IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

SC Appeal 159 / 2018

SC/Spl/LA No. 137/2017

High Court Balapitiya case No. 542 / 2016

Magistrate's Court Balapitiya case No. 97138

Agampodi Wijepala de Soyza,

Katuwila,

Ahungalla.

ACCUSED - APPELLANT – APPELLANT

-Vs-

1. Officer-in-Charge,

   Police Station,

   Ahungalla.

   COMPLAINANT - RESPONDENT - RESPONDENT

2. Hon. Attorney General,

   Attorney General's Department,

   Colombo 12.

   RESPONDENT - RESPONDENT

Before: **L. T. B. Dehideniya J**

P. Padman Surasena J

Yasantha Kodagoda PC J

Counsel: Chathura Galhena for the Accused - Appellant - Appellant.

Yuresha De Silva SSC for Attorney General.

Argued on : 30 - 04 - 2021

Decided on : 07 - 07 - 2021

P Padman Surasena J

The Accused - Appellant - Appellant (hereinafter sometimes referred to as the Appellant) along with his wife stood charged in the Magistrate's Court of Balapitiya. The charge has alleged that the accused on 02-07-2007 had assaulted one Alagiyahandi Nandawathie de Silva with hand and thereby committed an offence punishable under section 314 read with section 32 of the Penal Code. Both the Appellant and his wife had pleaded not guilty to the said charge.

The wife of the Appellant who was named as the 2nd Accused in the charge sheet, had passed away in the course of the trial in the Magistrate's Court. Thereafter, the trial had proceeded only against the Appellant.

At the trial, the virtual complainant Alagiyahandi Nandawathie de Silva, her sister Sriyawathie de Silva and Police Sergeant 21709 Koswatta Gedara Nishshanka (an officer from Ahungalla Police Station) had given evidence. After the prosecution closed its case, the Appellant had given a dock statement.

Learned Magistrate at the conclusion of the trial, pronounced the judgment dated 28-04-2015, convicting the Appellant for the above charge.

Being aggrieved, by the said judgment of the learned Magistrate, the Appellant had appealed to the High Court of Southern Province holden at Balapitiya. The High Court, by its judgment dated 09-05-2017 had affirmed the conviction and enhanced the compensation payable to the virtual complainant. The Appellant, in this appeal, seeks to canvass the above judgments before this Court.

Upon the Petitioner supporting the special leave to appeal application relevant to this appeal, this Court by its order dated 10th October 2018, had granted special leave to appeal on the following questions of law.

i. Did the Provincial High Court has misdirected itself in analyzing the evidence led by the prosecution and the medico-legal report marked **P 1**?

ii. Did the Provincial High Court misdirected itself in failing to analyze the contradictions in the evidence of the virtual complainant and the contents of the medico-legal report marked **P 1**?

iii. Did the Provincial High Court err in entering the Judgment without dealing with the infirmities of the judgment of the learned Magistrate?

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

The virtual Complainant Alagiyahandi Nanadawathie de Silva has commenced narrating the incident relevant to the charge revealing the fact that the Appellant is the person to whom she had leased out her land. As the period of the said lease had ended, she along with her sister Alagiyahandi Sriyawathie de Silva had gone to the said land on the date of the incident with the intention of re-taking the possession of the house in the said land. According to her, the extent of this land is about six acres. As they entered the property, the Appellant who had refused to hand over the keys of the house, had started assaulting the virtual complainant's head. This had taken place in the porch as she entered the house. The virtual complainant has also further stated that the wife of the Appellant also assaulted all over her body with a Cinnamon stick. Sriyawathie who was with her at that time had then run away. The virtual complainant states that the Appellant and his wife had thereafter dragged her out and pushed her to the road. She had fallen at that time. Having flagged down a three-wheeler thereafter, she had then gone to Ahungalla Police Station. She had not known that her hand was fractured until she went to the hospital. She has categorically stated that it was her right hand, which was fractured because of this incident. Further, she also has stated that she obtained an X ray image of her right hand and that it was her right hand, which was treated and bandaged in the hospital. She had made a complaint to the police before she got herself admitted to Balapitiya hospital.

It is to be noted that this witness had shown the wrist area of her right hand as the location of the injury when answering the questions during the cross-examination.

The Medico legal report (MLR) of the Virtual Complainant has been produced marked **P 1** in the course of the trial. The short history given by the patient in the said MLR is recorded as *"assaulted by a known person and fallen on ground after the assault".* The said MLR has

confirmed that there have been two injuries on the body of the Virtual complainant. They have been described in the MLR as follows.

1) *Contusion measuring 2 x 2 cm on left wrist joint*

2) *Scaphoid bone fracture of left wrist.*

The first two questions of law in respect of which this Court has granted leave to appeal are centered around the question as to whether the Provincial High Court has misdirected/erred in analyzing evidence adduced by the prosecution vis a vis the contents of the MLR marked **P 1**. It was in that backdrop that the learned counsel for the Appellant submitted before this Court that the discrepancies highlighted by the defence in the course of the trial go to the root of the prosecution's case. He further submitted that the said discrepancies have affected the credibility of the main prosecution witness in this case, namely the virtual complainant.

It is a fact that the virtual complainant has categorically stated that it was her right hand, which was fractured because of this incident. It is also a fact that the MLR shows injuries only on her left wrist. It is on that basis that the learned counsel for the Appellant argues that the evidence of the virtual complainant is not corroborated by medical evidence.

As the two of the above positions are clearly irreconcilable to each other, there exists a clear discrepancy (with regard to the question whether the injury was on the left or right hand) between the positions taken up by the virtual complainant on one hand and the medical evidence adduced by the prosecution on the other. While the prosecution has not called the particular Medical Officer who had examined and prepared the said MLR to give evidence before the Magistrate, even if it had happened, the Medical Officer concerned could not have taken a different position, as he is required to base his evidence on the contents of the report he had made. Therefore, the categorical assertion by the virtual complainant that it was her right hand, which was fractured because of this incident and the fact that she obtained treatment to her right hand, becomes clearly contradictory to the contents of MLR.

As the aforementioned first two questions of law relate to the question as to whether the Provincial High Court has misdirected/erred in analyzing evidence adduced by the prosecution vis a vis the contents of the MLR marked **P 1**, this Court must next find out how the learned High Court Judge had considered this issue.

The view expressed by the learned High Court Judge is that the above discrepancy had not misled the learned Magistrate, as the said discrepancy is not related to the causing of injury referred to in the charge. The said view is on the basis that the only charge framed against the Accused is for causing hurt to the virtual complainant by assaulting with hands. Hence,

the learned High Court Judge has taken the view that the above discrepancy is not relevant to the case at hand. (i.e. the injury on the hand is not directly relevant to the charge). It is on the same basis that the learned High Court Judge has concluded that the learned Magistrate had not misdirected herself on the said discrepancy.

The inference most favourable to the defence in the given situation would be to the effect that the virtual complainant has told in Court, something that is not true. However, as all falsehood is not deliberate (as held in the case of Boghinbai Hirjibai V State of Gujarat[1]), there is an onerous task for the Court then to ascertain whether such falsehood is due to a deliberate attempt to mislead Court with a view of obtaining an order or any other benefit in favour of the witness who uttered such falsehood. This is in addition to the other duties of Court such as ascertaining whether such discrepancies go to the root of the case and shake the overall credibility of such witness.

There could be broadly two reasons as to why the virtual complainant in the instant situation had taken up such a position. Those reasons could be as follows.

I. She has deliberately told Court something, which she knew to be false.

II. Due to an inadvertence, she has mixed up the facts and did not remember whether it was her right or left arm, which was injured.

I would now consider whether the virtual complainant in the instant situation has deliberately told Court something, which she knew to be false.

At the outset, it is relevant to note that this witness was around 64-68 years of age[2] at the time of giving evidence before the learned Magistrate. This incident had occurred on the 2nd July 2007 and the virtual complainant had given evidence on 14-02-2012. This means that the said witness had given evidence before the Magistrate's Court about 4½ years after she sustained the injuries.

Her evidence is that she felt a pain in the hand after she fell down. It is also her position that she realized that her hand was also injured only in the hospital. Thus, this seems to be not an injury serious to the extent that the witness should have felt a severe pain at the time of injury. If the injury is so serious to the extent of creating a lasting severe pain, then one may be justified in thinking that it would be improbable for such a person not to remember the exact hand on which such injury was inflicted. However, in the light of the evidence adduced

[1] AIR 1983 SC 753.
[2] Her age has been recorded at the commencement of her evidence as 64 and that as 68 at the commencement of the cross examination.

in the instant case, it is difficult to identify the injury caused to the wrist of the virtual complainant as one, which had brought about a severe pain, which one would expect to last in her mind for a considerable length of time due to its severity. Further, this injury is not one caused directly due to the assault but due to the fall. That may have been another factor as to why the witness could not remember whether it was the left or right hand that hit the ground causing that injury.

I cannot see how she could have got any additional advantage by falsely stating that it is her right hand that was injured due to the relevant fall and not the left hand. This shows that there has not been any necessity for this witness to falsely assert that it was her right hand that was injured in the course of this incident. Thus, the most that a Court of law can infer in this instance is that the witness has mixed up her left and right hands. One needs to be mindful that this is not a case where the assertion of the witness can never be supported by the medical evidence due to absence of any injury whatsoever. To the contrary, had the witness managed to avoid the mix up of her left and right hands, this would then be a classic case where medical evidence perfectly supports the evidence of the virtual complainant who has stated that she felt a pain in the hand after she fell down. Therefore, the above discrepancy alone would not be sufficient to vitiate the conviction of the Appellant.

E R S R Coomaraswamy in his work '*The Law of Evidence*'[3] has described as to how a Court should evaluate contradictions and omissions in the following way.[4] "*…. Another test that is applied in the evaluation of evidence is the test of inconsistency, contradictions per se and discrepancies in the evidence of the witness. A witness is often contradicted by his statements to the police under section 110 of the Code,[5] or by his depositions in the magistrate's court. Some may be positive contradictions, while others may be omissions, which may be of material facts or immaterial facts. In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The entire statement should be taken into consideration to ascertain whether they are due to a deliberate attempt to suppress or depart from the truth. Witnesses should not be disbelieved on the basis of trifling discrepancies and omissions.[6]"*

Thus, it would be necessary for the Court to examine the instant discrepancy along with the other infirmities relied upon by the learned counsel for the Appellant.

---

[3] Vol II, Book 2.
[4] Ibid. at page 1054 (under the sub headings 'The test of inconsistency, contradictions and discrepancies').
[5] *Act No. 15 of 1979. (Cap 26).*
[6] *Dashiraj vs. The State A.I.R. (1964) Tri. 54.*

Learned counsel who appeared for the Accused before the Magistrate's Court had drawn the attention of the court to an omission in the statement of this witness to Police to show that this witness had not stated in her statement to Police that she suffered any pain in her hand. It is to be noted that this witness in the course of answering the questions posed to her in cross-examination, has categorically stated that her hand was not injured in the course of the assault.

The virtual complainant is consistent and firm when she had stated that it was her right hand, which was injured. She had even proceeded to show that to Court. The omission pointed out by the defence in the trial is to the effect that she had not stated in the statement to police that her hand had been injured. This fact is corroborated by the virtual complainant herself as she had stated in her evidence that it was only in the hospital that she realized that her hand had also been injured. As has been mentioned above, this witness had made a complaint to the police before she got herself admitted to hospital. Thus, the fact that her hand had been injured when she fell was not within her knowledge by the time she made her statement to Police. Therefore, the purported omission the learned Counsel for the Appellant is relying upon, does not in any way affect the consistency of the evidence of this witness.

The learned defence counsel had also drawn the attention of Court to the fact that this witness had not stated anything with regard to the assault by the wife of the Appellant in her statement to police. I observe that this is a piece of evidence only against the wife of the Appellant, the prosecution against whom was abated due to her demise. On the other hand, this Court needs to consider whether indeed an omission of this nature has been established by the defence in this case.

According to section 155 of the Evidence Ordinance one of the ways in which credit of a witness can be impeached by the adverse party is by proving that such witness has made a former statement, which is inconsistent with that witnesses's evidence in Court. One tool used by the defence counsel in trial Courts to achieve this purpose is to highlight the fact that such witness has failed to state some material fact to the statement made by such witness to Police. Such failures are commonly referred to as omissions attributed to that witness. Once such omissions are proved, then the trial Court must consider whether such omission affects the credibility of that witness. Thus, condition precedent to such consideration by Court is the firm establishment of such omission. This is because the necessity to consider such an omission does not simply arise if indeed there is no such omission in existence.

It would be relevant at this stage to refer to the Court of Appeal judgment in the case of Keerthi Bandara V Attorney General.[7] In that case, His Lordship Justice Sisira De Abrew stated as follows.

"*…… We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point. …* "

Moreover, the Evidence Ordinance in section 145 specifically provides for the manner in which a witness can be cross-examined and confronted with the statements made by such witness previously and the procedure to be adopted when proving such statements. It is worthwhile to reproduce here the said section.

Section 145.

(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

(2) If a witness, upon cross examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of

[7] 2000 (2) SLR 245 at 258.

the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.

The scheme of the above section clearly demands that the following mandatory steps must be adhered to, when marking and proving an inconsistency.

Firstly, a cross-examining counsel who intends to show that the evidence of the witness under cross examination is contradictory with a previous statement made by him, must ask questions relevant to such matters in question without such previous statements being shown to him.

Secondly, if such witness comes out with something that is prima facie inconsistent with any part of such statement, it is then only the section allows such counsel to bring such parts of such statement which are to be used for the purpose of contradicting him, to the attention of such witness.

Thirdly, if such witness has stated something inconsistent with his previous statement and does not distinctly admit making such previous statement, then the cross-examining counsel is under a duty as per sub section 2 of the above section to ask whether or not such witness has made such a previous statement.

Fourthly, it is thereafter only the cross-examining counsel can proceed to prove that such witness has in fact made such previous statement.

The second question of law as set out towards the beginning of this judgment also raises the question whether the Provincial High Court misdirected itself in failing to analyze the contradictions in the evidence of the virtual complainant. Therefore, I would now deal with the effect of the two contradictions marked **V 1** and **V 2** by the defence in the trial.

By the contradiction marked **V 1**, the learned counsel who appeared for the Accused at the Magistrate's Court had attempted to show that the virtual complainant has stated in the evidence in chief that she had received a blow to the lower part of her right arm when the accused assaulted her. Thus, I will reproduce below, the relevant portion from the Magistrate's Court proceedings which reflect the said questions and answers leading to the said purported marking of the contradiction **V 1**, **V 2** as well as the other purported discrepancies.

> 01,02 වුදිතයින් සිටි.
> නිතිඥ සසංක ජයසේකර මහතා පෙනී සිටි.
> පැමිනිල්ල වෙනුවෙන් අහුන්ගල්ල පෙලිසියේ උ.පො.ප.ජයසුරිය පෙනී සිටි.
> පැ.සා.1 මුලික සාක්ෂි අවසන් කර ඇත. හරස් ප්‍රශ්ණ සදහා කැඳවයි.

<u>අලගියාහන්දි නන්දාවති ද සිල්වා : වයස : අවු.68 යි.,පදිංචිය - අංක.12,බොරුගෙඩලන්ද, කොස්ගම. සිංහ.,ප්‍රතිඥා මත.</u>

<u>හරස් ප්‍රශ්ණ</u> - නිතිඥ සසංක ජයසේකර මහතා :

ප්‍ර. දැන් තමන් කලින් දවසේ සාක්ෂි දිලා කියා සිටියා, තමන්ගේ අතටත් වැදුනා, ගහපු පාර ?

අතට වැදුනා කියා කිව්වා ?

උ. නැහැ. අරගෙන ගිහිල්ලා අනිත් පාරට තල්ලු කලා කිව්වා.

ප්‍ර. මගේ දකුණු අතේ යට බාහුවටත් වැදුනා. එහෙම කියලා සාක්ෂි දිලා කියා තියෙනවා නම් හරිද? වැරදිද ?

උ. රෝහලේදි තමයි, අත කැඩිච්ච බව දන්නේ.

ප්‍ර. එමෙන්ම මගේ දකුණු අතේ යට බාහුවට වැදුනා කිව්ව නම්, ඒක හරිද? වැරදිද ?

උ. මට මතක හැටියට මම කිව්වේ නැහැ.

ප්‍ර. එහෙම නම් තමන් කිව්වේ නැහැ ?

උ. මට මතක හැටියට කිව්වේ නැහැ.

(සාක්ෂිකාරියගේ **2012.02.14** වන දින මුලික සාක්ෂියේ ,03 වන පිටුවේ අවසාන පේළියේ සහ ඊට උඩ පේළියේ ඇති , "මගේ දකුණු අතේ යට බාහුවට වැදුනා" කියන කොටස - **වි.1** - ලෙස සළකුනු කිරීමට අවසර ඉල්ල සිටි.)

ප්‍ර. තමන්ට පහර දිපු අවස්ථාවේ තමන්ගේ අත තුවාල වුනාද ?

උ. මට කෝටුවෙන් පහර දුන්නා.

ප්‍ර. එහෙම පහර දිලා අත තුවාල වුනාද ?

උ. එහෙම පහර දුන්නා තුවාල වුන් නැහැ.

ප්‍ර. මම අහන්නේ අත තුවාල වුනාද ?.

උ. ගහද්දි අත තුවාල වුනේ නැහැ.

ප්‍ර. තමන් පසුගිය දවසේ ගරු අධිකරණයේ සාක්ෂි දිලා, "මම රෝහලට යන තෙක් දන්නේ නැහැ, දකුණු අත තුවාල වෙලා කියා" කිව්වාද ?

උ. මම ඇදගෙන ගිහිල්ලා වත්තෙන් එළියට තල්ලු කලාට පස්සේ මම වැටුනා.

ප්‍ර. තමන් මේ ගරු අධිකරණයට පහුගිය දවසේ සාක්ෂි දිලා, මගේ දකුණු අත තුවාල වුනා කිව්ව නම්, හරිද ? වැරදිද ?

උ. දකුණු අත තමයි තුවාල වුනේ ඇදගෙන ගිහිල්ලා දැම්මට පස්සේ.

ප්‍ර තුවාල වෙලාද තිබුනද ?

උ. තුවාලයක් නැහැ. කැක්කුම තිබුනා.

ප්‍ර. එහෙම නම් දකුණු අතේ තුවාලවුනා කිව්ව නම්, ඒක බොරුද ?

උ. මට නැගිට ගන්න බැරි වුනා. කැක්කුමයි. රෝහලේදි දොස්තර මහත්තය කිව්වා, ඔයාගේ අත කැඩිලා කියා.

ප්‍ර. එහෙම නම් එදා කිව්වේ බොරුවක් ?

උ. උත්තරය් නැත.

(එදින සාක්ෂි සටහන් වල **04** වන පිටුවේ "දකුණු අත තුවාල වුනා" කියන කොටස **<u>වි.2</u>** ලෙස ලකුනු කරන බව කියා සිටි.)

ප්‍ර. තමන් කියන්නේ, පාරට ඇදලා දැම්මා කියා ?

උ. ඔව්.

ප්‍ර. තමන් කියන විදිහට ඒ වෙලාවේ තුවාල වුනා ?

උ. ඔව්.

ප්‍ර. තමන්ගේ තුවාල වුනේ කොහොමද ?

උ. මගේ දකුණු අත කැක්කුම තිබුනා.

ප්‍ර. කවිද තමන් පොලිසියට එක්ක ගෙන ගියේ ?

උ. එතන ත්‍රිවිල් රථයක් තිබුනා, ඒකෙන්.

ප්‍ර. තමන් පොලිසියට කිව්වද මම පාරට ඇදලා දාලා මගේ අත කැක්කුම තියෙනවා කියා කිව්වද ?

උ. කිව්වා.

ප්‍ර. අතට පහර දුන්නා කියා කිව්වද ?

උ. අනම් මනන් ඇහුන නිසා ,අත කැක්කුම තියෙනවා කියා කිව්වා.

ප්‍ර. 2008.07.02 වන දින පොලිසියට කරපු ප්‍රකාශයේ ,අත කැක්කුම තියෙනවා කියා වවනයක්වත් කියා නැත කියා යෝජනා කරන්නේ ?

උ. අත කැක්කුමයි කියා තමයි රෝහලට ඇතුලත් කලේ.

ප්‍ර. "මගේ අත කැක්කුම තියෙනවා" කියා තමන් පොලිසියට දීපු කට උත්තරයේ වවනයක්වත් කියා නැත කියා යෝජනා කරන්නේ ?

උ. මම කිව්වා, මගේ ඔඵවෙහි කැක්කුම තියෙනවා. මට පෙෂර් එක තියෙනා. කියා කිව්වා.

උ. "මගේ අත කැක්කුමයි " කියන කොටස ඌණතාවයක් ලෙස සළකුණු කරන බව කියා සිටි.

(පැ.1 දරණ අධිකරණ වෛද්‍ය වාර්තාව වුදිතගේ නිතිඥ මහතා (නඩු ගොනුවේ ඇති) පරීක්ෂා කර බලයි.)

ප්‍ර. කවදද තමන් ඔය විජේපාලලාගේ ගෙදරට ගියේ ?

උ. 2007 , 10 වෙනි මාසයේ 02 වැනිදා වත්තට ගියේ.

ප්‍ර. මොකටද ගියේ ?

උ. මම වත්ත බදු දීලා තිබුනේ, අවුරුදු 06 කට. ඊට පස්සේ වත්තේ බද්ද ඉවර වුනේ. 2007. ඊට පස්සේ මම මාසයක් පහු කරලා දවසක ගියා වත්තට. එදා තමයි මට පහර දුන්නේ.

ප්‍ර. කවිද තමන්ට ඉස්සර වෙලාම ගැහුවේ ?

උ. මෙම වත්ත බදු දීප බදුකරු විජේපාල.

ප්‍ර. කොහේදිද ගැහුවේ ?

උ. මගේ වත්තේ වාඩිය තියෙනවා. වාඩියේස්තෝප්පුවේ ඉඳගෙන.

ප්‍ර. මොකකින්ද ?

උ. අතින්.

ප්‍ර. කොහේටද ගැහුවේ ?

උ. මගේ වත්තේ වාඩිය තියෙනවා, වාඩියේ වාඩියේස්තෝප්පුවේ ඉඳගෙන.

ප්‍ර. මොකකින්ද ?

උ. අතින්.

ප්‍ර. කොහේටද ගැසුවේ ?

උ. ඔඵවට ගැහුවා. මෙයාගේ බිරිඳ කෝටුවෙන් ගැහුවා.

ප්‍ර. කොහේටද ගැහුවේ මූණටත් වැදුනද ?

උ. මුණටත් වැදුනා.

ප්‍ර. කිපාරක් ගැහුවාද ?

උ. පාර 05 ක් 06 ක් ගැහුවා.

ප්‍ර. මුණට සහ ඔළුවට ගැහුවම තුවාල වුනාද ?

උ. ඔළුව කැක්කුම ගත්තා.

ප්‍ර. මුණ ඉදිමුනා නේද ?

උ. ටිකක් ඉදිමුනා.

ප්‍ර. ඔළුවට සහ මුණට ගැහුවා ?

උ. ඔළුවට ගැහුවා. මුණටත් වැදුනා.

ප්‍ර. තමන් අමුලික බොරු කියන්නේ, මුණටයි ඔළුවටයි ගැහුවා කියා ?

උ. මට ගැහුවා. .

ප්‍ර. විජේපාලගේ බිරිඳ ගැහුවේ කොහොමද ?

උ. කුරුඳු කෝට්ටක් අරගෙන ඇවිල්ලා එතනදි මට ගැහුවා, විජේපාලගේ බිරිඳ.

ප්‍ර. මොකකින්ද ගැහුවේ ?

උ. කුරුඳු කෝට්ටෙන්.

ප්‍ර. තමන් පොලිසියට කිව්වද විජේපාලගේ බිරිඳ කුරුඳු කෝට්ටකින් හෝ පොල්ලකින් පහර දුන්නා කියා ?

උ. මතක නැහැ.

ප්‍ර. තමන් දැන් මේ නඩුවේ වාසි ගන්න බොරු සාක්ෂි දෙනවා කියා යෝජනා කරන්නේ?

උ. මට වාසි ගන්න උවමනා නැහැ. මම වාසි ගන්න බොරු කියන්නේ නැහැ.

ප්‍ර. දැන් තමන් සිවිල් අධිකරණයේ නඩුවක් පවරා තියෙනවා නේද ?

උ. පවරා තියෙනවා.

ප්‍ර. තමන් පවරාලා තියෙන්නේ මොකටද ?

උ. මේ අය එලියට දාන්න. ඒ නඩුව මේ 26 වෙනිදා තියෙනවා.

ප්‍ර. දැන් තමන් අද කිව්වා පොලිසියට කිව්වද නැද්ද කියා තමන්ට මතක නැත කියා?

උ. ඔව්.

ප්‍ර. තමන් ගිය වතාවේ මේ අධිකරණයේ සාක්ෂි දෙන විට කිව්වා නේද කුරුඳු කෝටුවකින් පහර දුන්නා කියා?

උ. කිව්වා.

ප්‍ර. තමන් පොලිසියට කිව්වද ඒක ?

උ. මතක නැහැ.

ප්‍ර. මතක නැහැ.

ප්‍ර තමන් අද අධිකරණයට කිව්වා මතකයි, පොලිසියට කිව්වද කියා මතක නැහැ කියා?

උ. ඔව්.

ප්‍ර. තමන් යෝජනා කරන්නේ තමන් විජේපාලගේ බිරිඳ ගැහුවා කියා එක වචනයක්වත් කියා නැත කියා පොලිසියට ?

උ. මම කිව්වද මතක නැහැ. මට පෙෂ්ර වැඩිවෙලා සිටියේ මතක නැහැ.

When one peruses the evidence in chief of the virtual complainant as a whole, it can clearly be observed that her evidence in court was that her right arm had rested hard on the ground when she fell after being pushed by the Accused. It is therefore a matter for regret that the learned counsel who appeared for the Accused in the Magistrate's Court had

replaced his own version in place of that of the witness when he questioned the witness in the following manner; දැන් තමන් කලින් දවසේ සාක්ෂි දිලා කියා සිටියා, තමන්ගේ අතටත් වැදුනා, ගහපු පාර ?

Thus, it is clear that the above purported portion of the evidence, which the learned counsel had used to contradict the witness, is not indeed a part of her evidence before Court. Therefore, the learned counsel who appeared for the accused in the Magistrate's Court deliberately, without any excuse, had attempted to mislead the witness by asking questions as if she had stated so in the evidence in chief. In any case, while the witness had not admitted making such statement in Court, the prosecution also had not proved that she had made such statement. Thus, I am of the view that the contradiction **V 1**, is something that does not in reality exists in the evidence of the virtual complainant.

As regards the other contradiction **V 2**, it can be clearly observed that the virtual complainant in both her evidence in chief and cross-examination has been consistent that it was only in the hospital that she got to know that her right hand had been injured. Further, the unfair manner in which the said counsel had questioned the witness clearly shows that the contradiction **V 2**, is a contradiction illegally created by counsel and not an inconsistency in the evidence of the witness.

Learned counsel who appeared for the Accused before the Magistrate's Court had also attempted to highlight certain other items of evidence of the virtual complainant as omissions in her statement to Police. I have carefully perused the evidence of the virtual complainant on record and I am unable to trace any satisfactory proof of the said other so called discrepancies as well. The learned counsel for the reasons best known to him has been satisfied to leave it at that without even making any attempt to adduce proof before Court that the virtual complainant had indeed made such statements. They are either non-existent or are not proved to the satisfaction of Court. A closer look at the questions and answers set out above would manifestly show that it is so. Thus, it is not possible for a Court of law to consider them as omissions in the statement made to Police by the virtual complainant.

Therefore, as reflected from the above record of proceedings, I am of the view that the two purported contradictions marked **V 1** and **V 2** by the defence in the trial before the Magistrate's Court are non-existent contradictions and hence should not be considered as discrepancies in the evidence of the virtual complainant.

The learned defense counsel had also suggested to this witness that there were no signs of assault on her head.

As the sister of the virtual complainant (prosecution witness No. 2) also stated in her evidence that the 1st Accused assaulted both the virtual complainant and herself with hands. She also

stated that the wife of the Accused had assaulted with a stick. She further states that she ran away from the scene when they came to assault her further. She states that there were bruises on the body of the virtual complainant.

In the case of Bandaranaike V Jagathsena and others [8] this Court has taken the view that when version of two witnesses do not agree the trial judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether in the witness' powers of observation were limited.[9]

In the Indian case of State of Uttar Pradesh V M K Anthony,[10] it was held as follows.

" … while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies of trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may defer in some details unrelated to the main incident because power of observation, retention and reproduction defer with individuals. Cross examination is an unequal dual between a rustic and refined lawyer. … "

In the light of the above conclusions it is my view that the learned High Court Judge was right when he concluded that the so called discrepancies has not affected the credibility of the virtual complainant or that the said purported discrepancies have not created any reasonable doubt in the prosecution's case. Therefore, I answer all of the aforementioned questions of law in the negative.

---

[8] 1984 (2) SLR 397.
[9] Ibid. at page 415.
[10] A I R (1985) SC 48 (paragraph 10).

For the above reasons, the Accused Appellant is not entitled to succeed in this appeal. In these circumstances, I affirm both the judgment of the High Court dated 09-05-2017 and the judgment of the learned Magistrate dated 28-04-2015 and direct that this appeal be dismissed.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya J

I agree,

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda PC J

I agree,

JUDGE OF THE SUPREME COURT