

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

Ahamad Razlan Razikdeen,
21/A,
1st Lane,
Milidoowa,
Galle.

Accused appellant

CA 41/2008

HC-GALLE-1922

vs.

The Attorney General,
Attorney General's
Department,
Colombo 12.

Respondent

Before : **Ranjith Silva, J. &
H.N.J. Perera, J.**

Counsel : **Ms. Indika Mallawarachchi for the
Accused Appellant
Rohantha Abeysooriya, SSC for AG**

Argued &

Decided on : 25.06.2012

Ranjith Silva, J.

Heard both counsel for and against this appeal. Counsel for the appellant has filed written submissions whereas the State has not. We find that the entire case against the accused appellant rests on the evidence of two witnesses. One is Siththi Fathima, she had seen only the 1st and the 2nd Accused appellants assaulting the deceased with clubs and their hands. The 2nd witness was not available to give evidence and only her deposition was led in evidence. According to the 2nd witness, all the seven accused who were indicted in the High Court had converged on the deceased and had assaulted him. What is objectionable in this case is the fact that the judge had acted on the evidence of Siththi Jeniya who was not available for cross examination and only whose deposition was led in evidence.

We find that the version of the two witnesses are rather contradictory. May be that the 1st witness so only a part of the incident during its initial stages and according to her she had left the scene early. Siththi Jeniya who was abroad at the time and was not available to give evidence had seen the rest of the incident.

Because of this contradictory nature of evidence, it would have been much better and much desirable even at much expense to have secured the attendance of Siththi Jeniya to give evidence and allow the defence to confront the witness in cross examination.

Also we find that on a mere statement made by the fiscal to the effect that Siththi Jeniya was not in the island and that she had gone abroad the learned judge decided to allow the prosecution to lead the deposition without making any attempt to ascertain and verify whether the witness was actually out of the island. In this regard, I would like to refer to the judgement of H/L Justice Gamini Amarathunge in **Lionel Vs. The Attorney General** 2004 1SLR at Page 123. And also the judgment of this court which followed the said decision and several other decisions including Indian decisions, in CA 226/2007 (HC-Gampaha 46/2004) decided on the 01.07.2010, it was held in that case that no evidence was led before High Court to establish the fact that the witness had gone abroad. The correct procedure would be for the prosecution to lead the evidence of the wife of the witness and the Grama Niladhari and provide an opportunity for the defence to cross examine the witnesses. It is after such inquiry provided the court is satisfied that the witness infact had gone abroad and that his presence cannot

be obtained without an amount of delay or expense which under the circumstances of the case, the court considers unreasonable, that a court should allow such an application. The trial judge was duty-bound to follow the established procedure before he arrived at his decision to adopt such evidence. In this regard, we refer to **Annavi Muththirian Vs. Emperor** 1915 16 Criminal Law journal Page 294 and **Sajjan Singh Vs. Emperor** 1925 26 Criminal Law journal at page 1489.

I would also like to refer to **Opatha Vidanapathiranaige Wasantha and others Vs. The Attorney General** CA 179/2006 HC-Galle 1513 and **King Vs. Fernando** 51 NLR page 224.

In this case the judge has acted on the evidence of a fiscal who gave evidence that the particular witness was not in the island and he had submitted two statements in evidence given by the mother and the Grama Sevaka of the area. But none of those witnesses were available for cross examination in courts. Therefore, that evidence would only be hear-say.

We find that it is not safe to allow the conviction to stand. But we find that a judge if properly directed on the law with regard to the admissibility of depositions and the reception of depositions and if the evidence is

properly evaluated, there is good evidence in this case to maintain the indictment.

Therefore, we direct a fresh trial and the Registrar is directed to send this case record to the relevant High Court as soon as practicable.

The learned High Court Judge is directed to issue process and make all necessary endeavors to secure the attendance of the particular witness, Siththi Jeniya who had made the deposition in the Magistrate's Court, to give evidence in this case.

The learned High Court Judge is also directed to first exhaust all avenues to secure the attendance of that witness and thereafter commence the trial.

Convictions and the sentence set aside. A re-trial ordered.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera, J.

I agree.

JUDGE OF THE COURT OF APPEAL

LA/-