LEX/SLCA/0376/2012

Hon'ble Judges-

W.L. Ranjith Silva, J. and Nalin Perera, JJ.

Facts-

The accused appellant received an invitation to attend a party to be held at the Glow Night Club scheduled to be held on 30th of June 2005 organized by the Colombo Night Life Society. The appellant invited Caroline, the sister of the deceased, to be his guest at the party. The Request made to the appellant, by Caroline to take her sister Yvonne Johnson along with them to the party was readily granted. The two sisters picked up the accused appellant at about 8:30 p.m. at Bagathale Road. The vehicle in which they traveled belonged to the father of Caroline and Yvonne (the deceased) and was driven by the deceased. They spend the night visiting various nightclubs and finally Caroline wanted to get back to her flat.

The diseased decided to stay back and spend more time whilst Caroline who had to sit for an exam the following day decided to return home. When they left the club the deceased sister was in the company of a friend named Khone. The evidence in the case disclosed that the

particular car bearing number JU 2257 carrying the accused appellant and Caroline arrived at Royal Park at 2 a.m. on first of July 2005 and left at 2.02 a.m having dropped both of them.

The deceased, her sister Caroline and their parents lived in an apartment on the 23rd floor of the Royal Park residences. After arriving at the flat, Caroline went up to their parents, room and informed them that they had returned. She had also misinformed them that she returned with her sister. Thereafter Caroline retreated to a room in her apartment with the accused and once inside the room Caroline gave a call to Khone to find out about her sister (the deceased). The accused appellant, whilst remaining inside the room, took a call to get down a taxi and thereafter the accused appellant left the room saying "I love you forever." The following day Yvonne Johnson's body was discovered on the staircase near the 19th floor.

The accused appellant (hereinafter some-times referred to as the appellant) was indicted in the High Court of Colombo for committing the murder of Yvonne Johnson at Rajagiriya, on or about first of July 2005, an offence as defined in section 294 of the Penal Code and punishable under section 296 of the Penal Code.

The accused appellant was tried before a Judge sitting without a Jury. On 28 July 2006 the learned High Court Judge found the appellant guilty of culpable homicide not amounting to murder, on the basis of knowledge, convicted the accused and sentenced him to a term of 12 years rigorous imprisonment, imposing in addition, a fine of 300,000 on him.

Being aggrieved by the said conviction and the sentences the appellant has preferred this Appeal to this court. The Attorney General too has preferred an Appeal to this Court by way of Leave to Appeal to have the said Judgment convicting the appellant for culpable homicide not amounting to murder set aside or reversed instead to have the said accused appellant convicted for murder and sentenced to death.

Issues-

Whether the punishment awarded to him is bad in law and should it be enhanced to death penalty or commuted to lesser punishment?

Decision-

<W.L. Ranjith Silva, J.>

Provocation given by Caroline cannot be ventilated on the deceased. Unless the deceased had given the provocation the actions of the appellant cannot be justified as arising out of provocation unless it occurred by accident or mistake. Mere provocation alone is not sufficient; the provocation must be grave and sudden.

It is trite law that even if the accused does not specifically take up the defence of a general or special exception to criminal liability, if the facts and circumstances before the court disclose that there was such material to sustain such a plea then the court must consider whether the accused should be convicted for a lesser offence.

Further, it is settled law that if a person is intoxicated to an extent not to know what he is doing, even if the act is done without the requisite intention the law imputes the knowledge of a rational person and he could be convicted only for Culpable Homicide not amounting to murder under and in terms section Se. 79 of the Penal Code.

According to the facts and circumstances of the instant case the inhuman and the gruesome manner in which the murder was committed clearly shows the murderous intention the accused appellant entertained when he committed the murder. Even prior to the incident, it appears that the accused had carefully planned and taken the deceased to the staircase soon after she emerged from the elevator.

Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence. It is wrong to assume that under no circumstances should the evidence of the prosecution be considered but the evidence for the prosecution should not be compared with the dock statement as it is against the fundamental principles of law and will amount to shifting the burden of proof.

For the reasons adumbrated on the law and the facts I dismiss the appeal taken by the accused appellant and allow the appeal taken by the Attorney General. I set aside the conviction for culpable homicide not amounting to murder entered on the basis of knowledge. I set aside the term of 12 years rigorous imprisonment and the fine of Rs. 300,000 imposed on the accused

appellant. I find the accused appellant guilty of murder under section 296 of the Penal Code and convict him for murder.

Hence, when the punishment of death penalty is awarded to the accused, every general defense shall be considered by the court, in the light of the facts and circumstances of the case to lessen the punishment

THE QUEEN

VS.

MAPITIGAMA BUDDHARAKKITA THERA AND 2 OTHERS

High Court of Sri Lanka

Appeals Nos. 100, 101 and 102 of 1961, With Applications Nos. 106, 107 and 108

Decided On- 15.01.1962

Citation- (1962)(63)NLR(433)

Hon'ble Judges-

Basnayake, C.J. (President), Sansoni, J., H.N.G. Fernando, J.Sinnetamby, J. and De Silva, J.

Facts-

The three accused-appellants, Mapitigama Buddharakkita Thera, Hemachandra Piyasena Jayawardena, and Talduwa Somarama Thera, the 1st, 2nd, and 4th accused respectively, along with two others, Palihakkarage Anura de Silva and Weerasooriya Arachchige Newton Perera, the 3rd and 5th accused respectively, were indicted on the following charges:-

1. That between the 25th August 1958 and the 26th September 1959 at Kelaniya, Wellampitiya, Rajagiriya, Colombo, and other places, within the jurisdiction of this Court, you did agree to commit or abet or act together with the common purpose for or in committing or abetting an offence, to wit, the murder of Solomon West Ridgeway Dias Bandaranaike, and that you are thereby guilty of the offence of conspiracy to commit or abet the said offence of murder, in consequence of which conspiracy the said offence of murder

was committed, and that you have thereby committed an offence punishable under section 296 read with sections 113s and 102 of the Penal Code.

That on or about the 25th September 1959 at No. 65 Rosmead Place, Colombo, within the jurisdiction of this Court,, you Talduwe Somarama Thero, the fourth accused above-named did, in the course of the same transaction, commit murder by causing the death of the said Solomon West Ridgeway Dias Bandaranaike, and that you have thereby committed an offence punishable under section 296 of the Penal Code.

After a trial which commenced on 22nd February 1961 and ended on 12th May 1961 the 1st, 2nd, and 4th accused were-by a unanimous verdict found guilty of the charge of conspiracy to murder and the 4th accused of the charge of murder of Solomon West Ridgeway Dias Bandaranaike (hereinafter referred to as the deceased) and sentenced to death. The 3rd and 5th accused were found not guilty and acquitted. The former by a unanimous verdict and the latter by a divided verdict of 5 to 2. The accused preferred an appeal.

Issues-

Whether the accused were denied of fair trial in lieu of improper admission?

Whether the corroboration of evidence was done properly or not?

Whether the sentence of death passed on the accused illegal or not?

Decision-

<Basnayake, C.J.>

While dealing with first issue, the Court held that, what has been stated as to the relevancy of this part of the evidence upon the case of the 1st accused applies more strongly in the context of the case against the 2nd accused, for the evidence was to the effect that he participated most actively in the affairs of both the Companies, Considering that the murder which was the subject of the alleged conspiracy was that of the Prime Minister himself and that there was at least a strong likelihood that the motive for the murder was political and not purely a private one, the evidence concerning the 1st accused's political and business interests was

relevant to show positively that he was ambitious, if not for political power itself, at least to wield political influence. If thus evidence did in fact create an impression that the 1st accused was unworthy of the robe that was quite unavoidable. If in addition there were some items of evidence not strictly relevant for the purposes which have just been mentioned and which therefore only tended to create such an impression, those items could not have exaggerated the effect of that part of the evidence which was relevant to establish the political and business interests of the 1st and 2nd accused to show that they had a motive for conspiring to murder the deceased.

On considering second issue, the court pointed out that, it appears that the learned Judge made these references at that stage only with the intention of pointing to parts of the alleged accomplice's evidence, the general purport of which was similar to one or other of the items of evidence contributed by some other witness, as well (to use his own expression) as to mention in the form of a " narrative ", in the order of their alleged occurrence, the facts deposed to by the several witnesses, including the alleged accomplice. While this was a somewhat unsafe mode of placing before the jury the case for the prosecution as to the various items of evidence claimed to be corroborative, the submission that the jury were for this reason misled into treating any of the alleged accomplice's evidence as being corroborative of himself is not acceptable; they were duly warned, and on more than one occasion, that they must look for independent testimony from somebody other than the alleged accomplice.

The effect of this section 296 of Penal Code, having regard to its express words, is that the Legislature clearly declared its intention that upon every conviction for the offence of murder entered after 1st December 1959 the punishment to be imposed for that offence shall be the punishment of death, notwithstanding anything in any other written law, the written law here in reference being section 6 (3) of the Interpretation Ordinance. Hence for instance in the case of the 4th accused who has after 1st December 1959 been convicted of the offence of murder committed prior to the coming into force of the Suspension Repeal Act, section 3(a) avoids the effect of section 6(3) of the Interpretation Ordinance by clearly providing for the death penalty for persons in the position of the 4th accused. There is however nothing more in the Suspension Repeal Act in the nature of any express provision to limit, the operation of section 6(3) in its application in a case where a person is convicted after that Act of any other offence which at the time of its commission attracted, by reason of the Suspension Act only the punishment of imprisonment for life, and not the punishment of death.

The only argument adduced by counsel appearing for the Crown was quite unconvincing. It was that, since the relevant sections (113B, 102 and 296) of the Penal Code, as they stood at the time of the convictions in this case, provide for the punishment of death for the offence of conspiracy to commit murder, the trial Judge had by law to impose that punishment. This argument completely ignores the existence and effect of section 6(3) of the Interpretation Ordinance.

We accordingly quash the sentence of death passed on the 1st, 2nd and 4th accused in respect of the first count of conspiracy and substitute therefor a sentence of imprisonment for life.

The sentence of death imposed on the 4th accused in respect of the second count of murder is affirmed. 'Subject to the above variation of the sentence passed in respect of the charge of conspiracy the appeals of all the accused are dismissed and their applications are refused.

Hence, the capital punishment awarded to an accused is valid and legal in law and it is mostly provided in murder cases.

SESSION 5

CIRCUMSTANTIAL EVIDENCE

THAVANAYAKI

VS.

MAHALINGAM

Supreme Court of The Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 64/80

Decided on- 01.12.1981

Citation- LEX/SLSC/0028/1981

Hon'ble Judges-

Sharvananda, J., Wimalaratne, J. and Ratwatte, J.

Facts-

The applicant is the youngest daughter of one K. Kandasamy, whose wife died .about 1969. As her other brothers and sisters were married and living separately, she was looked after by her mother's brother Thamotherampillai who resided in the adjoining house with is wife and two unmarried sons, the younger of whom was Mahalingam, the respondent. She was about 16 years and Mahalingam who was about 20 was yet a student but was also helping his father in his cultivation. Although a common fence separated the two houses, a gate provided easy access from one house to the other. The applicant stated that it was her uncle Thamotherampillai who after her mother's death invited her to live in their house on the

promise that Mahalingam would be married to her, and that Mahalingam's parents accepted her as their daughter-in-law. Having seen and heard both the applicant and Mahalingam in the witness box the learned Magistrate has accepted the evidence of the applicant.

The applicant claimed maintenance from the respondent alleging that they were married according to Hindu customary rites, that a female child Imayalini was born on 28.1.76 and that the respondent who was the father of the child failed to maintain them. The respondent denied marriage and paternity. At the trial the applicant failed' to establish a marriage according to Hindu rites, but led evidence to show that she lived in the respondent's house on terms of intimacy for about six years before the child was born. The learned Magistrate, whilst refusing her-application for maintenance for herself, held that her evidence of intimacy with the respondent was corroborated in material particulars by other evidence to his satisfaction, and ordered a sum of Rs. 50/-per month as maintenance for the child.

The respondent appealed, and the Court of Appeal allowed his appeal for the reason that the Magistrate, in attempting to answer the question regarding the paternity of the child, "starts on a false premise that the applicant's position was that she was factually married, and she had a belief that there was a de facto marriage. There was no justification for this assumption." The Court of Appeal also formed the view that there was no satisfactory evidence to corroborate the evidence that she and the respondent were on terms of intimacy, and that the child was begotten in consequence. Hence, this appeal rose.

Issue-

Whether the evidence of opportunity, previous statements by applicant and conduct of respondent & her mother lead to the corroboration of circumstantial evidence?

Decision-

<Wimalaratne, J.>

The previous statement had to be either one made "at or about" the time when the fact sought to be corroborated took place or had to be made before a "competent authority."

When she informed him of her pregnancy he promised "somehow or other to accept her in January". That evidence as well as the evidence that the respondent's mother took the applicant to a native physician has been believed by the Magistrate. One could not expect the applicant to have called the respondent's mother, for that may have been disastrous to her own case. On the other hand the respondent ought to have contradicted that evidence by calling his mother as a witness.

The Court held that, it would appear that although the applicant failed to establish a marriage according to Hindu custom, she did convince the Magistrate that she lived with the respondent for a period of six years, and that the child Imayalini was born as a result of their intimacy. The Court of Appeal therefore erred when it rejected. the Magistrate's finding of fact, for in reaching that conclusion the Magistrate had not gone on any assumption of marriage, but had considered the evidence of their relationship independently. The Court also erred when it said that the Magistrate had misdirected himself on the matter of corroboration.

The Magistrate was satisfied that the evidence of opportunity, the evidence of previous statements and the evidence of the conduct of the respondent constituted satisfactory corroboration of the applicant's evidence. The Court of Appeal was not justified in disturbing those findings of fact.

Hence, the evidences of opportunity, previous statements and conduct of the parties are relevant for the corroboration of circumstantial evidence.

RASNEGGE JAYARATHNA

VS.

THE HON'NLE ATTORNEY GENERAL

Court of Appeal

C.A. No. 147/2012

Decided on- 06.10.2015

Citation- LEX/SLCA/0249/2015

Hon'ble Judges-

H.N.J. Perera, J. and K.K. Wickramasinghe, J.

Facts-

The accused-appellant (herein after referred to as the 'appellant'), Rasnegge Jayarathna, who was at all relevant times, a police officer who served under the P.S.D. (Presidential Security Division), was indicted in the High Court of Kurunegala with having caused the death of Mohomed Aliyar Mohomed Munaz at Wewagedara on or about the 07th of March 1991 and that he thereby committed the offence of murder punishable under Section 296 of the Penal Code. After service of the indictment to the appellant on 24.01.1997, the appellant had opted for a non-jury trial.

After the inquiry, the learned Trial Judge was satisfied that the appellant had left the Island and therefore on 03.12.2001 he had made an order to proceed the trial in absentia. At the trial the prosecution had led evidence of several witnesses (PW 1 to PW 16) to prove the

prosecution case. However, there were no eye witnesses. The case was based only on circumstantial evidence.

Thereafter on 12.06.2012 appellant was arrested on open warrant and produced before the learned High Court Judge of Kurunegala and remanded. Then on 13.06.2012 the learned Trial Judge imposed the death penalty on the appellant.

Issue-

Whether the prosecution has not proved the charge beyond reasonable doubt and has failed to prove each item of the chain beyond reasonable doubt?

Decision-

<K.K. Wickramasinghe, J.>

After analysing all the evidence before the court, it is evident that each and every item of the chain is interconnected and matches with each other.

Further, it is evident that there is no reasonable doubt on the part of the prosecution's case. The evidence led by any of the prosecution witnesses had not been contradicted by any other evidence. The deceased had been last seen with the appellant and also all the circumstantial evidence for the prosecution corroborates with each other creating a chain of circumstances that leads only to the guilt of the appellant.

The learned Counsel for the appellant also pointed out that after the appellant was brought before Court, the Judge has not acted under sec. 241(3) of the Criminal Procedure Code of No. 15 of 1979 to hold an inquiry. It is evident that at the commencement of the trial the appellant was present, but thereafter he had absconded. It is an obvious fact that the appellant deliberately evaded facing the trial and I see that there is no reason to interfere with the findings of the learned Trial Judge.

Even after he was produced in Court, he opted not to give reasons to Court. Therefore the learned High Court Judge was unable to act under sec. 241(3)(b) of the Criminal Procedure Code.

Considering the above there is no reason to interfere with the findings of the learned High Court Judge.

Hence, the court could base a case on circumstantial evidences, when all the circumstantial evidence corroborates with each other forming/creating a chain of circumstances that leads only to the guilt of the accused.

PAULINE RUTH DE CROOS

VS.

THE QUEEN

High Court of Sri Lanka

C.C.A. Appeal No. 18 of 1968 with Application No. 22 of 1968

Decided on- 24.03.1968

Citation- (1968)(71)NLR(169)

Hon'ble Judges:

T.S. Fernando, J. (President), Tambiah, J. and Sirimane, J.

Facts-

The Attorney-General presented to this Court an indictment containing two charges against the appellant as the 1st accused and' another as the 2nd accused alleging (1) conspiracy to commit or abet the offence of murder of one Ramdas Gotabhaya Kirambakanda in consequence of which conspiracy the murder was alleged to have been committed (S. 113B read with SS. 296 and 102 of the Penal Code) and (2) murder of the said person (S. 296). The deceased Gotabhaya was a school-boy of the age of 11 years and a son of the 2nd accused. The appellant is an unmarried girl living with her parents at Dehiwala in which town the 2nd accused also resides with his family. The two accused were tried on this indictment before a judge and jury. After five days of evidence had been recorded, counsel for the 2nd accused objected to the admissibility of a certain piece of evidence sought to be led by the Crown and legal argument on its admissibility was permitted in the absence of the jury.

Issue-

Whether the circumstantial evidence could be corroborated in a manner to give a verdict of guilty?

Decision-

<T.S. Fernando, J.>

The circumstantial evidence summarized above constituted a fairly strong case against the appellant, further strengthened as it was by an absence of any effort on the part of the appellant to suggest any innocent reason for desiring to throw away the books and sandals and the attache case of the deceased. The evidence against the appellant being entirely circumstantial, I would remind myself of what the Privy Council stated in Ebert Silva v. The King [(1951) 52 N.L.R. at 509] was the right question the Court of Criminal Appeal has to pose for itself: " Was there any evidence upon which the jury could find their verdict?" If there is any evidence upon which a reasonable jury could have found a verdict of guilty, it is not the function of the Court of Criminal Appeal, in the absence of any misdirection by the trial judge, to enquire whether, in its own opinion, the offence is established beyond reasonable doubt. While that may be a sufficient test to be applied at this stage, it could be said that in this particular case the cumulative effect of the circumstantial evidence was so compelling that a verdict of not guilty would have been almost a perverse one.

Hence, when evidences are corroborated in such a manner so as to compel the judge to give a verdict of guilty, then the case could be based upon the circumstantial evidence

GUNAWARDENA

VS.

THE REPUBLIC OF SRI LANKA

Court of Appeal

C.A. No. 35/80

Decided on- 05.08.1981

Citation- (1981)(2)SLR(315)

Hon'ble Judges-

Colin-Thome, (President), Atukorale, J. and Tambiah, J.

Facts-

This case has had an abnormally chequered history. The appellant was charged with having committed murder by causing the death of M. G. Somawathie alias Soma Perera on 15.5.1973, at Galenbindunuwewa, an offence punishable under section 296 of the Penal Code. The appellant has had three trials on the same charge and has been through three appeals.

According to the prosecution the appellant had a strong motive for killing the deceased. She had embarrassed him, a married man, by arriving at Galenbindunuwewa on the 15th May. He murdered her at the spot here her body was found by strangling her between 8.30 p.m. and 9 p.m. on the 15th. Thereafter he scattered her clothing and her particles to simulate a sexual assault on her and robbery.

The case for the prosecution rested wholly and substantially on strands of circumstantial evidence.

Issue-

Whether the sole reliance on circumstantial evidence be given to convict/acquit an accused from the charges?

Decision-

<Colin-Thome, (President)>

On the paragraph 46 of the judgment, the court said The House of Lords in this case considered the dictum in Hodge (1938) 2 Lew. 227, 228, where Alderson, B., said in summing-up to the jury that the case was made up of circumstances entirely and that, before they could find the prisoner guilty they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the person was the guilty person." This dictum which came to be known as the "rule" in Hodge's case has been followed in most countries in the Commonwealth, including Sri Lanka, for decades.

Further, on paragraph 53 the court affirmed the pointed laid in paragraph 52 which is as follows, “52. Baron Pollock observed in Regina v Exall 176 ER Nisi Privy 853:-

It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the rope may be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.

53. This is also the law in Sri Lanka. In a case of circumstantial evidence the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance of suspicion; See The King v Gunaratna 47 NLR 145, 149.”

The Courts have, however, interfered where the case against the appellant was not proved with the certainty which is necessary in order to justify a verdict of guilty: Wallace (supra). In this case it was held that the Court will quash a conviction founded on mere suspicion. The Chief Justice remarked:

Suffice it to say that we are not concerned here with suspicion, however grave, or with theories, however ingenious.

In the instant case, in view of the several grave non-directions on the evidence amounting to misdirections, and misdirection per se and as the case against the appellant was not proved with the certainty which was necessary in order to justify the verdict of guilty, we hold that the verdict of the jury was unsafe, unsatisfactory and unreasonable and cannot be supported having regard to the evidence. The jury had substituted suspicion for inference, reversed the burden of proof and used intuition instead of reason.

We allow the appeal. We set aside the verdict, quash the conviction and sentence and acquit the appellant.

Hence, in cases of circumstantial evidence, when the evidence of the facts given are taken cumulatively, and if it is sufficient to rebut the presumption of innocence when combined together, then sentence could be passed solely on circumstantial evidences.

NUWAN DE SILVA

VS.

THE ATTORNEY GENERAL

Supreme Court of The Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 18/2003 (TAB)

Decided On- 09.09.2004

Citation- (2005) (1) SLR (146)

Hon'ble Judges:

Sarath N. Silva, C.J., Bandaranayake, J., Yapa, J., De Silva, J. and Jayasinghe, J.

Facts-

This is an appeal from the conviction entered and sentences imposed on the accused appellant (the accused) at a Trial at Bar of the High Court. In terms of Section 451(3) of the Code of Criminal Procedure (Amendment) Act, No. 21 of 1988, the appeal has to be heard by a Bench of not less than 5 Judges of this Court.

The accused was charged on 3 counts of, having kidnapped a boy named Sadeepa Lakshan, (an offence punishable under section 354 of the Penal Code), committing the murder of the boy (an offence punishable under Section 296 of the Penal Code) and of extorting Rs. 2.5 million from Nihal Jayantha de Silva being the father of the boy (an offence punishable under Section 375 of the Penal Code), between the 8th and 11th of October 1999.

The High Court convicted the accused on all 3 counts and he was sentenced to death on the count of murder and to terms of imprisonment and fines on the other counts. The prosecution relied on a confession made by the accused to the Magistrate recorded in terms of Section 127 of the Code of Criminal Procedure Act, No. 15 of 1979 and on several items of circumstantial evidence.

Issue-

Whether the court can rely upon the circumstantial evidence while proving the guilt of an accused when he has fails to prove any contradiction to the circumstantial evidences?

Decision-

<Sarath N. Silva, C.J.>

It is seen that the items of circumstantial evidence implicate the accused with having talked to the boy shortly before the time he disappeared. He is linked up with the ransom calls to the deceased boy's father. The ransom money including the note in the handwriting of the father was found in his possession. He knew the place where the body was concealed and had access to that house.

The accused failed to explain anyone of these items of circumstantial evidence. His evidence was a total denial which is clearly unacceptable. I am of the view that the High Court rightly rejected his evidence.

The Court also held that, it is inclined to accept the submissions of the learned Senior State Counsel that the strong items of circumstantial evidence unexplained by the accused would in itself be adequate to establish the charges against the accused.

Hence, when the circumstantial evidences are not refuted by the accused, then it could be used against him by the court.

P.P. PETERSINGHAM

VS.

THE QUEEN

High Court of Sri Lanka

Decided On- 02.02.1970

Citation- (1970) (73) NLR (537)

Hon'ble Judges-

Alles, J. (President), Siva Supramaniam, J. and Samerawickrame, J.

Facts-

The appellant, a police constable attached to the Kalmunai Police, was convicted by an unanimous verdict of the jury of the murder of a fellow constable of the same Police Station called Aiyathurai. Aiyathurai was alleged to have been done to death on the Wesak night of 12th May, 1968 in Kalmunai town. After the fatal assault his body was enclosed in two gunny sacks tied with rope, the mouth of which had been sewn up and the trussed up body inside the gunny sacks was found the following morning by the side of Mahadevan Road, a distance of 994 feet from the house of the appellant.

The case against the appellant depended entirely on circumstantial evidence. It was the submission of Counsel for the appellant that the directions of the learned trial Judge on circumstantial evidence were inadequate that his client had been gravely prejudiced by the admission of inadmissible evidence under the provisions of Section 27 of the Evidence Act and finally that even on an acceptance of the entirety of the items of circumstantial evidence

relied upon by the Crown, the case against the appellant had not been proved beyond reasonable doubt.

Issue-

Whether the directions given by the learned trial judge on circumstantial evidence inadequate and gravely prejudiced by the admission of inadmissible evidence, against accused?

Decision-

<Alles, J. (President)>

All the circumstances in this case point to the fact that a charge had been made against the appellant before he made his statement, part of which has been proved in evidence.

A court said that, it was the complaint of counsel for appellant that the trial Judge did not pointedly draw the attention of the jury that each single item of Circumstantial Evidence on which the Crown relied had to be proved beyond reasonable doubt, although the jury were in fact directed that they should consider the cumulative effect of the proved facts in deciding whether the Crown had established its case. While it may have been better if the attention of the jury had been drawn to this matter when the Judge was dealing with Circumstantial Evidence, we do not think that in the instant case his omission to do so has occasioned a failure of justice. Before he gave his directions on Circumstantial Evidence he directed the jury on the burden of proof and told them "that if they were left with any reasonable doubt in regard to any matter which the prosecution must prove it becomes your duty in law, it is indeed the right of the accused to demand at your hands that you give him the benefit of the doubt." Again after dealing with each single item of Circumstantial Evidence at the conclusion of his charge he repeated that the jury "must be satisfied beyond reasonable doubt in regard to each matter which the prosecution must prove." The case for the prosecution being entirely dependent on Circumstantial Evidence, these directions can only mean that each item of Circumstantial Evidence must be proved beyond reasonable doubt.

Further the Court held that, the submission of Counsel that, even accepting the entirety of the prosecution case, the circumstantial evidence only amounted to a case of grave suspicion.

The Court was unable to agree to this submission. In our view the cumulative effect of the proved facts, in the absence of an explanation was quite sufficient to rebut the presumption of innocence and establish that the appellant was at least one of the assailants.

Hence, it is the right of the accused to demand the benefit of the doubt at the hands of the court/jury.

SOMASIRI

VS.

ATTORNEY-GENERAL

Court of Appeal

C.A. No. 127/82

Decided On- 17.06.1983

Citation- (1983) (2) SLR (225)

Hon'ble Judges:

Seneviratne, J., Abeywardene, J. and G.P.S. De Silva, J.

Facts-

The accused-appellant was indicted in the High Court, Colombo on the following charge - that you did on 7.4.1978 at Nugegoda cause the death of Kulatunge Arachchige Aladin Singho alias Hemapala, and thereby committed the offence of murder - section 296, Penal Code. The Jury by a 6-1 verdict has found the accused-appellant guilty of the offence of murder. The case against the accused-appellant was based solely on circumstantial evidence.

The accused-appellant has not given evidence, but had made a statement from the dock. His statement was a bare denial as follows: - "The deceased Hemapala was my friend. I did not have that kind of enmity with him to cause his death. We two were friends. I cannot say for what reason I have been implicated in this case. I came to know that Hemapala was dead when I was in my work place. When I was in my work place, two Police Constables came

and took me into custody in connection with this charge. I cannot say anything because I do not know about this murder."

Issue-

Whether the circumstantial evidence led was sufficient to prove the case of murder against the accused-appellant or not?

Decision-

<Seneviratne, J.>

I hold that on the totality of the evidence led against the accused-appellant, the Jury could not have come to any other conclusion, than the one and only irresistible conclusion that on this circumstantial evidence the accused was guilty of the offence of murder of Hemapala. I have pointed out the non-directions in the charge to the Jury. This is an instance in which this Court should act on the proviso to section 334

Code of Criminal Procedure Act No. 15 of 1979, and hold that "notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred". The trial Judge has directed the Jury to consider a verdict of both murder and culpable homicide not amounting to murder on the basis of knowledge. The Jury having considered the directions brought a verdict of murder. It is, quite clear that the Jury brought this verdict having come to the conclusion on the circumstantial evidence that the accused-appellant has used the weapon axe (P2) and intentionally caused the death of Hemapala. There is no reason to interfere with the verdict of murder.

Though, there have been non-directions in the charge, I am of the view that "no miscarriage of justice" has occurred, nor has the verdict "occasioned a failure of justice". For the reasons set out above, I affirm the verdict of the Jury and the sentence passed on the accused-appellant. The appeal is dismissed.

Hence, the circumstantial evidence could be alone sufficient to prove the case of murder against any person (accused) if judiciously considered.

SESSION 6

RECORDING OF CONFESSIONS, RELIABILITY OF WITNESS

Section 127 of the Code of Criminal Procedure Act, No. 15 of 1979, empowers any Magistrate to record any statement made to him before the commencement of an inquiry or trial.

Section 127(3) specifically deals with the recording of a statement, being a confession. It requires the Magistrate not to record any such statement "unless upon questioning the person making it he has reason to believe that it was made voluntarily". This provision requires the Magistrate to make a signed memorandum at the end of the statement, recording his belief that the statement was voluntarily made. This requirement is coupled with the provisions of Section 24 of the Evidence Ordinance which provides an exception to the general rule of the relevancy of admissions and confessions.

RECORDING OF CONFESSION

NUWAN DE SILVA

VS.

THE ATTORNEY GENERAL

Supreme Court of yhe Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 18/2003 (TAB)

Decided On- 09.09.2004

Citation- (2005) (1) SLR (146)

Hon'ble Judges:

Sarath N. Silva, C.J., Bandaranayake, J., Yapa, J., De Silva, J. and Jayasinghe, J.

Facts-

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The accused was charged on 3 counts of, having kidnapped a boy named Sadeepa Lakshan, (an offence punishable under section 354 of the Penal Code), committing the murder of the boy (an offence punishable under Section 296 of the Penal Code) and of extorting Rs. 2.5 million from Nihal Jayantha de Silva being the father of the boy (an offence punishable under Section 375 of the Penal Code), between the 8th and 11th of October 1999.

The High Court convicted the accused on all 3 counts and he was sentenced to death on the count of murder and to terms of imprisonment and fines on the other counts. The prosecution relied on a confession made by the accused to the Magistrate recorded in terms of Section 127 of the Code of Criminal Procedure Act, No. 15 of 1979 and on several items of circumstantial evidence.

Issue-

How is a confession recorded in court by the magistrate and whether the confession given by the accused admissible as evidence in this case?

Decision-

<Sarath N. Silva, C.J.>

The Magistrate had put several questions to the accused to ascertain whether the confession was being made voluntarily. She thereafter allowed time to the accused to reflect on the matter of making a confession and questioned him once again 1 1/2 hours later. On that occasion too the Magistrate asked a series of questions from the accused to ascertain whether the statement was being made voluntarily and on being satisfied as to voluntariness commenced recording the statement which took about 1 1/2 hours.

A Magistrate recording a statement in the nature of a confession in terms of Section 127 of the Code of Criminal Procedure Act has to be mindful of the factors set out in Section 24 of the Evidence Ordinance, which would result in a confession being irrelevant in criminal proceedings. The foremost in the series of vitiating factors is the role of a person in authority in relation to the accused which would mean in normal circumstances police officers connected with investigations. Since the question relates to a possibility of any inducement, threat or promise emanating from such a person in authority or from any other in the presence of such person, it is necessary to ascertain the circumstances relevant to the period in which the accused person, was in the custody of the police officers or the period in which such police officers had access to the accused person.

The line of questioning by the Magistrate should be directed at ascertaining whether the person was sufficiently removed from the pervasive influence of the Police or of any person in authority and the decision to make the confession has been of his own free will.

In the sequence of questions addressed by the Magistrate, she has specifically asked the question as to why he is willing to make a statement? In both instances when this question was asked by the Magistrate the accused had given similar answers. They are to the effect that according to his conscience he was aware that he did a wrong thing and that he wanted to save his four friends by making this statement. This answer clearly indicates the state of mind of the accused. He has been persuaded by an innate sense of guilt and a desire to save four of his friends who were taken into custody and were according to the evidence detained in the same cell in the prison.

Following upon that answer the Magistrate has specifically asked the question whether there was any inducement, threat or promise by the Police or any person in authority. Both questions have been answered in the negative.

In this instance it is quite clear that the statement has been made after the accused was in remand custody for more than 10 days. He has had ample opportunity to reflect on the consequences of making a statement, in his own words he was induced to make a statement, pricked by his own conscience to make a clean breast of his involvement in the commission of any of the offences.

The court was of the view that there is no merit in the submission of learned Counsel, as to the conclusion arrived at by the Magistrate on the question of voluntariness and the finding of

the High Court as to the absence of any factors that would result in the confession being irrelevant under Section 24 of the Evidence Ordinance. The confession was held to be valid and admissible.

Hence, the judge has to apply his mind while taking the confession, and also that the confession being given by the accused is on his one free will and not out of compulsion.

A. GUNATUNGA-SUSPECT

VS.

THE ATTORNEY-GENERAL

Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. Application 85/76

Decided on- 25.03.1976

Citation- (1976)(78)NLR(198)

Hon'ble Judges-

Sirimane, J. and Wanasundera, J.

Facts-

This is an application for revision of an order dated 6.2.76 made by the Magistrate of Gangodawila in case No. B|2144.

The petitioner in this case had surrendered to the Magistrate's Court in connection with an alleged offence of murder as he feared to go to the Police Station because "the police would use coercive pressure and third degree methods on him to get a confession." The Magistrate remanded him to Fiscal's custody. Thereafter the Criminal Investigations Department had taken over the investigation and made an application to the Magistrate to take the petitioner out of the remand prison and to the fourth floor of the Criminal Investigations Department for the purpose of questioning him and continuing further investigation. This application was allowed by the learned Magistrate by his order of 6J2|76 and consequently it is admitted that the petitioner was taken from the prison to the fourth floor of the Criminal Investigations

Department for questioning. The validity of the order of the learned Magistrate and the subsequent action depends on the interpretation of Section 75(5) of the Administration of Justice Law.

Issue-

Whether the application made by Criminal Investigation Department to take the petitioner out of the remand prison and to the fourth floor of the Criminal Investigations Department for the purpose of questioning him and continuing further investigation admissible in court of law?

Decision-

<Sirimane, J.>

Whilst I agree that the large majority of police officers especially the more senior officers act with a due sense of responsibility and propriety the same unfortunately cannot be said of all of them and hence the need for these salutory provisions. Even the Evidence Ordinance enacted in 1895 prohibits the proof of a confession made to a police officer (as there may be instances (isolated though they may be) of such confession being obtained by undue Influence or coercive methods. These provisions are still necessary safeguards in the larger interests of justice. The trend in recent times has not helped to inspire any greater degree of confidence as the abuse of power, especially by the more subordinate officers has become increasingly frequent. In these circumstances the very salutory provisions of Section 75 and other similar provisions of the Administration of Justice Law enacted by the legislature must be carefully noted by Magistrates as it is their responsibility to see that these provisions are translated into meaningful action for the benefit of both the inquiring officers on the one hand and the safety and protection of the suspect on the other. It is therefore the duty of Magistrates to examine and consider each application under this section on its merits before they exercise the discretion vested in them and not to allow such applications as a matter of course without much scrutiny.

The learned Magistrate was of the view that though there is no specific provision in the Administration of Justice Law to authorise the suspect to be taken to the Criminal Investigation Department office, still the provisions of Section 74 which require a Magistrate

to assist the conduct of an investigation when application is made to him, were wide enough to justify the order he made. It is sufficient to state that the assistance referred to in that section is to make and issue "appropriate orders and processes of Court." It is needless to state that such orders must be ones that a Magistrate is empowered by law to make and not any order.

For these reasons I am of the view that the order made by the learned Magistrate dated 6.2.76 permitting the suspect to be taken by the police to the fourth floor of the Criminal Investigation Department for questioning is not warranted under Section 75 aforesaid and I therefore set aside that order.

Hence, due to the possibility of abuse of law granted by law, the confession given by any person to a police officer is not admissible in court.

OBIYAS APPUHAMY

VS.

THE QUEEN

High Court of Sri Lanka

Decided on- 17.03.1952

Citation- (1952)(54)NLR(32)

Hon'ble Judges-

Nagalingam, A.C.J. (President), Gunasekara, J. and Pulle, J.

Facts-

This appeal raises a question as to the admissibility of certain evidence regarding a statement made by the accused appellant to a police officer and the propriety of a direction given to the Jury about that statement.

The appellant was convicted on a charge of murder which was based on circumstantial evidence and evidence of admissions alleged to have been made by him to two persons, Aron and Velun, to the effect that he had shot the deceased. According to the case for the Crown, the deceased, a man named William, had been shot dead at about 4 p.m. on the 8th May, 1951, in the neighbourhood of a watch hut on a coconut estate, and on the evening of the same day a sub-inspector of police found a spent cartridge in a vegetable garden behind the watch hut. It was alleged that the cartridge was found in consequence of a statement which was made to the sub-inspector by the appellant who was then in his custody at that place, and

that the statement was that the appellant "threw it into the vegetable garden which is behind the watch hut" and which he pointed out to the sub-inspector.

Issue-

Whether statement made to a police officer admissible in court as confession?

Decision-

<Gunasekara, J.>

The Court analyzed the case Rex v. Kalu Banda: That if the Crown at the trial of a prisoner tenders in evidence a statement made by the prisoner, whether self-inculpatory or self-exculpatory in intention, with a view to an inference being drawn by the Court from that statement against the prisoner, that statement becomes ex vi termini, as defined by section 17 (2), a ' confession ', and that if it was made to a Police officer it cannot be received in evidence.

After analyzing the above case, the court held that, “the evidence given by the sub-inspector of police, to the effect that the appellant volunteered a statement to him at the Police Station and he thereupon immediately took the appellant into custody and in view of what he had stated set out with him to the scene of the shooting, is inadmissible for the reason that if believed it would prove as against the appellant that he made a confession to the sub-inspector.

It was also inadmissible against him, for the reason that it amounted to a confession made to a Police officer notwithstanding that the admission of the incriminating fact is qualified by a plea of exculpation: R. V. Ranhamy [(1940) 42 N.L.R. 221].

We set aside the conviction and sentence and we order a new trial.

Hence, any confession made to a police officer is inadmissible in court of law and should be made only to a judge.

M. DON HEMANTHA KUMARA PERERA

VS.

ATTORNEY GENERAL

Court of Appeal

C.A. 98/2010

Decided on- 13.05.2014

Citation- LEX/SLCA/0243/2014

Hon'ble Judges-

Anil Gooneratne, J. and N. Sunil Rajapaksa, J.

Facts-

The Accused-Appellant in this appeal was convicted of murder and sentenced to death. The date of incident of murder as stated in the indictment was on 29th November 1990. The facts of this case could be briefly stated as follows.

One of the witnesses called by the prosecution states (Sumith Anura Kumara) he was a soldier attached to the Palaly Camp and served in a unit of the camp at Wasavilan school as described by him in his evidence. In that place there had been a platoon of about 35 soldiers, and he and others in the platoon occupied an abandoned houses, in the vicinity. The witness gives the details of persons who were occupying these house, i.e. Lt. Atapattu, deceased Soldier Dushantha Perera the Accused who was a corporal in the Army. The incident took place at about 1.25 p.m. in the afternoon and the witnesses had been cooking at that time. It is also in evidence that there were others attending to various other functions. Then he heard a

noise of a gun-shot from behind, from the place he was seated and cooking. The kitchen was about 10/15 feet outside the house. Thereafter the witness stood up and looked through the window towards the direction where there were others. He saw the deceased fallen.

Issue-

Whether there were inconsistencies, lapses and contradictions in the prosecution case and whether the alleged confessions made, was contrary to the provisions of the Evidence Ordinance and other legal provisions?

Decision-

<Anil Gooneratne, J.>

When an objection is taken that the purported confession was not voluntary or even no objection is taken, court must decide whether the confession was voluntary or not. On Voir/Dire and admissibility of confession. Accused need not prove inducement, threat etc. burden is on the prosecution to establish voluntariness and establish relevancy. King Vs. Weerasamy 43 NLR 152 1 NLR 209; 57 NLR 132; 73 BLR 154 at 177-178. Court need to be extra cautious. In the case in hand the prosecution does not seem to have shown the absence of invalidating circumstances set out in Section 24 and must prove beyond reasonable doubt. It is not proved in this case.

The principle to be applied is to avoid the risk of admitting false confession or confessions made under duress in the existing state of affairs, may be in the police or even Army. The trial Judge should have held the voir-dire inquiry and satisfied on the voluntariness as and when the objection was raised, since the witness is a superior officer in the Army who has authority over the Accused. Abuses and unfair advantages, 60 NLR 313 at 319-320, need to be checked and tried by the trial judge. A mere answer of an admission and that the Accused failed to challenge the confession should not be the only deciding factor. Trial Judge has not attempted to rule out abuses of unfair advantages, since witness' evidence thereafter suggest very many lapses deliberate or otherwise within the Army, to conceal evidence. Trial Judge need to be extra cautious if a need arises to rule on a confessions.

When we consider the evidence led before the High Court and the material suggested to this court by the learned President's Counsel, it is very unsafe to act upon the prosecution version.

In view of the several matters stated above we have to intervene and interfere with the judgment of the learned High Court Judge. We cannot allow the conviction to stand. As such, we set aside the conviction and sentence, and allow the appeal.

Hence, the burden to prove that the confession was taken without any coercion/duress and was voluntary is not on the person making confession but on the prosecution. Also, the judge needs to be extra cautious if a need arises to rule on a confession.

KING

VS.

BILINDA ET AL.

Court of Appeal

Decided on- 26.02.1926

Citation- (1926) (27) NLR (390)

Hon'ble Judges-

Jayewardene, A.J

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Facts-

This case raises a question with regard to the admissibility of a confession made by the first accused. The first accused and three others were charged in this case with the forgery of a deed of sale. The first and the fourth accused have been convicted and sentenced to undergo three months' rigorous imprisonment. Both accused appeal, and it is contended for them that the confession on which the conviction is based has been wrongly admitted in evidence by the learned District Judge. The impugned deed was produced in a civil case before the Court of Requests of Gampola. One Horatala who is described as the grantor of this deed denied having executed it. After the termination of the case he sent a petition regarding the forged deed, and a police investigation was directed. In the course of their investigations the police arrested the first accused Belinda, brother of Horatala. He was brought to Kandy under arrest and was produced on February 3 last year to be remanded. Before he was brought to the Police Court at Kandy, he had made a statement amounting to a confession to the police, and

immediately before he was produced before the Magistrate the Inspector of Police recorded the confession.

When he produced the accused before the Police Magistrate he informed the latter that the accused wished to make a statement. The Magistrate inquired from the accused whether it was so, and on his answering in the affirmative, he proceeded to record the statement marked X2 in which the accused stated that he was taken to Kegalla, given something to eat, and induced to forge Horatala's name to the impugned deed. Later, criminal proceedings were instituted against this accused and three others in the Police Court, and in his statutory statement he retracted his confession. The confession was produced - as part of the evidence in the case. At the trial before the District Court, when the prosecutor proposed to read the confession in evidence, objection was taken that it was inadmissible as the requirements of section 134 had not been complied with in recording it. The Police Magistrate of Kandy who recorded the confession, and his Interpreter Mudaliyar were called under section 424 of the Criminal Procedure Code to prove that the requirements had been complied with, although the record did not show it. The learned District Judge disallowed the objection and admitted the confession in evidence. The conviction of both accused is based on the confession. I may at once say that as against the fourth accused - appellant the confession being a statement made by a co-accused is not evidence, even if the confession has been rightly admitted.

Issue-

Whether the requirements of Section 134 have been complied with to make a confession admissible in court?

Decision-

<Jayewardene, A.J.>

In the present case none of the requirements have been complied with except that the confession itself was placed on record. The learned Judge has tabulated the omissions and they may be summarized thus:

(a) The memorandum required by section 134 (3) was not made at the time the confession was recorded. The memorandum which now appears below the confession was made two and a half months later.

(b) The questions put, and the answers given, were not recorded as required by section 302, and the record does not snow that the Police Magistrate questioned the accused as required by section 134 (3) to enable him to form the opinion that the confession was made voluntarily.

(c) The accused has not signed the statement.

(d) There is nothing to show that it was read over and interpreted or that an opportunity was given to explain or add to the answers.

This wholesale omission to comply with the requirements of sections 134 and 302, it is contended, can be remedied under section 424, by evidence being led to prove that the requirements were in fact complied with at the time the confession was made. These omissions lead me to the conclusion that the learned Police Magistrate who recorded tie confession did not purport to do so under section 134. The Magistrate appears to have known that he had the right to record confessions made before an inquiry or trial, but he had forgotten the fact that they had to be recorded under section 134. Now section 424 empowers a Court before which a deposition of a witness, or a statement of an accused, is tendered in evidence to take evidence that the witness or the accused gave the evidence or made the statement recorded, if it finds that the provisions of the Code have not been fully complied with by the Police Magistrate recording the evidence or statement. Here no attempt had been made to comply with any of the requirements of section 134, and in view of the imperative terms of the section, my opinion is that section 424 cannot be resorted to make good all these omissions.

There has been a failure to comply with the letter or the spirit of section 134 which framed in very imperative terms. The so - called A.J. confession is, therefore, inadmissible in evidence, and ought to have been rejected. It was, as I have already stated, retracted when the accused was called upon to make his statutory statement at the preliminary inquiry under Chapter XVI of the Criminal Procedure Code.

Hence, in this case, the requirements to be fulfilled during confession are laid down and non-compliance of the requirements leads to inadmissibility of the confession.

RELIABILITY OF WITNESS

KAHANDAGAMAGE DHARMASIRI

VS.

THE REPUBLIC OF SRI LANKA

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 04/2009 and S.C. Spl. L.A. No. 165/2008

Decided on- 03.02.2012

Citation- LEX/SLSC/0036/2012

Hon'ble Judges-

Shiranee Tilakawardane, J., Marsoof, J. and Imam, J.

Facts-

The death of Arabada Gamage Nandawathie occurred due to an incident that took place on 31st March 1993, at her residence in the district of Hambantota. At the trial the Prosecution (hereinafter referred to as the Respondent) led the evidence of two eye witnesses namely Kusumawathie, mother of the deceased and Maduranga the son of deceased. The Accused - Appellant - Petitioner (hereinafter referred to as the Appellant) along with two others stood trial without a jury in the High Court of Hambantota.

The Appellant (the 1st accused in the case) and the 2nd accused were found guilty and sentenced to death whilst the 3rd accused was acquitted on 29th June 2004. The 2nd accused died pending the hearing of the appeal in the Court of Appeal.

The incident that led to the murder of Arabada Gamage Nandawathie is not disputed. The District Medical officer evidence concludes that the deceased was shot twice. She was first shot in the chest and subsequently shot in the head with both having been in close proximity.

The appellant has sought leave to appeal from the decision of the Court of Appeal, where it upheld the decision of High Court.

Issue-

Whether the Courts have failed to consider the serious and material omissions in the main witness evidence?

Decision-

<Shiranee Tilakawardane, J.>

the cause of the belatedness in testifying to the Appellant's identity, which according to her, was the palpable and petrifying fear instilled into the witnesses by the 1st Appellant, when he threatened her with a gun to her head, directing her not to disclose his identity is accepted as a plausible and a reasonable ground for the initial non-disclosure by this witness. It is significant that this witness, in her first statement, named the others who accompanied the Appellant.

The witness revealed in her testimony at the trial that the Appellant had fired the second shot at the deceased and proceeded to unfold a clear and consistent narrative of the events. No material contradictions were marked and an evaluation of the events proves beyond a reasonable doubt the presence of the eye witness, at the incident.

In the case of Surendra Pal & Ors. v. State of U.P. & Anr., Judgment held on 16th Septemeber 2010, Supreme Court of India states the following:

Merely because eye-witnesses did not give out the names of the accused persons while describing the cause of death in the inquest report did not render the presence of the eye-witnesses on the spot doubtful.

In addition to the reasons given above no material omissions or contradictions had been marked by the counsel for the defense at the trial, and the testimony of the 1st and 2nd witnesses, corroborated each other on all material aspects of the case. This evidence was also corroborated by the independent, scientific forensic evidence and the Post Mortem Report.

Therefore, this Court holds that the mere belatedness and failure of the 1st witness to name the appellant in the first statement, under the given circumstances does not render the witness's evidence unreliable or lacking in testimonial creditworthiness; or the presence at the incident of the 1st and 2ndeyewitness doubtful.

This court also concurs with the opinion of the Honourable Judge of the High Court and Their Lordships of the Court of Appeal that the evidence of the witnesses corroborates each other on all material aspects disclosing the consistency, reliability and credibility of their testimony.

This court must also in considering the testimony of the 2nd eyewitness determine two critical tests before considering belated evidence as reliable evidence: firstly, reasons for delay? And secondly, are those reasons justifiable?

At the trial, the learned High Court Judge, after hearing the evidence and reasons for belated statement by the first witness and Maduranga, had determined that delay did not assail the credibility of the witness. This Court holds that the reasons given to explain the delay in this witness making a statement, on the facts elicited at the trial, is reasonably plausible, conceivable and justifiable.

This Court accepts the presumption made by the Court of Appeal that the learned trial Judge certainly had the benefit of determining the witnesses' credibility both under examination-in-chief and under cross-examination and has arrived at a reasonable finding that in the interest of justice, the Courts had overlooked the inconsistencies in the witness statements and evidence at the trial due to various reasonable circumstances in the aforementioned.

Accordingly, the opinion of this Court is that the Court of Appeal was in the right not to interfere with the trial Judges case decisions as the learned trial Judge had applied correct principles. As a result there was no necessity for the Court of Appeal to "reverse, correct or modify any order, judgment, decree or sentence according to law" or "receive and admit new evidence additional to or supplementary of the evidence already taken in the Court of First

Instance touching the matter at issue in any original case, suit, prosecution or action as the justice of the case may require" as directed in Article 139 (1) & (2) of the Constitution.

Hence, the credibility of the eyewitness could be determined by two critical tests: firstly, reasons for delay? And secondly, are those reasons justifiable?

Further, the reliability/credibility of the witness could be examined under examination-in-chief and cross-examination

THE ATTORNEY GENERAL

VS.

SANDANAM PITCHI MARY THERESA

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 79/2008 and S.C. (Spl.) L.A. No. 153/2008

Decided on- 06.05.2010

Citation- LEX/SLSC/0039/2010

Hon'ble Judges-

S. Tilakawardane, J., Sripavan, J. and Imam, J.

Facts-

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.

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. Hence, the Special Leave appeal.

Issue-

Whether the Court of Appeal erred in law by holding the witness of Matilda credible and reliable?

Decision-

<S. Tilakawardane, J.>

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 (SC 23/75 D.C. Colombo Bribery 190/B - Minutes of S.C. Dated 1/11/1975) 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 independent witness (Vide, Hasker v. Summers (1884) 10 V.L.R. (Eq.) 204 - Australia; Leefunteum v. Beaudoin (1897) 28 S.C.R. 89) - 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, MANU/PR/0012/1935: AIR 1936 P.C. 60). The Court may also determine credibility based on the relative probability of the defence version taking place in light of the evidence before Court.

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. Hence, the Court of Appeal have erred in law by holding Matilda's evidence reliable.

Hence, the test of credibility is whether the witness is an interested or disinterested witness. The evidence given by an independent witness is given more credibility over a witness who is interested in the matter.

ADLIET RATNAYAKE

VS.

RATNAYAKE ET AL.

Court of Appeal

Decided on- 06.03.1947

Citation- (1947) (48) NLR (134)

Hon'ble Judges-

Keuneman, J. and Canekeratne, J.

Facts-

The 1st petitioner who propounded the will was the mistress of Ratnayake, who had treated her as he would a married wife, and who had two children by her to whom he was devoted. The District Judge has held that the will itself was not an unreasonable will, and that no suspicion can attach to the will from the dispositions contained in it which were just and equitable, In fact it is not improbable that the will represented the wishes of the testator. No doubt the will was written in an unusual place, viz., an account book of the testator. But it is also to be noted that this moderately long will was written out entirely in handwriting strongly resembling that of the testator in this account book which contained pages of the testator's writing. If the will was a forgery, the forger was courting immediate detection. The will certainly was accepted for a time as genuine by the 2nd petitioner who is now a strong opponent of the will, and he signed the original affidavit asking for probate as one of the executors named in the will. The 2nd petitioner was familiar with the handwriting of the deceased.

Issues-

Whether the alleged will (P1) of May 23, 1943, was duly executed by James Albert Ratnayake in the presence of five witnesses?

Whether the findings of the District Judge related to matter affects the credibility or the reliability of the various witnesses called?

Decision-

<Keuneman, J.>

The Court said that, one matter may be specially mentioned. The District Judge says "Grave suspicious arise on the evidence as to whether the will propounded was the act of the deceased". We have carefully examined the judgement and we do not think that in this case any element of suspicion relating to the will can be said to have arisen. The questions which did arise according to the findings of the District Judge related to matters which may have affected the credibility or the reliability of the various witnesses called and cannot be said to relate to the circumstances under which the will was made. We do not think that any suspicion with regard to the genuineness of the will can be said to have arisen.

In the present case the question was whether the alleged will was duly executed by the testator and attested by the five witnesses. It was a pure question of fact-as to whether the witnesses who spoke to the due execution and attestation were to be believed. If they were believed no element of suspicion arose. If they were not believed, then the will could not be held proved.

In our opinion the District Judge has been misled into the belief that there were elements of suspicion which it was the duty of the propounder to remove. This belief has influenced the District Judge into thinking that a heavier burden of proof rested on the propounder than the law had in fact imposed upon her. There can be no doubt, on the facts present in this case, of the mental competency of the testator, and if it were proved that he in fact executed the will there can be no doubt that he knew and approved of the contents of the will. The real question to be decided was whether the will had been executed and attested in due course.

In dealing with the witnesses who spoke into the due execution of the will the District Judge mentioned certain facts which in his opinion affected their reliability. Some of the reasons relating to particular witness are fairly cogent, some are not so convincing. In the end the District Judge said:- "The evidence of the 1st petitioner and her witnesses has not removed those suspicions. On the contrary their evidence is not such evidence as I feel I can act on with a confidence." In our opinion the District Judge expected an especially high degree of proof for the removal of the suspicion which he thought had arisen in the case.

There has been in this case delay in the delivery of the judgement. The District Judge has explained the reasons of the delay, and no fault appears to attach to him in this respect. The delay, however, may have affected his recollection of the witnesses, some of whom gave evidence a considerable time before the date of the judgement. At any rate it makes us less reluctant to interfere in this case.

In the circumstances we set aside the judgement appealed against and send the case back for trial before another District Judge. If the parties agree the evidence already recorded may be utilized, but it is desirable that all the witnesses be presented again for cross-examination.

Hence, when there is any suspicion as to the reliability of the witness, and a question arises thereon, then the judge only has to clear that suspicion.

SESSION 7

APPRECIATION OF ELECTRONIC EVIDENCE

JANASHAKTHI INSURANCE CO. LTD.

VS.

UMBICHY LTD.

Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. 26/99

Decided on- 23.05.2007

Citation- (2007)(2)SLR(39)

Hon'ble Judges-

S.N. Silva, C.J., Jayasinghe, J. and Shiranee Tilakawardane, J.

Facts-

This is an appeal by the successor to the original insurer, the defendant-appellant, against the judgment of the Commercial High Court dated 22nd April 1999, awarding the insured, the plaintiff-respondent, damages on two causes of action for breach of contract to pay the sums insured on two contracts of marine insurance, pertaining to the carriage of consignments of cargo from Turkey to Sri Lanka.

The High Court awarded the insured an amount aggregating to Rs. 27,323,372.00 with legal interest thereon from 1st September 1987 to the date of decree and thereafter on the aggregate amount of the decree till payment in full and taxed costs.

The plaintiff-respondent instituted action against the defendant-appellant on 24th May 1993 for the loss of cargo consisting of 2000 metric tons of red split lentils valued at Rs. 25,668,380/- and 200 metric tons of chickpeas valued at Rs. 1,654,992/- consigned to the plaintiff- respondent on M.V. 'Elitor' which sailed from the port of Mersin in Turkey on or about 24th May 1987.

Issues-

Whether the Act provides for the admissibility of contemporaneous recordings by electronic means, where such evidence would only be admissible if notice is given to the other party and an opportunity to inspect the evidence and the machine used to produce the evidence?

Decision-

<Shiranee Tilakawardane, J>

The Court held that it is unnecessary to comment on the merits of this submission, as this too is a fresh submission made at the appeal stage which finds no place in the trial proceedings.

Hence, the admissibility of evidence in court by electronic means is not settled.

Prior to the introduction of Evidence (Special Provisions) Act, 1995 in Sri Lanka, there was no provision under Law of Evidence to admit Computer Evidence.

The Evidence (Special Provisions) Act has been introduced to manage computer based evidence efficiently and legally in civil and criminal proceedings before courts.

The following Acts enacted by the Legislature of Sri Lanka deals with the admissibility and appreciation of electronic evidence in the State-

1. Evidence (Special Provision) Act, 1995 and

2. Electronic Transaction Act, 2006.

Appreciation of digital evidence in Sri Lankan Law- By Talwant Singh, Additional District & Session Judge Delhi District Court, India- Published on Feb 01, 2014.

1. Appreciation of Digital Evidence • ICT related evidence may be computer generated or computer related evidence and could be even without any human intervention. • Some countries tried to interpret computer evidence as Documentary Evidence or Real Evidence as in case of India. • Then it should be governed under Rules of Primary and Secondary evidence and it shows that computer evidence is not easy to consider as `documentary evidence.'

2. Appreciation of Digital Evidence • Prior to the introduction of Evidence (Special Provisions) Act, 1995 in Sri Lanka, there was no provision under Law of Evidence to admit Computer Evidence. • The Evidence (Special Provisions) Act has been introduced to manage computer based evidence efficiently and legally in civil and criminal proceedings before courts.

3. Appreciation of Digital Evidence • Computer' is defined in section 12 of the Act and it means any device the functions of which includes storing and processing of information. • By this definition, even a Smart Phone is a Computer. • 'Digital evidence' or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial.

4. Appreciation of Digital Evidence • Computer Evidence has been specified under section 5(1) of the Act as: • In any proceedings where direct oral evidence of a fact would be admissible any information contained in any statement produced by a computer and tending to establish the same fact shall be admissible as evidence of that fact subject to the conditions expressed in the same section such as; • The statement produced or reproduced, is capable of being perceived by the senses; • Cont...

5. Appreciation of Digital Evidence Cont.. • At all material times the computer producing the statement was operating properly or, if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the production of the statement of the accuracy of the information contained therein; • The information supplied to the computer was accurate and the information contained in the statement reproduces or is derived from, the information so supplied to the computer.

6. Appreciation of Digital Evidence • It shall be sufficient to show that: (a) during the said period there was regularly supplied to the computer, in the ordinary course of such activity, information of the kind contained in the statement or of the kind from which the information so contained is derived ; and (b) the information contained in the statement reproduces, or is derived from, information regularly supplied to the computer in the ordinary course of such activity.

7. Appreciation of Digital Evidence • Where any statement referred to in sub-section 5(1) of the Act, (a) It cannot be played, displayed, or reproduced in such a manner as to make it capable of being perceived by the senses; (b) It is capable of being so perceived but the same is unintelligible to a person not conversant in a specific science; or (c) Same is of such a nature it is not convenient to perceive and receive in evidence, in its original form, • Then a transcript, translation, conversion or transformation, as the case may be, of the same, which is intelligible and is capable of being perceived by the senses are admissible as evidence.

8. Appreciation of Digital Evidence • Section 7 of the Act provides provisions regarding Notices to have access to inspect evidence sought to be produced, machine, device, or computer, any records relating to the production of the evidence or the system used in such production, and the steps to be taken by the other party. • The court may presume the accuracy of any recording, reproduction or statement produced by, or by use of a machine, device or computer which is in common use where the court draws such presumption with respect to any recording, reproduction or statement, and in the absence of any evidence to the contrary.

9. Appreciation of Digital Evidence • As per Electronic Transactions Act No.19 of 2006, If any information is contained in a data message, electronic document, electronic record or other communication made by a person who is dead or who by reason of his bodily or mental condition is unfit to attend as a witness; • Or who is outside Sri Lanka and where reasonable steps have been taken to find such person and he cannot be found; • Or who does not wish to give oral evidence through fear; or who is prevented from so giving evidence, • Then any evidence relating to such information shall, if available, be admissible.

10. Appreciation of Digital Evidence • The Courts shall, unless the contrary is proved, presume the truth of information contained in a data message, or in any electronic document or electronic record or other communication; and • In the case of any data message, electronic document, electronic record or other communication made by a person, that it was made by the person who is purported to have made it; and • Similarly, shall presume the genuineness of any electronic signature or distinctive identification mark therein.

11. Appreciation of Digital Evidence • The burden of proof of the genuineness of such document has been virtually shifted from proposing party to the opposing party. • There is no applicability of the Evidence (Special Provisions) Act in relation to any data message, electronic document, electronic record or other document to which the provisions of Electronic Transactions Act applies.

12. Appreciation of Digital Evidence • Section 16 of the Payment Devices Frauds Act deals with matters relating to evidence under the same Act. Accordingly, a certified copy of an entry relating to a payment device located in Sri Lanka or outside Sri Lanka, kept by an Issuer or acquirer in the ordinary course of business of such Issuer or acquirer, whether kept in written form or stored by electronic, magnetic, optical or any other means in an information system or computer or payment device shall be admissible in evidence in relation to a prosecution in respect of an offence under section 3 of the Act, and shall be prima facie evidence of the facts stated therein.

13. Appreciation of Digital Evidence • Discovery of evidence is the most essential part to prove a case and various jurisdictions have faced common and different types of difficulties unique to relevant legal systems due to its own nature (of laws), procedures etc. • When the subject matter is discussed with `Computer or electronic evidence', it will be a more complicated issue compared to discovery of non electronic evidence.

14. Appreciation of Digital Evidence • With development of technology, evidence takes a new form. • E-mail, chat room transcripts, databases, spreadsheets, web browser history files, information through system backup tapes have been replacing conventional paper documents. • Computer evidence may be stored in hidden files as there is a great deal of left over data stored on their disk drives of a computer. Some institutions may store their data at a distant server, different website etc.

15. Appreciation of Digital Evidence • • • • • • • • Digital Evidence can be found in: e-mails digital photographs ATM transaction logs word processing documents instant message histories files saved from accounting programs spreadsheets internet browser histories

16. Appreciation of Digital Evidence Cont... • • • • • • • databases Contents of computer memory Computer backups Computer printouts Global Positioning System tracks Logs from a hotel’s electronic door locks Digital video or audio files

17. Appreciation of Digital Evidence • Digital discovery tends to be voluminous, as electronic data are cheaper and easier to copy, archive and distribute. • Electronic data, unlike their conventional counterparts, do not disappear easily and difficult to delete (or destroy) of an electronic document. • Unlike a paper document, digital document has increased the number of locations where potentially discoverable documents may be found. • Cost factor relating to digital discovery is a serious problem due to its nature.

18. Appreciation of Digital Evidence • Digital Evidence: >tends to be more voluminous >more difficult to destroy >easily modified >easily duplicated >potentially more expressive, and >more readily available

19. Appreciation of Digital Evidence • Privacy issues will be another aspect under Digital discovery since courts can allow access to email, records of Web sites visited, transcripts of chat room discussions etc. to discover such evidence. • Standard of knowledge and competence of investigators and their ability to explain the relevance of electronic forensic analysing tools used for discovery of electronic evidence also might open doors for different level of acceptability of such evidence in Court trials. • It is the duty of the Forensic experts to ensure that nothing has been added to or deleted from electronic evidence recovered from crime scene.

Case Study

The 2013 Salzburg Workshop on Cyber Investigations: Digital Evidence and Investigatory Protocols- By Tommy Umberg and Cherrie Warden, Page 6.[1]

Sri Lanka case study-[2] Often authentication is not suited for evidence not taken directly from a device; therefore, an investigator must use unconventional methods. The following case study describes one such situation that called for creative approaches to the authentication of the evidence.

In August of 2009, during the Sri Lankan army's battle against the Liberation Tigers of Tamil Eelam, video footage purporting to show the execution of prisoners became public through the submission from a private source to a news agency.[3] No witnesses were willing to verify the video, nor was there any ancillary evidence to corroborate the video's authenticity. Furthermore, the Sri Lankan Government denied the allegations and labeled the video unreliable.[4]

Philip Alston, the UN special rapporteur on extrajudicial, summary or arbitrary executions, suspected that the video had evidentiary value and therefore sought to determine whether the video was authentic. Additionally, he set out to determine the reliability of the evidence, in that it depicted what it purported to show. To prove that the video was authentic, Alston sent the footage to a digital editing forensic expert. The expert used software (called "Cognitech") to stabilize and enlarge vital parts of the footage. He concluded that there were no breaks in the film's continuity, indicating that the footage had not been edited or manipulated.

Alston subsequently sent the stabilized and enlarged footage to two other experts, a ballistic expert and a forensic pathologist. The ballistic expert sought to determine whether the weapons and bullets shot during the video were real. He concluded that the weapons in the

[1] The 2013 Salzburg Workshop on Cyber Investigations: Digital Evidence and Investigatory Protocols- By Tommy Umberg and Cherrie Warden, Page 6, HeinOnline, 11 Digital Evidence & Elec. Signature L. Rev. 128 2014

[2] This section is predominantly compiled from Deeming Sri Lanka Execution Video Authentic, UN Expert Calls for War Crimes Probe, UN News Centre, 7 January 2010, http://www.un.ora/apps/news/stoy.asp?NewslD=33423 .

[3] The video can be viewed at http://www.Iiveleak.com/view?i=0a1 1311145191.

[4] Office of the High Commissioner for Human Rights, United Nations, UN Expert Concludes that Sri Lankan Video is Authentic, Calls for an Independent War Crimes Investigation, (7 January 2010), http//www.ohchror/EN/NewsEventsPaqes/DisplayNews.aspx?Ne ws10=9706&LangaIOE.

video were AK-47s and thus conducted experiments by shooting live and imitation AK-47 ammunition. After comparing the tapes with the original video, he concluded that the recoil, the movement of the weapon and shooter, and the gasses emitted from the muzzle were consistent with the firing of live ammunition rather than blanks. The forensic pathologist analyzed the victims' body reactions and blood splatter from the video, and determined that both were consistent with "what would be expected" in a close range shooting.[5]

While none of the experts' findings independently proved beyond all doubt that the video was authentic, working in conjunction, they serve as compelling evidence of the authenticity of the video. Upon publishing these findings, the international community put pressure on the Sri Lankan Government to address the situation. In addition, Christ of Heyns, a U.N. special rapporteur, stated at a press conference that the case should go to the next level of international investigation.[6] The results of the official investigation are pending at the time of writing.

The methods outlined above shed sufficient light upon the accuracy of the video to warrant an official investigation. If resources permit, then similar techniques should be employed to aid in the authentication for other evidence of a similar nature. Furthermore, the reliance upon a wide array of experts suggests that it is advantageous for an investigative body such as the OTP to pursue and maintain a large network of diverse experts.

For evidence that is recovered independently of a device or from some anonymous source, investigators must proceed on a case-by-case basis. Investigators dealing with such evidence may be able to employ traditional authentication techniques, but at times are required to develop creative strategies similar to those depicted in the Sri Lanka case study.

[5] Office of the High Commissioner for Human Rights, United Nations, UN Expert Concludes that Sri Lankan Video is Authentic, Calls for an Independent War Crimes Investigation.

[6] United Nations News Centre, United Nations, Sri Lanka: UN Experts Calls on Government to Probe Executions Captured on Video, (31 May 2011), http://www.un.orolapps/news/story.asp?NewslD=38564#.UkVDJLvTaFM.

Fourth amendment - search and seizure and evidence retention - second circuit creates a potential "right to deletion" of imaged hard drives.

UNITED STATES

VS.

GANIAS

755 r3d 125 (2d cir. 2014)

One of the most pressing challenges facing the legal world today is the application of constitutional law to rapidly evolving technology - particularly the application of the Fourth Amendment protection from unreasonable search and seizure to the digital frontier.[7] The Fourth Amendment was drafted primarily with physical property in mind,[8] to protect against general warrants "not limited in scope and application."[9] When executing warrants today, the standard approach in seizing electronic data is the creation of an identical read-only copy of the computer's contents called a forensic mirror image.[10] However, such evidence collection standards have generated a host of constitutional questions, centering on "how to limit the invasiveness of computer searches to avoid creating the digital equivalent of general searches."[11]

[7] See, e.g., Orin S. Kerr, Searches and Seizures in a Digital World, iI HARV. L. REV. 531 (2005).
[8] See United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 313 (1972).
[9] Maryland v. King, 133 S. Ct. 1958, 198o (2013) (Scalia, J., dissenting); accord Kerr, supra note i, at 536 ("General warrants permitted the King's officials to enter private homes and conduct dragnet searches for evidence of any crime.").
[10] See Scott Carlson, New Challenges for Digital Forensics Experts and the Attorneys Who Work with Them, in UNDERSTANDING THE LEGAL ISSUES OF COMPUTER FORENSICS 17, i9-20 (Aspatore 2o13), 2o13 WL 3759817, at *2 (offering a background on the standard procedures of digital forensics). Such sweeping data collection is constitutionally justified by the practical need to find files in the depths of a hard drive, akin to "intermingled documents" in a wholesale seizure. Cf. United States v. Tamura, 694 F.2d 591, 595-96 (9th Cir. 1982).
[11] Kerr, supra note i, at 535.

Recently, in United States v. Ganias,[12] the Second Circuit held that the government's retention of files outside the scope of a warrant from lawfully imaged hard drives for over two and a half years violated the Fourth Amendment.[13] While the reasoning behind this decision seems sound and intuitive when viewed against Fourth Amendment requirements regarding physical property, the opinion raises concerns about the evidentiary chain of custody[14]; as a result, the opinion risks creating a "right to deletion,"[15] which could unnecessarily complicate criminal prosecutions.

Facts-

In 2003, the Army launched an investigation into alleged "improper conduct" by an Army contractor, Industrial Property Management (IPM).10 As part of the investigation, the Army obtained a warrant to seize materials from Stavros Ganias, IPM's accountant. The warrant authorized the seizure of all "books, records, documents, materials, computer hardware and software and computer associated data relating to ... [IPM]. ' When the warrant was executed, the Army's computer specialists made forensic mirror images of all three of Ganias's computers. "[Tihe investigators were careful ... to review only data" within the scope of the warrant. However, they did not purge or delete the files that did not pertain to IPM and that were therefore "non-responsive" to the warrant.

In late 2004, IRS investigators discovered accounting irregularities in the paper documents from Ganias's office. The government then expanded its investigation of Ganias to include possible tax violations and discovered evidence that Ganias had improperly reported income for his clients, and perhaps for himself. The IRS case agent sought to review Ganias's personal financial records, and although she knew they were stored on the government copies of Ganias's computers, did not believe she could properly review them as they were outside the scope of the 2003 warrant. Ganias and his counsel did not respond to a request to access

[12] 755 F.3d 125 (2d Cir. 2014).
[13] Id. at 127 -28.
[14] This comment uses the terms "chain of custody" and "authentication" interchangeably to refer to the process of verifying the integrity of digital evidence.
[15] Throughout this comment, the "right to deletion" refers to an individual's right to have the government delete electronic evidence that is nonresponsive to a search warrant and the government's responsibility to do so within a reasonable amount of time. This usage varies somewhat from some other legal scholarship. See, e.g., Andrea M. Matwyshyn, Privacy, the Hacker Way, 87 S. CAL. L. REV. i, 63-64 (2013) (proposing a statutory "right of deletion" for consumers' data after contract termination); Paul Ohm, The Fourth Amendment Right to Delete, I19 HARV. L. REV. F. Io, 17-18 (2005) (using the term to refer to a right that a data owner could rely upon to compel the government to delete seized imaged hard drives); John Palfrey, The Public and the Private at the United States Border with Cyberspace, 78 MIss. L.J. 241, 291-92, 291 nn.138-39 (2008) (discussing the "right to demand deletion" suggested by Ohm and other scholars).

these files, and subsequently, the government obtained a warrant in April 2006 to search the preserved files of Ganias's personal financial records from 2003. In October 2008, Ganias was indicted by a grand jury for conspiracy and tax evasion. In February 2010, Ganias sought to suppress the evi-dence obtained as a result of the 2006 warrant, arguing that the data outside the scope of the 2003 warrant were held for an unreasonable amount of time and should have been returned. In April 2010, the U.S. District Court for the District of Connecticut denied the motion on the grounds that the data were seized pursuant to a valid warrant by "means less intrusive to the individual ... than other means ... authorized. ' On April i, 2011, the jury convicted Ganias on both counts of tax evasion. Ganias moved for a new trial on the basis of alleged jury misconduct, but the district court denied the motion and later sentenced

Ganias to twenty-four months' imprisonment.

Issue-

Whether there was violation of the rights of the Ganias conferred by 4th Amendment?

Decision-

The Ganias court's opinion properly held that Ganias's Fourth Amendment rights were violated, and it rightly recognized the importance of the particularity requirement in the context of electronic evidence. A hard drive contains detailed personal information including correspondence, lists of associates, web history, and financial information. Forensic investigators can also often recover deleted files as well as use "metadata," a host of associated data detailing when and how a computer was used, to discover a wealth of additional information and reconstruct the development of a file. The opinion reflects the fear that the government could retain a defendant's files indefinitely, and then much later, when probable cause is finally developed, obtain a search warrant, causing every warrant for specific electronic data to "become, in essence, a general warrant.' The court expressed very real concerns that allowing the actions of the government in a case like this would essentially "reduce[] the Fourth Amendment to a form of words.'

But the court may have gone further than necessary in safeguarding this constitutional interest. The decision in Ganias stated that the government is not authorized to "retain all non-responsive documents indefinitely. This has led some commentators to note that the court created an implied "right to deletion" that has potentially broad implications, particularly in relation to the evidentiary chain of custody. Such a reading is supported by sweeping language that appears at times throughout the majority opinion indicating that the retention itself, rather than the specific use of the retained data by the government, may have been an issue for the court. Although it is unclear from the opinion exactly when such data must be deleted, the court's opinion could be read to suggest that nonresponsive data must be deleted sooner rather than later.

However, such a prescription threatens the authentication process. Upon execution of a warrant for electronic data, the government copies the entire hard drive before segregating the responsive files. The Ganias court acknowledged this practical reality of electronic forensic analysis, stating that it would be both "impractical" and "unnecessary" for the government not to use off-site analysis via mirror imaging.

After collecting a hard drive image, the data must be authenticated for it to be admissible under current procedural rules. "Hash values," strings of characters described as "digital fingerprints," are the best method of verifying that the copied files are identical and unaltered.

This method allows the entire hard drive to be authenticated at the highest standard and guarantees protection from evidence tampering, while only minimally intruding on any defendant's privacy interest.

Hence, while dealing with electronic evidence, only that material should be kept for which permission is given and is relevant for the matter, and not any other information, which would tend to violation of constitutional right.

Symposium on the Challenges of Electronic Evidence– The Philip D. Reed Lecture Series.[16]

1. It's pretty difficult to deny that technology is changing the way American law works. Discovery is an example. The volume, the expense of producing discovery in American litigation has changed exponentially because of e-discovery, because of electronically stored information (ESI);
2. Electronic signatures are another problem. In bankruptcy, most things are done electronically. That's increasingly true for other filings. Well, that's a potential problem for fraud;
3. The evidence rules, that is amending rules to account for changes in technology;
4. The other thing we're doing is accounting for all of the rules and how they need to change with the onset of universal electronic filing. Take something like the three-day rule. Does that rule make sense when people are automatically served? Well, I would say not exactly. Should we be so focused on font size and the color of a brief when I haven't seen a blue or a red brief in a long time? Not exactly. So maybe all that has to be adjusted;
5. The restyling effort, however, gave the Committee a chance to update the language of the rules, to accommodate electronic evidence without actually changing any substantive rulings of the courts. And the way that was done was by amending Rule 101 to add a definition that any reference to writing also includes similar information in electronic form. That language at least basically modernizes all of the rules by way of definition;

   But what the restyling did not solve was whether, even if the rules do cover electronic information by word, the basic evidentiary concepts need to be retooled to deal with electronic information;
6. As to authenticity if it's a hard copy, you can fairly easily see whether it's been altered. If it's electronic, it's more difficult. And the question is whether that possibility of alteration should result in any different standard of authenticity;
7. Another question is whether electronic information can be managed and retrieved in such a way as to permit easier methods of authentication;

[16] Symposium on the Challenges of Electronic Evidence– The Philip D. Reed Lecture Series, HeinOnline, Citation: 83 Fordham L. Rev. 1163 2014-2015.

8. with authentication of digital evidence, you can have a question about what's the judge's job versus the jury's job if there is a reasonable dispute of fact and a fact-finder could find that the evidence either is authentic or is non;
9. Rules of Evidence can be broadly divided into two categories. The first category is rules that are based on how people act. And the second category is rules that are based on what people make.

   The challenge of the rules is to test the premise of admissibility against the changes of technology to make certain that the reasons for admissibility remain valid; and
10. Should the Rules of Evidence begin to reflect differences in technology, underlying different types of exhibits? Should an old-fashioned photograph be easier to admit than a digital image? Should a digital image be admissible purely on the say-so?

    If not, by what standards should the admissibility of the new technology be judged? Should trial judges caution jurors about admitted images, computer printouts, and other digitally created evidence and their potential limitations? Should the Rules of Evidence allow for an investigation into how the potentially admissible digital objects were created so that the images can be reverse-engineered to determine their authenticity?

    The real challenged posed before us is that whether the difference between the baby and the image should cause us concern when a lawyer moves into evidence the digitally created image as exhibit one.

SESSION 8

CYBER CRIMES AND LAWS DEALING WITH CYBER CRIME

1. The following Acts enacted by the Legislature of Sri Lanka deals with the Cyber Crimes in the State-

    1. Computer Crime Act, 2007 and

    2. Computer and Information Technology Council of Sri Lanka Act, 1984.