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

In the matter of an Appeal in terms of Article 128 of the Constitution of Sri Lanka read with the Supreme Court Rules 1990.

The Democratic Socialist Republic of Sri Lanka.

Complainant

SC Appeal No. 171/2012
SC Special (LA) 139/2012
CA Appeal 38/2011
HC Colombo No. 4931/2009

Vs.

Munasinghe Arachchige Chamila Perera

Accused

AND BETWEEN

In Appeal before the Court of Appeal between

Munasinghe Arachchige Chamila Perera

Accused-Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka.

Complainant-Respondent

AND NOW BETWEEN

Munasinghe Arachchige Chamila Perera

Accused-Appellant-Petitioner

Vs.

The Democratic Socialist Republic of Sri Lanka.

Complainant-Respondent-Respondent

Before: **Justice Murdu N.B. Fernando, PC**
Justice A.L. Shiran Gooneratne
Justice Mahinda Samayawardhena

Counsel: Nalin Ladduwahetty, PC with Hafeel Farisz, Kavithri Hirusha Ubeysekera instructed by Lilanthi De Silva **for the Accused-Appellant-Petitioner.**

Lakmali Karunanayaka, SDSG, **for the Complainant-Respondent.**

Argued on: 27/08/2024

Decided on: 04/11/2024

A.L. Shiran Gooneratne J.

[1] The Accused-Appellant-Appellant was indicted by the High Court of Colombo under the Poisons and Dangerous Drugs Act No. 13 of 1984 (as amended) on two counts i.e. that on or about 19/12/2004, the Accused was in possession of 23.2 grams of diacetyl morphine also known as heroin, and trafficking the said quantity, to which the Accused pleaded not guilty.

[2] At the conclusion of the trial before the High Court, by Judgment dated 01/03/2011, the Accused was convicted on both charges and was sentenced to death. The Court of Appeal by its Judgment dated 14/06/2012, affirmed the said conviction.

[3] Being aggrieved by the said conviction and sentence the Accused-Appellant by Petition dated 24/07/2012 is before this Court, to set aside the Judgment dated 01/03/2011 and 14/06/2012, delivered by the High Court and the Court of Appeal respectively.

[4] By Order dated 26/09/2012, this Court granted leave to appeal on the following questions of law;

1. Did the Court of Appeal misdirect itself in law as to the manner of evaluating evidence as required by law.
2. Did the Court of Appeal err in law when it rejected the Petitioner's evidence and thereby her defence outright.

[5] When this matter was taken up for hearing, the learned Presidents Counsel for the Accused-Appellant identified specific issues, which in his submission arise due to the failure by the Court of Appeal to consider the infirmities in the prosecution evidence, to be addressed by this Court when answering the questions of law, No. 1 and 2 above, which have been reiterated in the written submissions tendered dated 10/09/2024, that is;

1. Contradictions *inter se* in the evidence of PW1 and PW3.
2. Not entering notes by the detection party prior to leaving the police station amounts to noncompliance with departmental orders to ensure that nothing illegal was found on them.
3. Conscious decision not to call PW4, the woman police constable.
4. The inherent discrepancy in the inward journey.
5. Failure to consider the defence of the Petitioner.
6. Excessive intervention and interjections by the learned High Court Judge.

The arrest of the Accused.

[6] The prosecution evidence leading to the arrest of the Accused was that, on 19/12/2004 around 2.45 p.m., a police party consisting of five police officers, including a women police constable were travelling in a three-wheeler on a regular reconnaissance duty and arriving close to the Mattakkuliya petrol station, the leader of the police party, Handagala Devage Piyapala had received information from an informant that a woman was trafficking heroin from Thotalanga to Kelani Ganga Mola area. Acting on the said information a woman was identified in the vicinity of the Aliwatta mosque and on search, had recovered a parcel containing an illegal substance suspected to be heroin from her. Having arrested the Accused, the suspected substance along with the Accused was taken to the Police Narcotics Bureau, where the substance was weighed and sealed. Thereafter, the police party had proceeded to the Modera Police Station where the recovered substance and the suspect was formally handed over to their custody.

[7] The Accused version of events leading to the arrest was different to that of the prosecution. According to the Accused, in the morning of the date of arrest, five police officers had entered her house and had carried out a search. Soon after, the Accused was taken to her mother's house which was in close proximity. Thereafter, the police officers had brought one Siththy Fareena who was known to her and had pointed to a parcel which Siththy Fareena was carrying. The Accused was then questioned about

the parcel and had implicated that the contents of the parcel, as belonging to her. Thereafter, the Accused and Siththy Fareena were arrested and taken to the Modera Police Station in a jeep, and then to the Police Narcotics Bureau.

Contradictions *inter se* in the evidence of PW1 and PW3

[8] It is the position of the Accused-Appellant that there are contradictions in the evidence given by PW1 and PW3, leading to the arrest of the Accused, detection, and the seizure of the illegal substance.

[9] The contradictions that are sought to be highlighted would fall under the test of consistency *inter se* arising from the evidence given by the detecting officer Piyapala and that of police constable Jayakody.

[10] Piyapala under cross examination stated that when he inquired from the Accused as to what contained in the parcel, **she looked frightened and was dumbfounded**. Thereafter, Piyapala had taken the parcel from her hand. Police constable Jayakody who was also a witness to this incident, under cross examination testified to the fact that when the Accused was stopped by Piyapala, **she did not show any excitement**. **The search party had then approached the Accused** and Piyapala had pointed to a parcel in her hand, and on examination they observed that the parcel contained a suspected substance. (Emphasis is mine)

[11] Secondly, under cross examination Piyapala revealed that the informant approached the three-wheeler to part with the information regarding the Accused, and Jayakody's evidence was that Piyapala walked up to the informant to receive the said information.

[12] It is observed that the above positions taken by the Accused-Appellant were not 'put' to the corresponding witness at the trial stage nor was this position agitated at the hearing before the Court of Appeal.

[13] It is the contention of the learned President's Counsel that the contradictions *inter se* as discussed above should have been considered by the learned High Court Judge when evaluating evidence as a whole and with utmost caution.

[14] The learned High Court Judge when analyzing the evidence of Piyapala and Jayakody has come to a clear and a definite finding that there is no reason to doubt the veracity of the testimony of the two witnesses and nothing is brought out to hold against the credibility or the trustworthiness of the witnesses. In evaluating contradictions, it is undesirable for a court to pick out sentences and consider them in isolation from rest of the evidence.

[15] In evaluating contradictions *inter-se* of two witnesses, the Judge must probe whether discrepancy is due to dishonesty, or defective memory or whether witness's power of observation was limited - per Colin Thom'e J. in ***Bandaranayake vs. Jagathsena***[1]. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be given too much importance. ***Boghi Bhai Hirji Bhai vs. State of Gujerat***[2]**.**

[16] In such circumstances, it is of importance to consider whether such inconsistencies go to the root of the matter which can shake the credibility of the witnesses. If that is the case, the evidence can be rejected on that account. The non consistency *inter se* highlighted above cannot be seen as deliberate attempts to depart from the truth which can make a witness unworthy of reliance and affects the credibility of the prosecution case.

[17] In the case of ***Veerasamy Sivathasan vs. AG***[3] which cited the case of ***State of Uttar Pradesh vs. M. K. Anthony*** held that; *"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*

[1] [1984] 2 SLR 397
[2] AIR 1983 SC 753
[3] SC Appeal 208/2012 (15 December 2021).

the court to scrutinize the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in 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 on 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. ... Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals..."

[18] It is noteworthy that the evidence of the said witnesses was consistent and reliable specifically on the material part of arrest of the Accused and the subsequent seizer of the illegal substance at the time of arrest.

[19] The evidence given by Piyapala regarding the arrest of the Accused and the parcel taken into custody in the possession of the Accused corroborates without any reservation with the evidence of Jayakody. The acceptability and the trustworthiness of evidence of both witnesses could be easily ascertained by examining the evidence related to the place of arrest and the subsequent journey to the Police Narcotics Bureau.

[20] Witness evidence can even be acted upon without corroboration where no inhibition or unreliability has been attached or suggested against such testimony. In the circumstances we do not see any reason to depart from the findings of the learned High Court Judge on this point.

Searching the officers and the three-wheeler prior to leaving the police station.

[21] It is contended that a serious doubt of authenticity of the purported detection and arrest arise due to the absence of notes maintained by the detecting police officers in keeping with departmental orders.

[22] In the present case there is no material on record on which it can be said that the three-wheeler used by the police party to travel was searched for any illegal substance which may have contained or in the possession of any of the police officers who travelled in it.

[23] There is evidence in support of the police officer's presence on the scene of the arrest and the subsequent recovery of the illegal substance. The veracity of the evidence of the police officers must be tested on its own merit. It cannot be merely disbelieved or consider to affect the credibility of the evidence and rejected, on the ground of failure/ omission to adhere to an administrative control of the police authorities in maintaining departure notes.

[24] As held in the case of ***Mahathun and Others vs. The Attorney General***[4] *"------*

(4) Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

(5) The Court of Appeal will not lightly disturb the findings of a trial judge with regard to the acceptance or rejection of the testimony of a witness unless it is manifestly wrong."

[25] Even assuming that they are witnesses of interest who failed to follow up with departmental orders, applying the 'rule of caution', their evidence is found to be

[4] [2015] 1 SLR 74

creditworthy. A procedural irregularity cannot be a ground to discredit the testimony of a witness and certainly should not be a ground for acquittal.

Conscious decision not to call PW4 the woman police constable

[26] I may approach the above question of fact by citing the case of ***Naranjan Shel vs. State of Tripura***[5], where it was held that, *"...if the evidence available on record is sufficient to prove the case beyond any doubt, then the non-examination of one or some of the witnesses may not result in discarding the whole prosecution case, which is otherwise found proved from the available material on record."*

Furthermore, as per ***R vs. Russell-Jones***[6] *"The prosecution enjoys discretion regarding whether to call, or tender, any witness they require to attend, but the discretion is not unfettered."*

[27] It was submitted that the decision not to call the woman police constable raises a doubt about the presence of the woman constable at the detection and arrest, and it is urged for the consideration of the application of Section 114(f) of the Evidence Ordinance.

In ***Devunderage Nihal vs. AG***[7], the key issue was whether corroboration is required in drug-related offences. Initially, the Court of Appeal held that corroboration was necessary when trained officers conducted raids, allowing the defence to challenge the prosecution's evidence. The Attorney General appealed, arguing that this imposed an undue burden on the prosecution, as Section 134 of the Evidence Ordinance states that *"no particular number of witnesses shall in any case be required for the proof of any fact."* The Supreme Court held that corroboration is not mandatory for a conviction in cases involving police detection and it is not legally required unless specified by law, and a conviction can be sustained based on a single credible witness if their testimony is deemed trustworthy.

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[5] (High Court of Gujarat, 1 September 1999).
[6] [1995] 1 Cr App R 538.
[7] SC Appeal 154/2010 (3 January 2019)

As held in the case of ***R vs. Stephen Seneviratne***[8], the Privy Council held that the prosecution must call witnesses whose evidence is essential to the unfolding of the narrative of the case. The Court further held that: *"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this, which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candor and fairness on the part of those conducting prosecutions; but, at the same time, they cannot, speaking generally, approve of the idea that a prosecution must call witnesses irrespective of considerations of number and reliability."*

[28] The woman police constable was a member of the arresting party and an eyewitness, though not the sole eyewitness, to the arrest and the seizure of the illegal substance.

As held in the case of ***Walimunige John vs. The State***[9], where two Accused were convicted of murder, one argument raised in the appeal was the failure of the prosecution to call two witnesses, whose names were on the back of the indictment and who were alleged to have been present at the scene. The Appellants argued that the trial judge should have directed the jury to draw an adverse inference from the prosecution's failure to call these witnesses, as per Section 114(f) of the Evidence Ordinance. The Court, however, reaffirmed that the prosecution is not obligated to call all witnesses listed on the indictment. It emphasized the prosecutor's discretion in determining which witnesses to present, and the Court saw no necessity to call the other two witnesses because their evidence would have been merely cumulative, supporting the testimony of the deceased's widow. The Court further held that the trial judge is not required to instruct the jury to draw adverse inferences unless the omission of a witness creates a significant gap in the prosecution's case.

[29] Accordingly, the application of Section 114(f) of the Evidence Ordinance would arise when considering whether an adverse inference ought to be drawn from the absence of a witness who might be expected to give evidence on an important issue of fact.

[8] 38 NLR 208

[9] 76 NLR 488

The Singapore High Court, in the case of ***Cheong Ghim Fah vs. Murugian s/o Rangasamy***[10], addressed the application of Section 116(g) of the Evidence Act, which is identical to Section 114(f) of the Sri Lankan Evidence Ordinance.

"Care should be taken, by parties intending to raise such an inference, to "put" across the reasons for a witness's absence in the course of cross-examination. This is to give the opposing party an opportunity to explain the absence of a witness. Of course, if no witnesses are called or the reason(s) for a witness's absence is undisputed, then the procedure of "putting" the issue does not arise."

[30] In fact, it is the same principle embodied in Section 134 of the Evidence Ordinance, where it states that no particular number of witnesses is required for the proof of any fact. In ***Attorney General vs. Mohomed Saheeb Mohamed Ismath***[11]**,** Jayasuriya J. interpreted it to mean that evidence should be evaluated and weighed, not counted.

[31] The withholding or absence of evidence from the woman police constable by the prosecution was not identified at the trial stage. Had it been so, it would have assisted the Court in their approach to evaluating the evidence. This was also not an issue identified before the Court of Appeal for determination.

[32] The learned High Court Judge decided that the evidence placed before him was sufficient to prove the charges beyond reasonable doubt against the Accused. In all criminal cases, the onus of proving a charge beyond reasonable doubt lies upon the prosecution. It is for the prosecution to decide which witnesses are material to their case in proving it beyond reasonable doubt.

[33] It is a proper exercise of prosecutorial discretion to decide whether or not to call a witness. If the prosecution, in withholding material evidence in its possession, is willfully suppressing such evidence, it would be presumed that the evidence would be unfavorable to the prosecution's case.

[10] [2004] 1 Singapore Law Reports (R) 628
[11] CA No 87/97 (13 July 1999)

[34] When the Court is called upon to decide whether it is appropriate to draw an adverse presumption against the prosecution under Section 114(f), all the circumstances of the case should be considered to determine whether the failure to call that material witness would adversely impact the prosecution's case. If not, the application of the presumption does not arise.

[35] *"The question of who should be called to give evidence for the prosecution is for the prosecuting counsel to resolve. Where counsel is reluctant to call a witness, it is wrong for the trial judge to insist on the witness being called by the prosecution."* ***(R. vs. Grafton[12])***

[36] In the facts of this case, no adverse inference could be drawn by this Court against the prosecution for the alleged willful suppression of the truth, which would inhibit the interests of justice. In these circumstances, Section 114(f) of the Evidence Ordinance would not be applicable.

The inherent discrepancies in the inward journey.

[37] It is alleged that the lapses in the inward journey of productions cannot be cured by an admission under Section 420 of the Code of Criminal Procedure Act. It is also alleged that there were glaring lapses in the chain of custody in the evidence of the witnesses prior to the said admission which the prosecution was bound to bring to the attention of Court.

[38] Section 420 of the Code of Criminal Procedure reads as follows:

"It shall not be necessary in any summary prosecution or trial on indictment for either party to lead proof of any fact which is admitted by the opposite party…

Such admissions may be made before or during the trial.

[12] [1996] 96 Cr App R 156.

Such admissions ***shall be sufficient proof*** *of the fact or facts admitted without other evidence;*

Provided however that this section shall not apply unless the Accused person was represented by an attorney-at-law at the time the admission was made.

Provided further that where such admissions have been made before the trial, they shall be in writing, signed by the Accused, and attested as to their accuracy and the identity and signature of the Accused by an attorney-at-law." [emphasis added]

[39] The principle of admissibility of an admission under this Section is laid out in Section 58 of the Evidence Ordinance which states that:

"No fact needs to be proved in any proceeding which the parties thereto or the agents agreed to admit at the hearing, or which, before the hearing, they agreed to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings;

Provided that the court may come out in its discretion, require the facts admitted to be proved otherwise than by such admissions"

[40] Both Section 420 of the Code of Criminal Procedure Act and Section 58 of the Evidence Ordinance have the effect of dispensing with proof of a formal act done in the course of judicial proceedings. Such admissions would waive the need of evidence by conceding the facts to be placed before Court by the prosecution as true. A plain reading of these provisions indicates that such admissions are conclusive, except where specific legal exceptions apply. Consequently, once an admission is properly made in accordance with legal requirements, it attains a finality that binds the parties and precludes any change in stance regarding the admitted facts.

[41] These provisions indicate that the other party is entitled to rely on the admission and is not obligated to present further evidence on the admitted facts. Therefore, requiring

such party to prove or provide an explanation on the facts already admitted would be redundant and would undermine the purpose of such admissions.

"...Section 58 of the Evidence Ordinance enacts that 'NO fact need be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or, which before the hearing, they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.:." ***[Sivarathnam vs. Dissanayake & others]***[13]

[42] Therefore, this poses a greater duty on Counsel to be thoroughly mindful of the facts they admit on behalf of their clients, as these admissions allow the Court and the opposing party to rely on them. They must ensure that any admissions made are fully considered and reflect the client's position, recognizing that these admissions relieve the other party of the burden of proof for those facts.

"Admissions which have been deliberately made for the purposes of the suit, whether in the pleadings or by agreement will act as an estoppel to the admission of any evidence contradicting them" ***[Burjorji vs. Muncherji]***[14]

[43] The proviso to Section 58 allows the Court to require further proof of admitted facts in other ways than in the form of an admission. As E.R.S.R. Kumarasswami explains in 'Law of Evidence', Volume 1[15], the legal system prioritizes the discovery of truth by all effective methods. Consequently, the doctrine of estoppel should not be extended beyond reasons on which it is founded. Therefore, according to Sri Lankan Law, the Court may exercise its discretion to require further proof for valid reasons, such as when an admission was obtained through fraud, made in error, or under a misapprehension.

[44] In the matter at hand, prior to the closure of the prosecution case the Counsel for the Accused very clearly consented to admit the parcel that was recovered from the

[13] [2004] 1 SLR 145
[14] E.R.S.R. Coomaraswamy, , Law of Evidence (with special reference to Laws of Sri Lanka) Volume 1,126
[15] ibid 127

Accused by PW1 and that it was this same parcel which was examined and in the custody of PW2. With the said formal admission in terms of Section 420, the prosecution did not lead further evidence to substantiate the inward or the outward journey of the said production.

[45] If the Accused-Appellant alleges that such evidentiary admissions relied upon by Court are erroneous or not conclusive, the Court may afford an opportunity to tender an explanation and clarify the point on such question of admission. No such application was made before the trial court or before the Court of Appeal for an appropriate order to be made. Then the question arises as to who should make that application. The position of the Accused-Appellant is that the prosecution had a bounden duty to bring to the attention of court of such infirmity.

[46] The admissions in terms of Section 420 were disclosed at the hearing with the agreement of both counsels. It referred specifically to the evidence of PW1 and PW2. It was the same counsel who represented the Accused when PW1 and PW2 were cross examined. When there is clear evidence of the facts admitted on record it is unnecessary for the prosecution to lead further evidence of proof pertaining to such facts.

[47] An admission can be made at the hearing when the witness is under cross examination or at any time of the trial by the Accused or by Counsel who represents him. The usual practice of Court is to record such admissions in the proceedings, ascribing due consent of the parties.

[48] In proceedings dated 03/02/2011, it is clearly stated that the Counsel for the Accused made an oral application that he does not wish to contest the contents of the said admission. Thereafter in terms of Section 420, the court relying on the said admission proceeded to record acceptance of the said evidence. When an admission during the trial is not specifically traversed by either party, the Court is entitled to draw an inference that the same has been admitted.

[49] It is a well-established legal principle that *"the most important journey is the inward journey, because the final Analyst report will be depend on that*[16]*."* Therefore, it is reasonable to conclude that the admission was made deliberately and with full appreciation of its legal consequences. In the absence of any subsequent challenge or indication of error, it can be concluded that there was no mistake of fact or misapprehension on the part of the defence at the time of the trial. Accordingly, the Court is justified in treating the admission as binding and conclusive, and the prosecution was under no obligation to provide additional evidence on the admitted facts. The contention of the defence that the prosecution had a duty to highlight any alleged infirmities is unfounded, as the responsibility to rectify or withdraw an admission lies with the party who made it.

Failure to consider the Defence of the Accused-Appellant.

[50] This position is advanced by the Accused-Appellant on the basis that she had presented her defence by testifying before Court and the evidence of witness Siththy Fareena, with no marked material contradictions or omissions.

As pointed out by the Judgment by the Court of Appeal,

"…the main thrust of the defence case was that due to the rejection by the Appellant of an improper advance made by a particular police officer called Herath, the police manipulated and fabricated this false charge against the Accused-Appellant. Apart from this bare assertion there is nothing to substantiate this accusation."

[51] When analyzing the evidence given by the Accused before the High Court, the Court of Appeal in its Judgment dated 14/06/2012 was mindful of the fact that the defence version of the events leading to the arrest of the Accused was *"that the heroin was not introduced by the police but was a quantity of heroin brought by a person called Inoka and kept at Siththy Fareena's place."*

[16] [1998] 1 SLR 378

[52] The Court of Appeal in the said Judgment also observed that *"apart from this bare assertion there is nothing to substantiate this accusation."* According to the evidence of the Accused, on the day of the raid, the police party arrived at her house accompanied by Siththy who had in her possession a parcel, the contents of which were thrust upon the Accused. Siththy's version of events reveals that a person called Inoka had left the parcel with her.

[53] In cross examination the Accused implicated a person named Herath of fabricating a false charge against her. The submissions made by the learned Presidents Counsel in Court was that the fabrication was at the instigation of the Accused resisting improper advances made towards her.

[54] However, this position was never suggested to any of the prosecution witnesses other than to be revealed in cross examination of Piyapala, that a police officer by that name was attached to the Blumandal Police Station and not to the Mutwal Police, from where the detection was carried out.

[55] It was not the position of the Accused that placing the parcel of heroin in her possession by the police party, was due to the instigation of Herath. At no time had the defence suggested to Piyapala or any other witness of the said fabrication nor was it suggested that an acrimony prevailed between any of the prosecution witnesses and the Accused, at any time of detection.

[56] As held in the case of ***Gunasiri and 2 Others vs. Republic of Sri Lanka***[17]

"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."

[57] It was admitted by the Accused that Herath was not amongst the raiding party that arrested the Accused. Therefore, his identity remains elusive to the investigator.

[17] [2009] 1 SLR 39

[58] The testimony of Siththy does not reveal that she informed the police party that the parcel belonged to Inoka, nor was it 'put' in issue when Piyapala or Jayakody was under cross examination. The Court of Appeal correctly observed that Siththy did not speak about Inoka to the police and gave evasive answers in cross examination to the questions put to her concerning Inoka.

[59] This Court observes that the lapse on the part of Siththy's evidence on this issue makes her testimony improbable and lacks trustworthiness due to concealing the identity of Inoka from the investigators and/ or when testifying in Court. If the parcel thrusted upon the Accused was in fact kept at Siththy's house by Inoka, in all probability Siththy should have divulged that vital information, well knowing the inevitable risk attached to it for not having done so.

[60] This is not in any way to say that the Court is in question on the failure to call a particular witness to testify about something of importance for the defence or imposing a burden on the Accused to prove her innocence. Nevertheless, the Judge has the right to comment on the failure of not calling a particular witness and make general observations, when the Court is aware that the particular witness had relevant evidence to testify upon the commencement of the defence case.

[61] Furthermore, when considering the credibility of the witnesses, the learned trial judge conducted an extensive analysis of both witnesses for the defence. The learned trial judge concluded that the evidence of both these witnesses lacks credibility and is improbable. As held in the case of ***Dharmasiri vs. Republic of Sri Lanka***[18]:

"Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness..."

[18] [2010] 2 SLR 241

In the case of ***AG vs. Sanadanam Pitchy Mary Theresa***[19] Shiranee Thilakwardene J quotes the following regarding the credibility, with approval,

"A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be referred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29)."

In the same case, Tilakawardena J. cited ***Onnassi vs. Vergottis***[20] with approval, which states that: *"one thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a court of appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial judge and the court of appeal has not been occasioned by any demeanor of the witnesses or truer atmosphere of the trial (which may have eluded the appellate court) or by any other of those advantages which the trial judge possesses."*

[62] Having evaluated the evidence, the learned trial Judge and the Judges of the Court of Appeal came to the same conclusion that the prosecution has discharged its burden by proving its case beyond reasonable doubt. Both Courts also held that the evidence given by the Accused-Appellant and Siththy Fareena are not cogent, improbable, and unbelievable.

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[19] [2011] 2 SLR 292
[20] [1968] 2 Lloyd's Report 403

[63] For all the reasons stated above, this Court finds that the evidence given by the Accused-Appellant and the defence witness is not sufficient to create any doubt in the case for the prosecution and on that account the defence case is rejected.

The excessive intervention and interjection by the learned High Court Judge.

[64] The above concern was raised for the first time by the learned President's Counsel for the accused appellant in his oral submissions to this Court and also by post hearing written submissions filed of record. However, no specific instance of the trial judge acting in such manner was brought to our attention.

[65] While the Court should be mindful of Section 165 of the Evidence Ordinance, it is well received and acknowledged that a presiding judge cannot be a silent spectator in the evidence collection process and it is not only his right but his duty to take part in finding out the truth to reach the correct conclusions. In the process of evidence collection, the Court must be alert and alive and make use of whenever it thinks necessary to maintain fairness of the trial. This Section *"…enables the judge to obtain what is described as "indicative" evidence, and which has been defined by Best as "evidence not in itself receivable but which is indicative of better."*[21]

[66] One such way of Achieving fairness in a trial proceeding is to record questions put by the Court to the witness as questions by court or an indication to that effect, which the trial court was in conformity.

[67] There should be no absolute fetters placed to restrain the efficiency of a trial judge in establishing the facts in a criminal case. *"If the object of the trial is, first to ascertain truth by the light of reason, and then, do justice-conventionalized, indeed- justice according to law-upon the basis of this truth, then the judge is not only justified but required to elicit a fact, whenever these interests of truth and justice would suffer, if he did not.*[22]*"*

[21] E.R.S.R. Coomaraswamy, Law of Evidence (with special reference to Laws of Sri Lanka) Volume 2, Book II 861
[22] Sir John Woodroffe and Syed Amir Ali's Law of Evidence (18th edn, vol 4, LexisNexis 2009) 6557.

[68] In the case of ***The Queen vs. Nimalasena de Zoysa***[23]**,** questioning by the trial judge became a point of contention in the Appeal. The main issue was the number of questions asked by the Judge. The Appellant's argued that the Judge's conduct, including asking numerous questions, prejudiced the defence. His Lordship the Chief Justice acknowledged the high number of questions asked by the trial judge, but held that the Judge's actions did not amount to a miscarriage of justice. The Court stated that simply asking a large number of questions, even more than the lawyers involved, was not in itself a reason to overturn the conviction unless it could be shown that it led to a miscarriage of justice. The court concluded that there was no evidence or complaint that the Judge's questioning interfered with the cross-examination or examination of witnesses by either side. Therefore, the Court found that the volume of questions alone was insufficient to justify quashing the conviction.

[69] In the above case Basnayake C.J. observed that; "*The section quoted above* [Section 165 of the Evidence Ordinance] *gives the Judge a wide power. In order to discover or to obtain proper proof of relevant facts he may ask any question he pleases in any form, at any time, about any fact whether relevant or irrelevant. This power extensive though it be [sic] has limits, but those limits cannot be precisely defined. The trial Judge himself is the best arbiter of how and when he may exercise it. In its exercise a Judge should be careful not to usurp the functions of the prosecution or the defense."*

[70] In this case we do not find any instance where the trial judge has over indulged himself of participating excessively in examination or cross examination of witnesses and/ or being intolerant and resentful towards the Counsel client relationship.

[71] In the circumstance, this Court is of the view that, in deciding on this Appeal the two questions on which leave to appeal to this Court was granted and which have been quoted earlier in this Judgement should be decided in the negative.

[23] 60 NLR 97

[72] In these reasons, the Judgement dated 01/03/2011 of the High Court Judge and the Judgement dated 14/06/2012 of the Court of Appeal are hereby affirmed and this Appeal is dismissed. No order for Costs.

Judge of the Supreme Court

Murdu N.B. Fernando, PC, J.

I agree

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree

Judge of the Supreme Court