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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No.
CA/HCC/ 0290/2015
High Court of Panadura
Case No. HC/2472/2008

Vanaguruge Susantha Gamini

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Darshana Kuruppu with Sajini Elvitigala, Chinthaka Udadeniya, Dineru Bandara, Buddhika Thilakarathne, Thanuja Dissanayake, Sudarsha de Silva and Dilki Hewapanna for the Appellant.** **Azard Navavi, DSG for the Respondent.**

ARGUED ON : **24/03/2022**

DECIDED ON : **15/06/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Panadura for committing the following offences:

I. Under Section 296 of the Penal Code for committing the murder of Anoma Magammana on or about 29th March 2004 at Magammana.
II. In the course of the same transaction for committing house trespass in order to commit an offence punishable by death and thereby liable to be punished under Section 435 of the Penal Code.
III. In the course of the same transaction robbing a gold chain worth of Rs.80,000/- and a sum of Rs.45,000/- which items were in Anoma Magammana's possession an offence punishable under Section 380 of the Penal Code.

The trial commenced before the High Court Judge of Panadura as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement, called witnesses and closed his case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant for all counts and sentenced him on 26/11/2015 as follows:

I. For Count 01, the Appellant was sentenced to death.

II. A term of 20 years rigorous imprisonment and a fine of Rs.100,000/- with a default sentence of 01 years simple imprisonment for count No.02.

III. A term of 10 years rigorous imprisonment and a fine of Rs.50,000/- with a default sentence of 01 years simple imprisonment for count No.03.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

Background of the Case

PW2, Manorika, resided in the same house along with the deceased and her father. On the day of the incident i.e., on 29/03/2004 when she returned home from work around 7.55 p.m., she had found the main door unlocked but the lights not switched on in the house. When she had searched the house after switching the lights on, she had found the deceased lying on the floor between the bed and an almirah in a room. This room is only used by the deceased's brother whenever he returns home from abroad. She had also observed a blue-coloured nylon ligature around her neck. She had further noticed that the gold chain usually worn by the deceased was missing. She had called PW1 immediately and the police had been informed through PW1. According to her, the deceased got legally married to the Appellant but had undergone a divorce within three years.

As the deceased had loved the Appellant very much the Appellant had obtained the divorce ex-parte.
Investigations commenced and it revealed that the deceased had gone to the bank around 2.30 p.m. on the date of incident and withdrawn Rs.80,000/- from her account by way of a loan against her fixed deposit.
During the investigation a fingerprint from the mirror frame and a palm print from the almirah door had been recovered from the room where the deceased was found lying on the ground.

The Appellant was arrested on 17/05/2004 and upon his statement, Rs.40,000/- cash, a portion of nylon ligature and the gold chain of the deceased had been recovered by the police. Upon examination the Government Analyst had opined that the parts of the ligature removed from the corpse could be the portion recovered upon information provided by the Appellant.

The fingerprint traced from the scene of crime did not match with the Appellant's fingerprint but the palm print matched with that of the Appellant.

The telephone details obtained from the Appellant's telecommunication service provider - Sri Lanka Telecom had revealed that the Appellant had been in contact with the deceased over the phone on 13 different occasions between 01/03/2004 and 31/03/2004.

The Appellant made a dock statement and denied the charges and called 08 witnesses. The Appellant's wife who gave evidence for the defence alleged that the Appellant was in fact, arrested on 11/05/2004 and not on 17/05/2004 as claimed by the police. Further, the recovery made based on the Appellant's statement was heavily contested by the Appellant relying on a reporter who had been alleged to have reported about the said recovery

on 18/05/2004 in the 'Dinamina' newspaper which was the very next day of the arrest.

<u>Following grounds of appeal are advanced by the Appellant.</u>

1. The Learned Trial judge has failed to consider that the circumstances brought forth against the Appellant by the prosecution are not cogent and fully established and are wholly inadequate to support the conviction.
2. The Learned Trial judge has failed to consider the failure of the prosecution to rule out the possibility of a third party committing the crime.
3. The Learned Trial judge has failed to consider the explanation given by the Appellant and the inherent weaknesses in the evidence pertaining to the palmprint.
4. The Trial Court has failed to consider the well-established principle 'suspicious circumstances do not establish guilt'.
5. The Learned High Court judge has misdirected himself by applying the 'Lucas Principle' and by drawing adverse inference against the Appellant.
6. The Learned High Court judge has come to an erroneous finding based on speculations and surmises.

It is a well-established principle that in a case based on circumstantial evidence it is the duty of the trial judge to take into consideration the fact that the evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. As this case entirely rests on circumstantial evidence, it is necessary to discuss with case laws how this concept has been developed and accepted in our judicial system.

In the case of **C. Chenga Reddy and others v. State of Andhra Pradesh** (1996) 10 SCC 193 the court held that:

> "*In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence".*

In the case of **The Attorney General v. Potta Naufer & Others** [2007) 2 SLR 144 the Supreme Court held that:

> *"When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence".*

In the case of **Kusumadasa v. State** [2011] 1 SLR 240 Sisira de Abrew J in the Court of Appeal held that:

> *"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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence".*

In **Premawansha v. Attorney General** [2009] 2 SLR 205 the Court of Appeal held that:

> *"In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence".*

In the case of **Regina v. Exall and Others** [1866] 4F. & F. pages 922 at 929 the Court held that:

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed 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."*

In this case in order to find the Appellant guilty to the charge, all the circumstances must point at the Appellant that he is the one who committed the murder of the deceased and not anybody else. It is the incumbent duty of the prosecution to prove same beyond reasonable doubt.

In the first ground of appeal the Appellant contends that the Learned Trial judge has failed to consider that the circumstances brought forth against the Appellant by the prosecution are not cogent and fully established and are wholly inadequate to support the conviction.

According to the prosecution, the deceased was found dead on 29/03/2007. The investigation commenced on that day itself. According to PW2 the deceased had legally registered his matrimony with the Appellant in the year 1997 but no marriage ceremony had been held. At that time the Appellant was working in the Sri Lankan Army and was serving in the North. As the Appellant had not shown any interest to marry the deceased ceremonially, the said marriage ended up in a divorce filed ex-parte by the Appellant. Even though the marriage had ended the deceased had been in love with the Appellant. The Appellant had visited the deceased's house several times before the divorce, but not afterwards. After the funeral when this witness was examining the personal items of the deceased, she had found her bank passbook and a slip which indicated the withdrawal of money on the date of the incident. As this witness had come across their landline being engaged continuously on several occasions, she had passed this information to the police for investigation purposes.

The police continued their investigation after receiving this information from PW2 and arrested the Appellant on 17/05/2004 at his Padukka residence. Upon the information provided by the Appellant the police had recovered a jam bottle from the ceiling of the Appellant's house and a portion of blue coloured nylon rope from the rear side of his house. The deceased's gold chain and Rs.40,000/- cash was inside the bottle. In addition, a Rs.5000/- note was also recovered by the police. The gold chain had been identified by PW2 as the deceased's chain.

The portion of the nylon rope which had been recovered upon the information of the Appellant and the nylon rope which had been found wrapped around the deceased's neck had been sent to Government Analyst. The piece of rope that was found wrapped around the deceased's neck had been cut in to 07 pieces by the Judicial Medical Officer when he removed it from the deceased's neck. According to the Government Analyst's Report all pieces originate from one and the same nylon rope.

According to the JMO, the death had been caused due to Asphyxia following ligature strangulation.

The admissibility of the recovery evidence under Section 27(1) of the Evidence Ordinance had been discussed in several cases decided by the Superior Courts of our country.

The Section 27 of the Evidence Ordinance states that,

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance*

discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."

In this case the Learned High Court judge had very correctly admitted the recovery under Section 27(1) of the Evidence Ordinance.

In the evidence of PW2 it was revealed that the deceased was in contact with the Appellant even after the divorce. Hence the police investigated this information by obtaining telephone call details of the two sides landlines to check the veracity of the information given by PW2 on this point.

The investigation had revealed that the telephone no. 011 2753190 is registered under the name of M. Edwin, who is the father of the deceased and of PW2. Telephone No. 011 2830235 is registered under the name of the Appellant. Telephone details obtained for the period between 01.03.2004 to 31.03.2004 revealed that 13 calls had originated from the deceased's house to the Appellants house in the month of March, 2004.

The dates of which are as follows:
01.03.2004, 02.03.2004, 03.03.2004, 05.03.2004, 11.03.2004, 12.03.2004, 13.03.2004, 15.03.2004, 16.03.2004, 17.03.2004, 18.03.2004, 19.03.2004, 20.03.2004, 22.03.2004, 23.03.2004, 26.03.2004 and 27.03.2004.

The last call originating from the deceased's house was on 27.03.2004. Hence it is quite clear that the deceased was in constant contact with the Appellant. This position was admitted by the Appellant in his dock statement.

It was contended that the Appellant was arrested on 11/05/2004 at his residence and not on 17/05/2004 as claimed by the prosecution. According to PW8, the Appellant was arrested on 17/05/2004 at 10.00 p.m. at his residence. His statement was recorded at 1.15 a.m. on 18/05/2004. To recover the production the police had visited the Appellant's house at 6.30 a.m. on 18/05/2004. The witness vehemently denied that the Appellant was arrested on 11/05/2004. To contradict the date of arrest the Appellant marked the case record of the Bail Application and highlighted that PW8 in his objection has mentioned the date of arrest as 18/05/2004. This cannot be considered as a vital contradiction which affects the root of the case as the Appellant was arrested on 17/05/2004 at 10.00 p.m. by the police.

Further, although the wife of the Appellant said in her evidence that the Appellant was arrested on 11/05/2004, she only lodged her complaint at the Police Headquarters on 17/05/2004 at 11.35 a.m. Even though a complaint was lodged, she was neither summoned for any inquiry nor was her statement obtained until she gave evidence before the High Court.

The Counsel for the Appellant further argued that even before the recovery was made under Section 27(1) of the Evidence Ordinance by PW8, the said news had been published in the Dinamina Newspaper published on 18/05/2004. Without going into detail, I fully agree with the reasons given by the Learned High Court judge as to why he had refused to act on the evidence given by the defence witness Deepal Rathnayake. The reasoning given by the Learned High Court judge is reproduced *verbatim* as follows: (pages 1273-1274 of the brief)

පුවත්පත් වල සඳහන් කරුණු අධිකරණයේ නඩු විභාග වලට අදාළ නොවේ. පුවත්පත් වාර්තාකරුවන් ඔවුන් ව්‍යාපාරික කටයුත්තක් වශයෙන් තම පුවත්පත් විකිණීම සඳහා විවිධාකාර දැන්වීම් පලකොට ව්‍යාපාරික අරමුණින් කටයුතු කරණ ආයතන වේ. එබැවින් පුවත්පත් වාර්තාකරුවන් පුවත්පත් වල ප්‍රසිද්ධ කරන කරුණු ගැන නඩු විභාගයේ දී අදාළ කර ගත

නොහැකි අතර, අධිකරණයේ ඉදිරිපත් වන සාක්ෂි පමණක් අධිකරණයට සළකා බැලීමට සිදු වේ. පුවත්පත් වල යම් යම් අපරාධ සම්බන්ධයෙන් නොයෙකුත් ආකාරයට විස්තර වාර්තා වන බව සාමාන්‍ය කරුණකි. නමුත් ඒවා පොලිස් I.B පොත් වැනි ලේඛන වල සඳහන් කොට පලකරන ඒවා නොවේ. ඒවායේ සත්‍යතාවය තහවුරු කර ගැනීමට පොත්පත් ලේඛන නොමැති, හුදෙක් දැන්වීම් පමණකි. එබැවින් පුවත් පත් වල සඳහන් දැන්වීම් පිළිගැනීම ප්‍රතික්ෂේප කරමි. එම පුවත්පත් සම්බන්ධව පොත්පත් කිසිවක් ඉදිරිපත් වී නොමැත.

Due to aforesaid reasons, I find that the first ground of appeal has no merit.

In the second ground of appeal the Appellant contends that the Learned Trial judge has failed to consider the failure of the prosecution to rule out the possibility of a third party committing the crime.

The defence had queried from PW8 whether he investigated about the three-wheel driver Nimal Dharmasiri alias Sudu Malli who was supposed to have stated that a person who was travelling in his three-wheeler had asked him whether a lady had been murdered on 29/03/2004. The investigating officer had conducted the investigation and recorded his statement but could not establish any breakthrough based on it.

The defence had called the three-wheeler driver Nimal Dharmasiri as a witness. According to him a person who went on a hire in his three-wheeler had asked him whether a murder had taken place in the area. As he was unaware, he had replied in the negative. During cross examination the witness had stated that he was not certain whether the village people were aware of the incident by that time. According to him the time was around 7.30 p.m. when he went on the hire. This witness is an ordinary person of the society who never expected that he would be called in to give evidence before a court of law. He had referred to an approximate time period without verifying it with an actual clock. Hence considering the evidence of this witness it is incorrect to argue that his evidence casts a doubt about a third party committing the crime.

The Learned High Court judge has considered this evidence in his judgment. As this evidence failed to create any doubt on the prosecution case, I conclude that the second ground of appeal is also sans merit.

The Appellant in his third ground of appeal contends that the Learned Trial Judge has failed to consider the explanation given by the Appellant and the inherent weaknesses in the evidence pertaining to the palm print.

The Counsel for the Appellant argued that the fingerprint and the palm print uplifted from the crime scene were not proved beyond reasonable doubt by the prosecution.

PW8, IP Navaratne had visited the crime scene upon receiving the complaint from PW1. He had gone to the room where the deceased's body was found and has recorded his observations and has engaged police protection for the crime scene until the arrival of the officers to collect finger print evidence. On 30/03/2004 two police officers namely SI Kaluarachchi and PC 17600 Sisira from the Police Fingerprint Department had arrived at the crime scene and had extracted a fingerprint from a dressing table and a palm print from an almirah. Although the fingerprint and the palm print were extracted on 30/03/2004, the Appellant was arrested on 17/05/2004 about one and a half months following the incident. Further, when the fingerprint and palm print were extracted, there was no any clue received regarding any suspect in connection to this incident. The Appellant was arrested upon further inquiry conducted on phone conversation details.

According to PW9, the Registrar of the Fingerprint Department confirmed that SI Kaluarachchi had extracted a fingerprint and a palm print on 30/05/2004. As he only received the fingerprint of the Appellant on 18/05/2004, he had done the comparison but the fingerprint extracted

from the dressing table was not matched with the Appellant's fingerprint. As the palm print of the Appellant had not been sent for comparison, he had called for the same from Kahathuduwa Police. On 09/11/2004, he had received the palm print of the Appellant for comparison. Upon comparison, the Appellant's palm print was found to coincide with the palm print extracted from the almirah on 30/05/2004. Accordingly, he had prepared the report and submitted it to court. He has placed evidence before the court of his expertise in the particular field and had given evidence after marking all necessary photographs and documents to substantiate his opinion.

The evidence regarding the extraction of the fingerprint and palm print were not contradicted during the trial. Further the Appellant was arrested after about one and half months of the detection of the fingerprint and the palm print.

The Appellant in his dock statement contended that he had visited the deceased's house and stayed in her room on several occasions prior to legal marriage. But he failed to mention whether he used the furniture and other items in the room. But according to PW1 and PW2 the room where the body of the deceased was found is exclusively used by deceased's brother whenever he comes home from abroad and not by the deceased. Further, according to PW2 the marriage of the deceased was terminated in the year 2000, four years prior to the murder.

The investigating officer admitted that the Appellant was taken to the deceased's house after his arrest on 17/05/2004. But the palm print was extracted on 30/05/2004. As such there is no room for the fabrication of evidence against the Appellant in this case.

Section 45 of the Evidence Ordinance states:

> "When the court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant facts. Such persons are called experts".

In The **Queen v. Wijehamy** 62 NLR 425 the Court of Appeal held that:

> *"Under Section 45 of the Evidence Ordinance it is for the court to form an opinion as to the identity of finger and palm impressions, assisted by the opinion of an expert".*

In the **King v. Jayasena** [1933] 2 CLW the court held that:

> *"A conviction can be based on finger print evidence alone, in the absence of a satisfactory explanation from the accused".*

Considering the evidence presented pertaining to the palm print impression of the Appellant, the explanation given by the Appellant and being guided by the above-mentioned judgments, the acceptance of palm print evidence has not caused any prejudice in this case. As such this ground is also devoid of any merit.

In the fourth ground of appeal the Appellant contends that the Trial Court has failed to consider the well-established principle 'suspicious circumstances do not establish guilt'.

In the case of **The Queen v. M. G. Sumanasena** 66 NLR 350 it was held that:

> *"In a criminal case 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".*

In this case the Learned High Court judge has considered all the evidence presented by the prosecution and the defence accurately. The evidence presented by both parties had been analyzed extensively and reasons had been given for the acceptance and rejection of evidence.

In the fifth ground of appeal the Appellant contends that the Learned High Court judge has misdirected himself by applying the 'Lucas Principle' and by drawing adverse inference against the Appellant.

In **R v. Lucas** [1981] 1 Q.B. 720 the following criteria were laid down for situations necessitating the courts to consider whether lies, whether told in court or out of court, can amount to corroboration:

> *"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be*

a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

Hence false denial can amount to corroboration in appropriate circumstances, only when it relates to a vital issue which is in dispute in the case.

In **Ajith Samarakoon v The Republic (Kobaigane Murder Case**) [2004] 2 SLR 209 applying the Lucas Principle Jayasuriya, J. held that:

> *"The accused made a dock statement in the course of which he denied the charge and he emphatically stated that he had held a high and exalted position of Officer-in-Charge of the Kobeigana police station and there was no necessity whatsoever for him to maintain and have a love affair with a daughter of Dingiriya who as. a mere coconut plucker by profession and who resided in the same village. He also stated that there was no necessity whatsoever for him to obtain Gunaratnehamy's van when there were several jeeps and a requisitioned van at the Kobeigana police station for his use".*

His Lordship further held that:

> *"The accused had uttered a deliberate lie on a material issue - love letters written by the deceased to the accused-because he knew that if he told the truth he could be sealing his fate, if such was the motive the utterance of such lie would corroborate the prosecution case.*

‘The principle is that a lie on some material issue by a party may indicate consciousness that if he tells the truth he will lose.’ ”

In this case the Appellant using his statutory right to make a dock statement, denying the charges level against him, took up several positions which he has not confronted in cross examination with the relevant witnesses. Although he had stated in his dock statement that the police officers who had conducted the investigation had solicited Rs.100,000/- bribe for his release, but this position was not put to the relevant witnesses in the cross examination.

Further, although he had taken the position that he had had the access to the deceased’s house when he registered the marriage with the deceased but failed to explain whether he had used the said almirah on which his palm print was uplifted.

Although he had taken up the position that the fingerprint which had been uplifted from the dressing table had gone missing but the evidence given by the relevant witness for the prosecution stated that the fingerprint did not match with the Appellant’s fingerprint.

In this case as the Appellant had not lie on some material issue, the applying of Lucas Principle, I consider it is not appropriate in this case. But applying this principle has not caused any adverse inference on the Appellant as the Learned High Court Judge has very correctly considered the all-available circumstances adduced in this case.

In the final ground of appeal, the Appellant contends that the Learned High Court judge has come to an erroneous finding based on speculations and surmises.

The Learned High Court Judge in his judgment very extensively considered the evidence presented by the prosecution and the defence to come to his conclusion. He had not acted on speculations and surmises. Also, not considered the evidence presented by both sides erroneously. Hence this ground also devoid any merit.

The Learned High Court Judge has considered this case in keeping with standards that should have been adopted when a case is rest entirely on circumstantial evidence. His consideration very clearly in keeping with the guidance that have been decided in several judgments which were entirely rested on circumstances evidence. He has analyzed the evidence and given reasons why he accepts the prosecution case.

Further he had considered the dock statement of the Appellant and had given plausible reasons as to why he rejects the same. Also had given equal and due consideration to the defence evidence in his judgement.

As discussed under the appeal grounds advanced by the Appellant, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and come to conclusion that the all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

As the Learned High Court Judge had rightly convicted the Appellant for all the charges levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar is directed to send a copy of this judgment to the High Court of Panadura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL