

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

In the matter of an application for Special Leave to Appeal under and in terms of Section 9 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

**SC. Appeal No. 140/2010**

Special Leave to  
Appeal No. 118/10

High Court Colombo HCMCA 127/07

MC Colombo Case No. 71986/04

Amarasinghe Kankanamlage  
Kamal Rasika Amarasinghe  
Inspector of Police,  
Welikada.

**Accused-Appellant-Petitioner**

Vs.

Officer-in-Charge  
Special Investigation Unit,  
Police Headquarters,  
Colombo 01.

**Complainant-Respondent-  
Respondent**

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

**Respondent-Respondent**

**BEFORE**

: Sisira J. de Abrew, J.  
Prasanna S. Jayawardena, PC, J. &  
L. T. B. Dehideniya, J.

**COUNSEL** : Nalin Ladduwahetty, PC, with Lakni Silva for the  
Accused-Appellant-Petitioner.

Lakmali Karunanayake, SSC, for the Attorney  
General.

**ARGUED &  
DECIDED ON** : 18.07.2018

**Sisira J. de Abrew, J.**

Heard both Counsel in support of their respective cases.

In this case the Accused was charged in the Magistrate's Court for an offence under Section 314 of the Penal Code. After trial, the learned Magistrate convicted the Accused-Appellant and sentenced him to 01 year Rigorous Imprisonment and to pay a fine of Rs. 1000/-.

Being aggrieved by the said conviction and the sentence the Accused-Appellant appealed to the High Court and the learned High Court Judge by his judgment dated 18/05/2010 dismissed the appeal affirming the conviction and the sentence. Being aggrieved by the said judgment of the learned High Court Judge, the Accused-Appellant has appealed to this Court.

This Court by its order dated 25/10/2010 granted leave to appeal on questions of law set out in paragraphs 23 (b), (e) and (f) of the petition of appeal dated 28/06/2010. The said questions of

law are set out below:-

- 1). Did the learned High Court Judge err in concluding that the contradictions and omissions marked do not go to the root of the case for the prosecution, when the said contradictions and omissions seriously affect the credibility of the witnesses?
- 2). Did the learned High Court Judge misdirect himself when he failed to consider that the medical evidence did not support the version of the prosecution?
- 3). Did the learned High Court Judge fail to consider that the charge preferred against the Petitioner was illegal in that the charge framed against the Petitioner is bad for duplicity and no valid trial could have been held on such a charge?

The facts of this case may be briefly summarized as follows: the Complainant, Nishantha Vidura Kumarawadu, his wife and his brother were travelling in a car on 25<sup>th</sup> of August 2001. The name of the brother is Banu Kumarawadu. Banu Kumarawadu who drove the car overtook a double cab. Thereafter double cab overtook the car and stopped the double cab in a way that the car could not move. Thereafter inmates of the double cab got down from the double cab and the Accused who is a police officer assaulted both Nishantha Vidura Kumarawadu and Banu Kumarawadu. Thereafter they were taken to the Welikada Police Station.

Version of the Accused-Appellant is quite different from

the version of the prosecution. The Accused-Appellant in his evidence took up the position that the vehicle driven by Banu Kumarawadu failed to stop when he was signaled to stop by a police officer at a road block and as such the said police officer gave chase to the car driven by Banu Kumarawadu and stopped the car. Later the inmates of the car were taken to the Welikada Police Station. After they were taken to the Welikada Police Station they were produced before the Judicial Medical Officer. The Judicial Medical Officer in his report has stated that Nishantha Vidura Kumarawadu had received two abrasions.

Learned President's Counsel appearing for the Accused-Appellant submits that contradictions in the evidence had not been considered by the learned Magistrate. He submits that Nishantha Vidura Kumarawadu in his evidence has stated that he was in a hurry to meet a doctor regarding his mother's surgery but his brother has said that they were coming from hospital. Therefore learned President's Counsel submits that this is a serious contradiction that goes to the route of the case.

Learned President's Counsel brought to our notice a contradiction with regard to the place where the assault took place. One witness says it is near the double cab and the other witness says it is near the car. Learned President's Counsel submits that this contradiction is a vital contradiction.

In considering the submissions of learned President's Counsel with regard to the contradiction, I am guided by the judgment in **Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753 wherein Indian Supreme Court held as follows:-**

“By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

Ordinarily it so happens that a witness is overtaken by events. The Witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attuned to absorb the details.

The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person’s mind, whereas it might go unnoticed on the part of another.

Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. ”

We note that learned Magistrate who heard the case has considered all the above contradictions and the learned High Court Judge has also considered the said contradictions. We note that the learned Magistrate who heard the case has convicted the Accused. Therefore the learned Magistrate who saw the deportment and demeanor of the witnesses has the opportunity to assess the evidence. In this regard I would like to consider a judgment of the Privy Council reported **in 20 NLR page 282 Fradd V. Brown & Co. Ltd. wherein the Privy Council held as follows:-**

“It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance.”

**In Alwis V. Piyasena Fernando [1993] 1 SLR 119 His Lordship Justice G. P.S. de Silva, Chief Justice made the following observation;** “it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal”

When I consider the above judicial literature and the contradiction that had been brought to the notice of this Court, I hold that the contradictions submitted by learned President’s Counsel are not vital and they do not go to the root of the case. For the above reasons, I reject the said contention of learned President’s Counsel.

Learned President’s Counsel next contended that the charge leveled against the Accused is defective. Learned President’s Counsel contended that name of two persons had been stated in the charge sheet as injured persons and therefore charge was defective. The Accused-Appellant has not raised an objection to the charge at the trial. In the first place we note that at page 97, the Accused-Appellant has admitted that he knows about the charge. As I pointed out earlier

the Accused-Appellant has failed to raise any objections to the charge at the trial. In this regard I rely on the judgment of **the Court of Criminal Appeal in 45 NLR page 82 in King V. Kitchilan wherein the Court of Criminal appeal held as follows:**

“The proper time at which an objection of the nature should be taken is before the accused has pleaded”

It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception.

In this connection I would like to consider **Section 166 of the Criminal Procedure Code which reads as follows:-**

“Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omissions.”

**In Wickramasinghe V. Chandrasa 67 NLR 550 His Lordship Justice Sriskandarajah observed the following facts;**

“Where in a report made to Court under Section 148(1) (b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal provision was not mentioned. His Lordship held as follows:- The omission to mention in a charge sheet the penal Section is not a fatal irregularity if the accused has not been

misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable.”

In this case has the Accused been misled? As I pointed out earlier Accused-Appellant in his evidence at page 97 admitted that he understood the charge. Therefore I hold that Accused had not been misled by the said defect in the charge sheet.

For the above reasons I reject the contention of learned President’s Counsel.

Learned President’s Counsel next contended that the medical evidence has not supported the version of the prosecution. But we note that the Judicial Medical Officer in his report has stated that Nishantha Vidura Kumarawadu has received two abrasions. Further at page 69 of the brief, learned Counsel who appeared for the Accused-Appellant at the trial has admitted the medico legal report without the doctor being called. PW1 in his evidence has referred to injuries which he received in his both arms. Therefore we hold that the evidence relating to injuries stated by witness Nishantha Vidura Kumarawadu has been corroborated by medical evidence.

When I consider all the above matters, I am unable to agree with the contention of learned President’s Counsel. For the above reasons I reject the contention of the learned President’s Counsel.

Relying on the above judicial literature stated in *Frad Vs. Brown and Alwis Vs. Piyasena Fernando* 1993 1 SLR 119, we hold that the findings of the trial Judge who had the opportunity of

observing demeanor and deportment of witnesses should not be easily disturbed.

When I consider all the above matters, I answer the questions of law raised by the Accused-Appellant in the negative. For all the above reasons I hold that there is no ground to interfere with the judgment of the learned High Court Judge and the learned Magistrate. We affirm the judgment of the learned High Court Judge and the learned Magistrate. We affirm the conviction and the sentence and dismiss this appeal.

Registrar of this Court is directed to send certified copies of this Judgment to the relevant High Court, Magistrate's Court, Hon. Attorney General and the Inspector General of Police forthwith.

*Appeal dismissed.*

**JUDGE OF THE SUPREME COURT**

**Prasanna S. Jayawardena, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**L. T. B. Dehideniya, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

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