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

In the matter of an application for appeal under section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

**CA No: CA/HCC/ 0049/2019**
**HC: Anuradhapura: HC 62/1999**

The Democratic Socialist Republic of Sri Lanka

**Complainant**

**Vs.**

Shahul Hameed Abdul Kalam

**Accused**

**And now between**

Shahul Hameed Abdul Kalam

**Accused- Appellant**

**Vs.**

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

**Complainant-Respondent**

**Before:** **N. Bandula Karunarathna J.**

**&**

**R. Gurusinghe J.**

**Counsel**: Rushdhie Habeeb AAL with Rizwan Uwis AAL for the Accused-Apellant

Sudharshana de Silva DSG for the Complainant-Respondent

**Written Submissions:** By the Accused-Appellant on 11.09.2019

By the Complainant-Respondent 18.10.2019

**Argued on :** 08.04.2022

**Decided on :** **06.06.2022**

**N. Bandula Karunarathna J.**

This appeal is from the judgment, delivered by the learned Judge of the High Court of Vavuniya, dated 28.03.2019, by which, the accused-appellant, was convicted and sentenced to 10 years rigorous imprisonment and fined Rs. 20,000/- and in default, 6 months rigorous imprisonment.

For the 02nd count death sentence was imposed.

The accused-appellant was indicted in the High Court of Anuradhapura on two counts of offences punishable under section 383 and 296 respectively committing offences of the penal code. In the indictment dated 03.03.1999 filed against the accused-appellant Shahul Hameed Abdhul Kalam.

The accused - Appellant was charged as follows:

1. During the period 14.11.1992 and 18.11.1992 in Ulukkulama within the Jurisdiction of this Court committing the robbery against Kanagasundharam Lankeshwaram, Rs. 235,000/- and Lorry registered 24 Sri 5393 worth Rs. 200,000/- using a deadly weapon and thereby you have committed an offence punishable under Section 383 of the Penal Code.

2. At the same time at the same place and in the same cause of action the accused caused the murder of Kanagasundharam Lankeshwaram and thereby committed an offence punishable under Section 296 of the Penal Code.

The accused person decided to have his trial without a jury and consented to a trial before the High Court Judge. The trial began on 06.03.2000. On this day learned state counsel had moved in terms of 167 of the Criminal Procedure Code to amend the charges as above to which the trial Judge allowed with no objection placed by the defence.

The following 9 witnesses have given evidence on behalf of the prosecution. The Prosecution closed their case, having annexed documents marked as P 1 to P 9.

(i) Ilangeswaram Saraswathi (PW 1)

(ii) Panawala Pathiranalage Don Siriplala Pathirana (PW 3)

(iii) Priyantha Kumara Senevirathna (PW 5)

(iv) Weerasooriya Muhandhiramlage Wijesiri (PW 4)

(v) Upul Ajith Kumara Thennakoon (PW 13)

(vi) Henaka Mudhiyanselage Kulasekara (PW 15)

(vii) Walpita Hewage Amithasiri (PW 24)

(viii) Jayalath Mudhiyanselagae Premasiri Jayalath (PW 16)

(ix) Interpreter Mudlier

Thereafter the learned High Court Judge called the defence. The accused-appellant made a dock statement. Once the defence was closed, the case was fixed for judgment. The learned high court Judge delivered the judgment on 28.03.2019 and the accused was convicted for both counts under sections 383 and 296 of the penal code and sentenced as follows:

**First Count** : 10 years rigorous imprisonment, 20,000/- fine and in default 6 months rigorous imprisonment.

**Second Count** : Death Penalty

Being aggrieved by the said conviction and sentence of the learned High Court Judge dated 28.03.2019 the accused person preferred this appeal on the following grounds.

(i) The learned trial Judge has misdirected to consider the hearsay evidence.
(ii) The learned trial Judge has failed to consider the applicability of the last seen theory.
(iii) The learned trial Judge has failed to consider the Identification of the production.
(iv) The prosecution has not proved their case beyond a reasonable doubt.

On 9.11.1996, the lorry owned by the deceased had a breakdown at the Madawachchiya checkpoint. The registration number of the lorry was 24 Sri 5393 and the model was VMC. The wife of the deceased (PW 1) had stated that the deceased left the house on 14.11.1996 around 3.30 p.m. and was reported dead on 17.11.1996. She had identified the sarong worn by the deceased as P1. She had given details of the lorry which was handed back to her through Court and later she sold the same to a person in Colombo.

The deceased had left with the appellant and one Ganeshan in a motorbike on 14.11.1996. The appellant is a known person before the incident and came to their house on 9.11.1996. Ganeshan was a next-door neighbour and had returned after dropping the deceased and the appellant. The wife of the deceased person had identified the photographs of the deceased, marked as P 2(A) and P 2(B). Under cross-examination one contradiction was marked in her evidence. She denied telling the Magistrate Court that 'It was wrong to say that a Muslim went with my husband.'

Siripala Pathirana (PW 3) is an owner of a garage. According to him the appellant came and handed over a lorry for repair. The Police came on the following day when he was out for lunch. A Little later the lorry was taken to Police custody. Under cross-examination, V 2 was marked as to whether he was running the Garage since 1979. He remembers the lorry number was having 24 Sri Number.

Priyantha Kumara Senewiratne (PW 5) had sold a white-coloured car to the appellant on 5.11.1992. Weerasuriya Muhandiramlage Wijesiri (PW 4) had stated that the appellant left some parts of the lorry in his back yard and two or three days later Police came and took those into their custody. The conduct of the Identification parades and the notes were admitted by the defence during the trial.

Judicial Medical Officer Dr Ajith Thennakoon (PW 13) who conducted the Post Mortem had stated that the injury on the neck is necessarily fatal and the cut injury of the right-back of the head is fatal in the ordinary cause of nature.

Retired Police Sergeant 11562 Kulasekara (PW 15) had taken photographs of the scene on 18.11.1992. He had identified 5 photographs in P 2 as photos taken by him.

W. Amithsiri (PW 24) of the Registrar of Motor Vehicles Department had produced the Registration Certificates of 24 Sri 5393 (P 5) and 24 Sri 7838 (P 6) vehicles.

ASP Premasiri Jayalath (PW 16) was the OIC Crimes Anuradhapura on 10.11.1992. On information received about an unidentified dead body, investigations have commenced on 18.11.1992. The wife of the deceased had identified the photographs of the dead body and clothes of the deceased on 3.12.1992. The appellant was arrested on 8.12.1992. The lorry was recovered as Section 27 recovery on the same day at 17.05 hours.

The learned counsel for the respondent argued that although the 24 Sri 7838 number plate was painted the revenue license pasted on the windscreen is 24 Sri 5393. The number plates were removed. The details of the lorry given by the wife of the deceased matched the recovered vehicle.

There were no eyewitnesses or direct evidence in respect of this incident and the prosecution has relied only on circumstantial evidence. The Prosecution alleges that the dead body of the deceased was recovered by the police from a pond in Ulukkulama and thereafter accused was charged in connection with murder and robbery. According to the prosecution, the vehicle belonging to the deceased was found at the Vehicle Repair Garage but the defence version it was not belonging to the deceased as two number plates are contested in the trial. Further Prosecution sought to establish the recovery of the vehicle according to the instructions and guidance of the accused made.

It is important to note that in the judgment of King vs Appuhamy 46 NLR 128, it was held that;

> "... the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution fails to fix the exact time of death of the deceased. Even if the prosecution has relied on the last seen theory, the time of death could easily be inferred upon the clear evidence to the effect that the accused-appellant told Karunadasa the deceased was dead. But he was with her, when she was alive, a little over three hours ago. Therefore, the accused-appellant is not entitled to succeed on this ground of appeal. The third ground of appeal also therefore necessarily fails."

It was decided in Regina vs Exall (176 English Reports, Nisi Prius, at 853) Pollock CB, (1866) 4 F and F 922, England and Wales

> "Circumstantial evidence might be compared to a rope comprised of several cords: 'One strand of the cord might be insufficient to sustain the weight, but three-stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence there may be a combination of circumstances, no one of which would raise a

reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of."

The learned counsel for the appellant says that the prosecution based its case on the "last seen" theory. The prosecution has failed to establish the exact time of the death of the deceased. It was further submitted by the learned Counsel for the accused-appellant that as the prosecution has failed to prove the exact time of death the reliance of the prosecution on the last seen theory in presenting its case and the conviction of the accused-appellant, by the trial Court based on that theory are erroneous.

When the prosecution relies on the last seen theory to prove its case, they have to present a strong case based on items of circumstantial evidence. It is evident that the relevant and admissible facts presented before the trial Court by the prosecution through its witnesses, in the present case not revealed that the accused-appellant was with the deceased after 14.11.1996 at least for 3 days. Therefore, we are of the view that in convicting the accused-appellant on a charge of murder, the trial Court has to consider the whole body of circumstantial evidence without placing reliance only on the last seen theory.

When the totality of the evidence is considered, there is a serious doubt that the accused-appellant committed these two offences. If the test of consistency is applied the witnesses on behalf of the prosecution had created doubts on numerous occasions. Not only are there per-se contradictions in the evidence of witnesses there are also inter-se contradictions between the evidence of the Witnesses.

There are no eyewitnesses or direct evidence in respect of this incident. And the prosecution has relied on only circumstantial evidence. The only witness who speaks about the Garage Vehicle Incident is the PW 3 who says that the vehicle was handed over to him by the accused-person to make some repairs. Even though PW 16 who is the Investigation Officer in this case stated that this vehicle was found after following the guidance of the accused-appellant, PW 3 has never stated in his evidence that when the vehicle was seized by the police at the garage, the accused was with the police custody or the accused came to Garage with police officers to seek the vehicle.

Evidence in chief of the PW 3 at page 148 of the appeal brief is as follows:

ප්‍ර: ඔබ පොලීසියට කටඋත්තර ලබා දුන්නේ මෙම විත්තිකරු වාහනය ඔබගේ ආයතනයට ඉදිරිපත් කර කොච්චර කාලයකට පසුද?

උ: ඊට පහුවදාම

ප්‍ර: පොලීසිය ඔබ සොයා පැමිණියේ එක් අවස්ථාවයිද?

උ: ඉස්සර පැමිණ තිබෙනවා. මම හිටියේ නැහැ කෑමට ගිහින් ඊට පස්සේ කියලා ගිහින් තිබෙනවා වැඩපලේ කෙනෙක්ට. ඔහු මට කිව්ව මෙහෙමයි කියල. පසුව මට මතක ලෙස මට පොලීසිය කතා කරා හෝ මම පොලීසියට කතා කරා හෝ හරියටම සිද්ධිය මතක නැහැ. කොහොමහරි පොලීසිය පහුවදා ඇවිත් වාහනය අරන් ගියා.

ප්‍ර: කවුද අරන් ගියේ?

උ: පොලීසියෙන් ඇවිත් අරන් ගියා.

Cross Examination of the PW 3 at pages 157 & 158 of the appeal brief is as follows;

ප්‍ර: ඔබ පොලීසියට කියලා තියෙනවා නම් 1992.12.04 වන දින තමයි පොලීසියෙන් ඇවිත් මෙම ලොරිය මනුෂ්‍ය ඝාතනයකට සම්බන්ධයි කියලා, පොලීසියෙන් රැගෙන ගියා කියලා ඒක හරිද?

උ: ඔව්.

ප්‍ර: එදා තමුන් පොලීසියට උත්තරය දෙන කොට කියලා තියෙන්නේ 1992.12.04 වන දින හවස 5 ට පමණ පොලීසියෙන් ලොරිය අරගෙන ගිය බව, ඒක පිළිගන්නවාද?

උ: ඔව්.

ප්‍ර: ලොරිය තමුන්ට භාර දෙන්න විත්තිකරු සමග පැමිණි නම නොදන්නා පුද්ගලයා ලොරිය බඩු වගයක් ඇදගන්න තියෙනවා කියලා ඉල්ලුවේ 1992.12.04 වන දිනද?

උ: ඔව්.

ප්‍ර: ඉන් පස්සේ උදේ ඔහුට ගෙනියන්න බැරි වුනා?

උ: ඔව්.

ප්‍ර: ඉන් පස්සේ හවස පොලීසියෙන් ඇවිත් ලොරිය අරගෙන ගියා?

උ: ඔව්

Further Cross Examination of the PW 3 at pages 159 & 160 of the appeal brief is as follows;

ප්‍ර: ලොරිය පොලීසිය විසින් රැගෙන ගියාට පස්සේ සාක්ෂි දෙන අවස්ථාවේදී ඔබට එය පෙන්වා සිටියාද?

උ: නැහැ.

ප්‍ර: කවුද වාහනය අරගෙන ගියේ?

උ: ස්ථානාධිපති, ජයලත් මහත්තයා.

ප්‍ර: එතුමා එවකට අපරාධ අංශයේ ස්ථානාධිපතිවරයාද?

උ: ඔව්.

ප්‍ර: එතුමා ඔබ හඳුනනවාද?

උ: ඔව්.

ප්‍ර: පොලීසියේ වාහනත් ඔබගේ ගරාජයේ හදනවාද?

උ: ඔව්.

ප්‍ර: ඒ නිසා ජයලත් මහත්තයා ගැන ඔබ හොඳට දන්නවාද?

උ: ගරාජ් එකට එන අය දන්නවා.

ප්‍ර: ජයලත් මහත්තයාත් ඔබ දන්නවාද?

උ: ඔව්.

ප්‍ර: ලොරිය පොලීසියෙන් කොහොමද අරගෙන ගියේ?

උ: ඇදගෙන ගියේ.

ප්‍ර: මොකෙන්ද?

උ: ට්‍රැක්ටරයකින්.

ප්‍ර: පොලීසියේ අපරාධ අංශයේ ස්ථානාධිපතිවරයා විසින් මෙම ලොරිය භාරයට ගත්තා නම් ඒ සම්බන්ධයෙන් වාහනය භාර සේවාදායකයාට පෙන්වන්න කියලා ඔබට ලිපියක් ලබා දුන්නාද?

උ: නැහැ.

ප්‍ර: පොලීසියෙන් දැකලා ඇවිත් ලොරිය අරගෙන ගියාද?

උ: ඔව්.

According to the Evidence of PW-16, the Investigation Officer states that the vehicle was recovered with the guidance of the accused-appellant. The accused-appellant denied that at the trial of the prosecution case and the defence position was that the accused did not make a section 27 statement to the police that he would assist to find the vehicle. The learned counsel for the accused-appellant submits that the accused was unaware of where the lorry was. On behalf of the appellant, it was argued that this false and fabricated statement has been made by the PW 16 against the accused-appellant and the prosecution case cannot believe depending on the evidence given by the PW 16.

Evidence in chief of the PW 16 at pages 249 & 250 of the appeal brief is as follows;

ප්‍ර: වව්නියාව පොලීසියෙන් පිටව යන විට අදාල ලොරිය ඇති ස්ථානය පෙන්වා දෙන්න කවුරු හරි ආවද?

උ: මාත් සමග සැකකරු අබ්දුල් කලාම් පැමිණියා.

ප්‍ර: සැකකරුගේ මගපෙන්වීම මත කොහේටද ගියේ?

උ: ප්‍රමින්ටන් ගරාජයට, මිහින්තලා පාර, අනුරාධපුරය.

ප්‍ර: කවදා කීයටද ගියේ?

උ: 1992.12.08 පැය 17.05 ට

ප්‍ර: කවුරු විසින්ද එම ස්ථානය පෙන්වා දුන්නේ?

උ: සැකකරු අබ්දුල් කලාම් විසින් ලොරි රථය පෙන්වා සිටියා.

ප්‍ර: ලොරි රථය කොහෙද තිබුනේ?

උ: ගරාජ් එක ඇතුලේ කෙලවරකට වෙන්න නතර කරලා තිබුණා?

ප්‍ර: ඒ ගරාජයේ හිමිකරු සම්බන්ධයෙන් සොයා බැලුවාද?

උ: අපි යන අවස්ථාවෙත් එහි හිමිකරු සිටියා.

ප්‍ර: කවුද හිමිකරු?

උ: ඩබ්.පී.ඩී සිරිපාල පතිරණ

According to the Cross Examination of the PW 16 at pages 268 & 269 of the appeal brief is as follows;

ප්‍ර: මෙම ලොරිය ගරාජ් එකට භාර දුන්නේ කවදාද? සිරිපාල පතිරණගේ ප්‍රකාශයක් ලබාදුන්නා නේද?

උ: 1992.12.03 වෙනිදා.

ප්‍ර: ඒක ඔබ සොයා ගත්තේ සිරිපාල පතිරණගේ ප්‍රකාශය අනුව නේද?

උ: ඔව්.

ප්‍ර: 12.03 වන දින ප්‍රමින්ටන් ගැරේජ් එකට ගෙනවිත් භාර දුන්න ලොරිය, 1992.12.04 වන දින සවස 5 ට පොලීසියෙන් ඇවිත් එය මනුෂ්‍ය ඝාතනයකට සම්බන්ධයි කියලා රැගෙන ගොස් තියෙනවා කියලා සටහන් වල තියෙනවා නේද?

උ: ඔව්.

According to the Cross Examination of the PW 16 at page 270 of the appeal brief is as follows;

ප: ඔබ කිසිම අවස්ථාවක මෙම ගරාජයට ලොරිය අත්අඩංගුවට ගන්න මේ චූදිත සමග ගියේ නැහැ කියලා විත්තියෙන් යෝජනා කරනවා?

උ: පිළිගන්නේ නැහැ.

ප්‍ර: චූදිත අත්අඩංගුවට ගන්න විට ලොරිය තිබුණේ පොලිස් අත්අඩංගුවේ කියලා යෝජනා කරනවා?

උ: පිළිගන්නේ නැහැ.

ප්‍ර: 12.08 වන දින චූදිත අත්අඩංගුවට ගත්තා කියන දිනය වෙන කොට 12.04 වන දින ඉඳලාම පොලිස් භාරයේ මෙම ලොරිය තිබුණා කියලා යෝජනා කරනවා?

උ: පිළිගන්නේ නැහැ.

One of the main arguments raised on behalf of the appellant was the time of death was uncertain.

In any event, the prosecution had failed to prove the exact or probable time of death. The JMO who held the Post Mortem examination was called to give evidence on the Post Mortem report prepared by him. No evidence was elicited in the course of the prosecution evidence on what basis the time of death has occurred. This being opinion evidence the court can come to a specific finding that the death occurred if the necessary medical facts were placed before Court. In the absence of such evidence, it becomes inadmissible under Section 45 of the Evidence Ordinance.

In King Vs Appuhami 46 NLR 128, it was held that the failure of the prosecution to prove the exact time of death was considered a fact favourable to the accused in a case which depends on circumstantial evidence.

We do not know when the time and the date of the deceased death, had been occurred. It was not revealed by the evidence of the JMO. It should also be noted that this creates a doubt as to the exact time of death.

It is important to note that the Government Analyst Report has not been called regarding the discovered lorry.

The defence challenged that it is not the deceased vehicle. The prosecution charged the accused-person with Robbery of the vehicle. They have to prove their case beyond reasonable doubt that it is the deceased vehicle. The prosecution has not proved that the accused-appellant has robbed the vehicle and it was used, possessed and sent to the garage for repairs. The accuracy of the vehicle can be shown by the government analyst report whenever there is a doubt. There was no such report has been marked during the trial. It could be considered a miscarriage of justice to the accused-appellant.

Cross-examination of the PW 16 at pages 272 - 273 of the appeal brief is as follows;

ප්‍ර: එහෙම අංක තහඩු වෙනස් කරලා තිබුණා නම් ඇයි තමුන් එය තහවුරු කර ගන්න රජයේ රස පරීක්ෂක වෙත යොමු කළේ නැත්තේ?

උ: පැහැදිලිවම නිරීක්ෂණය උනා එය වෙනස් කර තිබුණා කියලා. ඒ නිසා එය රජයේ රස පරීක්ෂක වෙත යැවීමට උත්සාහ කලේ නැහැ.

ප්‍ර: ගැරේජ් එකක තීන්ත බෝතල්, ටිනර් බෝතල් තියෙන එක අමුතු දෙයක් නෙවෙයිනේ. ඒත් ඔබට සැක හිතුනාද මෙම අංක තහඩුව වෙනස් කරන්න තමයි ටිනර් සහ තීන්ත යොදාගෙන තියෙන්නේ කියලා ?

උ: ඔව්.

ප්‍ර: ඒ අනුව ඒ තීන්ත බෝතල් සහ ටිනර් බෝතල් කවුද පාවිච්චි කලේ කියලා සොයා බලන්න ඇණිලි සටහන් එහෙම ලබා ගැනීමට කටයුතු කලාද?

උ: ඒ සම්බන්ධයෙන් සොයා බලා කටයුතු කලා.

ප්‍ර: කුමක්ද කලේ ?

උ: ඇසරේ අංශයේ නිලධාරීන් වන පො.සැ. 9914, අත්අකුරු පරීක්ෂක නිලධාරීන් වන පො.සැ 15393 ප්‍රේමරත්න නිලධාරියා ලවා එකී බෝතල් පරීක්ෂා කලා.

However, there is no such report marked by the prosecution in the trial. Thereby this creates a reasonable doubt of the prosecution case.

Further cross-examination of the PW 16 at pages 274 - 275 of the appeal brief is as follows;

ප්‍ර: එතකොට වාර්තාවක් ගත්තාද?

උ: ඔව්.

ප්‍ර: එහෙම තියෙනවා නම් ඒක වාසිසහගත කාරණයක්නේ පැමිණිල්ලට?

උ: ඔව්. ඒක අපිට දෙන්නේ නැහැ.

ප්‍ර : කෝ එහෙමනම් ඒක? කාටද දීලා තියෙන්නේ ?

උ: පිළිතුරක් නැත.

රජයේ නීතීඥ මහතා ඒ සම්බන්ධයෙන් වාර්තාවක් ලැබී නැති බව දන්වා සිටී.

ප්‍ර: ඒ කාරණයත්, මේ අංක තහඩු වෙනස් කරන්න උපයෝගී කර ගත්තාද නැද්ද කියන එකත් ඔබගේ සැකයක් පමණයි. ඒක තහවුරු වෙන ආකාරයේ වාර්තාවක් ලබා ගන්න බැරි වුනා කියලා යෝජනා කරනවා ? වාර්තාවක් ගත්තේ නැහැනේ ?

උ: ගත්තේ නැහැ. නමුත් මගේ නිරීක්ෂණවලින් මට තහවුරු වුනා. ඒ බව මම සටහන් කරලා තියෙනවා.

අධිකරණයෙන්.

ප්‍ර: විමර්ෂණයේදී හෙළිදරව් වුවාද ඒ අංක තහඩු වෙනස් කිරීමක් සම්බන්ධයෙන් ?

උ: එහෙමයි.

.....

ප්‍ර: ඔය සියල්ලක්ම ඔබ වාචිකව කරන ප්‍රකාශ පමණයි. ඒවා තහවුරු කරන්න රස පරීක්ෂකටවත්, ඇඟිලි සලකුණු පරීක්ෂකවරයෙකුටවත් යවන්න කටයුතු කරලා නැහැ නේද?

උ: එහෙම වාර්තාවක් ගත්තේ නැහැ.

අධිකරණයෙන්

ප්‍ර: අත් අකුරු පරීක්ෂණයකට යවන්න සොයා බැලුවා ද? නමුත් වාර්තාවක් ලැබිලා නැහැ?

උ: නැහැ.

ප්‍ර: ඒ කියන්නේ ඇත්ත වශයෙන්ම එය මෙම අපරාධයට සම්බන්ධ නඩු භාණ්ඩයක් බවට වාර්තාවක් ලැබුනා නම් ඒක ඔබට මේ පරීක්ෂණවලදී උපයෝගී කරගන්න පුළුවන් වාර්තාවක් නේද?

උ: එහෙමයි.

ප්‍ර: ඒක එහෙම නෙවෙයි කියලා ආවොත් ඒක ඔබට අවාසි සහගත වෙනවාද?

උ: එහෙම වෙන්න ඕනෑ. නමුත් වාර්තාවක් ලැබිලා නැහැ.

ප්‍ර: ඡායාරූප ශිල්පියෙකුත් ගෙන්වූ බව කිව්වා නේද?

උ: ඔව්.

ප්‍ර: ඉස්සරලා අපරාධ ස්ථානය ඡායාරූප ගත කරලා පැ. 2 කියලා, ඔය අංක තහඩුවේ ඡායාරූපයක් ගත්තද? අඩු තරමින් ඒ අංක තහඩුවේ ඡායාරූපයක් හරි පෙන්වන්න පුළුවන්ද ?

ළ: බැහැ.

In Ranasinghe Vs AG 2007(1) SLR 223 it was held as follows;

> "Next complaint made by the learned counsel was that the erroneous approach of the Learned Trial Judge with regard to Section 27 (Evidence Ordinance) Statement of the appellant (herein after referred to as Section 27 Statement) learned trial Judge, referring to recovery of an iron club recovered from a well observed as follows, "this iron club was recovered from a well in consequence of the accused statement. This shows that the accused tried to hide the weapon which was used to commit the crime" in my view the above conclusion of the learned trial judge is erroneous since discovery in consequence of a section 27 statement only leads to the conclusion that the accused had knowledge as to the weapon being kept at the place from which it was detected."

Wimalaratne Silva and another Vs AG 2008 (1) SLR 103 in dealing with a case of recovery of a weapon in consequence of a Section 27 statement, held as follows;

> "Recovery of the Axe (P3) on an Evidence Ordinance Section 27 statement (P4) made by the 1st, Appellant-there is no evidence to connect the axe to the crime. The fact that a sharp cutting weapon was used to kill the deceased does not necessarily mean that this same axe was used. If human blood which tallies with that of the deceased was detected on the axe by the Government Analyst, it would have constituted a strong piece of circumstantial evidence against the 1st appellant. When part of a statement of an accused person is put in evidence under Section 27 of the Evidence Ordinance, it is only evidence that the accused knew where the article discovered could be found, and nothing more".

Learned Counsel for the appellant argued that in this case there was no motive for the accused-appellant to commit the said offences. The legal effect of that situation was discussed in King Vs Haramanis 48 NLR 403 at 404. The Court observed as follows;

> "As a matter of law, the prosecution is neither bound to assign nor prove a motive as to why a criminal act was done. However, if the evidence is clear the question of motive is immaterial. If the facts are not clear the presence of an unintelligible motive may help the court to ascertain and decide that which is not clear. But when the facts themselves are not clear and there is also the absence of an intelligible motive these combined factors may have the effect of creating doubts in favour of the accused."
>
> Therefore, in this case where the facts are not clear the absence of an intelligible motive creates a reasonable doubt the benefit of which should have been given to the accused-appellant and he should have been acquitted.

Another item of circumstantial evidence which is taken in favour of the prosecution is that the accused-appellant was at or about the scene, at or about the time the incident took place. In this case, there is absolutely no direct evidence against the accused-appellant. Therefore, the learned counsel for the accused-appellant argued that this is an item of evidence which should have been taken into consideration by this Court in assessing whether a case has been proved beyond reasonable doubt against the accused-appellant. It was submitted that from the prosecution evidence absence of a motive is proved.

King vs Appuhami 46 NLR 128 at 132 Court held "absence of a motive whatsoever for the accused to commit murder is a factor in favour of the accused person.

The court observed in King Vs Haramanis 48 NLR 403 at 408 that "when the facts themselves are not clear and there is also the absence of an intelligible motive these combined factors may have the effect of creating doubts in favour of the accused.

In Lionel Vs Attorney General 2004(1) SLR page 123 at 130 Justice Amaratunga held as follows;

> "Motive is a double-edged weapon. The deceased also could have had a reason to implicate the accused due to this reason. The Learned Trial Judge has failed to consider this aspect when he considered whether there was any motive to the deceased to falsely implicate the accused."

It is important to understand the suspicious circumstances of the incident. The presence of a motive may be a suspicious circumstance. It has been consistently held by our courts that suspicion is not sufficient to base a conviction.

In The Queen Vs M.G. Sumanasena 66NLR 350 at 351 Basnayake CJ stated as follows;

> "Suspicious Circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relive the prosecution of this burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence."

This proposition of law was also followed in Muniratne and Others Vs The State 2001(2)SLR page 394 where it was stated in the attendant circumstances of this case we are tempted to reiterate the wise observations made by Basnayake CJ in The Queen Vs M.G.Sumanasena (supra).

> “It is to the following effect suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. The burden of establishing circumstances which not only established the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence."

For completeness, I wish to cite the judgment of Abrahams CJ in Wijemanna Vs Sinnathambi 39 NLR 311 wherein he stated “ I am of opinion that though this is a very suspicious case, it lacks that finality in proof which every criminal case must-have."

What the question before the court was there is no direct evidence in respect of this incident. At the time the Lorry that is not identified at the garage put by the accused is it possible to find the accused guilty based on circumstantial evidence? It is well-settled law that the accused is in a position to offer evidence of facts and circumstances in explanation of the serious charges established against the accused and indicate his innocence. But in this case, the learned High Court Judge has failed to consider and misdirected the defence case. The accused position was that he was not involved since the beginning of the scenario. Therefore, it is my view that no relevant facts to explain the last seen theory by the accused as he was not there.

The court should consider the Absence of Corroboration as it is important in cases where direct evidence is not available. It was decided in Sunil and Another Vs The Attorney General 1986 (1) SLR 230 wherein justice Dheeraratne held thus:

> "Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible."

A statement made by a witness to various other persons is not corroboration in this strict sense. This concept was widely discussed in the following cases;

(i) Dole Vs Romanis Appu 40 NLR 449

(ii) King Vs Ana Shriff 42 NLR 169

(iii) King Vs Atukorala 50 NLR 256.

It was stated that for a statement to be admissible under section 157 of the Evidence Ordinance, it should be made at or about the time of the incident and should be made to a person before there is a possibility of fabrication. Thus, it is my view that grave prejudice has been caused to the accused-appellant.

The attention of the court was drawn by the learned counsel for the accused-appellant to the Applicability of the Dictum of Lord Ellenborough. It was discussed in the following decide cases where the dictum of Lord Ellenborough has been dealt with:

Dissanayake Rallage Ranasingha and another vs OIC Warakapola and another SC Appeal No. 39/ 2011 & 39 A/ 2011, the Learned Magistrate applied the dictum of Lord Ellenborough in Rex v Cochrane, Garney's Reports, page 479. Ellenborough dictum states:

> " No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; nevertheless, if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the

conviction that the evidence so suppressed or not adduced would operate adversely to his interest".

The dictum was applied in several cases including;

(i) The king vs L. Seeder De silva 41 NLR 337
(ii) The king vs Geekiyange John Silva 46 NLR 73
(iii) Queen vs Seetin 68 NLR 316
(iv) Republic vs Illangathilaka 1984 (2) SLR 38
(v) Chadradasa vs Queen 72 NLR 160.

Ekanakaka Mudiyanselage Samaraweera Ekanayka vs AG, CA Case No : 203/2013,

Ellenborough dictum contained in Lord Cochrane's case and as adopted and developed by courts today provides that "No person accused of a crime is bound to offer any explanation of his conduct or circumstances of suspicions which attach to him; nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest".

Sri Lankan courts have for the most part applied the principle that while suspicious circumstances alone do not relieve the prosecution of the burden of proving the guilt of the accused beyond a reasonable doubt, the existence of telling evidence of a mass of circumstances, which remain unexplained by the accused, could result in a finding of guilt against the accused. I hold that the evidence led in this case does warrant the application of the Ellenborough principle.

It was decided in Kusumadasa vs State 2011 (1) SLR 253 that to apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case. When the prosecution has not put forward a strong *prima facie* case the dictum of the lord Ellenborough cannot be applied. It cannot be used to give life to a weak case put forward by the prosecution.

"No person accused of a crime is bound to offer any explanation of his conduct or circumstances of suspicions which attach to him; nevertheless, if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest".

To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case against the accused. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. Ellenborough's principle cannot be used to give life to a weak case put forward by the prosecution. I, therefore, held that the instant case dictum of Lord Ellenborough cannot be applied.

Gunawardena vs Republic of Sri Lanka 1981 (2) SLR 315 was decided on the applicability of the Ellenborough principle. It is the accused appellant's submission that since the prosecution failed to establish a strong prima facie case against him, the reliance placed on the said principle by the trial Court in convicting him becomes erroneous.

Applicability of the dictum of Lord Ellenborough was considered in the judgment of Kusumadasa vs State 2011 (1) SLR 240, where it was held that;

> "to apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case against the accused. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. The dictum of Lord Ellenborough cannot be used to give life to a weak case put forward by the prosecution. "

In the impugned judgment, the trial Court has utilized the dictum of Lord Ellenborough to impute liability on the accused-appellant. Therefore, it is incumbent upon this Court to consider whether the prosecution has established a strong prima facie case against him.

This dictum could be applied in cases where there is a strong *prima facie* case made out against the accused and if he refrains from explaining suspicious circumstances attached to him when it is in his power to offer evidence. In such a situation an adverse interference can be drawn against him. In this instant case, there is no prima facie case has been established by the prosecution against the accused-appellant. Therefore, the dictum of Lord Ellenborough cannot be directly applied in this case when the opportunity for a fair trial was not offered to the accused.

In Queen Vs, Wellasamy 63 NLR 265 at 269 Court held as follows.

Apart from the question of whether the conviction of the accused of the offence punishable under section 198 of the Penal Code without an amendment of the indictment and the accused being afforded the opportunity of answering the charge is good in law, the question is whether, on the directions given by the learned Judge, the verdict of guilty of an offence punishable under section 198 can be reconciled with the verdict of acquittal of the charge of murder arises for consideration.

The learned Judge emphasized more than once, and it would appear from his charge that learned counsel for the defence did likewise, the fact that the whole case depended on Maniccam's evidence. The trial judge said;

> "If you reject Maniccam's evidence then the whole case is over." Again, after discussing the evidence further, he said: "If you reject his evidence then you will acquit the prisoners." Acting in this direction, so it may be presumed, the jury acquitted the

> accused. The inference that may be drawn from the verdict of acquittal is that Maniccam's evidence was rejected. The only relevant evidence he gave was the evidence of his meeting the five accused, four of whom were carrying the deceased covered with a very cloth in the direction of the channel along Emerson Road. If this evidence was rejected on the charge of murder, it is difficult to understand how on the same evidence a conviction of any other offence can be founded. The standard of proof required in respect of a charge under section 198 of the Penal Code is not below that required in respect of a charge under section 296.

The charge of murder shows that the jury disbelieved Maniccam's story that the accused carried the body of the deceased towards the channel at about 11.30 pm on the night of 25th April. Evidence which is unacceptable in respect of one offence cannot reasonably afford good ground for convicting the same persons of another offence. It was Maniccam's credibility that was in question. When the jury treated him as a witness who was not credible there was an end to the case as the learned trial judge rightly observed more than once in the course of his summing-up?

A witness cannot be both not credible and credible regarding the very same evidence. This view of the indivisibility of a witness's credibility gains support from the case of Baksh Vs The Queen (1958) 1 AC167 at 172, where the view was expressed that the evidence of a witness which was rejected as against one accused cannot be accepted against another.

The Privy Council observed:

> "Their credibility cannot be treated as divisible and accepted against one and rejected against the other. As his evidence has been disbelieved in respect of the charge of murder it cannot sustain the conviction on any other charge. The convictions of the accused cannot be upheld as there is no evidence apart from that of Maniccam which implicates them. We accordingly allow the appeal and direct that the convictions of the accused be quashed and that a judgment of acquittal is entered in respect of all of them.
>
> In addition, the maxim *falsus in uno falsus in omini bus* also applies in this case and which means that if the witness is false in one aspect it is considered false in all other aspects and therefore the evidence of PW 16 has to be rejected. The evidence of the witness cannot be believed in respect of this, his evidence should be rejected in respect of the accused-appellant. Based on the above principles it is unsafe to act on the evidence of the witness and therefore the accused-appellant should be acquitted of all charges levelled against him.

In Budhsen Vs. The State of UP. 1970 Crl. L. J. 1149 it was held that "They are generally held during the investigation if the primary object enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigation officers of the Bonafides of the prosecution witness and also to furnish evidence to corroborate their testimony in court"

In the case of Asarif Vs. State AIR 1961 All 153 it was held;

"The identification is always a matter of opinion or belief. With regards to criminal offence is identification has a twofold object; first to satisfy the investigating authorities before sending a case for trial to the court, that a person arrested but not previously known to the witnesses was one of those who committed the crime, or the property concerned was the subject of such crime. Second, to satisfy the court that the accused was the real offender or the article was concerned with the crime which is being tried".

The identity of the production has been challenged by the appellant. According to the prosecution case, the accused has kept the vehicle (Lorry) in the garage and police discovered it by the statement of the accused-appellant. Therefore, the witness PW 3 has been called as the Garage Owner and given the evidence in the trial court. The Prosecution has not shown the vehicle to the witness and asked whether it was in his garage. It is an inevitable thing to prove by the prosecution in a murder case. The whole scenario of the prosecution case depends on this. It is the main duty of the prosecution to prove the case beyond reasonable doubt that the recovered vehicle is the disputed vehicle of the deceased.

Cross-examination of the PW 3 at page 148 & 149 of the appeal brief is as follows;

ප්‍ර: ඔබගෙන් අවසාන ලෙස ඇහුව මේ විත්තිකරු ගෙනත් දුන්න ලොරිය නැවත දැක්කොත් හඳුනාගත හැකිද කියල?

උ: ඔව් වර්ගයෙන් එක වගේ වාහන තියෙන නිසා පාට වෙනස් කරල තිබ්බොත් හරියටම හඳුනන්න බැහැ.

ප්‍ර: වාහනය හඳුනාගන්නට පුළුවන්ද කියල ඇහුවට මේක ලොරියක් කියල නීතීඥ මහත්මිය පෙන්නුවේ නෑ නේද?

උ: නැහැ.

ප්‍ර: යම් හෙයකින් සමහරවිට හඳුනාගන්නත් පුළුවන්, බැරි වෙන්නත් පුළුවන්?

උ: පුළුවන් වෙන්නත් පුළුවන්. බැරි වෙන්නත් පුළුවන්.

ප්‍ර: මේ කරුණ සම්බන්ධයෙන් ඔබ මහේස්ත්‍රාත් අධිකරණයේ සාක්ෂි දුන්න නේද?

උ: ඔව්.

ප්‍ර: ඒ සාක්ෂි දුන්න දිනය **1994.08.09** වෙනිදාද?

උ: ඔව්.

ප්‍ර: ඒ සාක්ෂි දුන්න දිනයේදී ඒ උසාවියේදී, මේක විත්තිකරු ගෙනත් තිබෙන ලොරිය කියල පෙන්නුවද?

උ: නැහැ.

In Prameshwaran Vs Officer in Charge of Norwood Police 1988 (2) SLR pages 138 at 140 and 141 are as follows;

In a criminal case, the identity of productions must be accurately proved by the direct evidence which is available and not by way of inferences. Vide Queen Vs. Kularatne 71 NLR 529.

Therefore, the learned counsel for the accused-appellant says that this is a miscarriage of justice for the accused. Thereby the accused should be acquitted upon this default.

The learned counsel for the accused-appellant argued that non-calling certain witnesses by the prosecution should have been considered by the learned trial judge. The prosecution is not bound to call a particular number of witnesses to prove a case. But in this instant case, at the time the PW 1 categorically states that the deceased left with two persons called "Ganesh" except the accused. According to the evidence of PW 1, the person so-called "Ganesh" also was there. This position was put to the prosecution witnesses. Therefore, the person so-called "Ganesh" could have been called an important witness.

In Examination in chief of PW 1 at page 139 of the appeal brief is as follows;

**ප්‍ර: තමුන් පහල උසාවියේදී සාක්ෂි දීලා පිළිගත්තාද බස් ස්ටෑන්ඩ් එකට ගියේ ගනේෂ් එක්ක කියලා, විත්තියේ නීතිඥ මහතා කරපු යෝජනාව? තමුන් පිළිගත්තා නේද?**

**උ: එහෙම කිව්වේ නැහැ. 03 දෙනා එකතු වෙලා ගියේ.**

**ප්‍ර: තමුන් පහළ අධිකරණයේදී 1998.06.24 වෙනි දින සාක්ෂි දෙමින් මෙහෙම කිව්වද? "බස් ස්ටෑන්ඩ් එකට ගියේ ගනේෂ් එක්ක කියලා තියෙනවා නම් මම ඒක හරි කියලා පිළිගන්නවා? මුස්ලිම් කෙනෙක් ඇවිත් මගේ පුරුෂයා එක්ක ගියේ කියලා තියෙනවා නම් ඒක වැරදි වෙන්න පුළුවන්?"**

**උ: මම ස්ථිරවම කියන්නේ, මුස්ලිම් කෙනෙක් එක්ක ගියා කියලා මම කිව්වා.**

**ප්‍ර: තමුන් පහල උසාවියේදී ඒ ගැන කියපු ආකාරය පිළිගන්නවද?**

**උ: මම එහෙම කිව්වේ නැහැ.**

**(බස් ස්ටෑන්ඩ් එකට එක්ක ගියේ ගනේෂ් කියලා තියෙනවා නම් මම ඒක හරි කියලා පිළිගන්නවා යන කොටස වි 01 ලෙස සලකුණු කිරීමට අවසර ඉල්ලා සිටී)**

It was the contention of the learned counsel for the appellant that non-calling of this witness makes the already existing doubt greater and the record is starved of evidence and the prosecution is endeavouring to call partisan witnesses and tried to prove a fabricated case maliciously.

On behalf of the accused-appellant it was argued by the learned counsel that hearsay evidence cannot be considered without corroboration. The prosecution has called the witness PW 1 who is the wife of the deceased. She has given evidence in the trial court that the deceased has left the home with two others. one of them is the accused and the other person is named "Ganesh". However, the defence position was that the accused had not joined with them and denied the prosecution witness's evidence. Therefore, corroboration evidence is

important to prove this evidence because hearsay evidence has been led by the prosecution through PW 1 saying that the deceased person was with the accused and Ganesh.

She stated that Ganesh informed her that he dropped them off and returned home. But this evidence is completely hearsay and the prosecution has not proved them by calling Ganesh as a witness. Hence this evidence cannot be considered against the accused-appellant in the trial.

Examination in chief of PW 1 at page 123 of the appeal brief is as follows;

ප්‍ර: ඔබ සඳහන් කර සිටියා ගනේෂන් කියන තැනැත්තා මහත්තයා එක්ක ගියා කියලා. ගනේෂන් කියන තැනැත්තාව තමුන් කොහොමද දන්නේ ?

උ: එයත් එක්ක තමයි ගියේ. අපේ ගෙවල් ළඟ හිටියේ.

ප්‍ර: තමුන්ගේ මහත්තයා නැතිවෙන කාලය වෙනකොට, කොච්චර කාලයක ඉඳලා තමුන් ගනේෂන්ව අඳුරනවද?

උ: ගොඩක් කල් ඉඳලා අඳුරන කෙනෙක්.

ප්‍ර: සමීප මිත්‍රයෙක්ද?

උ: ඔව්.

ප්‍ර: ගනේෂන් කියන තැනැත්තා සාමාන්‍යයෙන් මහත්තයා සමග ව්‍යාපාරික කටයුතුවලට සම්බන්ධ වෙනවද?

උ: නැහැ. එයා ගිහිල්ලා දාලා ආවා.

ප්‍ර: කොහොමද දාලා ආවේ?

උ: බස්ටෑන්ඩ් එකට.

ප්‍ර: මොකකින්ද දාලා ආවේ?

උ: බස් නැවතුම්පොළට දැම්මා කියලා කිව්වා මට.

ප්‍ර: ඔබ සඳහන් කර සිටියා තවත් වාහනයක් ඇවිත් තිබුණා කියලා ඒ අවස්ථාවේදී?

උ: මෝටර් සයිකලයක්.

ප්‍ර: කවුද පැමිණියේ මෝටර් සයිකලයෙන්?

උ: 3න් දෙනාම ගියේ මෝටර් සයිකලයෙන්.

Examination in chief of PW 1 at page 125 of the appeal brief is as follows;

ප්‍ර: ඔබ සඳහන් කර සිටියා ගනේෂණුයි, මහත්තයයි, මේ චිත්තිකාරයයි, ගෙදරින් පිටත් වෙලා ගියාට පස්සේ මහත්තයා ආවේ නැහැ කියලා. චිත්තිකාරයා හරි ගනේෂන් හරි කොයි වෙලාවක හරි ආවාද?

උ: ගනේෂන් ආවා. අල්ලපු ගෙදර ඉන්නේ එයා. එයා අසල්වැසියෙක්.

ප්‍ර: ඒ පුද්ගලයා ආවේ එදිනමද ?

උ: හැමදාම ගෙදර ඇවිත් යනවා.

ප්‍ර: 14 වෙනිදා මහත්තයයි, විත්තිකාරයයි ගියාට පස්සේ එදා කොයි අවස්ථාවක හරි ඒ පුද්ගලයා ආවාද?

උ: එදා හවසම ආවා.

ප්‍ර: ඇවිත් මොනවා හරි කිව්වාද මහත්තයා ගිය ස්ථානයක් සම්බන්ධයෙන් ?

උ: මුරපොළේ දාලා ආවා කියලා කිව්වා.

ප්‍ර: කොයි මුරපොළේද?

උ: මැදවච්චිය අසල තියෙන මුරපොළ.

Page No. 125

Examination in chief of PW 1 at page 139 of the appeal brief is as follows;

ප්‍ර: එ් ගනේෂ් කියන තැනැත්තා එක්ක නේද අවසාන වතාවට යතුරු පැදියේ නැඟලා පිට වෙලා ගියේ?

උ: 03 දෙනාම ගියේ?

Learned counsel for the accused-appellant cited another important aspect to consider on behalf of the appellant. That was the Good Character of the accused appellant. The accused in his dock statement placed his good character as an issue. In a criminal trial, what is the effect of leading evidence of the good character of the accused?

Section 53 of the evidence ordinance makes the good character of the accused a relevant fact. The section reads as follows;

> "In Criminal proceedings, the fact that the person accused is of a good character is relevant."

Is this just a death sentence in the evidence ordinance and if not, what inference could be drawn from that evidence?

In Rex Vs Gunatilake 51 NLR 302 an accused charged with murder called the headmaster of his school who gave evidence of the accused's good character, the trial judge directed the jury that as a matter of law they should not pay the slightest attention to the evidence. The Court of Criminal Appeal held that this constituted a grave misdirection which vitiates the conviction.

It was held in Peter Singho Vs Werapitiya 55 NLR 155 the court of criminal appeal emphasized that in all criminal proceedings the accused is entitled to put his good character in issue and have the matter taken into account by the jury.

Professor G.L Pieris in his book "Recent trends in the Commonwealth Law of Evidence" on page 311 states as follows;

> "Where the evidence viewed as a whole admits some degree of doubt. This doubt may be reinforced by evidence of good character which to that extent could facilitate an acquittal in marginal cases."

He further states on page 310 as follows;

> "No distinction can be made convincingly between evidence of good character. Going to credibility and evidence of good character having a bearing on the issue of guilt or innocence. Since these standards are incapable in the practice of being disentangled if the trial judge directed the jury that the appellant was more credible because of his good character, it would have followed that, he was less likely to commit the offence. (Vide 11 Vs Benin 1966 1AFR 522 and Richardson and Longman 1969 1QB 299)

The functions of an appellate Court in dealing with a judgment mainly on the facts from the Court which saw and heard witnesses was dealt with by Hon. Chief Justice MacDonnell in King Vs. Gunaratne 14 Ceylon Law Recorder 174 held as follows;

> I have to apply these tests as they seem to be, which a Court of Appeal must apply to an appeal coming to it on questions of fact,
>
> (i.) Was the verdict of the Judge unreasonably against the weight of the evidence?
> (ii.) Was there misdirection either on the law or the evidence?
> (iii.) Has the Court of trial drawn the wrong inference from the matters in evidence?

The testimonial trustworthiness of a witness is a matter of the trial Judge and considered the finding of a trial judge will not be disturbed by an Appellate Court lightly. It was held in Fradd Vs Brown & Company 20 NLR 282 at 283 that;

> 'It is rare that a decision of a Judge so expresses, so explicit upon a point of fact purely is overruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of the first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from papers or from the narrative of those who were present. It is very rare, in questions of veracity so direct and so specific as these, a Court of Appeal will overrule a Judge of the first instance.'

In State of Uttar Pradesh Vs M. K. Anthony 119841 SO 236/ [1985] CRI. L.J. 493 at 498/499 the Indian Supreme Court held;

> 'While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have the ring of truth, Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the

opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because the power of observation, retention and reproduction differ with individuals.'

This case was cited with approval by the Court of Appeal in Oliver Dayananda Kalansuriya alias Raja Vs Republic of Sri Lanka CA 28 /2009 (13.2.2013)

It was held by Justice Rodrigo in James Silva vs. Republic of Sri Lanka 1980 (2) SLR 167;

> 'A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty (the Privy Council judgment in Jayasena vs. Queen 72 NLR 313.)'

It was held by Justice Sisira De Abrew in B.R.R.A. Jagath Premawansa vs. Attorney General - CA Appeal No. 173/2005 decided on 19.3.2009 that:

> "When this evidence is not challenged can it be said that such evidence is accepted by the opposing party. In finding an answer to this question I would like to consider certain judicial decisions. In the case of Sarwan Singh v. State of Punjab 2002, AIR Supreme Court (iii) 3652 at 3655 and 3656 Indian Supreme Court held 'It is the rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.'

This judgment was cited with approval in the case of Bobby Mathew v. State of Karanataka (2004) 3 Cri. Page 3003. In the case of Himachal Pradesh v. Thakur Dass (1983) 2 CrL L.J. 1694 at 1701 V.D. Misra CJ held:

> "Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.' 'Absence of cross-examination of prosecution witness of certain facts leads to an inference of admission of that fact.' Vide Motilal v. State of Madhya Pradesh (1990) CrL L.J. NOC 125 MP.'

On consideration of the principles laid down in the above judicial decisions, I hold that whenever the evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject however to the qualification that he is a reliable witness."

In King Vs. Gunaratne 47 NLR 145 at 149 was held;

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then if anyone link broke, the chain

would fall. It is more like the case of a rope comprised of several cords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quire of sufficient strength. (Per Pollock C.J. in Regina v. Exall 176 English Reports, Nisi Prius at p. 853)"

In Don Sunny Vs Attorney General 1998 (2) SLR 1 it was held;

(i.) When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

(ii.) If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond a reasonable doubt.

(iii.) If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only if the proven items of circumstantial evidence are consistent with their guilt and inconsistent with their innocence.

The learned Counsel for the respondent argued that the only irresistible and inescapable conclusion that can be arrived at with proven items of circumstantial evidence, in this case, is that the appellant murdered the deceased.

It was held in Premathilaka vs. Republic of Sri Lanka 75 NLR 506 that:

"A conviction could be based upon the telling evidence of a mass of eloquent circumstances remain unexplained by the accused, no reasonable Judge could have any verdict other than that of guilt."

For the respondent, it was further argued that the finding of the learned High Court Judge is correct in the light of the evidence available in this case.

The learned Deputy Solicitor General conceded that the accused-appellant cannot be convicted for the charge of robbery as there was no direct or circumstantial evidence against him. It should be appreciated the spirit of the Attorney General's Department, whenever the case is weak against the accused-appellant they are not reluctant always to admit that, to assist the court.

In the case of Martin Fernando vs. Inspector of Police, Minuwannda 46 NLR 210 Wijewardena, J re-defined the role of the Appellate Court. It is as follows;

"An Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically although the decision of a Judge on question of facts based on

demeanour and credibility of witnesses carries great weight. Where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt"

On the part of the accused-appellant, all grounds of appeal as having been urged above cumulatively point towards a miscarriage of justice, failure of justice and irreparable prejudice to the interest of the appellant, hence, the intervention of this Court is *the sine qua non* to set things right.

The prosecution has failed to prove its case beyond reasonable doubt and that the conviction and the sentence imposed on the accused-appellant cannot stand. Owing to the above circumstances, this Court is of the view that the learned trial Judge has lamentably failed in evaluating the entirety of the evidence that was before him and therefore, the convictions of the appellant are quashed.

The case against the accused-appellant was not proven beyond reasonable doubt and the conviction is not within the well-established principles of law as enumerated above. On the premises aforementioned this Court sets aside the judgement dated 28.03.2019 whereby the accused-appellant was convicted and sentenced to death and now pronounces a fresh judgment of acquittal from both charges in the indictment.

In those circumstances, the conviction of the accused-appellant cannot stand in law and is set aside and the accused-appellant is acquitted and discharged from both charges in the indictment of this case.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**