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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/189/2010
H/C Panadura case No. 1859/2004

Asitha Godabedda

ACCUSED

And,

Asitha Godabedda

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Dulindra Weerasuriya PC with Dharshana Edirisuriya and Ruvinda Welikala for the Accused-Appellant

D.de Livera PC Additional Solicitor General, for the AG

Argued on: 19.05.2015, 29.05.2015, 12.07.2015, 18.08.2015, 01.09.2015 and 07.09.2015

Written Submissions on: 16.11.2015

Judgment on: 19.02.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant to the present case namely Asitha Godabedda alias Chooti alias Chutta was Indicted before the High Court of Panadura for committing the murder of one Kondage Saumya Priyadarshani with others unknown to the prosecution on 23rd March 2001 at Gorakapola, an offence punishable under section 296 read with section 32 of the Penal Code.

The accused-appellant elected to be tried before the High Court Judge without a jury and was convicted after trial and sentenced to death by the Learned High Court Judge. Being dissatisfied with the above conviction and sentence the accused-appellant had preferred this appeal.

The case against the accused-appellant entirely depends on 4 dying depositions made by the deceased. Before analyzing the said dying depositions, I will now turn to the other evidence relied upon by the prosecution which explains the circumstances under which this incident had occurred.

The deceased was a woman of 24 years of age married to one Jagath Kumara. The accused-appellant was a close associate of the husband of the deceased and a frequent visitor to the house of the deceased.

It was revealed during the trial that the deceased was having an extra-marital affair with the accused-appellant and was pregnant for 6-7 months, most probably from the accused-appellant, but the relationship of the deceased and her husband was not disturbed due to this relationship.

It was further revealed during the trial that the said cordial relationship between the deceased and the accused-appellant was disturbed since the accused-appellant had agreed to get married to another girl on the request of his parents.

Based on the above material the prosecution took up the position that the accused-appellant had a strong reason to kill the deceased, since she had become a problem to him by this time. As against the said position the defence argued that the deceased committed suicide in front of the house of the intended wife of the accused-appellant, in order to embarrass the accused-appellant.

I will now turn to the dying depositions and the other evidence relied by the prosecution at the High Court Trial.

Deceased Saumya Priyadarshani who had died of "carbonic phosphate poisoning" had made 4 statements prior to her death to the following witness,

1. Madhana Kondage Bandusena Fernando (father)
2. Madhana Kondage Shyama Dilrukshi Fernando (sister)
3. Muthuthanthrige Chanaka Thusan Cooray
4. PC 30115 H.R. Karunadasa.

According to the evidence of Muthuthanthrige Chanaka Thusan Cooray, he was only 13 years at the time the incident occurred. He was staying in Kuruppu Mawatha, Panadura two doors away from the house of one Ramesha who was to marry the accused-appellant. On the day in question around 1.30 pm he returned home from school and was having his lunch with his father and mother. At that time he heard their neighbor one Dayawathy shouting saying "look at this Piyumali"

Witness along with his father and mother (Piyumali) went out to see what it was and at that time he saw a woman lying at the door step of Dayawathy, she was vomiting at that time .

At that time he heard the woman saying "බඩේ ඉන්න දරුවා අසිත අයියාගේ" the witness knew who Asitha was and, he saw Asitha's lorry parked near Rumesha's house at that time. Since they didn't know who this woman was, steps were taken to inform the police. When the police came, they took the woman to the hospital.

When the woman lying in front of the house of Dayawathy the witness had seen Asitha leaving the area with two others in his lorry.

The witness could remember meeting the father of the deceased, who came to his area and requested him to look for the bottle contained poison, saying that it will help the doctors to treat the patient. Witness recovered the bottle from a shrub jungle few feet away from the place where the deceased was lying and later handed over the same to the sister of the deceased. According to this witness the only

statement made by the deceased at that time was that, the father of the unborn child is Asitha and he could not remember any other statement made by her at that time.

The next evidence relied by the prosecution to establish the dying deposition made by the deceased was the evidence of witness Madhana Kondage Bandusena Fernando, the father of the deceased.

According to his evidence at the High Court Trial, the deceased daughter was living with her husband at his place during this period. On the day in question he had returned home late in the night after attending to a house wiring in one of his friend's house.

When he returned home around 10.00 pm in the night, his younger daughter had informed him that "සෞම්‍යා දුව වහබීලා රෝහල් ගත කර සිටින බව" (page 42 of the brief)

He immediately went to the hospital but he was not permitted to go inside the hospital.

The following morning when he went to see his daughter, he questioned the daughter as to what has happened to her and at that time she replied saying;

"බූදු තාත්තේ මම චූටියට සල්ලිවගයක් දීලා තිබුනා. ඒ මුදල් දෙන්න මට එන්න කියලා කීවා වලාන කුරුප්පු මාවතට මුදල් දෙන්න එන්න කියලා චූටියා කිව්වා කියලා. එයා කුරුප්පු මාවතට යනවිට රතුපාට ත්‍රීවීල් එකකින් දෙදෙනෙක් එක්ක ඇවිත් බලහත්කාරයෙන් ත්‍රීවීල් එක ඇතුලට අරගෙන ත්‍රීවීල් එකේ දාගෙන මට වහ පෙව්වා කිව්වා."

Witness had identified the accused-appellant as the person referred to as chooti by the deceased in the dying deposition.

According to the witness when the deceased made the said statement, his two daughters, the son and the wife too were present near the bed.

Since the doctor who attended to the patient wanted him to find the poison given to her, in order to treat the patient he inquired from the deceased as to what happened to the bottle, and she replied saying,

"තාත්තේ වස පොවලා වස කුප්පිය කැලෑවට වීසිකලා" On this information, he visited Kuruppu Mawatha and with the help of a boy from that area he managed to recover the bottle and handed over the same to the hospital

The deceased had made the 3rd dying deposition to her sister Madhana Kondage Shyama Dilrukshi Fernando. According to her evidence at the High Court Trial, until the accused-appellant had informed her husband around 8.10 pm on 23rd March none of her family members knew about the incident took

place in the afternoon. Immediately thereafter her mother had gone to the hospital with her husband and when her father returned home she informed this to her father.

When she went to the hospital in the morning, she was not permitted to go inside the hospital. In the morning hours she went to Kuruppu Mawatha area in search of the bottle which contained the poison, and with the help of a small boy the said bottle was recovered and later handed over to her father.

During the lunch time around 12.30 she went inside the hospital, when she went up to her sister she told her "අක්කේ මට පේන්නේ නැහැ කිව්වා. ඊට පස්සේ බුදු අක්කේ මාව බේරගන්න කීවා එවිට මා විමසුවා ඔයාට මොකද වුනේ කියලා එවිට එයා කිව්වා මට වූට වහ පෙව්වා කියලා"

The next witness relied upon by the prosecution was one Hewa Ranmuthugoda Karunadasa a police officer attached to the Hospital Police Post of Panadura Hospital.

On 24th he recorded a statement of Madhana Kondage Saumya Priyadarshani who was taking treatment for poisoning at the hospital. This statement was recorded around 3.00 pm she could speak well at that time. After obtaining permission he recorded the statement and in the said statement she referred to the incident as follows, "මම කුරුප්පු මාවතේ ආවා එනවිට රතුපාට ත්‍රීවිල් එකක් ආවා. ත්‍රීවිල් රථය නැවැත්තුවා මාව එකසැරේට කළු ළමයින් දෙන්නා ත්‍රීවිල්එකට ඇදලා දාගත්තෙ. පොඩ්ඩ දුරක් ගිහින් අසිත මට පහරවල් අතින් මුහුණට ගැසුවා එවට අසිත පොඩි කුප්පියක මුඩිය ඇරියා මම හඳුනන්නේ නැති දෙන්නා මගේ අත් දෙක අල්ලා ගත්තා අසිත මගේ කට මිරිකා එම කුප්පියේ තිබුන වතුර වගේ දේ කටට වැක්කෙරුවා එවට මට වස ගඳක් දැනුන අතර මට උගුරු තුනක් විතර පෙවුනා කුප්පිය වැට අයිනට විසි කලා. මට වස ටික පෙවුනා......."

As this court observed, previously, these four items of evidence was the only evidence available against the accused-appellant in this case. As admitted by both parties, the question of admissibility of these items of evidence was never challenged at any stage of this case, but what was challenged was the truthfulness of the statement, the truthfulness of the witnesses who testified with regard to the dying deposition and the contradictory nature of the said dying depositions.

Section 32 (1) of the evidence Ordinance Provides for, a statement written or verbal to be considered as relevant,

> "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes in to question"

When considering the 4 dying depositions which I have already discussed, there is no question of the admissibility of the 2nd, 3rd and 4th statements under section 32 (1) of the Evidence Ordinance.

The first statement I have referred to above does not speak as to the cause of her death but it appears that the said statement become admissible under the second limb, i.e. "as to any of the circumstances of the transaction which resulted her death" since it was alleged by the prosecution that the accused-appellant was ashamed of his previous relationship with the deceased since he was getting ready to marry his new girlfriend.

During the arguments before this court, the Learned Counsel for the accused-appellant, did not challenged the 1st dying deposition referred to by witness Thushan Cooray, but made use of the said dying deposition to show the inconsistency of the dying depositions made by the deceased.

In the first dying deposition witness heard the deceased saying that Asitha is responsible for her pregnancy but when the deceased's statement was recorded by PC Karunadasa, the deceased had taken up the position that the unborn child belongs to her husband Jagath and the counsel argued that it is unsafe to act on dying depositions which are contradictory to each other.

When witness Bandusena Fernando was under cross examination, several contradictions were marked with regard to the making of the said dying deposition.

As pointed out earlier, when witness Bandusena visited the hospital in the morning, the deceased made the said statement to him. However under cross examination, following contradictions were marked with his police statement, inquest proceedings and the non- summary proceedings,

Page 71;

ප්‍ර: තමා මෙහෙම කිව්වාද පොලීසියට 2001.03.24 වෙනි දින තමා කියලා තියෙනවා "24 වෙනිදා උදේ මා රෝහලට පැමිනියා එවිට දෙවෙනි දුව සිහි නැතිවසිටිනවා මා දුටුවා"

උ: එහෙම කිව්වේ නැහැ හොඳට මා එක්ක කථාකලා මැරෙණ මොහොත දක්වා කථාකර කර හිටියේ.

"එවිට දෙවෙනි දුව සිහි නැතිවසිටිනවා මා දුටුවා" යන කොටස වි- 1 වශයෙන් ලකුණු කර ඉදිරිපත් කරමි.

Page 73;

ප්‍ර: සුමානයකට පසුව පවත්වන ලද මරණ පරීක්ෂණයෙදි එනම් 2001.03.30 වෙනිදින තමුන් මෙහෙම කිව්වාද? "පහුවදා උදේ 6.00ට දුව බලන්න රෝහලට මම ගියා ඒ වෙලාවේ එයාට සිහිය නැහැ කථාකලේ නැහැ එහෙම කිව්වාද?

උ: සිහිය තිබුනේ නැහැ කියලා මම කිව්වේ නැහැ දුව මැරෙණ මොහොත දක්වාම හොදට මගේ දුව කථාකලා.

"පහුවදා උදේ 6.00ට දුව බලන්න රෝහලට මම ගියා ඒ වෙලාවේ එයාට සිහිය නැහැ කථාකලේ නැහැ" එම කොටස **වි-2** වශයෙන් ලකුණු කර ඉදිරිපත් කරනවා.

Page 73-74;

ප්‍ර: තමුන් එම මහේස්‍රාත් උසාවියේදී මෙහෙම කිව්වාද? එදා උදේ පාන්දර 6.30ට ගියා මම දැක්කේ දුව සිහියනැතිව ඉන්නවා විතරයි. එහෙම කිව්වාද?

උ: මම කිව්වේ මැරෙණ මොහොත දක්වාම හොද සිහියෙන් හිටිය.

"එදා උදේ පාන්දර 6.30ට ගියා මම දැක්කේ දුව සිහියනැතිව ඉන්නවා විතරයි." එම කොටස **වි-3** වශයෙන් ලකුණු කර ඉදිරිපත් කරනවා.

With regard to the recovery of the bottle contained poison the following contradiction was marked during the cross examination

Page 81;

ප්‍ර: තමන් මෙහෙම කිව්වාද? මරණ පරීක්ෂණයේදී දුන්න කටඋත්තරයේ "දුව පණයන මොහොතේ මට කිව්වා වහ බීපු කුප්පිය කැළයට විසිකලා කියලා"

උ: මම එහෙම කිව්වේ නැහැ.

වහ පොවපු කුප්පිය කියල කිව්වේ මම නැවතත් කියන්නේ වහ බිව්වද, පෙව්වද කියලා මම දන්නේ නැහැ. මම කිව්වේ මගේ දුව මැරෙණ වෙලාවෙ කිව්ව ඒව.

"දුව පණයන මොහොතේ මට කිව්වා වහ බීපු කුප්පිය කැළයට විසිකලා කියලා" එම කොටස **වි-7** වශයෙන් ලකුණු කර ඉදිරිපත් කරනවා.

Whilst drawing attention to the said contradictions the Learned Counsel for the accused-appellant submitted that the Learned Trial Judge had misdirected herself when she rejected to consider the said contradictions as they were not going to the root of the case.

During the cross examination of witness Shyama Dilrukshi Fernando, it was transpired that she had failed to refer to the fact that her sister made a dying deposition to her in her statement to the police.

According to this witness, she spoke to her sister around 12.30 pm on 24th and thereafter went to the police station to make a statement. When she first went to the police station with her father, their statements were not recorded by the police but, after meeting the ASP, the statements were recorded. She further submitted that whilst making the statement, she was informed of the death of his sister by her brother.

However when she was questioned with regard to the dying deposition, the position taken up by the witness was recorded as follows,

Page 128;

ප්‍ර: කටඋත්තරය කියල දීල ඒ වෙලාවෙම තමයි තමන්ගේ අත්සන ගත්තේ

උ: කටඋත්තරය කියනවිට එය පැහැදිලිව ලියා තිබුනා

ප්‍ර: ඊට පස්සේ තමයි තමන්ගේ අත්සන ගත්තේ

උ: ඔව්

ප්‍ර: වචනයක්වත් තමන් කියා නැහැ වූටි තමන්ගේ නංගිට වහපෙව්වා කියලා

උ: උත්තරයක් නැත

එය ඌනතාවයක් වශයෙන් අධිකරණයේ අවධානය යොමු කරයි

This witness was further cross examined with regard to the relationship between the accused-appellant and the deceased, and the position taken up by the witness was that until she got to know of some relationship between the two from her father, she was not aware of any relationship of this nature.

This position was put to her under cross examination as follows,

Page 128;

ප්‍ර: තමන් කිව්වා තමන් දැනගත්තේ චිත්තිකරුගෙයි තමන්ගේ නංගීගෙයි අනියම් සම්බන්ධයක් ගැන සාජන් බන්ඩාර ඇවිත් එගැන තමන්ගේ පියාට කිව්වා, පියා ඇවිත් තමන්ට කිව්වාට පස්සේ කියලා

උ: ඔව්

ප්‍ර: චිත්තිකරුයි, තමන්ගේ නංගීයි එයාගෙ ස්වාමි පුරුෂයා වන ජගතුයි එක්ක එක ගෙදර හිටියද?

උ: නැහැ

ප්‍ර: තමන් මේ ගැන සාක්ෂි දුන්නා නේද මරණ පරීක්ෂණයේදි?

උ: ඔව්

ප්‍ර: තමන් මෙහෙම කිව්වාද?

"අසිත කියන අය මගේ නංගිට සහ එයාගෙ ස්වාමි පුරුෂයා සමඟ එක ගෙදර ජීවත්වුනේ"

උ: නැහැ. නංගි ජීවත්වුනේ මගේ අම්ම සමඟ මහගෙදර

නියෝගය

එම ආකාරයෙන් මරණ පරීක්ෂණයේදි සටහන් වී තිබෙන බැවින් එය පරස්පර විරෝධීතාවයක් ලෙස සලකුණු කිරීමට ඉඩ දෙමි.

However it is observed by this court that the Learned Trial Judge after analyzing the said omission and contradiction with the rest of her evidence, decided to accept her evidence as reliable evidence, even though at page 395 of the brief she had observed that the said omission goes to the root of the case.

A statement by persons who cannot be called as witnesses are capable of being received as evidence under section 32 of the Evidence Ordinance and 32-1 as I have discussed earlier in this judgment is one such situation under which a statement could be admissible.

The basis under which this provision is embodied to the English Law was discussed in the Case of ***Wood lock (1789) 1 leach 500 per Eyre C.B*** as; 'The principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice'.

However it is observed that our courts when dealing with dying depositions were careful in accepting those statements considering the circumstances under which the statements were made.

In the case of ***Justinpala V. The Queen (1964) 66 NLR 409*** T.S Fernando J observed that "whilst the necessity of a direction in regard to corroboration of a dying declaration or deposition must depend on the particular circumstances of each case, we think, the jury's attention should ordinarily be drawn to the fact that the declaration or deposition, as the case may be, has not been tested in the usual mode available to a party affected by it viz. by cross examination."

In the case of ***Somasundaram and two others V. The Queen (1971) 76 NLR 10***, Court of Criminal Appeal observed that, "when evidence is given under section 32 (1) of the Evidence Ordinance of statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, it is the duty of the trial judge to administer the jury the necessary caution in regard to how they should approach the consideration of statements made by a deceased person.

In the said case Samerawickrama J observed, "A presiding Judge should caution the jury as to the risk of acting upon the statement of a person who is not a witness at the trial and as to the need to consider with special care the question whether the statement could be accepted as true and accurate."

When considering the above decisions by our courts, it is clear that, our courts were mindful of the fact that the declaration or the deposition as the case may be is not tested as accurate, in the absence of its maker was not before court for cross examination and therefore the trial judge should be mindful of this fact when acting upon such dying declarations or deposition as the case may be.

As observed in the present case, the only evidence against the accused-appellant was the dying depositions made by the deceased. Therefore it is our view that the Learned Trial Judge should have been mindful of this aspect when considering the admissibility of each deposition before trial court.

In this regard the Learned President's Counsel for the accused-appellant raised two issues before this court. Firstly he raised, whether it is safe to conclude that the witnesses speaking the truth when referring to the dying depositions and secondly, he questioned whether it is safe to conclude that the deceased was speaking the truth when making such statement.

With regard to the evidence of Bandusena Fernando, contradictions marked as වි- 1 to වි-3 referred to the time the so called statement was made by the deceased. Even though a contradiction marked before trial court is not evidence before court, what is important is whether in fact, the deceased made such statement in the morning when he visited the deceased, since she was unconscious at that time, according to his police statement. Evidence at the inquest proceedings and Non Summary Proceedings.

Contradiction marked වි- 7 referred to the throwing of the bottle contained poison by the deceased herself after consuming poison. The defence version of the present case is that, the deceased committed suicide in front of the house of the accused-appellant's girlfriend. In the light of the said defence, the contradiction referred to above appear to be a contradiction which goes to the root of the case.

During the evidence of witness Dilrukshi Fernando, an omission was marked to the effect that she had not informed the police with regard to making of the dying deposition to her by the deceased. The Learned Trial Judge had considered the above omission as one goes to the root of the case, but considering the rest of the evidence given by her decided to accept her evidence as reliable evidence.

However it is observed by this court that the Learned Trial Judge had not considered the said contradictions marked වි- 1 to වි- 3 and වි- 7 as serious contradictions which goes to the root of the case and given due consideration to the omission marked during the evidence of Dilrukshi Fernando.

As observed by me earlier in this order the dying depositions made to Thushan Cooray and PC Karunadasa there is contradictions inter say, with regard to the person who is responsible for her pregnancy.

However during the argument before us the Learned Additional Solicitor General argued that the statement of the deceased should not be rejected due to this contradiction alone, since she may have said a falsehood to police to clear the name of her family life.

The next important item of evidence both the prosecution as well as the accused-appellant relied upon is the medical evidence in this case. The post mortem into the death of Madhana Kondage Saumya Priyadarshani was conducted by Retd. Judicial Medical Officer, Dr. Lakshman Salgado.

According to the evidence of Dr. Salgado, he had observed 5 injuries on the body of the deceased and he had identified them as follows,

Injury No.1 small abrasion below the left eye

Injury No.2 contusion 1/2 x 1/3 inside the lower lip

Injury No.3 3 internal hemorrhages between the soft tissues inside the mouth which were marked as 3a, 3b and 3c

Injury No.4 contusion closer to the left shoulder

Injury No.5 1/4 x 1/8 discolored area on the back of the chest

However during the evidence Dr. Salgado has excluded the 5th injury, since it was only a discolored area on the skin. With regard to the 3 internal hemorrhages marked as 3 'a', 'b' and 'c' the Judicial Medical Officer took up the position that those three injuries could only have happened within 24 hours to the death when considering the nature of those injuries.

Even though the Learned Additional Solicitor General argued that the said position taken by the Judicial Medical Officer is un-acceptable when considering it with the other evidence, but the court observes that the Judicial Medical Officer had given reasons for his findings on those injuries. Therefore the attempt made by the prosecution to establish that the injuries marked 3a, 3b and 3c were caused when the accused forced the bottle in to the mouth of the deceased was not successful with the said explanation of the Judicial Medical Officer.

It was further transpired during the argument that a witness whose name appeared in the indictment, but not called by the prosecution, was called by the defence during the defence case. It is well settled law that the prosecutor has a wide discretion to decide the witness on whom the prosecution is relied upon during the trial but, whether the witness is called by the prosecution or defence, the court has a duty to consider the said evidence giving the same importance to the evidence given by the said witness.

During his evidence witness Asiri Jayalal Cooray had referred to a previous incident as follows,

(Page 308)

ප්‍ර: ඊට පස්සේ මොකද වුණේ?

උ: අනෝමා අක්කා කියන එක්කෙනා ගිහිල්ලා බැලුව ගෑණු කෙනෙක් වැටිලා ඉන්නවා කියලා. මමත් ගියා එතෙන්ට බලන්න. ඊට ඉස්සර වෙලත් ඔය ගෑණු එක්කෙනා කැගහලා ගිහින් තියෙනවා

අධිකරණයෙන්;

ප්‍ර: කැගහලා ගිහින් තියෙනවා කියන්නේ තමන් දැක්කාද කැගහනව?

උ: කැගහලා තියෙනවා

ප්‍ර: තමන් දැකලා තියෙනවද?

උ: දැකලා තියෙනවා

This fact clearly reveals the relationship remained between the deceased and the accused-appellant during this period as against the relationship the deceased had with the accused-appellant previously. In her evidence witness Dilrukshi Fernando referred to the relationship between the 3, i.e. deceased, her husband and the accused-appellant as they were friendly as birds, but it is further revealed from the evidence of Asiri Jayalal Cooray that this is not the very first day the deceased had visited this area but had previously come and shouted at somebody.

The Learned Counsel for the accused-appellant further submitted that the circumstantial evidence which is infavour of the accused-appellant or in other words which points to the fact that the deceased having committed suicide, had not been considered by the trial judge in her judgment.

In the case of ***Wijerathne V. The Republic 78 NLR 49*** the Supreme Court concluded that, "When an accused facing a capital charge it is essential that every point infavour of the accused though it may seem trivial, should be placed before the jury. It may well be that all such matters, if so placed before the jury may create a reasonable doubt, the benefit of which the accused is entitled to when the circumstances against the accused are emphasized and the trial judge express his opinion as to the adverse inference that could be drawn from the circumstances, and fails to place the circumstances and the inferences in favour of the accused before the jury, the accused is deprived of the substance of a fair trial."

During the evidence of Thushan Cooray who was only a 13 years old school boy at that time, it was revealed that he recovered the bottle contained poison few feet away from the door step where deceased was lying at that time. However according to the dying deposition made to PC Karunadasa, after forcing poison to the deceased, the bottle was thrown away and the deceased too was pushed out by the accused-appellant. According to the deceased this happened at Kuruppu Mawatha. After sending the three-wheeler away the accused-appellant had gone towards the house of Ramesha and the deceased too had followed him up to Dayawathy's house, where she had fallen. If this version is considered as correct, the bottle which was thrown away could not be recovered so close to the place where the deceased was

fallen unless the deceased herself had thrown it away after consuming poison at the doorstep of Dayawathy.

In this regard I observe that the contradiction marked as වි- 7 in witness Bandusena Fernando's evidence to the effect "දුව පණයන මොහොතේ මට කීව වහබීපු කුප්පිය කැලයට විසිකලා කියලා" has same importance in this case and therefore I am of the view that the Learned Trial Judge had misdirected herself by refusing to consider the said contradiction by concluding that it does not go to the root of the case.

As against the above position the Learned Additional Solicitor General submitted that there was no reason for the deceased to commit Suicide, since she was happily getting ready for her confinement during this time. However in this regard I am reminded of the evidence given by witness Asiri Jayalal Cooray regarding the conduct of the deceased few days prior to the incident.

When considering the material discussed above, I am of the view that the Learned Trial Judge had misdirected herself when she failed to give due consideration to the important contradictions and omissions marked during the trial and also by failing to give due consideration to the items of circumstantial evidence which are in favour of the accused.

In the said circumstances we decide to set aside the conviction and sentences imposed on the accused-appellant by the Learned High Court Judge of Panadura on 12.05.2010 and acquit and discharge the accused-appellant.

Appeal allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL