

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

*In the nature of an Appeal to the Supreme Court
in terms of Article 128 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

**Officer-in-Charge
Special Crimes Division,
Colombo.**

Complainant

SC Appeal No. 155/14
High Court Colombo
Appeal HCMCA No. 106/08
Magistrates Court Maligakanda
Case No. 22070/05

vs.

**Mananage Susil Dharmapala
No. 132C, Pitumpe Road,
Padukka.**

Accused

AND BETWEEN

**Mananage Susil Dharmapala
No. 132C, Pitumpe Road,
Padukka.**

Accused – Appellant

vs.

Officer-in-Charge
Special Crimes Division,
Colombo.

Complainant - Respondent

AND NOW BETWEEN

Mananage Susil Dharmapala
No. 132C, Pitumpe Road,
Padukka.

Accused - Appellant - Appellant

vs.

Officer-in-Charge
Special Crimes Division,
Colombo.

Complainant - Respondent - Respondent

Before: **Hon. Priyantha Jayawardena, PC**
Hon. E.A.G.R. Amarasekara
Hon. Yasantha Kodagoda, PC

Counsel: Kapila Suriyaarachchi with Anuradha Bandara and
Dilini Wijesekara for the Appellant.
Yuresha De Silva, Senior State Counsel for the
Respondent.

Argued on: 25th June 2020

Written Submissions: On behalf of the Appellant, tendered on 16th October 2014 and further written submissions tendered on 4th August 2020.
On behalf of the Respondent, tendered on 7th August 2020.

Decided on: 28th June, 2021

Judgment

Yasantha Kodagoda, PC, J.

Background

On 16th June 2005 the Complainant – Respondent – Respondent (hereinafter referred to as the “Respondent”) “Officer-in-Charge, Colombo Crimes Division, Sri Lanka Police” [erroneously referred to in the caption of the Petition by which Special Leave to Appeal was sought, as the “Officer-in-Charge, Special Crimes Division”] instituted criminal proceedings against the above-named Accused – Appellant – Appellant (hereinafter referred to as the “Appellant”) in the Magistrate’s Court of Maligakanda (Case No. 22070/05). In the charge sheet attached to the complaint filed by the Respondent in terms of section 136(1)(b) of the Code of Criminal Procedure Act, it was alleged that the Appellant had committed the following offences:

1. That on or about 8th April 2005, at the Public Library in Colombo 7 situated within the jurisdiction of the Magistrates Court, exhibited for sale, gave on rent, or possessed for trading purposes, unlawfully prepared copies of a record named ‘Galana Gangaki Jeewithe’ containing songs titled ‘Yowun Wasanthae’ and ‘Onna Ekoomath’ which are owned and lyrics composed by Sunil Ariyaratne, and thereby committed an offence punishable in terms of section 178(2) of the Intellectual Property Act, No. 36 of 2003.

2. That on or about the same date, place and in the course of the same transaction of the afore-stated offence, exhibited for sale, gave on rent, or possessed for trading purposes unlawfully prepared copies of a record named '*Galana Gangaki Jeewithe*' containing 15 songs including the song titled '*Onna Ekoomath Eka*', of which the music was composed by, sung, and is owned by Mirihana Arachchige Nanda Malini, and thereby committed an offence punishable in terms of section 178(2) of the Intellectual Property Act, No. 36 of 2003.

3. That on or about the same date, place and in the course of the same transaction of the afore-stated offence, exhibited for sale, gave on rent, or possessed for trading purposes unlawfully prepared copies of a record named '*Galana Gangaki Jeewithe*', which contained songs titled '*Sannaliyane*' and '*Galana Gangaki Jeewithe*' owned by Mahagamage Raveendra Mahagamasekera and originally produced by his father, and thereby committed an offence punishable in terms of section 178(2) of the Intellectual Property Act, No. 36 of 2003.

On 22nd September 2005, after the charges were read out to the Appellant, he pleaded '*not guilty*', and accordingly the case was taken up for trial. Witnesses Sub Inspector Roshan Hewawitharana, Sub Inspector Prasad Weeraratne, Professor Sunil Ariyaratne, Visharadha Mirihana Arachchige Nanda Malini, and Mahagamage Raveendra Mahagamasekera testified for the prosecution. No evidence was presented for and on behalf of the Appellant. At the end of the trial, the learned Magistrate delivered Judgment finding the Appellant '*guilty*' as charged, and accordingly convicted him. He was sentenced to a substantive term of 6 months imprisonment suspended for a period of ten years, and to a fine of Rs. 5,00,000/= with a default sentence of oneyear imprisonment.

The Appellant appealed against the afore-stated conviction and sentence to the High Court of the Western Province holden in Colombo. Following the hearing of the Appeal, delivering Judgment dated 20th May 2014, the learned High Court Judge affirmed the conviction and sentence imposed by the learned Magistrate, and accordingly dismissed the Appeal.

The Appellant sought from this Court, Special Leave to Appeal against the Judgment of the High Court of the Western Province. On 4th September 2014, the Supreme Court granted Special Leave to Appeal in respect of the Judgment of the High Court of the Western Province, on the following two questions of law:

1. *Has the High Court erred in law by failing to apply the law with respect to the productions marked "P2", while the evidence of the prosecution has created a reasonable doubt as to the integrity of the said productions?*
2. *Has the High Court failed to consider the fact that the prosecution has not proved its case beyond reasonable doubt?*

The case for the prosecution presented before the learned Magistrate can be summarized in the following manner:

According to the evidence of Professor Sunil Ariyaratne, Visharadha Mirihana Aarachchige Nanda Malini, and Mahagamage Raveendra Mahagamasekera, upon receiving information that a particular person was illegally selling at the compound of the Colombo Public Library, music compact disks (music CDs) containing songs in respect of which they held proprietary rights, on 8th April 2005, they have gone to the Colombo Crimes Division of the Sri Lanka Police and lodged complaints relating to this matter. The complainants alleged that several video compact disks (VCDs) containing such unlawfully copied songs were also being sold at the same location.

On the same day, a team of police officers led by Sub Inspector (SI) Roshan Hewawitharana conducted a raid at the premises of the Colombo Public Library using Sub Inspector Prasad Weeraratne as a decoy. When the police party reached the premises of the Colombo Public Library the time was around 3.10 pm, and there had been an exhibition at the premises with multiple stalls. The Appellant was at one stall. On a table near the Appellant were some compact disks for sale. The compact disks (CDs) for sale included CDs titled '*Galana Gangaki Jeewithe*' and '*Sannaliyane*'. Decoy Weeraratne had inquired from the Appellant about the price at which the two CDs were being sold, and the Appellant had responded that each

one was being sold at Rs. 150/= . Thus, the decoy had given the Appellant a 500/= Rupee note, which SI Hewawitharana had previously given him at the police station to be used during the raid, and purchased from the Appellant two CDs which contained the afore-stated titles. The Appellant had returned change of Rs. 200/= . As soon as the transaction was completed, the decoy had given the previously agreed beckoning signal and the rest of the police officers including SI Roshan Hewawitharana had come to where SI Weeraratne and the Appellant were. The Appellant had been arrested by SI Hewawitharana. He had recovered the 500/= Rupee note which was tendered by the decoy to the Appellant from the right-hand trouser pocket of the Appellant. At the time of the arrest, further eight CDs titled '*Galana Gangaki Jeewithe*' had been taken into the custody by the police from the possession of the Appellant. Thereafter, the Appellant had been taken in police custody to the police station along with the CDs. At the police station, officers have got down an audio CD playback device to play the CDs and also a television set, and played the CDs. They had done so in the presence of the three complainants, having got them down to the police station following the raid. They have listened to the songs in the CDs. There is also evidence that at the police station, the police had shown to the complainants a film contained in another CD recovered from the Appellant's possession. It is necessary to note that the three charges contained in the charge sheet relate to one out of the two CDs purchased from the Appellant by the decoy SI Weeraratne, namely the CD titled '*Galana Gangaki Jeewithe*'.

Following the examination of the CDs by the police officers and the complainants at the police station by listening to and viewing them, they had been duly sealed and placed in safe custody, after registering the productions under reference 'PR 46/05'. It is in evidence that for the purpose of sealing the productions the investigators have used both the left thumb impression of the Appellant and the police seal. Several items relating to the raid, namely (i) the 500/= Rupee note bearing No. H/79 420550 which was used to purchase the two compact disks, (ii) the two compact disks that were so purchased, and (iii) the eight compact disks that were taken into custody from the possession of the Appellant, were produced at the trial and marked "P1" (currency note), "P2A" and "P2A1" (two CDs purchased by the decoy from the Appellant) and "P3" (the eight CDs taken by the police from the possession of the Appellant).

According to Professor Sunil Ariyaratne, the compact disk titled '*Galana Gangaki Jeewithe*' was played at the police station in the room of a police officer. He observed that the disk contained three songs of which he had composed the lyrics, namely '*Onna Ekomath*', '*Bambarindu Bambarindu*' and '*Yowun Wasanthe*'. These three songs were listed as items 8, 9 and 15 in the disk. Professor Ariyaratne's position was that while he possessed co-ownership of the intellectual property rights of these songs, the Appellant had not been conferred with copying or publication rights of these songs. Documentary proof in this regard was produced at the trial. According to him, at the police station they had viewed the film '*Sarungalaya*' from a CD collected by the police during the raid. That too had contained his songs. However, it is necessary to note that the charge sheet does not contain a charge based on the '*Sarungalaya*' film, nor is there a reference to the song '*Bambarindu Bambarindu*', which is said to be a song of that film.

During the trial in the Magistrate's Court, "P2A" and "P2A1" had been re-played. "P2A" was a compact disk entitled '*Galana Gangaki Jeewithe*'. "P2A1" was entitled '*Sannaliyane*'. "P2A" contained *inter-alia* the songs '*Galana Gangaki Jeewithe*', '*Onna Ekomath*', '*Bambarindu Bambarindu*' and '*Youwun Wasanthe*'. Professor Ariyaratne has produced marked "P5" and "P6" documents to establish his intellectual property ownership of the film '*Diyamanthi*' in which the song '*Yowun Wasanthe*' is found, and the film '*Saradiyelge Putha*' in which the song '*Onna Ekomath*' is found. His position was that as reflected in the said documents, he possessed the right to authorize copying of the songs into CDs, a right which he had not transferred to anyone.

According to Visharadha Mirihana Arachchige Nanda Malini, "P2A" which had the title "*Galana Gangaki Jeewithe*", also had the words "*Edaa Geetha Edaa Handinma*" (having the meaning '*songs of that era, from the voices of that era*'). She testified that this particular CD contained 15 songs, all of which were originally sung by her. She said that the CD contained the song '*Onna Ekomath*'. This was a song in the film '*Saradiyelge Putha*'. After singing the song for the production of the film she had obtained ownership of the song from the producer of that film. According to her, her ownership of the song is reflected in "P6". She also testified that "P3" had eight CDs, all of which contained songs sung by her for different films and copied and included into those CD without her permission.

According to Mahagamage Raveendra Mahagamasekera, his father Mahagama Sekera had been a lyricist. He died in 1976. His father had not conveyed intellectual property rights with regard to the songs authored by him, to anyone. Thus, upon his death, the intellectual property rights of his late father had been inherited by his mother, himself and his brother. After lodging the complaint, he had been asked to come to the police station to attempt to identify the CDs that had been taken into custody during a raid that had been conducted by the police. He had listened to some compact disks at the police station. He had identified in the compact disk titled '*Galanangangi Jeewithe*', five songs written by his late father and in the disk titled '*Sannaliyane*' another two songs. He testified that, songs of his father are contained in the disks titled '*Galanangangi Jeewithe*' and '*Sannaliyane*'. The songs of which the lyrics had been composed by his late father found in the compact disks had been '*Me Sinhala Apage Ratai*', '*Meepup Ladimi*', '*Ratna Deepa*', '*Pilae Pedura*', '*Sannaliyane*', '*Obe Deesa*', '*Wakkada Langa*', '*Aetha Kandukara*' and '*Malahiru Basina*'.

Following the closure of the case for the prosecution, the learned Magistrate had explained the rights of the Accused and called upon the Accused - Appellant to, if he so wishes, present evidence on his behalf. In response, the Accused - Appellant exercising his right to remain silent, did not testify or offer any evidence on his behalf.

The learned Magistrate having considered the applicable law and the evidence presented before court, concluded that the prosecution had discharged its burden of proving the case against the Accused - Appellant beyond reasonable doubt, and found him *guilty* of having committed all three offences contained in the charge sheet. Accordingly, the Accused - Appellant was convicted and sentenced by the learned Magistrate, in the manner stated above.

Submissions made by learned counsel

During the hearing of this Appeal and in his written submissions, learned counsel for the Appellant urged on behalf of the Appellant the following matters relating to the questions of law in respect of which special leave to appeal was granted.

As regards the first question of law relating to the prosecution not having established the integrity of the production marked "P2", it was submitted that there exists a contradiction between the testimonies given by SI Prasad Weeraratne and Sunil Ariyaratne, in that, while according to Prasad Weeraratne he purchased two CDs titled '*Sannaliyane*' and '*Galanagangaki Jeewithe*' and he watched them and realized that they contain songs, according to Sunil Ariyaratne, he watched the film '*Sarungalaya*' at the Police Station. Further, according to Sunil Ariyaratne, what was produced as evidence during the trial was not what he watched at the police station. Counsel pointed out that when the compact disk was played in court, what was heard was a song titled '*Bambarindu Bambarindu*'. It was submitted that Sunil Ariyaratne had not identified the production marked "P2" at the police station. Therefore, learned Counsel for the Appellant submitted that what was produced at the trial marked "P2" was not what was taken into custody by the police, but an introduction. Learned counsel cited *Perera v. Attorney General*, 1998(1) Sri L.R. 378 in support of his submission that in view of the foregoing, there exists a serious doubt regarding the genuineness of the productions. He further submitted that while according to police witnesses, "P2" was sealed soon after Sunil Ariyaratne, Nanda Malini and Raveendra Mahagamasekera examined them and they did so in the presence of the Appellant, according to Nanda Malini, she listened to the CDs on another day too, approximately two weeks after having listened to them on the first occasion. Learned counsel for the Appellant submitted that this too raised a doubt regarding the integrity of the production in issue.

As regards the second question of law relating to the prosecution not having proven its case beyond reasonable doubt, learned counsel relied with special emphasis on the issue pertaining to the doubt arising with regard to the integrity of the production marked "P2". Learned counsel for the Appellant submitted that the prosecution had not established that Sunil Ariyaratne, Nanda Malini and Raveendra Mahagamasekera had ownership of the works contained in the two CDs. He also submitted that from an overall perspective, the prosecution had not discharged its burden of proving the prosecution's case beyond reasonable doubt.

In response to the submissions of the learned counsel for the Appellant, learned Senior State Counsel who appeared for the Respondent submitted that the prosecution has established

that what was produced as productions by the prosecution and in particular "P2", were in fact what was recovered from the custody of the Appellant and therefore the integrity of the productions was intact. She also submitted that in a case where the productions are readily identifiable, evidence relating to the 'chain of custody' of such productions need not be established by the prosecution. Learned Senior State Counsel in her further written submissions has pointed out to the following features of the two CDs marked and produced as "P2A" and "P2A1", namely, (i) the titles of the two CDs (i.e. "Galana Gangaki Jeewithe" and "Sannaliyane"), (ii) the unique production reference (i.e. PR46/5) given by the police to those CDs, (iii) the date and the markings placed on the two CDs by the police when they were purchased by the decoy, and (iv) the two CDs having been shown to the three complainants at the police station soon after the detection, were aspects that supported the prosecution's position that what was purchased from the Appellant were in fact produced at the trial. Learned Senior State Counsel submitted that the three complainants had identified certain contents of the two CDs as containing their works, and therefore the CDs contained intellectual property in respect of which they have proprietary rights. She submitted that these evidential features were proof that what were produced at the trial were in fact what was recovered from the custody of the Appellant. In support of her submission, she cited *McCormick on Law of Evidence* (3rd Edition, West Publishing Co.). It was also pointed out by the learned Senior State Counsel that during the cross-examination of the two police officers it was not even suggested to them that what was shown to Sunil Ariyaratne, Nanda Malini and to Raveendra Mahagamasekera were not the CDs that were purchased by the police decoy from the Appellant. Thus, learned Senior State Counsel pointed out that no allegation of *foul play* can now be made against the police. She submitted that the prosecution had fulfilled its duty of establishing the integrity of the productions '*without a scintilla of doubt*'.

As regards the second issue raised by learned counsel for the Appellant, learned Senior State Counsel has in her written submissions, adverted to the following: In view of the constituent ingredients of the offence contained in section 178(2) of the Intellectual Property Act, the prosecution does not have the legal burden of proving that the intellectual property in issue (which the Appellant sold to the decoy) were owned by Sunil Ariyaratne, Nanda Malini and Raveendra Mahagamasekera. What is necessary is to establish that the Appellant did not

have copyrights of the works contained in the two CDs. Learned Senior State Counsel submitted that the ingredients of the offence have been successfully proven by the prosecution. She also pointed out that the Appellant had failed to establish that he had any rights in respect of the works in issue.

It is necessary to point out that the written submissions tendered on behalf of the Appellant contained certain other submissions which were not urged at the hearing of this Appeal. At the conclusion of the hearing, it was agreed by counsel that post-argument written submissions will be confined to only the matters that were in fact urged on behalf of the parties during the hearing of this Appeal. Court indicated to learned counsel that the judgment will also relate only to matters that were urged during the hearing. Therefore, I will confine this judgment to my opinion and conclusions relating only to the matters that were in fact urged by learned counsel (as reflected above) during the hearing and to the corresponding submissions contained in the written submissions. However, while doing so, I will consider from multiple perspectives, whether the prosecution has proven the charges against the Appellant beyond reasonable doubt.

Consideration by Court and conclusions

In view of the inextricable link between the first and second questions of law, I propose to deal with both questions together.

Real (physical) evidence

Learned counsel for the Appellant laid heavy emphasis on the production which he referred to as "P2", which should actually be a reference to compact disks (CD) marked and produced at the trial as "P2A" and "P2A1". His primary submission was that *"the prosecution had failed to establish the integrity of "P2", namely, that the prosecution had failed to prove that "P2" was the CD recovered from the Appellant's custody, and that "P2" contained unauthorized copies of songs of which the three complainants had copyrights"*.

Productions marked and produced as "P2A", "P2A1" and "P3" are items of **real evidence**. It is to be noted that unfortunately though, such items of physical evidence are produced in

certain trials, without much attention being given to requirements of the law pertaining to their admissibility and evidential significance. The present case is a good example.

According to the law of Evidence, as of right it would not be possible for a party to a criminal or civil case to present a physical object as an item of evidence, on its own standing. This is because it would not come within any one of the four categories of 'evidence' also referred to as 'judicial evidence', recognized by the law of Evidence, namely '**oral evidence**', '**documentary evidence**', '**contemporaneous audio-visual recordings**' and '**computer evidence**'. The latter two categories of evidence, namely '**contemporaneous audio-visual recordings**' and '**computer evidence**' gained recognition in the eyes of the law by the Evidence (Special Provisions) Act, No. 14 of 1995. What is contemplated by 'contemporaneous audio-visual recordings' are recordings of the occurrence of the facts in issue or relevant facts embedded in certain media, and they can take the form of audio recordings, video recordings, audio-visual or video recordings, and still photographs. Section 60 of the Evidence Ordinance which provides that **oral evidence** must in all cases whatsoever, be direct, provides further, in its second proviso that, "*if oral evidence refers to the existence or condition of any **material thing** other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection*". (Emphasis added.) Such *material things* when produced at a trial are referred to as *real evidence*. Thus, it would be seen that the law of Evidence has not completely precluded the presentation of physical material as evidence. Therefore, the sequence to be followed in the presentation of a physical object as *real evidence* would be, first, to present oral evidence regarding the existence or condition of such a physical object, and thereafter, secondly, invite the Court to consider permitting the production of such physical object for inspection. What is important to note is that in terms of section 60 of the Evidence Ordinance, once such a material thing is presented to the Court, the function of the Court is to **inspect** it. That is for the Judge or Jury as the case may be, to directly perceive such an object using his or their own senses. If necessary, the Court may record its observations regarding such material object that was produced. However, as in the case of oral and documentary evidence, a physical object is not ordinarily produced at the trial for the purpose of proving or disproving the existence or non-existence of a *fact in issue* or a *relevant fact*. The practice in Sri Lanka is to refer to such items as 'productions'. In most other jurisdictions they are referred to as 'exhibits'.

E.R.S.R. Coomaraswamy (Volume I, at page 68) in his monumental work on the Law of Evidence, has stated that though 'real evidence' does not come within the ambit of 'Evidence' under section 3 of the Evidence Ordinance, *real evidence* is an item of 'judicial evidence' and the judge is called upon to see the thing himself and the knowledge derivable therefrom is generally obtained without the use of any medium. However, in view of the second proviso to section 60 of the Evidence Ordinance which provides for the admission of real / physical evidence, it is necessary to bear in mind that, such evidence in the nature of physical objects are not *sui generis* (does not stand alone by itself), and is necessarily associated with an item of oral evidence which provides a description of the existence or condition of such physical item. In other words, the Court may in terms of section 60 permit the production of a material object for inspection, only if oral evidence refers to the existence or the condition of any material thing. In the alternative, acting in terms of section 165 of the Evidence Ordinance, the Court may on its own motion *order the production of any document or thing* in order to *discover or to obtain proper proof of relevant facts*.

Therefore, such evidence (physical / real evidence) in my view will serve the purposes of (i) providing clarity to oral evidence and enable the judge or the jury as the case may be to correctly comprehend the relevant item of oral evidence, (ii) providing corroboration of oral testimony and documentary evidence, (iii) being used as an aide to the assessment of credibility and testimonial trustworthiness of testimony provided by one or more witnesses, and (iv) being a basis for the Court to determine the cogency or sufficiency of evidence presented in the form of oral and documentary evidence. Thus, an item of real evidence cannot by itself generally be used to 'prove' the *facts in issue*, which in criminal cases amounts to the constituent ingredients of the offence. In certain situations, a physical object may be produced at a trial for the first time, for the purpose of its identification. That may aid the proof of a *fact in issue* or a *relevant fact*.

The impact or the legal consequences arising out of the absence of a particular physical item of evidence being presented by the prosecution at a trial will depend on a host of considerations, including the attendant facts and circumstances of the case. In such situations, the principal factor to be taken into consideration is, what purpose, if any, would the prosecution have achieved, had they produced the relevant item of real evidence. As

E.R.S.R. Coomaraswamy has put it, “non-production of a physical object, which might conveniently be produced for inspection by the Court, does not render oral evidence respecting the same inadmissible” (Volume II, Book I, page 19). The legal consequences arising out of a doubt being created with regard to the integrity of a physical object that was produced, would be founded upon a consideration of the purpose sought to have been achieved by the party which produced the object. The legal consequences that may arise by a party not producing a material object which was within their control to produce, would be the rendering of nugatory the purpose such party could have achieved by having produced it. It may also affect the cogency of the evidence. There may be situations where the circumstances of the case may justify the judge from drawing an adverse presumption in terms of section 114(f) of the Evidence Ordinance.

I will now apply these principles of law with regard to the submission made by learned counsel for the Appellant relating to the productions produced at the trial, and in particular to production marked “P2A” (“*Galana Gangaki Jeewithe*”), which he erroneously submitted had been marked as “P2”. In this regard, it is necessary to recall that all three charges relate to songs said to have been contained only in one CD, and that being the CD titled “*Galana Gangaki Jeewithe*”.

Particularly in view of the emphasis shown by the learned counsel for the Appellant with regard to these productions, I examined the productions relating to the Magistrate’s Court case. The examination of the productions revealed the following:

Production marked “P2A”

This production is a compact disk (CD) with a cover. The cover contains the title “*Galana Gangaki Jeewithe*”. In addition to the title of the CD, the front cover contains the following in Sinhala and English. “*Eda Geetha Eda Handinma*”, “*Solid Gold Old Songs*” and “*Old is Gold*”. Its rear contains the following words: “Nanda Malini Geyu Chithrapata Geetha”, and “Sahaya Gayana – Narada Dissasekera, W.D. Amaradeva, Sisira Senaratne, Victor Ratnayake”. It also contains references to the existence of 15 songs inside the CD and a list of such songs. Within brackets there is a reference to

the film in which the relevant song is to be found. Among the list of the songs are “Galana Gangaki Jeewithe” (“Ranmuthuduwa”) as item No. 1, “Onna Ekomath” (“Saradiyelge Putha”) as item No. 8 and “Yowun Wasanthe” (“Diyamanthi”) as item No. 15. It should be noted that, it is these songs, that are referred to in the three charges contained in the charge sheet.

Production marked “P2A1”

Though another CD entitled “Sannaliyane” and marked “P2A1” was available among the productions, I do not propose to set out details of that CD, as none of the charges relate to a CD by that name. Suffice for me to state that “P2A1” contained a list of songs, which included the songs which Raveendra Mahagamasekera claimed had been authored by his father late Mahagama Sekera.

Constituent ingredients of the offence

Section 178(2) of the IP Act provides as follows:

“Any person knowing or having reason to believe that copies have been made in infringement of the rights protected under Part II of the Act, sells, displays for sale, or has in his possession for sale or rental or for any other purpose of trade any such copies, shall be guilty of an offence, and shall be liable on conviction by a Magistrate for ...”

Therefore, the *actus reus* of this offence is that the offender should have (i) sold, (ii) displayed for sale, or (iii) had in his possession for sale or for rental or for any other purpose of trade, a ‘copy’ that has been made in infringement of the rights protected under Part II of the Act. The offence does not require the prosecution to prove that the copying was carried out by the offender, as ‘copying’ is not a constituent ingredient of the offence. The *mens rea* of the offence is that the offender should have either (i) known or (ii) had reason to believe that the ‘copy’ in issue had been made by whomsoever in infringement of the rights protected under Part II of the Act.

Copyrights

In the context of the IP Act, the term ‘copy’ is a reference to a ‘copy’ of a ‘work’ that is recognized by that Act. In terms of section 5 of the IP Act, a ‘work’ means ‘any literary,

artistic or scientific work referred to in section 6'. In terms of section 6, both '*musical works, with or without accompanying words*' and '*audio-visual works*' fall within the ambit of '*protected literary, artistic or scientific work*', provided they are '*original intellectual creations in the literary, artistic and scientific domain*'. Therefore, original songs are '*works*' that are protected in terms of the Act. In terms of section 6(2) of the Act, such '*works*' shall be legally protected by the sole fact of their creation, and irrespective of their mode or form of expression, as well as of their content, quality or purpose. Section 9 of the Act provides that '*subject to the provisions of sections 11 to 13, the owner of copyright of a work shall have the exclusive right to carry out or authorize inter alia the acts of (a) reproduction of the work, and (b) the public distribution of the original and each copy of the work by sale, rental, export or otherwise, of such work*'. These two rights along with the other rights contained in section 9 of the IP Act are referred to as '**economic rights**'. Sections 11 to 13 confers exceptions with regard to copyright protection, namely copying for the purposes of fair use and copying following the lapse of seventy years following the death of the author. In terms of section 10 of the IP Act, authors of '*works*' are also conferred with '**moral rights**', which includes the right to have his name indicated prominently on the copies of the work. It is important to note that authors are entitled to such '**moral rights**', independently of the '**economic rights**', and even when the author is no longer the owner of the '**economic rights**' of a work. In terms of section 5 of the Act, an '*author*' is the physical person who had created the '*work*'. He would normally have both the *economic* and *moral rights* of the relevant '*work*'.

As per section 6(1)(e) of the IP Act, for the purposes of the application of the provisions of the Act, a song would be a protected '*work*', as it is a '*musical work with accompanying words in the artistic domain*'. Similarly, as per section 6(1)(f), a film (motion picture) would also be a protected '*work*', as it is '*an audio-visual work in the artistic domain*'. The term '*audio-visual work*' has been interpreted in the IP Act to mean '*a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds susceptible of being made audible*'. Section 5 of the IP Act provides that the '*author*' means the physical person who has created the relevant '*work*'. In the context of a song, for the purpose of the application of the IP Act, the '*author*' of a song would be the lyricist, music composer, and should there have been a producer, such producer of the song. This is in view of the fact that they perform constituent and

indispensable functions relating to the creation of a song. The '*author*' of a film would be its proprietor, who is designated as the 'producer' of the film. In terms of section 5 of the IP Act, the 'producer' of an 'audio-visual work' means the physical person or legal entity that undertakes the initiative and responsibility for the making of the relevant audio-visual work or sound recording. Thus, in terms of the law, the producer of the film would originally have the film's economic and moral rights.

The lyricist, music composer and the producer of a song jointly have economic rights to *inter alia* authorize the reproduction of the song. That is a reference to the 'copying' of the song from one media to another. If a song is made for the purpose of an 'audio-visual work' (such as a film) and integrated into such film, unless otherwise provided, the producer of the film will be vested with the economic and moral rights of the film, which would include such rights in respect of components of the film including the song included in the film. Therefore, when a song is embedded in a film, unless specifically protected through agreement, the lyricist, music composer and the producer of the song would lose economic rights in respect of the song. Thus, right to authorize copying of the song into a media (such as a compact disk) will be vested with the producer of the film. Reproducing the song without obtaining the authorization of such a person who has economic rights of the *work*, would amount to an infringement of the economic rights of the owner of the film, namely the producer. The position would be different if the song is produced again and provided a new fixation. However, it is important to note that when a song becomes a component of a film, though the lyricist, music composer and the producer of such song lose their economic rights, they retain moral rights with regard to the original song. It is also necessary for the purposes of this Appeal to be mindful that a producer of a film or any other subsequent copyright owner of such film, may in terms of section 16 of the Act grant a license, an assignment or transfer to any other person in writing, and the right to carry out any of the acts arising out of economic rights in whole or any part of such economic rights. Unless specifically precluded in the licensing, assignment or transfer agreement, there is no prohibition in law for a licensee, assignee or transferee to re-transfer the rights he has received to another third party.

Section 17 of the Act prescribes the rights of performers, such as singers of songs. In terms of section 17(1) of the Act, subject to the provisions of section 21 of the IP Act (provision which sets out certain limitations), a performer (such as the singer of a song) shall have exclusive right to carry out or to authorize *inter alia* the reproduction of a *fixation* of his performance or a substantial part thereof. According to law, for a *work* to be protectable, it must be *fixed* to a tangible medium of expression. A *work* is considered to be *fixed* when it is stored on some medium in which it can be perceived, reproduced, or otherwise communicated. Thus, when a song is recorded onto a compact disk (CD) the *work* is deemed to be *fixed* to the compact disk on which the song has been recorded. That is referred to as a *fixation*. Therefore, the authorization of the singer of a song is required for the preparation of copies of the fixation in which such song has been recorded. Thus, the preparation of copies of such a compact disk without obtaining the authorization of the original performer (singer), would amount to an infringement of the rights of such performer. However, when a song has been sung for inclusion in a film and such song has been included into such film, unless otherwise specifically provided in the agreement between the singer and the producer of the film, the singer loses his rights under section 17(1). That is in view of section 17(2) of the Act which provides that once a performer has authorized the incorporation of his performance into an audio-visual fixation (such as a film), the provisions of section 17(1) shall have no further application. If the performer once again performs with the permission of the producer of the film, that performance will be recognized as a different performance, and section 17(1) will become applicable once again. However, if such subsequent performance is a component of a different fixation, the rights of the singer will be limited to the agreement between the singer and the producer of such subsequent fixation. In this case, the position of the complainants is that unauthorized copying had taken place from the original films.

Fixations such as compact disks containing **unauthorized reproductions / copies of works** such as songs, songs extracted from films and films themselves, are generally referred to as '*pirated copies*'.

The essence of the above narrative of the law relating copyrights which is a component of Intellectual Property Law, as is relevant to the facts of this case, is that the preparation of

unauthorized copies, the sale, and the possession for sale *pirated copies* of songs including songs copied out of films and copying of songs into other fixations, whether in their audio-visual form or audio only form, is prohibited by the Intellectual Property Act. The violation of that prohibition amounts to an offence, as the preparation of such copies infringes upon the rights recognized by Part II of the IP Act. Additionally, in terms of section 178(2) of the Act, selling, displaying for sale, and having in possession for sale, rental or for any other purpose of trade any such copies prepared in violation of copyrights, is also prohibited by law, and the violation of such prohibition constitutes an offence.

Charges

The first charge preferred against the Appellant relates to the songs '*Yowun Wasanthe*' and '*Onna Ekomath*', which the prosecution claimed were in a compact disk entitled '*Galana Gangaki Jeewithe*'. The second charge also relates to the song '*Onna Ekomath*' in the same disk. The third charge relates to the songs '*Sannaliyane*' and '*Galana Gangaki Jeewithe*' in the disk named '*Galana Gangaki Jeewithe*'. According to the first charge, the position of the prosecution was that Sunil Ariyaratne had '*ownership*' of the songs '*Yowun Wasanthe*' and '*Onna Ekomath*'. According to the second charge, the prosecution alleged that Mirihana Arachchige Nanda Malini also had '*ownership*' of the song '*Onna Ekomath*'. According to the third charge, the prosecution alleged that Raveendra Mahagamasekera had ownership of the songs '*Sannaliyane*' and '*Galanagangaki Jeewithe*' said to have been in the same CD titled '*Galana Gangaki Jeewithe*'. Thus, it would be seen that, all three charges are related to a compact disk titled '*Galana Gangaki Jeewithe*' in which the songs '*Yowun Wasanthe*', '*Onna Ekomath*', '*Sannaliyane*' and '*Galana Gangaki Jeewithe*' were said to have been found.

Actus reus of the offence

I will now examine and arrive at a conclusion on whether the prosecution has proven the *actus reus* or the physical element of the offence contained in section 178(2) of the Act. For that purpose, it is necessary to re-visit the evidence led at the trial.

According to the evidence of Professor Sunil Ariyaratne, he had been the lyricist of the songs '*Yowun Wasanthe*' and '*Onna Ekomath*'. The song '*Yowun Wasanthe*' had been a component

of the film '*Diyamanthi*'. Professor Ariyaratne had obtained copyrights for the audio-visual display through multi-media of the film '*Diyamanthi*' from the producer of the film, Wasantha Obeysekera. Thus, he exclaimed that he had copyrights of the songs in the film '*Diyamanthi*' and documentary proof thereof was tendered to court by producing the document marked "P5". Therefore, his position was that he had copyrights of the song '*Yowun Wasanthe*'. The song '*Onna Ekomath*' had been a component of the film '*Saradiyalge Putha*'. Professor Sunil Ariyaratne and Visharadha Nanda Malini had jointly obtained copyrights for audio-visual display of the film '*Saradiyelge Putha*' from the producer of the film Neil Rupasinghe, and a document in proof of that was produced marked "P6". Therefore, his position was that he and Nanda Malini had joint copyrights for the song '*Onna Ekomath*'. He had not transferred copyrights of these two songs to any other person. Nor had he given such rights to any other person authorizing the copying of these two songs onto compact disks or to sell disks containing such copies.

On 8th April 2005, when Professor Ariyaratne was informed by officers of the Colombo Crimes Division that sequel to his complaint, a raid had been conducted, and thus to call-over at the police station, he complied. At the police station, he listened to and viewed several compact disks that had been recovered by the police during the raid. It is indeed a fact that according to Professor Ariyaratne, at the police station he had viewed a film titled '*Sarungale*' as well. Among the items he listened to, was a compact disk titled '*Galana Gangaki Jeewithe*' which contained the abovementioned songs in respect of which he possessed copyrights. He has observed that the songs were of the nature of the original songs. He noted that the 'publisher' listed on the label of the compact disk, namely Sajindra Video, of No. 32, Super Market, Padukka, had not been conferred with copyrights relating to these songs. Additionally, the compact disk did not contain a reference that the lyricist of these songs was Professor Sunil Ariyaratne. It is this compact disk which was produced marked "P2A" during the trial.

According to Visharadha Nanda Malini, the song '*Onna Ekomath*' had been originally sung by her for the film '*Saradiyelge Putha*'. She had done so, having directed the music of that song too. She had also obtained copyrights of that song through a document marked "P6". Her position was also that she had neither transferred rights in respect of that song to any

other person or given permission for copying the song onto compact disks or for selling such disks containing her songs. She also testified that the compact disk titled '*Galana Gangaki Jeewithe*' (marked and produced at the trial as "P2A") contains fifteen songs, and all of them were sung by her. The song '*Onna Ekomath*' was the eighth song in that compact disk. She vouched for the fact that, the recording she listened to at the police station, contained her own voice. On being shown "P6" which was previously produced by Professor Sunil Ariyaratne, Visharadha Nanda Malini admitted that it was through "P6" that she too claimed copyrights to the song '*Onna Ekomath*'. Having examined the eight compact disks marked "P3", the witness testified that they too contained pirated copies of her film songs.

According to Mahagamage Raveendra Mahagamasekera, his late father Mahagama Sekera had composed the lyrics of the songs '*Ratna Deepa*', '*Pile Pedura*', '*Sannaliyane*', '*Obe Deesa*', '*Wakkada Langa*', '*Eatha Kandukara*', '*Mala Hiru Basina*', '*Me Sinhala Apege Ratai*' and '*Meepup Ladimi*'. He had identified these songs in the two CDs that were played at the police station after the raid. There had been two of his father's songs in the CD titled '*Galana Gangaki Jeewithe*' five of his father's songs in the CD titled '*Sannaliyane*'. Neither his father nor his mother, brother or himself, being the only heirs who jointly succeeded to his father's rights, had transferred those rights to anyone else or authorized the preparation of copies onto compact disks. However, he has not stated that the CD titled '*Galana Gangaki Jeewithe*' (marked and produced by the prosecution as "P2A") contained songs '*Sannaliyane*' and '*Galana Gangaki Jeewithe*' composed by his father. Thus, it is necessary to conclude that, through the evidence of Raveendra Mahagama Sekera, the prosecution has failed to establish the actus-reus of the third charge.

This witness has testified to the manner in which he got to know of the Appellant. In 2004, he had received information that a particular person was selling pirated copies of compact disks containing songs of which the lyrics had been written by his late father. Thus, he had visited the premises of the Colombo Public Library and met the Appellant who was selling the compact disks. The witness had purchased such a compact disk and asked for a receipt. The Appellant had declined to issue a receipt. The Appellant had explained that he (the Appellant) had purchased some *gramophone records*, and thus he was entitled to produce

and sell compact disks containing the relevant songs. The witness had responded that his father had not authorized any person to reproduce his songs. He had thus said that what the Appellant was doing was 'illegal', and that if he (the Appellant) were to continue to engage in such conduct he would be compelled to take legal action. After some time, as he had received information that the Appellant was continuing with the particular 'illegal' activity, the witness had informed the situation to Professor Sunil Ariyaratne and to Visharadha Nanda Malini, and had with them proceeded to the police and lodged a complaint.

From the foregoing evidence, I hold that the prosecution has successfully and beyond reasonable doubt proved that Professor Sunil Ariyaratne had economic rights in respect of the songs '*Yowun Wasanthe*' and '*Onna Ekomath*', which were components of the films '*Diyamanthi*' and '*Saradiyelge Putha*', which inter-alia conferred the right on him to authorize the copying of those songs to audio-visual media such as compact disks. Thus, copying of such songs without his permission would amount to a violation of the copyrights of Professor Sunil Ariyaratne. Further, Professor Sunil Ariyaratne also possessed moral rights with regard to those songs. I also hold that Visharadha Nanda Malini had economic rights with regard to authorizing the copying to audio-visual media such as to compact disks, of the song '*Onna Ekomath*' which was a component of the afore-stated film '*Diyamanthi*'.

The economic rights of Professor Sunil Ariyaratne and Visharadha Nanda Malini had not been given by license, or assignment or transferred by them to either the Appellant or to any other person.

I hold that the prosecution has failed to establish that Raveendra Mahagamasekera had moral rights of the song '*Galana Gangaki Jeewithe*', which the prosecution claimed in the third count in the charge sheet was in a CD titled '*Galana Gangaki Jeewithe*'. Further, though the prosecution has through the evidence of Raveendra Mahagamasekera established that the late Mahagama Sekera was the lyricist of the song '*Sannaliyane*' and hence Raveendra Mahagamasekera, his mother and brother had rights in respect of such song, as that song was not in the CD titled '*Galana Gangaki Jeewithe*', the third charge fails. Further, though outside the scope of the third charge, it is necessary for me to point out that, the evidence of

Raveendra Mahagamasekera reveals that the economic rights he jointly possessed with his mother and brother relating to songs authorized by his late father had been infringed by the unauthorized copying and possessing for sale CDs containing songs authored by the late Mahagama Sekera. These songs are to be found in CDs marked "P2A" and "P2A1". However, as the third charge has been framed in a faulty manner, the said evidence cannot be relied upon by the prosecution to prove the third charge.

The prosecution has established without any doubt that the Appellant 'sold' inter-alia a compact disk to Sub Inspector Prasad Weeraratne, which was prior to its sale in the possession of the Appellant. The said compact disks 'purchased' by Sub Inspector Prasad Weeraratne had been titled '*Galana Gangaki Jeewithe*'. That compact disk ("P2A") along with the compact disk marked "P2A1" and the other eight compact disks had been brought to the police station along with the Appellant. Soon afterwards, the compact disk titled '*Galana Gangaki Jeewithe*' had been played to be heard by Professor Sunil Ariyaratne, Visharadha Nanda Malini and Raveendra Mahagamasekera. Professor Sunil Ariyaratne and Visharada Nanda Malini identified several songs including the three songs referred to in the first and second charges in respect of which they had the copyrights referred to above. The prosecution has established beyond doubt the integrity of the compact disk '*Galana Gangaki Jeewithe*' from the stage it was 'purchased' from the Appellant to the stage at which it was played to be heard by the three complainants. Therefore, the integrity of the compact disk in issue is not in doubt, up to the stage when it was identified that the disk contained songs copied in violation of the copyrights of the owners of such copyrights, namely the afore-stated two complainants. Thus, I conclude that, the prosecution had proved beyond reasonable doubt the *actus reus* of the offence, namely that **the Appellant had in his possession for sale a compact disk titled '*Galana Gangaki Jeewithe*' which contained copies of songs '*Yowun Wasanthe*' and '*Onna Ekomath*' of which the copyrights were vested with Professor Sunil Ariyaratne and Visharadha Nanda Malini. Such copies had been made in infringement of the rights protected under Part II of the Act.**

Integrity of the productions

In view of the submissions strenuously made by learned counsel for the Appellant that the integrity of the production marked "P2" had not been established by the prosecution, in that

the prosecution had not established beyond doubt that the compact disks in issue (marked "P2A" and "P2A1") were in fact the compact disks recovered from the possession of the Appellant and were also the disks that were played at the police station and listened to by the three complainants, I need to point out the following: As pointed out by me previously, the production relating to the three charges are the productions that were marked "P2A". The abovementioned analysis of the evidence, reveals clearly that from the perspective of the need to maintain the integrity of the production, what was necessary for the prosecution to establish is that the compact disk that was listened to by the complainants at the police station was in fact one out of the several disks recovered from the possession of the Appellant. I hold that the said duty has been performed by the prosecution beyond reasonable doubt.

The situation would have been quite different had the prosecution attempted to get the songs identified for the first time by the complainants during the trial in the well of the Court. Then, it would have been incumbent on the prosecution to establish the integrity of the productions from the time they were taken into custody to the point they were produced in Court during the trial.

Even if the submission strenuously put forward by the learned counsel for the Appellant is accepted as being correct, it is necessary to point out that the prosecution has established that the compact disk marked "P2A" and produced at the trial was in fact that which was recovered from the possession of the Appellant and identified by the complainants at the police station. That conclusion has been reached by me due to the reasons that (a) there is cogent and reliable evidence that the compact disk titled '*Galana Gangaki Jeewithe*' having been 'purchased' from the Appellant was soon afterwards played at the police station to be heard by the three complainants, (b) the defence has not presented any evidence either through prosecution witnesses themselves or through defence witnesses indicative of the said compact disk having been 'introduced' or 'switched' either by the police or by a complainant, (c) as pointed out by the learned Senior State Counsel the compact disk titled '*Galana Gangaki Jeewithe*' had certain unique identification features, (d) soon after listening to the compact disks, the compact disks were sealed using the left thumb impression of the Appellant and the seal of the Officer-in-Charge of the police station (these being un-

impugned items of evidence), (e) the productions had been entered in the Production Register of the police station and thereby assigned a 'PR' number (un-impugned), and (f) as observed by the learned Magistrate, the afore-stated seals were intact at the time the productions were opened for the first time at the trial (another item of un-impugned evidence). Thus, there can be no doubt regarding the integrity of the productions, even from the standard and degree expounded by the learned counsel for the Appellant.

Mens Rea of the offence

It is now necessary to examine whether the Appellant possessed the requisite *mens rea* which is also referred to as the '*fault element of the offence*'. In view of the manner in which the offence contained in section 178(2) has been structured, it would be necessary for the prosecution to prove that at the time the Appellant possessed for sale the compact disk titled '*Galana Gangaki Jeewithe*', he **either (i) 'knew', or (ii) 'had reason to believe', that the copies of the four songs 'Yowun Wasanthe', and 'Onna Ekomath' contained in the said compact disk, had been made in infringement of the rights protected under Part II of the Act.**

Thus, the issue is whether the Appellant *knew or had reason to believe* that the compact disk in issue ("P2A") contained pirated copies of the afore-stated songs. The term '*knew*' as the literal meaning of the English word '*knowledge*' denotes and signifies the existence of specific knowledge by the accused regarding a particular fact. The term '*reason to believe*' has been interpreted in section 24 of the Penal Code. It provides that, "*a person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing, but not otherwise*". (Emphasis added.) Thus, the term '*had reason to believe*' denotes the existence of certain related knowledge on the part of the accused, based upon which, from an objective standard it can be reasonably inferred that the accused **ought to have known the existence of the relevant fact**. In other words, what the Court needs to consider is whether in the circumstances of the case, the accused either '*knew*' or '*had sufficient cause to believe*' the existence of the particular fact.

'*Criminal Law in Sri Lanka*' by Wing-Cheong Chan, Michael Her, Neil Morgan, Jeeva Niriella and Stanley Yeo (LexisNexis, India, 1st Edition, 2020), states as follows: "*Knowledge involves an awareness that something exists or is likely to exist in the future. ... Knowledge is a subjective*

state of mind which is different from an objective assessment of whether one should know certain facts. It cannot be imputed to a person merely from the consequences resulting from the act. ... Since the Penal Code sometimes uses the terms 'knowing' and 'having reason to believe' in the same section, it can be inferred that the fault element of 'knowing' something must be given a subjective meaning. ... It may be possible to infer that an accused had knowledge from proof that they had suspicion of the true facts, but deliberately refrained from making further inquiries which would have confirmed the suspicion."

As Dr. Sir Hair Singh Gour in *'The Penal Law of India'* (Diamond Jubilee - 10th Edition, Volume 1, page 242) has pointed out, *"what is a sufficient cause in a given case so as to justify the presumption, is a matter upon which no general statement can be made, for it must depend upon the facts and circumstances of each case"*. This is a reference to the presumption of the existence of 'knowledge'.

The formulation *'had reason to believe'* also in my view prevents an accused from taking up a position which can be aptly referred to as *wilful ignorance* or *voluntary blindness to the obvious*. Further, this element of *mens rea* has been included in most offences where *knowledge* is the foundational *mens rea*, as it would otherwise be impractical in most situations for a prosecution to prove through evidence that the accused actually had the required *knowledge* of the existence of the relevant fact. When in the 'mens rea', the term *'had reason to believe'* is the alternate component to 'knowledge', the burden on the prosecution is to establish that certain related circumstances were known to the accused, and hence from an objective footing he **ought to have known of the existence of the relevant fact**. Thus, from the perspective of sufficiency of evidence to prove the *mens rea*, it would be pertinent to note that to prove the requirement of *'had reason to believe'* would require a lesser threshold of evidence than the threshold required to prove *'knowledge'*.

Unlike with regard to the *actus reus* of an offence, the *mens rea* of an offence is a *state of mind* of the perpetrator, and hence it would not be possible to prove such ingredient through direct evidence. The existence of the *mens rea* of an offence has to be inferred by Court, based on a consideration of circumstantial evidence led by the prosecution, coupled with principles of evidence, such as inferences arising out of evidence, presumptions, and

matters in respect of which the Court is entitled to take judicial notice. With regard to *mens rea* in offences that contain the element '*knowing or having reason to believe*', to find the accused *guilty*, upon a consideration of the available evidence which is likely to be in the nature of circumstantial evidence, the Court must be in a position to arrive at an irresistible and inescapable sole inference that the accused either **had the requisite knowledge**, or **should have had reason to believe in the existence of the relevant facts pertaining to such knowledge**. Thereafter, such knowledge can be imputed as the state of mind of the accused. An inference less or different to that will accrue to the benefit of the accused and he shall be entitled to be acquitted. Even after the Court arrives at such inference based on the prosecution evidence, it may be possible for the accused to negate that inference upon a presentation of direct evidence that may emanate from the Accused himself, that he did not have the requisite state of mind and was acting in *good-faith*.

If one were to consider the evidence led at the trial including the attendant circumstances, it can be reasonably inferred that either the Appellant had himself made unauthorized copies of the songs or had procured the compact disks from a person such as the person / institution referred to in the label of disks (Sajindra Video, of No. 32, SuperMarket, Padukka) who had made the unauthorized copies. If in fact the Appellant had in *good faith* received the disks containing unauthorized copies of the songs in issue from either Sajindra Video or from some other third party, that would be a matter especially within his own knowledge. Section 106 of the Evidence Ordinance provides that, *when any fact is especially within the knowledge of any person, the burden of proving such fact lies upon him*. The Appellant has not presented any evidence in this regard or with regard to any other matter. In this regard it is also necessary to take into consideration the evidence of Raveendra Mahagama Sekera, about the incident which had taken place in 2004, where he met the Appellant and purchased a compact disk containing unauthorized copies of his father's songs. On that occasion, the Appellant had taken up the position that he had purchased an old record containing those songs (referred to by the Appellant as a '*gramophone record*') and hence he had the right to sell copies of the songs. Nevertheless, Raveendra Mahagama Sekera had challenged the Appellant that what he was doing was '*illegal*'. Thus, in 2004, the Appellant's position was that he had obtained copies of the songs, and that he had the right to do so. Another important item of circumstantial evidence is that the prosecution has proved that

the other compact disk purchased by Sub Inspector Prasad Weeraratne from the Appellant titled '*Sannaliyane*' ("P2A1"), and the other eight compact disks ("P3") secured from the Appellant's possession, all contained pirated material such as unauthorised copies of songs of Visharadha Nanda Malini and songs authored by the late Mahagama Sekera. Finally, both the external appearance of the compact disk titled '*Galana Gangaki Jeewithe*' ("P2A") "*Sannaliyane*" ("P2A1") and their contents did not contain any reference to the lyricists of the songs contained in the compact disk, namely Professor Sunil Ariyaratne and the late Mahagama Sekera. The external appearance of the disk titled '*Galana Gangaki Jeewithe*' however contained a reference to the singer of the songs contained in it, namely Visharadha Nanda Malini, in the phrase '*Nanda Malini Gayuu Chithrapata Geetha*' (meaning 'film songs sung by Nanda Malini'). Thus, there was an *ex-facie* infringement of the moral rights of lyricists Professor Sunil Ariyaratne and Mahagama Sekera in the two CDs marked "P2A" and "P2A1".

In view of all the afore-stated circumstances, I conclude that an irresistible and inescapable inference arises that the Appellant knew or certainly had reason to believe that the compact disk titled '*Galana Gangaki Jeewithe*' contained copies of the songs '*Yowun Wasanthe*' and '*Onna Ekomath*' which had been made in infringement of the rights protected under Part II of the Intellectual Property Act. Thus, I am satisfied that the prosecution has discharged its burden of proving beyond reasonable doubt that the Appellant entertained the requisite *mens rea* of the offence contained in section 178(2) of the Intellectual Property Act, with which he was charged.

Proof beyond reasonable doubt

As pointed out by the learned counsel for the Appellant, indeed, in a criminal trial, the prosecution must prove its case beyond a reasonable doubt. Learned Senior State Counsel also did not express disagreement with this standard of proof expected from the prosecution in any criminal case, which is a salient feature in adversarial criminal cases in common law jurisdictions. The degree of proof 'beyond reasonable doubt' apart from its historical roots in the common law tradition and the adversarial system of criminal justice, specifically arises out of a fundamental right enshrined in Article 13(5) of the Constitution. That being, the '*presumption of innocence until and accused is proven guilty*' and the right to a '*fair trial*'.

These two fundamental rights are cornerstones of our criminal justice system in which fairness is a governing principle. It is a principle enshrined in Sri Lanka's legal system. However, the presumption of innocence is rebuttable, and will prevail only until the presumption is vacated by Court, due to the cogency of evidence that the prosecution has presented. The importance and the weight of the presumption of innocence is such, that in order to vacate that presumption, the case for the prosecution must be proven beyond reasonable doubt. A '*reasonable doubt*' means a doubt in respect of which a valid reason can be attributed. For a '*doubt*' to be recognized as amounting to a '*reasonable doubt*', the ground for the development of the doubt must be objective and reason based. There should be a logical basis for the entertaining of the doubt. That is the distinction between a '*mere doubt*' and a '*reasonable doubt*'.

John Woordroffe & Amir Ali in '*Law of Evidence*' (18th Edition, Volume 1, page 325) has described '*proof beyond reasonable doubt*' in the following manner:

"For a doubt to stand in the way of conviction of guilt, it must be a real doubt and a reasonable doubt – a doubt which after full and fair consideration of the evidence, the judge really, on reasonable grounds, entertains. ... If the data leaves the mind of the trier in equilibrium, the decision must be against the party having the burden of persuasion. ... If the mind of the adjudicating tribunal is evenly balanced as to whether the accused is guilty or not, it is its duty of the tribunal to acquit. If the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is as manifestly unreliable that no reasonable tribunal can safely convict based on it, the prosecution must fail. The court cannot be satisfied beyond reasonable doubt, if there are still some reasonable hypotheses compatible with the innocence of the accused. There is no emancipation of the mind, unless all reasonable doubts have been eliminated from it. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The benefit of doubt, to which the accused is entitled to, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain, and not the doubt of a timid mind."

Lord Denning in *Miller v. Minister of Pensions* [(1947) 2 AER 372] referring to the degree of proof the prosecution must satisfy, has held that "... it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to

deflect the course of justice. If the evidence is so strong against a man, as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that would suffice."

In *The King v. Vidanalage Abraham Appu* [40 NLR 505] Acting Chief Justice Soertsz has held that " ... so far as the case for the prosecution in a criminal trial is concerned, it will not suffice for it to make out a case of grave suspicion against an accused person, it must establish its case, and so long as there is reasonable doubt left, there is no proof. The phrase 'to prove beyond reasonable doubt' is explanatory of the meaning of the word 'prove'."

In terms of section 3 of the Evidence Ordinance, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, on an application of the principle contained in section 3 of the Evidence Ordinances buttressed by the earlier mentioned judicial precedents, I am of the opinion that, a criminal case can be considered to have been proved by the prosecution beyond reasonable doubt, if in the objective mind of the Judge or the jury, as the case may be, the prosecution has presented sufficient cogent evidence which causes the Judge or the jury to believe that the accused had committed the offence he has been charged with, or the judge or the jury considers that the accused having committed the offence to be so probable that the judge or the jury ought, under the circumstances of the case, act upon the supposition that the accused committed the offence. A case is '*proven beyond reasonable doubt*', when a state of mind develops in the judge or the jury as the case may be, as to belief in the truthfulness of the assertion made by the prosecution, and the absence of a logically sound reason to doubt that assertion.

If either due to the sheer nature of the prosecution's evidence, or as a result of the defence impugning the prosecution's evidence, or through the presentation of defence evidence, or through a combination of such means, the defence raises what the judge / jury believes to be a '*reasonable doubt*' regarding the case for the prosecution, the benefit of such doubt must necessarily accrue to be benefit of the accused, and the accused would therefore be entitled

to be *acquitted*. The prosecution is required to prove all the ingredients of the offence the accused has been charged with (which would include the *actus reus* and the *mens rea* of the offence), '*beyond reasonable doubt*'. It must be borne in mind that proving the prosecution's case beyond reasonable doubt requires a very high degree of cogency and sufficiency of evidence. It is a very high standard to meet. Mere conjecture, theories, suspicion or even proving a case to a degree that the judge or the jury would form the view that the accused may have committed the offence, is wholly insufficient. Furthermore, proving a case on a balance of probabilities is also wholly insufficient. However, proving a case beyond reasonable doubt is distinct from and lesser in degree than proving a case to a degree of mathematical accuracy. The law does not require the prosecution to prove its case with scientific precision and to a degree of mathematical accuracy. Proving a case beyond reasonable does not mean that there should be proof beyond a shadow of doubt or fanciful or imaginary doubts. Prosecutions have to primarily rely on human testimony. With all the inherent weaknesses of human testimony, it would not be reasonably possible and would in fact be unattainable to achieve such an extremely high degree of proof. Therefore, what is necessary is to prove the prosecution's case beyond reasonable doubt, which in fact means that, on an objective consideration of the evidence presented by the prosecution and should the defence have opted to present evidence, on a consideration of such defence evidence as well, would a reasonable person considering the evidence objectively, entertain either absence or lack of belief that the accused in fact committed the offence.

As E.R.S.R. Coomaraswamy has put it, "*the presumption of innocence merely means that the prosecution must prove the case against the accused beyond reasonable doubt. The two rules mean the same concept ... The presumption of innocence is so strong that in order to rebut it, the crime must be brought home to the accused beyond reasonable doubt*". [The Law of Evidence, volume II, Book I, page 297-8]

It is indeed a well enshrined and recognized cardinal principle that an accused has the right to remain silent during the trial. In this case, the Accused - Appellant has exercised that right. There is no compulsion that may be imposed on an accused to present defence evidence or to prove his innocence. However, particularly in the backdrop of a prosecution having proved a minimum of a *strong prima facie case* against the accused, hiding behind the

presumption of innocence and exercising the right to remain silent, if the accused chooses to remain silent and not offer any evidence, if the circumstances justify, such silence and absence of evidence in favour of the accused may attract certain consequences in law in the nature of an adverse inference, and thereby entitle the judge or jury to arrive at certain adverse findings against such accused.

According to the *curses curiae* of this Court, on the application of, as well as quite independent of, the much debated dictum of Lord Ellenborough in *Rex v. Lord Cochrane and others* (1814) *Gurney's Reports* 479, when the prosecution has established a *strong prima facie case*, the continued silence on the part of the accused and his failure to explain incriminatory items of evidence, which, if the accused is in fact innocent, be well within his power to explain, would elevate the *strong prima facie case* to the level of a *presumptive case*, thereby in appropriate cases justifying a finding of *guilt* against the accused. In such circumstances, it would be lawful and fair for the Court to conclude that the prosecution has proven its case beyond reasonable doubt. {See *Queen v. Sumanasena*, [66. NLR 350], *Seetin v. The Queen* [68 NLR 316], *R. v. Seeder de Silva* [41 NLR 337], *Ilangatilaka v. The Republic* [(1984) 2 Sri L.R. 38], *Basnayake v. OIC, Special Crimes Detection Unit, Anuradhapura* [(1988) 2 Sri L.R. 50], *The Attorney General v. Potta Naufer and Others* [(2007) 2 Sri L.R. 144], and *Somaratne Rajapakse and Others vs. Honourable Attorney General* [(2010) 2 Sri L.R. 113].}

In the backdrop of all the earlier referred to cogent items of direct and circumstantial evidence presented by the prosecution, notwithstanding the prosecution having presented a very strong case against the Appellant, the Appellant did not offer any explanation on his behalf either by giving evidence or calling witnesses or through both such ways. There was no attempt by the Appellant to explain any item of evidence presented by the prosecution against him. The Appellant did not refute the allegation against him by way of evidence. He did not even attempt to explain the incriminatory items of evidence against him, which were well within his control to explain, if he was *not guilty* of having committed the offences contained in the charge sheet. Thus, taking as a whole the entire body of evidence presented by the prosecution and the accused's failure to provide an innocent explanation in respect of any of those items of evidence, I am of the view that the prosecution has proven its case

against the Appellant beyond reasonable doubt, and hence the conviction of the Accused - Appellant is lawful.

Suggestions put to prosecution witnesses

Counsel for the Accused - Appellant has during cross-examination **suggested** to Professor Sunil Ariyaratne, that due to a personal animosity he had with the Appellant, he had submitted to a Police Officer named Lugoda of the Colombo Crimes Division a CD which he himself had prepared, bribed him, and got a "*false case*" filed against the Appellant. It has also been suggested to him that his evidence that they watched the '*Sarungalaya*' film at the police station is false, and that they did not watch any film at the police station, and that he did not identify any production at the police station. Further, it has been suggested that what was shown to the witness by the police was not what was recovered from the possession of the Appellant. These suggestions have been vehemently denied by the witness.

Similarly, a **suggestion** has been made to witness Raveendra Mahagamasekera. It has been suggested to this witness that he is not the son of Mahagama Sekera. From the perspective of this witness's personal character, this is a very serious allegation to have been made. Undoubtedly, Raveendra Mahagamasekera would have been insulted, embarrassed and annoyed by the said suggestion, which he had vehemently denied. In view of Raveendra Mahagamasekera's own testimony that he is the son of Mahagama Sekera and the testimony given by Professor Sunil Ariyaratne and Visharadha Nanda Malini relating to Raveendra Mahagamasekera, it is overwhelmingly evident that Raveendra Mahagamasekera is in fact the son of the late well known and much respected lyricist Mahagama Sekera, and not an imposter. It is also evident that the defence counsel had no material at all, to establish the truth of such malicious and offensive suggestion, as, if he had, he would have impeached the testimony given by Raveendra Mahagamasekera using such material. After Raveendra Mahagamasekera denied the suggestion, the defence presented no evidence to contradict the witness and thereby assert the truthfulness of his suggestion.

It is necessary to observe that **suggestions** are in fact a component of a comprehensive cross-examination. Suggestions are factual assertions or propositions put to a witness during cross-examination by the counsel conducting such cross-examination, for the purposes of (i) impeaching the credibility and testimonial trustworthiness of a witness, (ii) attempting to elicit an item of evidence favourable to the party on whose behalf the cross-examination is being conducted, such as an admission, (iii) indicating to Court the position of the party on whose behalf the cross-examination is being conducted, regarding the testimony given by the particular witness, and (iv) indicating to Court the position of the party on whose behalf the cross-examination is being conducted, the overall case of the opposing party.

From an ethical perspective, **suggestions** must necessarily be founded upon instructions received by the counsel conducting the cross-examination from his client. Professional ethics of Attorneys require that for the purpose of deciding on the nature of the cross-examination to be conducted, for counsel not to rely on mere verbal instructions received from the client, but to examine and assess the veracity of the instructions he receives, prior to acting on instructions received and making suggestions. In fact, this requirement is not limited to making suggestions, but to all professional conduct of counsel. Counsel should not put suggestions to a witness, unless he in *good faith* believes the contents of such *suggestion* to be true. It would be unethical to put *suggestions* to a witness during cross-examination, which the counsel himself knows or has reason to believe is false. Thus, in the administration of justice, there is no room for baseless and ill-founded suggestions being made. It is the responsibility of Court to prevent the making of baseless suggestions, and if that is not possible, frown upon the making of such suggestions and where appropriate initiate disciplinary action against the Attorney-at-Law who acted in violation of this professional ethic.

In the circumstances, I am compelled to conclude that the question put under cross-examination containing the afore-stated suggestions, come within the ambit of section 151 and 152 of the Evidence Ordinance which empowers the Court to forbid the asking of indecent and scandalous questions, and questions aimed at annoying or insulting a witness. When such a question in the form of a suggestion is put to a witness, it would be desirable for the trial judge to inquire from counsel whether the Attorney has reasonable grounds for

the framing of and making such a suggestion, and an evidential basis to establish the truth of the contents of such suggestion. On a strict application of the law, in this case, the defence counsel who appeared on behalf of the accused should have been reported to the Supreme Court in terms of section 150 of the Evidence Ordinance. Courts of law should not be permitted to be used as platforms to make wild and sweeping allegations against witnesses, which cannot be substantiated, and thereby baselessly, unnecessarily and inappropriately injure the character and reputation of witnesses, harm the witness's state of mind, and to bring disrepute to the system of administration of justice.

Dr. A.R.B. Amerasinghe in "*Professional Ethics and Responsibilities of Lawyers*" (Chapter XII) has stated as follows: "*An attorney must not in the course of making submissions or cross-examining a witness say or lead a witness to say anything that might mislead the court. In particular, counsel must not make any statement to court or put any proposition to a witness that is not supported by reasonable instructions, or that lacks factual foundation by reference to the information available to court. Counsel has a particular responsibility to the court when cross-examining a witness not to put to the witness allegations in the form of questions which counsel knows that the witness does not have the necessary information or knowledge to answer, or where there is no justifiable foundation for the question.*" (Emphasis added.)

No **suggestion** if denied by the witness, would by itself be considered as evidence, or would be capable of creating a reasonable doubt regarding the testimony of the particular witness, unless, the truth of the contents of such suggestion is established by way of evidence, or through a combination of evidence and presumptions, matters in respect of which the Court may take judicial notice, and inferences which the Court is lawfully entitled to arrive at. In this case, the defence has neither presented evidence of its own behalf, nor elicited evidence from prosecution witnesses in proof of any of the suggestions made.

Therefore, I conclude that the above-mentioned suggestions made to Professor Sunil Ariyaratne and to Raveendra Mahagamsekera, and to the other witnesses who testified for the prosecution, have not given rise to a reasonable doubt either regarding their respective credibility or the case for the prosecution. The baseless and frivolous suggestions made to

the afore-stated prosecution witnesses by the Attorney-at-Law for the Accused has to be responded to by this Court by the condemnation his conduct necessarily deserve.

Conclusions

Therefore, I answer the two questions of law in respect of which special leave to appeal was granted in the following manner:

1. *The learned Magistrate and the learned Judge of the High Court have correctly applied the law with respect to productions marked "P2A", as the evidence for the prosecution **has not created a reasonable doubt** as to the integrity of the said productions.*
2. *As regards the first and the second counts on the charge sheet, the prosecution has in fact proven its case beyond reasonable doubt. In the circumstances, the learned Magistrate and the learned High Court Judge have correctly considered the evidence and concluded the fact that the prosecution has proved the first and the second charges in the charge sheet beyond reasonable doubt. However, the learned Magistrate and the learned High Court Judge have erred in holding that the prosecution had proved the third count in the charge sheet beyond reasonable doubt.*

Accordingly, I affirm the conviction imposed by the learned Magistrate with regard to the first and second counts on the indictment.

Sentence

An examination of the journal entries reveals that, following the finding of the accused *guilty* of having committed all three offences in the charge sheet and convicting him, the learned Magistrate has imposed what may be referred to as a 'composite punishment' in relation to the three charges contained in the charge sheet. The scheme of the Code of Criminal Procedure Act and in particular section 16 of the Act envisages that when an accused is convicted of having committed more than one offence, the High Court Judge or the Magistrate as the case may be, should impose separate sentences in relation to each of the offences in respect of which he has been found *guilty*. That has not been done in this matter. Thus, the sentence imposed by the learned Magistrate is unlawful to that extent.

The law relating to intellectual property such as copyrights have been developed for multiple reasons including the need to protect intellectual property such as original creations, and confer on the authors of protected works certain rights which would inter-alia confer on them lasting reputation for their creations as well as financial and commercial entitlements. Infringement of copyrights negates those objectives and inhibits the growth of creations. Violation of copyrights is an avenue of illicit business activity, which must be condemned. The conduct of the Accused – Appellant would have certainly caused financial loss to the complainants. The Accused – Appellant has for financial gain engaged in selling pirated copies of music CDs. His conduct has been premeditated, well organized, fraudulent, and carried out with the objectives of unlawful financial gain for himself, and causing financial loss to the complainants. It has also resulted in depriving the complainants of legitimate financial gain. I also see no mitigatory circumstances in favour of the Accused receiving a lenient sentence. In my view, in a matter of this nature involving infringement of intellectual property rights, the sentence to be imposed should be founded upon the need to punish the accused for the offence committed, impose deterrence on society, and effect compensatory relief to the complainants. These are sentencing policies, which should govern the sentence to be imposed. Taking the afore-stated factors into consideration, the sentence imposed by the learned Magistrate, in my view is lenient. However, the prosecution has not appealed and moved the High Court of the Provinces for enhancement of the sentence. Nevertheless, it is necessary for this Court to ensure the lawfulness of the sentence imposed.

In the circumstances, I impose a term of 6 months imprisonment suspended for a period of ten years and a fine of Rs. 5,00,000/= with a default sentence of imprisonment of one year, per each of the two charges the Accused – Appellant stands convicted of having committed. The sentences are to run concurrently.

In view of the foregoing, the conviction of the Accused – Appellant with regard to the first and second counts on the charge sheet are affirmed. The Accused – Appellant is acquitted with regard to the third count on the charge sheet. Subject thereto, this Appeal is dismissed.

As there is merit in the Appeal in so far as the third count in the charge sheet is concerned, no order is made as regards costs.

Judge of the Supreme Court

Priyantha Jayawardena, PC

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara

I agree.

Judge of the Supreme Court