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

Court of Appeal case no. CA/PHC/10/2005

H.C. Avissawella case no. 11/2003

M.C. Kaduwela case no. 17260

Dr. Don Chandradasa Dolawatta,
153/1, Weda Nivasa,
Rassapana Road, Ihala Bomiriya,
Kaduwela.

Plaintiff Petitioner Appellant

Vs.

Doigu Singholage Sarath Prasanna,
160/1, Ihala Bomiriya, Kaduwela.

Accused Respondent Respondent.

Before : P.R.Walgama J.
: L.T.B. Dehideniya J.

Counsel : Dr. Ranjith Fernando for the Plaintiff Petitioner Appellant.
: Alan David for the Accused Respondent Respondent.

Argued on : 19.02.2016

Decided on : 23.11.2016

L.T.B. Dehideniya J.

This is an appeal from an order of the High Court of Avissawella.

The Accused Respondent Respondent (hereinafter called and referred as to the Respondent) was charged before the Magistrate Court Kaduwala on a charge of causing grievous hurt punishable under section

316 of the Penal Code. After trial the learned Magistrate acquitted the Respondent. Being aggrieved by the said acquittal, the Plaintiff Petitioner Appellant (hereinafter called and referred as to the Appellant) sought permission from the Hon. Attorney General to appeal against the order of the Learned Magistrate, but was not granted. Thereafter, the Appellant moved in revision in the High Court of Avissawella. The learned High Court Judge after inquiry dismissed the application. This appeal is from the said dismissal.

The Appellant and the Respondent had a dispute over a roadway prior to this incident. There was an action filed under section 66 of the Primary Court Procedure Act. After the order was delivered, another case on committing contempt of Court by violating the order was also filed between the parties. But the present case is clearly on a criminal charge against the Respondent. The Appellant in the petition of appeal prayed for a relief in relation to the road dispute. Prayer 'D' of the petition of appeal is for an order to use the road without any obstruction. In a criminal case where the Respondent was charged under section 316, Court cannot grant any relief on a road dispute.

The Petitioner as the injured person gave evidence in the Magistrate Court. He said that when he was returning after inspecting three coconut trees that was to be cut, he was assaulted by the Respondent with an iron rod. There were several contradictions in his evidence and in the first complaint. There were material contradictions in his and the second witness's evidence too. In the evidence he said that he was assaulted on his neck and the shoulder. He was very specifically said that the Respondent did not say any filthy words during the incident. According to the Appellant, the only word used by the Respondent is that he inquired who is going in the road. But in the police complaint he has

stated that the Respondent asked 'කවිද යකෝ මගේ....." In cross examination he denied that he said to the police that the Respondent used the word යකෝ. The second witness in her evidence said that the Respondent abused the Appellant in filth language and assaulted. The Respondent in his evidence said that he was assaulted on the neck and the shoulder but the second witness said assaulted on the head. The contradiction marked v2 is that he said to the police that he was assaulted on the back of his head but he denied that he said so to police. The contradiction marked v3 is a very material contradiction. The witness denied that he said "මම වැටෙන කොට මට තව පාරක් ගහන්න හැදුවා. එවිට මම පොර බදා ගැහුවා." In his evidence there was nothing about straggling. In the history given to the Doctor by the Appellant, he has informed that he was hit with an iron pipe. One can argue that the appearance of the pipe and the rod is alike; the Appellant was very specific in his evidence that he was hit with a rod. Answering to Court, he went on to describe the rod saying that it is like "ගල් ඉන්න" but with a flat end and not with a pointed end. If he has identified the weapon so perfectly, there was no reason to say that it was a pipe to the Doctor.

The learned Magistrate acquitted the Respondent on the basis that the prosecution has failed to prove the charge.

The Appellant, being unsuccessful in obtaining the sanction of the Attorney General to appeal, moved in revision in the High Court of Avissawella against the acquittal. The learned High Court Judge dismissed the revision application. This appeal is from the said order of the learned High Court Judge.

The purpose of revision of this nature is to prevent the miscarriage of justice. M. Sevanthinathan V. Nagalingam and 3 others 69 NLR 419 is

a case where the complainant moved in revision against an acquittal. In the said case T. S. Fernando, J. observed that;

> *The complainant-petitioner instituted a private prosecution in the Magistrate's Court against the accused-respondents alleging that they had committed offences punishable under sections 290 and 292 of the Penal Code. The charges as framed in the Magistrate's Court alleged (1) that the accused defiled the Saivite temple at Chankanai East with the knowledge that all the Vellala and other high caste Saivites are likely to consider such defilement as an insult to the Saiva religion and (2) that the accused committed trespass in the said Saivite temple by entering the flagstaff mandapam therein with the knowledge that the feelings of the Vellala and other high caste Saivites are likely to be wounded, offences punishable under the said sections 290 and 292 respectively.*
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> *After a lengthy trial in the course of which a scholar said to be an expert in the exposition of the Agamas or the gospel was called for the prosecution, the learned Magistrate acquitted all the accused. An appeal from this acquittal was not competent except with sanction obtained from the Attorney-General. Such sanction was sought unsuccessfully by the petitioner who thereupon presented this application in revision to this Court claiming a retrial before another Magistrate. It is now settled that before this Court can grant a prayer like that of the petitioner on this application in revision, the petitioner must make out a case showing something in the nature of a positive miscarriage of justice in the Magistrate's Court. - The King v. Noordeen.1 [(1910) 13 N. L. R. at page 118.]*

In the present case the learned Magistrate acquitted the Respondent (the accused in the case before him) on the failure of the prosecution to prove the charge. As I have pointed out earlier in this judgment there were lot of contradictions in the evidence of the prosecution. The virtual complainant's evidence is contradicted with his previous statements given to the police and the history given to the doctor, and it is contradicted with the evidence of the second witness. The credibility of the witness is in doubt. Therefore I do not see any other decision that the learned Magistrate could have arrived at other than acquitting the Respondent.

The learned High Court Judge correctly dismissed the revision application.

I do not see any reason to interfere with the finding of the learned High Court Judge.

The appeal is dismissed with costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal