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

In the matter of an application for Revision/*Restitutio in Integrum* in terms of Article 138 of the Constitution.

C.A. Case No. CA/RI/343/2015

D.C. Homagama Case No. 9940/M

Jayasekara Liyana Arachchige Iyantha Jayasekara,
No.163/2, Pansala Junction,
Pitipana North,
Homagama.
PLAINTIFF

-Vs-

1. Ranhoti Gedara Chandana Pushpakumara,
   No.365, Pitipana South,
   Homagama.
2. G.D.N. Yasaratne,
   No.404, Pitipana South,
   Homagama.
   DEFENDANTS

AND NOW BETWEEN

G.D.N. Yasaratne,
No.404, Pitipana South,
Homagama.
2nd DEFENDANT-PETITIONER

-Vs-

Jayasekara Liyana Arachchige Iyantha Jayasekara,
No.163/2, Pansala Junction,
Pitipana North,
Homagama.
PLAINTIFF-RESPONDENT

Ranhoti Gedara Chandana Pushpakumara,
No.365, Pitipana South,
Homagama.
1st DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Thishya Weragoda with Iresh Seneviratne for the 2nd Defendant-Petitioner

Lalith N. Gunaratne for the 1st Defendant-Respondent

Chandima D. Senarath Yapa with Ayesha Attanayake for the Plaintiff-Respondent

Decided on : 11.12.2018

A.H.M.D. Nawaz, J.

This is a revision application to set aside an *ex parte* judgment delivered on 23.01.2009. After the service of the *ex parte* decree on the 2nd Defendant-Petitioner, he made his efforts to have the *ex parte* decree vacated at a default inquiry before the District Court of *Homagama* and failed. All his efforts at the appellate procedures first from the Civil

Appellate Court and ending in a leave to appeal application to the Supreme Court yielded him no results.

Upon the leave to appeal application being refused in the Supreme Court in August 2015, the Petitioner moved this Court to revise the *ex parte* judgment and decree through the revisionary jurisdiction reposed in this Court by virtue of Article 138 of the Constitution.

Two objections to the maintainability of the revisionary application have been taken namely *1)* delay and *2)* absence of exceptional circumstances.

The delay, though not specifically explained in the petition, is tangentially referred to in several paragraphs of the petition to this Court. The Petitioner avers that he had been concentrating his efforts on the remedial processes given to him in the event of a default in appearance namely an application to purge default which he made before the District Court itself and upon his failure to have the case restated, the Petitioner moved the Provincial High Court sitting in *Avissawella* and the Supreme Court. The Petitioner failed both in the Provincial High Court and the Supreme Court. The learned Judges of the High Court of Civil Appeal affirmed the order of the District Court dated 30.09.2010 not to set aside the *ex parte* judgment and decree on the basis that the Petitioner had not satisfied Court that he had reasonable grounds for default.

On 13.05.2015, the Supreme Court refused to grant leave to appeal in the application of the Petitioner filed against the judgment of the High Court of Civil Appeal. Thus the efforts made by the Petitioner to purge his default came a cropper in all forums and it is thereafter on 28.08.2015 that the Petitioner has moved this Court in revision.

No doubt, since the *ex parte* judgment of January 23, 2009, 6 years had lapsed when the Petitioner moved this Court in revision to canvass the propriety of the *ex parte* judgment and decree. Does this delay of 6 years bar this revisionary application? As is apparent on a perusal of the record, the period of 6 years has been spent on efforts to vacate the *ex parte* decree and none of the Courts have dealt with the merits of the *ex parte* judgment.

In fact, an *ex parte* judgment and decree could be attacked in two ways-both procedurally and on the merits. If the Petitioner had succeeded on the procedural aspect of offering reasonable grounds for default in terms of Section 86(2) of the Civil Procedure Code, needless to say that would have had the ultimate effect of annulment or setting aside of the *ex parte* judgment and decree regardless of the merits. It is trite that the merits of an *ex parte* decree is incapable of being attacked either before the District Court or this Court in appeal. It is only the refusal to set aside the decree that becomes appealable. However the merits of the *ex parte* judgment and decree are capable of being impugned in the revisionary jurisdiction of this Court-*see* ***Sirimavo Bandaranaike v. Times of Ceylon Limited*** (1995) 1 Sri L.R at 34-35; ***Arumugam v. Kumaraswamy*** (2000) BLR 55.

It is axiomatic that the revisionary jurisdiction of this Court is available to rectify manifest error or perversity. This principle was explained by this Court succinctly in ***Chandraguptha*** *v.* ***Gunadasa Suwandaratne*** C.A.L.A 508/2005 (CA minutes of 12.09.2017). In ***Sinnathangam v. Meeramohaideen*** 60 N.L.R 394-T.S. Fernando, J. (with Weerasooriya, J. agreeing) opined that the Court possesses the power to set right, in revision, an erroneous decision in an appropriate case even though an appeal has abated on the ground of non-compliance with technical requirements. Jayawickrama, J. (with De Silva, J. agreeing) followed ***Sinnathangam v. Meeramohaideen*** *(supra)*in ***Soysa v. Silva and Others*** (2000) 2 Sri L.R 235 and considered the case of a revision application that had been filed in the Court of Appeal 10 years after the pronouncement of the judgment in the District Court.

Revisionary jurisdiction of this Court under Article 138 of the Constitution is untrammeled by delay in its invocation provided there is irreparable damage, miscarriage of justice or perversity in the judgment of the court *a quo*.

The underlying theory behind revisionary jurisdiction is that there must be a manifest error-*see* ***Saheeda Umma and Another v. Haniffa*** (1999) 1 Sri L.R 150.

So in this application for revision, I would not hold the 6 year delay against the Petitioner, provided he establishes manifest or perverse error in the *ex parte* judgment that was delivered on 23rd January 2009.

The Petitioner recites several grounds for attacking the judgment on the merits.

1. lawful ownership of the 2nd Defendant to the offending car has not been established;
2. no evidence has been led in the *ex parte* trial to establish the liability of the 2nd Defendant.

I have examined the *ex parte* judgment dated 23.01.2009 vis-à-vis the solitary evidence of the Plaintiff and I find that it is destitute of the basic ingredients that go to make out tortious liability. Vicarious liability has been imposed on the 2nd Defendant-Petitioner but the judgment is devoid of material as to how this liability arises. Even if liability is capable of being imposed on a Defendant in an accident case, the judgment must manifest admissible evidence that establishes the liability. The pith and substance of the conclusions of the District Judge of *Homagama* in her terse and laconic judgment of January 23, 2009, which does not even traverse less than two pages is to the following effect:-

a) The action has been instituted to recover a sum of Rs.500,000/- as damages jointly and severally from the 1st and 2nd Defendants.

b) The Plaintiff testified that she had not seen the vehicle rushing towards her but she later came to know that it was because of the private bus bearing No.4553 she met with the accident.

c) The 1st Defendant pleaded guilty in a criminal case instituted in the Magistrate's Court of *Homagama* and upon this plea he was imposed a fine of Rs.23,000/-.

d) It is apparent from the conviction upon the plea that the 1st Defendant has acted negligently on a balance of probabilities.

e) The Plaintiff has proved on a balance of probabilities that she had suffered permanent injuries after the accident.

f) Therefore the Plaintiff has a right to obtain all the reliefs jointly and severally against the 1st and 2nd Defendants.

The judgment contains nothing more than the itemized narration as given above. I am afraid that this is hardly the kind of judgment that would pass muster in a merit based revisionary or appellate jurisdiction.

There is no discussion as to how the voluntary plea to a charge in the Magistrate's Court establishes negligence on the part of the 1st Defendant. What was the charge to which the 1st Defendant pleaded in the Magistrate's Court (MC)? Did that charge pertain to items of negligence on the part of the 1st Defendant? There is no evidence given of the Magistrate's Court proceedings and it is the Plaintiff who stated in evidence that the 1st Defendant had pleaded in the Magistrate's Court. From this *ipse dixit* of the Plaintiff about what had happened in the Magistrate's Court, the learned District Judge of *Homagama* concludes that the negligence of the 1st Defendant has been established. The admissibility of what the Plaintiff said in evidence about the MC proceedings was in question. Apart from hearsay, the Plaintiff's evidence cannot be acted upon to conclude negligence without more. If it is the conviction upon a voluntary plea by the 1st Defendant that the learned District Judge was relying upon as one item of evidence to conclude negligence, the conviction *per se* must have been led in evidence. Absent that item of evidence, the mere *ipssima verba* of the Plaintiff that the 1st Defendant pleaded guilty in the Magistrate's Court would amount to hearsay.

Since the learned District Judge of *Homagama* was laboring under a mistake as to the effect of a guilty plea in subsequent civil proceedings, it behoves me to look at the relevancy of convictions as evidence in subsequent civil proceedings. What is the status of an earlier criminal conviction at the subsequent civil trial relating to the same facts? The answer outlined at common law was that it had no status at all, despite the fact that the same defendant may be involved in both sets of proceedings. This was confirmed in the leading English case of ***Hollington v. Hewthorn and Co Ltd.,*** (1943) KB 587.

This case arose following a collision between two vehicles in which the plaintiff's son sustained fatal injuries. The plaintiff brought an action under the Fatal Accidents Acts against the defendants on behalf of his son's estate. However, as his son had died, he had no evidence of the defendant's negligence except the conviction of the second defendant for careless driving. It was alleged that the other defendants were vicariously liable for the action of the second defendant. It was argued that the conviction was admissible as at least *prima facie* evidence of negligence, but this argument was rejected by the Court of Appeal. In giving judgement, Lord Goddard CJ stated that:-

> *"The conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision....*
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> *.....It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything he saw, he may not express any opinion on whether either or both of the parties were negligent....On the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."*

The father's claim failed. Doubts were expressed as to the fairness of this result, and these were reflected in the 15th Report of the Law Reform Committee on the subject of what had come to be known as 'the rule in *Hollington v. Hewthorn*'-see Law Reform Committee, Cmnd 3391, 1967. In their report, the Committee stated:-

> *"Rationalise it how one will, the decision in the case offends one's sense of justice. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to prima facie evidence of negligent*

driving at that time and place. It is not easy to escape the implication in the rule in Hollington v Hewthorn that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgement of the Court of Appeal, although, in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one."

The criticisms voiced by the Committee were followed by the enactment of Sections 11-13 of the Civil Evidence Act 1968. So this decision of ***Hollington v. Hewthorn*** *(supra)* remained firm authority from 1943 to 1968 for the proposition that a certificate of a conviction cannot be tendered in evidence in civil proceedings until the principle was abolished by Section 11 of the Civil Evidence Act 1968. Section 11 should be sharply distinguished from Section 13 of the Act, the latter making a conviction conclusive evidence of guilt in defamation cases. For the sake of comparison, let me cite Section 11 substantially.

(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere is admissible in evidence for the purpose of proving, where to do so is relevant, that he committed that offence, whether he was convicted on a plea of guilty or otherwise, and whether or not he is a party to the civil proceedings, but no conviction, other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) But the effect of proving the conviction is only that the person convicted is to be taken to have committed the offence, **unless the contrary is proved**. It is open to the convicted person to disprove his guilt by evidence led in this regard to displace the presumption raised by the statute.

Stupple v. Royal Insurance Co Ltd., (1971) 1 QB 50 was the first case in England to deal extensively with the effect of Section 11 of the English Civil Evidence Act. Lord Denning Master of the Rolls held that Section 11 has a twofold effect. First, "it shifts the legal

burden of proof," namely the burden of persuasion. Secondly, he stated, ".....the conviction does not merely shift the burden of proof. It is a weighty piece of evidence of itself." He accepted that a distinction could be made. He was of the view that the weight to be given to a conviction would depend on the circumstances, and that a plea of guilty may have less weight than a conviction after a full trial because often defendants pleaded guilty in error, or to save time and expense where the offence was minor, or to avoid some embarrassing fact being made public. The Law Reform Committee took the same view. The Committee stated in its 15th Report that a conviction after a contested trial, a conviction on a plea of guilty, and an acquittal did not have the same probative value in relation to the question in issue in a civil action. Later, when dealing with the defendant's burden of proof, they made a distinction between convictions after a contested trial and convictions on a plea of guilty. In the former case, they said that the burden was unlikely to be discharged by the testimony of the convicted person alone; in the latter case they suggested that it could be, if he produced a convincing explanation for his plea.

Sri Lankan cases

The Civil Evidence Act of 1968 that abolished the rule in ***Hollington v. Hewthorn*** was not drawn to the attention of the Supreme Court and our Court followed the English decision in ***Sinniah Nadarajah v. Ceylon Transport Board*** (1978) 79 (II) N.L.R 48. Wimalaratne, J. referred to ***Hollington v. Hewthorn*** *(supra)* and said:-

> *"Where the driver of a vehicle is sued along with his employer for the recovery of damages resulting from an accident in which the Plaintiff suffered injuries by being knocked down, a plea of guilt tendered by the driver when charged in the Magistrate's Court in respect of the same accident is relevant as an admission made by him and ought to be taken into consideration by the trial judge in the civil suit".*

Wimalaratne, J. also made reference to another passage in ***Hollington v. Hewthorn*** *(supra)* and stated at page 52 of the judgment.

> *"In Hollington v Hewthorn & Co., Ltd., a conviction of one of the defendants for careless driving was held to be inadmissible as evidence of his negligence in proceedings for damages on that ground against him and his employer. But, "had the defendant before the Magistrate pleaded guilt" or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved but not the result of the trial."*

So ***Sinniah Nadarajah***'s case followed ***Hollington v. Hewthorn*** *(supra)* in placing an embargo on convictions after a contested trial but allowed the adduction of a conviction after a guilty plea in the subsequent civil pleadings. Even if the Civil Evidence Act of 1968 had been brought home to the attention of the Supreme Court in ***Sinniah Nadarajah,*** Wimalaratne, J. could not have sanctioned the admissibility of convictions after a contested criminal trial in civil proceedings because Section 43 of the Evidence Ordinance would have prohibited the reception of such convictions after a contested trial. The exceptions to rule against judgments were firmly enacted by Sir James Fitszjames Stephen in Sections 40, 41 and 42 and Section 43 declared that any other judgment other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of the judgment is a fact in issue, or is relevant under some other provision of the Evidence Ordinance. It is for this reason that the judgment of Wimalaratne, J. in ***Sinniah Nadarajah*** *(supra)* is also justifiable because the guilty plea in the Magistrate's Court could be admitted in the civil proceedings as an admission.

If at all a conviction after a contested trial were to become relevant, specific provisions had to be enacted into the Evidence Ordinance like in England and it is common knowledge that this did not happen in Sri Lanka until 1998 when the Evidence (Amendment) Act No.33 of 1998 was legislated to bring in the necessary changes by way of Sections 41A, 41B, and 41C. I will return to this presently after having looked at our cases since ***Sinniah Nadarajah.***

In ***De Mel and Another v. Rev. Somaloka*** (2002) 2 Sri.L.R23, the original charge sheet against the driver (the 2nd Defendant in the civil proceedings) had been causing death by a rash and negligent act not amounting to murder in terms of Section 298 of the Penal Code.

Later it was converted to Section 151(3)-negligent driving and Section 149(1)-failure to avoid an accident under the Motor Traffic Act.

Weerasuriya, J. stated at p 27-"one cannot ascertain with certainty as to the items which formed the charge if it was reduced to Section 149(1). There was also no reference in the charge sheet to items that formed the basis for negligent driving in terms of Section 151(3) of the Motor Traffic Act."

The driver (the 2nd Defendant) had pleaded guilty to these charges whose ingredients were unclear. The admission of guilt in the Magistrate's Court was produced in the District Court trial.

The plaint in the District Court had itemized the following acts:-

a) failure to take a proper look out of the road
b) using the road without consideration
c) failure to have a proper control
d) driving ay an excessive speed

The learned District Judge held in this case that the admission of guilt was not sufficient to establish negligence as itemized in the plaint.

The Court of Appeal held that the admission in the Magistrate's Court must specifically relate to the items of negligence as set out in the plaint. The importance of this judgment is that the admission of guilt in the Magistrate's Court cannot be used in the District Court as relevant evidence if the guilty plea does not coincide with what is averred in the plaint. One cannot apply the ratio of ***Sinniah Nadarajah*** in such a situation.

In this case under revision, the items of negligence in the Magistrate's Court could not be ascertained since the MC record was not before the learned District Judge of *Homagama*. So how the learned District Judge could relate the items of negligence to the charges in the MC is inexplicable and she could not have concluded negligence in the civil trial as she was quite unaware of what charge that the 1st Defendant had admitted.

Therefore one has to read the ratio of *Sinniah Nadarajah (supra)* subject to what has been quite correctly stated in *De Mel and Another v. Rev. Somaloka (supra)*. The principles of ***Sinniah Nadarajah*** will not apply in a civil case where the plaint alleges items of negligence but the plea tendered in the MC does not have any reference to these items of negligence.

Marsoof, J. followed *Sinniah Nadarajah* in ***Delungala Kotuwe Jain Nona v. Lalith Gamage*** [CA Appeal 467/2003 writ], which was decided on 04.11.2004.

I would now refer to an earlier case ***Ranbarana v. Kusumalatha*** reported in (1989) Sriskantha's Law Reports vol-VII - part-1 at p.01, because this case quite significantly reiterated the need to bring in legislative changes to our Evidence Ordinance on the lines of the Civil Evidence Act of 1968. Wijeyaratne, J. (with Wijetunge, J. agreeing) emphasized the following.

1. The Civil Court must independently of the decision of the Criminal Court investigate facts and come to its own findings.
2. *A plea of guilty in a criminal case may, but a verdict of a conviction cannot be considered as evidence in a civil case.*

Section 43 of the Evidence Ordinance would render the judgment of a Criminal Court irrelevant.

Having said the above, Wijeyaratne, J. next referred to the English case of ***Hollington v. Hewthorn*** (supra) and observed:-

> *"In an action for damages arising out of a collision between two motor cars the judgment of the criminal court convicting the defendant driver of negligent driving is not relevant. However, the case was decided in England in 1943 prior to the Civil Evidence Act of 1968 which changed the position."*

The learned judge was quite alive to the necessity to enact an identical legislation as the Civil Evidence Act of England and quite poignantly pointed out thus:-

"In our country it should be seriously considered whether such an enactment is desirable as it would save a lot of time in cases and inquiries in courts of law, tribunals and other bodies exercising judicial and / or administrative functions."

All the cases-***Hollington v. Hewthorn; Sinniah Nadarasa v. Ceylon Transport Board; Ranbarana v. Kusumalatha; De Mel and Another v. Rev. Somaloka*** and ***Delungala Kotuwe Jain Nona v. Lalith Gamage*** took the view that a previous conviction after a plea of guilt in the Magistrate's Court is relevant in a subsequent civil proceedings. Conviction after a full trial was a taboo. But for a conviction after a contested trial to become relevant in civil proceedings an amendment to the Evidence Ordinance was long overdue. After all, our Evidence Ordinance proceeds on the basis that it is inclusionary-*see* Section 5 of the Evidence Ordinance. All evidence, whether it be in a trial or in an inquiry, becomes relevant unless it is expressly excluded by a rule of evidence. A judge cannot shut out relevant evidence unless it is excluded by an exclusionary rule of evidence. Exceptions to these exclusionary rules of evidence are diffusely scattered in the Evidence Ordinance.

The exclusionary rule against judgments of other courts is a rule of evidence and exceptions to this rule were found only in Sections 40, 41, 42 and 43 and Section 43 in particular prohibited the reception of a conviction after a contested trial (a judgment in a criminal court) in subsequent civil proceedings. This prohibition was repealed when the legislature enacted further exceptions to the rule against judgments in 1998 with the passage of Evidence (Amendment) Act No.33 of 1998.

Sections 41A(1) and (2) that were inserted into the Evidence Ordinance as further exceptions to the exclusionary rule against judgments go as follows:-

1. Where in an action for defamation, the question whether any person committed a criminal offence is a fact in issue, a judgment of any court in Sri Lanka recording a conviction of that person for that criminal offence, being a judgment against which no appeal has been preferred within the appealable period or which has been finally affirmed on appeal, shall be relevant for the purpose of proving that such person committed such offence, and shall be conclusive proof of that Fact.

2. Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence.

So the law on relevancy of previous convictions in subsequent civil proceedings boils down to this-Section 41A(2) of the Evidence Ordinance which reflects the spirit of Section 11 of the Civil Evidence Act of 1968 renders a conviction, regardless of whether it was entered after a contested trial or upon a guilty plea, relevant to prove the fact in issue in subsequent civil proceedings.

The fact in issue in the subsequent civil trial should be whether the Defendant in the civil case committed such offence or committed the acts constituting such offence. If it is a case of negligence, the criminal conviction becomes relevant only if the acts constituting the offence are facts in issue in the civil trial.

Subsequent cases have considered Section 41A(2)-*see* Wimalachandra, J. in ***Mahipala v. Martin Singho*** (2006) 2 Sri L.R 272 and Anil Gooneratne, J. in ***Balapatabendige Piyadasa v. Don Jayantha Hemakumara*** (2002) 2 Galle Law Journal 296. I had occasion to consider the effect of this provision in *Hettiarachchige Dominic* ***Marx Perera v. Kuruwita Archchige Jeramious Perera and Others*** CA Case No.713/2000 (C.A. minutes of 13.02.2017) and observed in the context of an application to admit a previous conviction as fresh evidence that only two types of convictions become relevant under Section 41A(2). Either it has to be an unappealed conviction or if it had been appealed, it must have been affirmed in appeal. In the appeal before me, the 1st Defendant in the civil case who was found guilty in the criminal case had appealed against the conviction but before the appeal could be adjudicated upon, she passed away. The Plaintiff-Appellant sought to lead the

conviction as fresh evidence under Section 773 of the Civil Procedure Code. This was a conviction which was appealed against but not adjudicated upon. It cannot be an unappealed conviction nor can it be said that the conviction was affirmed. Therefore I proceeded to hold that this conviction which was left in limbo does not fall within Section 41A(2) of the Evidence Ordinance.

In ***Rosairo v. Basnayake*** 2011 (1) Sri L.R 34Abdus Salam, J. observed, "A plea of guilt is most relevant and ought to be taken into consideration in assessing the plaintiff's case and further plea of guilt on a charge of failing to avoid an accident by the driver cannot be lightly ignored in considering as to whose negligence it was which caused the accident. The learned Judge referred to Section 41(A) (2) of Evidence Ordinance.

In ***A.W. Pushmakumara Perera v. Wickramage David and others*** CA 977/1998 (CA minutes of 27.05.2015) Dehideniya, J. following the earlier cases on the point, held that: "When the 1st defendant pleaded guilty to the aforesaid charges of reckless and negligent driving under the Motor Traffic Act in the Magistrate's Court, it has legal proof in the legal sense. A conviction of charge of failure to avoid an accident under Motor Traffic Act to become relevant in a civil action for compensation for negligent driving; the conviction must be on the same items as complained of by the plaintiff, which constitute the negligent driving".

So a conviction may be, either upon the plea of the accused or after trial. There is no difference. If the accused has pleaded guilty to the charge of negligent driving, his conviction on that charge by the criminal court becomes relevant in a subsequent civil action. Thus, our law is in *pari materia* with English Law when a conviction, irrespective of whether it is on the admission of guilt or otherwise, becomes relevant in evidence in a subsequent civil suit. It has to be borne in mind that this relevant evidence can be repelled or rebutted by proof of contrary evidence by the Defendant. The Defendant against whom the previous conviction is tendered in evidence can lead contrary evidence in the civil trial to show that he did not commit the acts that constituted the offence. The defendant could lead rebutting evidence to establish on a preponderance of evidence that there was no negligence on his part though the Court had found him guilty in the criminal trial for

several examples of contrary evidence see *Previous Conviction as Evidence of Guilt by A. Zuckerman* in 1971 L.Q.R 21.

None of the above principles were borne in mind by the learned District Judge of *Homagama* when she automatically adopted the *ipse dixit* of the Plaintiff in the *ex parte* trial that the 1st Defendant had pleaded guilty in the Magistrate's Court. There is no evidence before the learned District Judge that the 1st Defendant had been convicted at all. But she proceeded to infer negligence from the mere testimony which was at the most hearsay. An *ex parte* judgment cannot rest on hearsay evidence-***Sheila Seneviratne v. Shereen Dharmaratne*** (1997) 1 Sri L.R 76 (SC).

In an accident case, it is axiomatic that the liability of the 2nd Defendant-Petitioner *qua* a master would arise on proof of a master and servant relationship and the fact that the driver-the 1st Defendant was acting in the course of his employment and not on a frolic of his own. The *ex parte* judgment dated 23.01.2009 is patently devoid of evidence showing this ingredient, apart from the absence of proof on evidence that the offending 1st Defendant himself was negligent.

Therefore the imposition of vicarious liability on the 2nd Defendant-Petitioner is without any foundation. There is no discussion on the tortious liability of duty of care, breach and quantum. These are manifest errors in the judgment that shock the conscience of court.

In the circumstances I would proceed to set aside the *ex parte* judgment dated 23.01.2009 and in consequence the judgment dated 30.09.2010 refusing to set aside the *ex parte* judgment and decree is also set aside.

I allow this application in revision and remand this case to the District Court of *Homagama* to notice the parties and conduct an *inter partes* trial *de novo*. The learned District Judge of *Homagama* is directed to take all steps to conclude the trial on the same pleadings as expeditiously as possible.

JUDGE OF THE COURT OF APPEAL