

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

Galaudakanda Wathukarage Siripala

**Accused-Respondent-Appellant**

**Vs.**

CA (PHC) 182/2000  
HC Avissawella 88/98 (Rev)

Thotapitiya Archchige Abeypala

**Petitioner-Respondent**

Before : Sisira de Abrew J &  
K.T Chitrasiri J

Counsel Palliyage for the accused-respondent-appellant  
Suranga Bandara for the petitioner-respondent.

Argued on : 4.7.2011,5.7.2011

~ Decided on : <sup>6</sup> 8.10.2011

**Sisira de Abrew J.**

The accused respondent appellant (hereinafter referred to as the accused appellant) was charged in the Magistrate's Court of Avissawella for causing grievous hurt to TA Abeypala an offence punishable under Section 316 of the Penal Code and for causing simple hurt to DD Jayasuriya, an offence punishable under Section 314 of the Penal Code. The learned Magistrate, after trial, by his judgment dated 25.9.98, acquitted the accused appellant of both charges. Being aggrieved by the said judgment, TA Abeypala, the petitioner respondent (hereinafter referred to as the

respondent) filed a revision application in the High Court of Avissawella. The Attorney General did not grant sanction to appeal against the judgment of the learned Magistrate. The learned High Court Judge (HCJ) by his judgment dated 14.6.201<sup>0</sup>~~0~~ set aside the judgment of the learned Magistrate and ordered a retrial. Being aggrieved by the said judgment of the learned HCJ, the accused appellant has appealed to this court.

According to the evidence of Abeypala around 9.00 p.m. on the day of the incident, on hearing a commotion, he went in the direction of Jayaweera's house. He, then, saw the accused appellant who was a police officer attached to the Ehaliygoda Police Station assaulting Jayaweera. When he made inquiries about the assault, the accused appellant told him to mind his own business. Thereafter Jayaweera was taken near the compound of the accused appellant and he continued to attack Jayaweera. There were other police officers present at the scene. After the attack on Jayaweera, Abeypala too was taken near the house of the accused appellant and the accused appellant attacked him with a club. The attack on Abeypala was witnessed by his wife who gave evidence at the trial.

The accused appellant and the Officer-in-Charge of Ehaliyagida Police Station gave evidence. The accused appellant, according to the evidence, was a neighbour of Abeypala. Version of the defence is that Abeypala and Jayaweera came and damaged the house of the accused appellant when he was inside the house; that the police officers attached to the Ehaliyagoda police at this time arrived at the scene; and that OIC gave chase and arrested Abeypala who fell into ten feet deep pit. Doctor who examined Abeypala observed lacerations, Contusions and fractures on the legs of Abeypala. Doctor in his evidence first agreed with the suggestion that

these injuries could have taken place due to a fall but later said that these injuries could not have taken place due to a fall as there were no injuries on the upper part of the body. (Vide pages 75-79 of the brief). But the learned Magistrate considering the medical evidence concluded that Abeypala had sustained injuries due to a fall. This was a serious misdirection committed by the learned Magistrate.

The learned Magistrate, at page 235 of the brief used a portion of the statement made to police by Jayaweera as evidence to reject the prosecution version. Jayaweera did not give evidence at the trial. His statement was not produced at the trial. He died before the commencement of the trial. It is settled law that trial judges cannot use statements made by witnesses to the police in the course of investigation as evidence when they are not produced at the trial. This was a serious misdirection on law committed by the learned Magistrate.

The accused appellant's version is that Abeypala or Jayaweera damaged glass windows and flower pots of his house. But the accused appellant being a police officer of Ehaliyagoda did not make a complaint. This was the evidence of the OIC of Ehaliyagoda Police Station. Learned Magistrate did not consider this matter in evaluating the defence evidence. In my view this matter becomes a vital matter in considering the credibility of the accused appellant's evidence.

When I consider all these matters, I hold the view that the learned Magistrate's conclusion in acquitting the accused appellant is wrong. In my view the learned H CJ was correct when he ordered a retrial. For these

reasons, I dismiss the appeal and affirm the judgment of the learned HCJ  
✓ dated 14.6.2000 .

*Appeal dismissed.*

Judge of the Court of Appeal.

KT Chitrasiri J  
I agree.

Judge of the Court of Appeal.