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

CA Application No.151/13

HC Kalutara 108/09

Democratic Socialist Republic of
Sri Lanka.

Complainant

Vs.

Harold Rex Jansen

Accused

And now between

Harold Rex Jansen

56/8B, Sri Sumangala Road,

Kalutara North.

Vs.

Hon. Attorney General

Attorney General's Department.

Colombo 12.

Respondent.

Before : A.W.A. Salam, J. & Malini Gunaratna J

Counsel : Shanaka Ranasinghe PC with Madhewe Wijayasiriwardhana and Priyasala Padmasiri for the accused-petitioner and Yasantha Kodagoda DSG for the respondent.

Argued on: 26.11.2013

Decided on: 26.02.2014

This is an application made in revision. The background to the application briefly is that the accused-petitioner was indicted in the High Court under section 357 and 365 (b) (2) (b) of the Penal Code. The trial proceeded without a jury. At the close of the case for the prosecution, the accused-petitioner moved under Section 200(1) of the Code of Criminal Procedure Act, for his acquittal. This application of the accused-petitioner was refused by the learned High Court Judge who then proceeded to call for the defence, as he is empowered in Law. It is this decision that is impugned in these proceedings.

The grounds for impugning the decision, as they transpire in the application, *inter alia* are as follows...

1. The failure to assign reasons for the refusal of the application made under Section 200(1) of the Code of Criminal Procedure Act.
2. The failure to appreciate the evidence of the alleged victim that no act of sexual gratification was committed on her by the accused-petitioner.
3. The failure to consider that the mother of the victim of the alleged sexual abuse was not called to testify on the charge of abduction.

4. Failure to prove the charge of abduction.
5. Failure to consider the contradictions among the witnesses for the prosecution.
6. Non-appreciation of the failure to prove the commission of the offences the accused-petitioner was charged with.

Section 200 (1) of the Code of Criminal Procedure Act enacts that when the case for the prosecution is closed, if the Judge (i) wholly discredits the evidence on the part of prosecution or (ii) is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or (iii) of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal;

If however, the Judge **CONSIDERS** that there are grounds for proceeding with the trial he shall call upon the accused for his defence. (Emphasis added)

Section 200(1) of the Code of Criminal Procedure Act, focuses on two types of occurrences, when the case for the prosecution is closed. Initially, it places emphasis on the acquittal of the accused at the close of the prosecution case without calling for the defence. The circumstances, under which a High Court Judge is empowered to acquit an accused, under 200(1) may be classified as follows....

1. When the evidence adduced by the prosecution is wholly discredited by the Judge or
2. When such evidence fails to establish the commission of the offence/offences in the indictment or
3. When the evidence adduced, does not point to the commission of any other offence/offences of which the accused might be convicted.

No lengthy discussion is necessary as to the manner in which an order of acquittal has to be entered. Nevertheless, in passing it may not be inappropriate to observe that an order of acquittal under Section 200(1) should necessarily accompany the reasons that prompted the exoneration of the accused from the charge/charges or any other charges he might otherwise be convicted. The rationale behind the obligation to set out the reasons for the acquittal of the accused without calling for the defence is that the acquittal constitutes the final decision in the case which is appealable at the instance of the State or an aggrieved party.

On the contrary, a decision to call for the defence under Section 200(1) warrants different consideration. In terms of section 200(1), when the Judge **considers that there are grounds to proceed with the trial** from the stage where the prosecution has closed the case, he shall call upon the accused for his defence.

Section 200 of the Code of Criminal Procedure Act (with the omission of Sub-Section (2) which is inapplicable to the instant application) reads as follows....

> 200. (1) When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal; if however the Judge **CONSIDERS** that there are grounds for proceeding with the trial he shall call upon the accused for his defence. (Emphasis added)

What needs to be addressed here is whether the Court is bound to give reasons before it decides to call for the defence under Section 200(1). Perhaps, there may be cases in which the High Court Judges traditionally express their mind that the prosecution has unfolded a prima-facie case or that there are grounds for proceeding with the trial or similar words to that effect, prior to their proceeding to call for the defence. On a strict interpretation of the Section, we are disposed to think that at the end of the case for the prosecution; suffice it to say that there are grounds for proceedings with the trial or similar expression. In giving effect to Section 200(1) of the Code, it must be borne in mind that when the High Court Judge does not wholly discredit the evidence on the part of the prosecution or is of opinion that such evidence establishes the commission of the offence or **of any other offence,** he is entitled to call for the defence.

The expression **"there are grounds for proceeding with the trial"** as used in Section 200(1) cannot certainly suggest or convey that the High Court Judge is obliged to give elaborate reasons for his decision to call for the defence. The grounds for proceeding with the trial at the close of the case for the prosecution means nothing more than the High Court Judge **CONSIDERING** that there are grounds for proceeding with the trial. The ordinary meaning of the word 'CONSIDER' as it occurs in Section 200(1) would mean "to think about carefully", especially in order to make a decision. Quite obviously, the Section does not make it obligatory on the part of the High Court Judge to give reasons as to why he

considers the case as disclosed by the prosecution merits further trial. If elaborate reasons are required to be assigned before calling the defence, then, every High Court criminal trial (without a jury) ought to carry two Judgments, one at the close of the case for prosecution and the other at the close of the defence, i.e under Sections 200 and 203 respectively.

As regards the claim made by the accused-petitioner, the learned President's Counsel relied heavily on the judgment in W M R B Wijeratne and four others vs Hon. Attorney General, SC appeal No TAB 1/2007[1]. This judgment had been pronounced consequent upon an appeal being preferred against the conviction of the accused on certain criminal charges before a Trial at Bar. In other words, the *ratio decidendi* in the judgment deals with the requirement to give sufficient reasons for the decision taken at the end of the trial and during the trial which materially affect the final outcome. Guided by the principles enunciated in the said decision, it is hardly possible to state that the decision of a High Court Judge to call for the defence would materially affect the final outcome of a case.

The contention of the learned President's Counsel is that by reason of the judgment in the case of Wijeratne, a High Court Judge is bound to give his reasons for refusing an application to acquit an accused pursuant upon an application made under Section 200(1). The basis of his argument is that the decision to call for the

[1] Bar Association Law Journal 2000 page 169

defence constitutes a substantial question arising in the course of the trial. We have given our anxious consideration to this contention and our considered view is that the decision of the High Court Judge to consider that there are grounds to proceed with the trial is not a decision which materially affects the final outcome of the case, in the sense expressed in the case of Wijeratna. It is only a procedural step taken by Court towards the conclusion of the trial.

At this stage, it is pertinent to observe that an accused whose defence is called for by court may be at a distinct advantage as regards the final outcome of the trial. For example after the prosecution has unfolded a prima facie case, an accused by his evidence (whether under oath or otherwise) or through the evidence of his witness/witnesses might be capable of creating a reasonable doubt on version of the case of the prosecution. It might sometimes render the version of the accused probable thus placing the accused at an advantageous position. A classic example would be a case where the defence of *alibi* is raised. Therefore, it cannot always be said that the decision to call for the defence would "materially affect the final outcome" to the detriment of the accused. Hence, the judgment in the case of Wijeratna has no application to a decision taken under Section 200(1) to call for the defence.

As far as Section 200 is concerned, the High Court Judge can proceed to call for the defence when he considers that there are grounds to proceed with the trial either on the charges preferred

against him or when he considers that the accused might be convicted for any other offence. As such, when the High Court Judge proceeds to call for the defence, it is unsafe for a higher court to interfere with such a decision as the decision of the High Court to call for the defence involves the credibility of the evidence adduced before him on the charges preferred in the indictment or any other offence that may have been disclosed in evidence.

The other matter that needs consideration is whether the accused-petitioner is without any remedy at the end of the trial, even if his present application is refused. There cannot be any controversy on this question, as a right of appeal is available to the accused in such a situation. The learned President's Counsel was heard to say that his client does not want to take the risk of being convicted without sufficient evidence and in which event he will be incarcerated pending his appeal against the conviction. We are not inclined to endorse this argument as being the correct position of the law because no Judge is ever expected to convict an accused unless such a conviction warrants on the evidence placed before him.

The learned Deputy Solicitor General adverted us to three important judgments of which one has been decided by this court and the other two by the Supreme Court. The Attorney General vs Heeraluge Neil Gunawardena (S.C503/76) decided jointly by Samarawickrama ACJ, Rajaratnam J, Wijeysundara J, Vythalingam J and Thiththawala J. on 14 September 1976 is a landmark judgment on this issue. The law that has been discussed

in this judgment pertaints to Section 212 (2) of the Administration of Justice Law No 25 of 1973 which corresponds to Section 200(1) of the Code of Criminal Procedure Act. By this judgment a divisional bench of the Supreme Court clearly laid down the guidelines towards the correct application of the law relating to the return of a verdict of "not guilty" (by the jury) when the judge considers at the close of the case for the prosecution that there is no evidence that the accused committed the offence. For purpose of clarity section 212 (2) of the Administration of Justice Law is reproduced below....

> "When the case for the prosecution is closed, if the judge considers that there is no evidence that the accused committed the offence he shall direct the jury to return a verdict of "not guilty."

In the case of the Attorney General vs Heeraluge Neil Gunawardena the learned High Court Judge considered that there was no evidence that the accused committed the offence and accordingly he was of the view that the jury should return a verdict of not guilty. Incidentally, the decision has been taken by the learned High Court judge prior to the closure of the case of the prosecution. The Honourable Attorney General having challenged the findings of the Learned High Court Judge, the Supreme Court observed as follow.....

> ".....The court will not exercise its powers of revision in regard to proceedings of the High Court, save in very exceptional circumstances. In particular, this court will not entertain an application which will have the effect of interrupting the proceedings of the trial in a High Court. For example, no application will be entertained by this court at the instance of either the

> prosecution or the defence in respect of an order made by the High Court as to the admission or rejection of evidence. Generally, in respect of all matters which take place during the course of a trial, the parties, should await the final verdict as an acquittal or conviction, as the case may be, may render unnecessary an application for the intervention by this court".

The case of Sinha Tissa Migara Ranatunga and the finding of the Court of Appeal and the Supreme Court with regard to the proper interpretation of Section 200 (1) can be usefully referred to at this point. Sinha Tissa Migara Ranatunga who was the editor of The Sunday Time newspaper was indicted before the High Court for the commission of offences under sections 479 and 480 of the Penal Code. When the case for the prosecution was closed, an application was made on behalf of the accused seeking an order of acquittal. The Learned High Court Judge made a lengthy order giving reasons which led to the refusal of the application and setting out the reasons for his finding that there were grounds to proceed with the trial. The accused-petitioner invoked the revisionary jurisdiction of the Court of Appeal in application No CA 381/96.

His Lordship D.P.S Gunasekara J with Ismail J agreeing, held *inter alia* that a trial judge is not obliged to make an elaborate order setting out his reasons for holding that there are grounds to proceed with the trial when a submission of no case to answer is made on behalf of an accused in terms of section 200 (1) of the Code of Criminal Procedure Act.

Against the judgment of His Lordship DPS Gunasekara J in the case of Sinha Tissa Migara Ranatunga Vs Honourable Attorney General, the accused-petitioner made an application to the Supreme Court in SC SPL.LA 336/96 for special leave to appeal. His Lordship the Chief Justice G.P.S De Silva with S.W.B Wadugodapitiya, J and S. Ananda Kumarasamy J concurring refused the application for leave to appeal in a considered judgment where His Lordship the Chief Justice *inter alia* stated as follows.....

> The principles which guide the court in entertaining applications in revision in respect of criminal proceedings pending before the High Court were lucidity and cogently set out by a bench of five judges of the Supreme Court in the case of the Attorney General vs Heeraluge Neil Gunawardena (SC application 503/76- SC minutes of 14.9.76).

In Sinha Tissa Migara Ranatunga the Hon Chief Justice re-echoed the well established principles of Law as stated in the case of Attorney General vs Heeraluge Neil Gunawardena (supra) in the following manner...

> "..... We are not disposed to exercise our powers in revision to give, by a side wind, an appeal in a matter where there is no right of appeal..... We wish to state that this court will not exercise its powers of revision in regard to proceedings of a High Court, save in very exceptional circumstances. In particular, this court will not entertain an application which will have the effect of interrupting the proceedings of a trial in the High Court..... Generally, in respect of all matters which take place during the course of a trial the parties should await the final verdict as an acquittal or a conviction, as the case may be, may render unnecessary an application for the intervention by this court".

Unlike in a usual criminal trial, in this particular instance we are bound to advert to the Provisions of Section 163 A of the Evidence Ordinance as amended by Section 4 of Act No 32 of 1999. The amendment permits the admissibility of a video recorded interview with a child in proceedings relating to child abuse at a preliminary interview which is conducted between an adult and a child who is not the accused in such proceeding.

As has been expressly laid down by this Section such a video recording relating to any matter in issue in those proceedings are permitted to be led in evidence notwithstanding the Provisions of any other law with the leave of the court and be given in evidence unless it is otherwise excluded.

As far as the present case is concerned, such a video recording has already been led in evidence and it is left to the High Court Judge to decide on the relevance and credibility of such evidence. Quite remarkably, the video recording is led in evidence constitutes the evidence in chief, in so far as such evidence is admissible in law.

In terms of Subsection 5 of Section 163 where a child witness, in the course of his direct oral testimony before court, contradicts, either expressly or by necessary implication, any statement previously made by him and disclosed by the video recording, it shall be lawful for the presiding Judge, if he considers it safe and just in all the circumstances of the case, to act upon such previous statement as disclosed by the video recording, if such

previous statement is corroborated in material particulars by evidence from an independent source.

Taking all these matters into consideration, we are of the view that this is not a fit case which calls for the exercise of the powers of this Court to revise or set aside the impugned decision of the High Court. The application of the accused-petitioner if allowed would unnecessarily have the most undesirable effect of interfering with the course of justice, the learned High Court judge has chosen to adopt in the case before him.

At the conclusion of the trial, if the accused-petitioner is aggrieved by the final decision, he is not without any remedy. He has the statutory right of appeal and also is entitled to bail pending appeal, if he is legally entitled to such an interim relief. The decision of the Learned High Court Judge to call for the defence cannot be said to have been prejudged the case of the accused.

Having analyzed every aspect of the application and regard being had to the principles enunciated in the decision of this Court and the Supreme Court as cited above, we feel that the facts and circumstances which had led to the filing of the revision application are so compelling that we are not disposed to exercise the discretionary powers in favour of the accused-petitioner. As such the accused-petitioner is compelled to await the final outcome of the case in the High Court. Hence, we see no reason to justify the grant of relief to the accused-petitioner. For reasons

briefly outlined, we have no option but to refuse the application of the accused-petitioner.

Taking into consideration the circumstances peculiar to the revision application, we make no order as to costs.

A W A SALAM,J

MALINI GUNARATNA, J

NR/-