

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

In the matter of an appeal in terms of section 9
of the High Court of the Provinces (Special
Provisions) Act No. 19 of 1990.

SC Appeal No. 123 / 2012

SC / Spl / LA Appln No. 115/2008

Provincial High Court of Panadura

Case No. 65435

Magistrate's Court Kesbewa

Case No. 65435

Dehigaspe Patabandige Nishantha
Nanayakkara,

No 34/3,

1st Lane,

Egodawatte Road,

Boralesgamuwa.

ACCUSED - RESPONDENT - APPELLANT

-Vs-

1. Kyoko Kyuma,

No 92/2A,

Lauries Road,

Colombo 04.

AGGRIEVED PARTY APPELLANT - RESPONDENT

2. Officer-In-Charge,

Police Station,

Piliyandala.

COMPLAINANT - RESPONDENT - RESPONDENT

3. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT - RESPONDENT

Before: **BUWANEKA ALUWIHARE PC J**

L T B DEHIDENIYA J

P PADMAN SURASENA J

Counsel: Asthika Devendra with Kanchana De Silva instructed by G S Thavarasha for
the Accused - Appellant - Appellant.

Shanaka Wijesinghe DSG for the Attorney General.

Argued on : 13-05-2020

Decided on : 07-08-2020

P Padman Surasena J

The Accused - Appellant - Appellant (hereinafter sometimes referred to as the Appellant) stood charged in the Magistrate's Court of Kesbewa on seven counts. The said seven counts respectively alleged that the appellant on or about 08-12-1999, had;

- I. assaulted Yukinori Kyuma with hand and thereby committed an offence punishable under Section 314 of the Penal Code;
- II. abetted Chinthaka alias D. C. R. Wanigasekara to assault Kyoko Kyuma and thereby committed an offence punishable under Section 314 read with 102 of the Penal Code;
- III. wrongfully confined Yukinori Kyuma and thereby committed an offence punishable under Section 333 of the Penal Code;
- IV. used criminal force to Yukinori Kyuma and thereby committed an offence punishable under Section 343 of the Penal Code;
- V. abetted Chinthaka alias D. C. R. Wanigasekara to commit the offence of robbery of a camera from the possession of Kyoko Kyuma and thereby committed an offence punishable under section 380 read with section 102 of the Penal Code;
- VI. used criminal force to Kyoko Kyuma and thereby committed an offence punishable under section 343 of the Penal Code;
- VII. abetted Chinthaka alias D. C. R. Wanigasekara to commit the offence of mischief by breaking the door of the Directors' room of Ceylon M. K. N. Ecopower (pvt) Ltd. and thereby committed an offence punishable under section 409 read with section 102 of the Penal Code.

The Appellant had pleaded not guilty to all the above charges and hence the learned Magistrate had taken steps to conduct and conclude the trial against him.

In the trial, the prosecution led evidence of four witnesses namely;

- i. Kyoko Kyuma, (daughter)

- ii. Yukinara Kyuma, (father)
- iii. Police Sergeant (PS 4481) Abdul Aziz Mohomed Mihilar,
- iv. Woman Police Constable (RWPC 651) Iluksuriya Arachchige Dayawathie.

After the prosecution closed its case, the Appellant had given evidence under oath. The defence also led evidence of two other witnesses namely;

- i. Udawattage Don Kamal Chandrasiri,
- ii. Anoma Upendranath Walpola.

Learned Magistrate at the conclusion of the trial, pronounced the judgment dated 28-06-2002, acquitting the Appellant from all of the above charges.

Being aggrieved, by the said judgment of the learned Magistrate, the Aggrieved Party - Appellant - Respondent (hereinafter sometimes referred to as the Aggrieved Party) had appealed to the Provincial High Court. The Provincial High Court of Western Province holden at Panadura, by its judgment dated 04-04-2008 had set aside the judgment of the learned Magistrate and ordered a re-trial to be conducted against the Appellant. The Appellant, in this appeal, seeks to canvass before this Court the said judgment of the Provincial High Court.

Upon the Appellant supporting the application for special leave to appeal relevant to this appeal, this Court by its order dated 12-07-2012, had granted special leave to appeal on the following question of law.¹

“Having regard to the evidence of this case, including the medical evidence and the history given by the parties to the Medical Officer, is the judgment of the learned High Court Judge setting aside the order of acquittal manifestly erroneous in law?”

In order to answer the above question of law, it would be necessary to turn, albeit briefly, to the evidence adduced before Court in this case.

¹ Question of law set out in paragraph 13(a) of the petition dated 15-05-2008.

The following facts have been revealed from the evidence of the prosecution witness No. 02, Yukinara Kyuma (father).

- I. He came to reside in Sri Lanka in 1997.
- II. He, along with the Appellant and one Noriko functioned as Directors of the company named 'Ceylon MKN Eco Power (Pvt) Ltd.'
- III. The Appellant functioned as the Chief Officer in the office of the said company situated in Piliyandala.
- IV. On 07-12-1999, at about 8 PM he along with his wife, Kyoko, Noriko, Sumuko and driver Jagath went to the said office.
- V. As there is a case filed by the Appellant regarding a dispute in the company, which was pending in the Supreme Court, he collected the important documents, kept it in the Director's room of the office, and locked it.
- VI. Around 8.30 AM on the following day, he along with his daughter Kyoko went to the said office in Piliyandala.
- VII. When they entered, the watcher and driver Jagath were there.
- VIII. Around 9 AM, another girl came to the office. Thereafter the Appellant along with several other people also came to the office. At that time, he and his daughter were in the main office.
- IX. The Appellant can speak Japanese language well but he can speak Sinhala language only a very little.
- X. The Appellant had told that his belongings are also in the locked up room and wanted him to open the locked up room.
- XI. When the Appellant assisted by the others with him, attempted to break open the door of the locked up room, he went in front of the said door and stood right in front of it with a view to prevent the said attempt. At that time, the Appellant assaulted him and that resulted in his pair of spectacles getting thrown away. He

then picked up his pair of spectacles and continued to stay in front of the door of the locked up room. At that time, the Appellant assisted by the others (who came with the Appellant), dragged him away and forcibly made him sit on a chair. He then saw his daughter trying to video record the act of breaking open the door. Then Chinthaka, upon being instructed by the Appellant, grabbed the video camera from his daughter. They then sent his daughter and driver Jagath out of the door and locked the main door. After about twenty minutes, officers from the Piliyandala Police Station came to the scene. Yukinara states that he does not know English language. He had observed that there were bleeding injuries on his face and on the small finger of his right hand. The Medico Legal Report was produced marked **P 4.**

He had identified the Appellant as the person who assaulted him. During the cross-examination also, this witness has re-iterated the sequence of events in the same way he had testified in his evidence in chief.

The prosecution witness No. 01, Kyoko Kyuma (daughter) in her evidence has stated that she knows the Appellant as one of the partners in business with his father. The said business was with regard to generation of hydropower electricity and the name of the company engaged in the said business is 'Ceylon MKN Eco Power (Pvt) Ltd.' She states that her father (Yukinara) functioned as the chairman and the Appellant and her sister Noriko Kyuma functioned as the other directors of the said company.

She states that acting on the advice given by their Attorney-at-Law, she along with her father, mother, sister, and the driver went to the office of the said company in Piliyandala on 07-12-1999. They thereafter collected all the important documents, kept them in the Director's room in the said office, locked the said room, and left the office.

At about 9 AM on the following day morning, she along with her father came back to the said office. She had seen an engineer by the name of Walpola also present near the gate. Although said Walpola wanted to come along with them into the office, they had not permitted him to come in. When she and her father were waiting in the office, the Appellant along with Walpola, Chinthaka, driver Kamal and the driver working for the Appellant had come to the office.

Thereafter, as the Appellant had wanted them to open the door of the locked up room an argument between her father and the Appellant had ensued. However, she and her father had refused to open the locked up room. At that time the Appellant with the help of the others who came with him, had made preparations to break open the door. When her father attempted to stop it, the Appellant had assaulted him with his hand. Her father had gone near the door and stood in front of it, to prevent the break opening. It was at that time that the Appellant assaulted her father on his face. She had then telephoned the Police. As she tried to defend her father, somebody in the crowd had assaulted her also. However, she has not identified the person who had assaulted her. On the instructions of the Appellant, the persons in the group of the Appellant had forcibly held her father seated on a chair rendering him immobilized.

As she tried to video record the incident that was taking place, Chinthaka on being instructed by the Appellant, had assaulted her, dragged her out of the main door, pushed her out of the door, and then locked the said main door. Her driver Jagath was also pushed out of the same door in the same way. After some time, Police came to the scene and took all of them to the Police Station. The Medico Legal Report in respect of the examination of this witness was produced marked **P 2**.

Answering the questions posed to her in cross-examination, this witness also has reaffirmed her evidence on the main points in the same way. She has reiterated in cross examination that she saw her father being assaulted by the Appellant and was held immobilized forcibly.

PS 4481 Abdul Aziz Mohammed Mihilar is the police officer who had gone to the place of the incident around 10 AM on 08-12-1999 as he was instructed to do so on a Walkie-talkie, by Piliyandala Police Station. He along with RPC 18608 Navaratne and the driver of the vehicle had gone to the address No. 202, Suwarapola, Moratuwa Road, Piliyandala.

He then had observed the scene of the incident. He had observed that the lock of the room had been broken. He also had observed injuries on Yukinara (father). He also had observed that Yukinara's shirt had been torn and his tie had been pulled out. He had observed the presence of the Appellant, Shammi Ramani Cooray, Chinthaka Wanigasekera, A U Walpola, Indika Atapattu, drivers Kamal Chandrasiri and Jagath at

that place at that time. According to his observations, Yukinara Kyuma did not appear to be normal.

RWPC 651 Iluksuriyaarachchige Dayawathie has entered the complaint produced by Kyoko Kyuma (daughter) written in English on 08-12-1999. She had issued medico-legal examination forms to both Kyoko Kyuma and Yukinara Kyuma and recorded the statements of the others present. She also arrested the Appellant on the instructions of the officer in charge of the crimes branch of the Police Station. She had also recorded the statements of Shammi Cooray who worked as the Accountant, Anoma Upendranath Walpola who functioned as the Electrical Engineer, Chinthaka Wanigasekera who functioned as the Mechanical Engineer, Indika Sanjeevani Atapattu who functioned as a clerk of the relevant organization.

After the prosecution closed its case, the Appellant Dehigaspe Patabendige Nishantha Nanayakkara also has given evidence. The next paragraph would consist of the summary of his evidence before Court.

The Appellant had admitted establishing 'Ceylon Eco Power (Pvt) Ltd' company along with Yukinara and establishing the office in Piliyandala. On 08-12-1999 at about 8.30 AM Engineer Walpola had informed him that Yukinara along with another person had come to the office in Piliyandala. Walpola also had alerted him about the existence of somewhat dangerous situation at the said office. Upon the receipt of the above information, the Appellant had proceeded to the office with his driver. Thereafter, the Appellant along with Walpola, driver Kamal and another employee Chinthaka had opened the gate and entered the office. He had found his room sealed and locked by placing a new lock on the door. He has also found that documents had been removed from the office. He had observed the word 'Kyuma' written in Japanese language on the seal. The Appellant had tried to enter the locked room but Yukinara stood guard in front of the door blocking and preventing access of the room to the Appellant. The Appellant then instructed the others to open the door of the room. Then Chinthaka and Nimal came and attempted to open the door. As Yukinara intervened against opening the door, they had forcibly dragged him and forced him to sit on a chair. Thereafter, Chinthaka and Nimal had forced open the door. According to the Appellant, it was in the course of the said melee that Yukinara

had sustained injuries. The Appellant also has stated that he had instructed Chinthaka to take the video camera from Koyoko (daughter) and he saw her going out of the office through the door. He also had seen her calling the Police. Police had arrived after about 12 minutes. The Appellant states that thereafter all of them went to the police station and Police subsequently arrested him and recorded a statement.

The Appellant denies having assaulted Yukinara, he also denies that Yukinara was assaulted by anybody else in his group. It is the Appellant's position that he used force on Yukinara when he attempted to block the break opening of the door.

Udawattage Don Kamal Chandrasiri who worked as a driver of the relevant company also had given evidence on behalf of the Appellant. This witness having narrated the incident had stated that the locked up room had got broken open when Nimal and Chinthaka pushed its door. According to this witness, Yukinara at that time had jumped towards the door. It was at that time Yukinara's finger had got entangled in the lock, which caused the injury on his finger. Chandrasiri had also stated that Jagath pulled from Yukinara's tie and pulled him away. He had seen Koyoko (daughter) raising the video camera which was in her hand. On being instructed by the Appellant, Chandrasiri had grabbed the video camera from Koyoko's hand and kept it elsewhere. Police had arrived after some time. Chandrasiri had observed injuries on Yukinara's finger and face.

Anoma Upendranath Walpola, who works as the Electrical Engineer of this company, also had given evidence on behalf of the Appellant. Having narrated the incident, he has stated that they had opened the locked door on the instructions of the Appellant. According to Walpola, Yukinara had attempted to block the opening of the door and it was in that process that Yukinara's finger had got injured as the finger had got entangled in the lock.

Walpola also has stated that Chinthaka grabbed the video camera from the hand of Koyoko (daughter) on the instructions of the Appellant as she had attempted to video record the incident at that time.

The question in respect of which this Court has granted special leave to appeal to wit, *"Having regard to the evidence of this case, including the medical evidence and the history given by the parties to the Medical Officer, is the judgment of the learned High*

Court Judge setting aside the order of acquittal manifestly erroneous in law?" would ex-facie be a question of fact as it revolves solely around facts of the case namely the evidence adduced by parties in the case. However, the said question would become a question of law only if the conclusion of the learned High Court Judge is found to be perverse. Therefore, I would endeavor to answer the said question within the above parameters.

Since the question in respect of which this Court has granted special leave to appeal has a reference to the consideration of medical evidence and the short history given by the victim, I would at this juncture briefly set out the medical evidence adduced in this case. The Medico Legal Report (MLR) of Yukinara Kiyuma has been produced marked **P 4** in the course of the trial. The short history given by the patient in the said MLR is recorded as *"assaulted by 7 people with hands & feet on 8/12/99 around 9.10 AM at Piliyandala."* The said MLR has confirmed that Yukinara had sustained following two injuries.

- 1) *½ cm abrasion about 1 ½ cm lateral to the left eye*
- 2) *1 cm abrasion in the dorsal aspect of the distal phalanx of second (2nd) finger of right hand.*

Thus, the aforesaid oral evidence adduced in this case, taken in to consideration together with the above medical evidence and the short history to the Medical Officer, shows clearly that this is not a case where the assertion of the witnesses cannot be supported by the medical evidence. This is because the injuries observed by the Medical Officer on Yukinara's body match with the oral account of the incident narrated by the witnesses in the trial.

Further, the consideration of evidence summarized above (including the medical evidence) in the backdrop of the charges set out in the charge sheet clearly shows that there is evidence against the Appellant. It can also be seen that the evidence adduced by the defence is not at substantial variance with that adduced by the prosecution. The main position taken up by the defence in this case is that this incident had sparked off as a result of actions of Yukinara in locking up the office room. It can be seen that the most

of the facts have been admitted by the defence in the course of the evidence they had adduced.

In spite of the presence of aforementioned evidence, the learned Magistrate had concluded that he was not prepared to accept that there has been an assault in view of the fact that the prosecution has not explained as to how these injuries were caused. In contradistinction to the above conclusion, it can be seen towards the end of the judgment that the learned Magistrate from the same breath has also concluded that there has been an incident between the Appellant and the prosecution witnesses and that Yukinara could have been injured in the course of that incident.

The learned Magistrate has also concluded that the prosecution has not proved the fact that Yukinara was unlawfully restrained. In coming to this conclusion, the learned Magistrate has taken the view that both Yukinara and Koyoko should have jointly seen what each of them had separately narrated in Court. This in my view is against the principle enunciated in the case of Bandaranaike V Jagathsena and others² where this Court has taken the view that when version of two witnesses do not agree the trial judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether in the witness' powers of observation were limited.³ Moreover, it appears that the learned Magistrate has lost sight of the fact that the Appellant also in his evidence has stated that they had forcibly dragged Yukinara and forced him to sit on a chair to prevent his intervention against opening the locked up room.

It appears to me from the judgment of the learned Magistrate that he has not taken into consideration the evidence adduced by the defence before he came to the conclusion that the prosecution has not proved its case. Moreover, it also appears that the Magistrate had failed to assess, evaluate and appreciate the evidence adduced in the trial as a whole. In spite of the presence of an abrasion on Yukinara's face, the move by the learned Magistrate to look for injuries that are more specific to hold that an assault had taken place would in my view be unrealistic in the light of the facts of this case.

² 1984 (2) SLR 397.

³ Ibid. at page 415.

In these circumstances, I am unable to find any acceptable basis, which could have enabled the learned Magistrate to acquit the Appellant from all the charges. Therefore, I am unable to hold that the conclusion by the learned High Court Judge that she cannot agree with the judgment of the learned Magistrate in acquitting the Appellant from all the charges is a perverse conclusion. Although there are other grounds to support my conclusion I would desist from referring to any more of them in this judgment as I am mindful that the Magistrate after this judgment will be called upon to consider and evaluate the available evidence afresh and pronounce a fresh judgment. Therefore, I would not proceed any further to deal with or pronounce any view on the evaluation of evidence adduced by both parties at the trial.

Further, presumably for the same reason, the learned High Court Judge too had not pronounced any opinion on the evaluation of evidence adduced at the trial by both parties. It is therefore unnecessary for me to embark on the step of evaluation of evidence adduced at the trial by both parties, as my task would be limited to the ascertainment whether the judgment of the learned High Court Judge setting aside the order of acquittal by the learned Magistrate is manifestly erroneous in law.

As has already been indicated, in view of the fact that I am inclined to affirm the judgment of the learned High Court Judge setting aside the learned Magistrate's judgment, I would conclude this judgment with the following quotation from the Indian case of State of Uttar Pradesh V M K Anthony.⁴ The Supreme Court of India in that case held as follows.

" ... while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view of the deficiencies, draw-backs 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 render it unworthy of belief. Minor discrepancies of trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some

⁴ A I R (1985) SC 48 (paragraph 10).

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. ... ”

It was further observed by Hon. Justice Desai in the above case that even honest and truthful witnesses may defer in some details unrelated to the main incident because power of observation, retention and reproduction defer with individuals.

As has already been mentioned above, in order to prevent jeopardizing further proceedings in the Magistrate’s Court, I am compelled to stop here with the process of reasoning.

I proceed to answer the aforementioned question of law in the negative.

For the above reasons, the Appellant is not entitled to succeed in this appeal. Therefore, I affirm the judgment of the High Court dated 04-04-2008 and dismiss this appeal.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare PC J

I agree,

JUDGE OF THE SUPREME COURT

L T B Dehideniya J

I agree,

JUDGE OF THE SUPREME COURT