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

In the matter of an Appeal in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Vs.

S.C.Appeal No.16/2021
SC/SPL/LA No. 88/20
Court of Appeal Case No.HCC/217/2018
H.C. Embilipitiya Case No. HC 85/2014

Punchihewage Sampath Kumara alias Bindu
Presenly in Angunakolapalassa Prison
Accused

And then Between

Punchihewage Sampath Kumara alias Bindu
Presenly in Angunakolapalassa Prison
Accused-Appellant

Vs.

Hon. Attorney General
Attorney General'sDepartment,
Colombo 12.
Complainant -Respondent

And Now Between

Punchihewage Sampath Kumara alias Bindu
Presenly in Angunakolapalassa Prison
Accused- Appellant -Appellant

Vs.

Hon. Attorney General
Attorney General'sDepartment,
Colombo 12.
Complainant-Respondent-Respondent-

BEFORE : **A.H.M.D. NAWAZ J.**
ACHALA WENGAPPULI, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Kaushalya Happuarachchi with Dharshan Weerasekera for the Accused-Appellant-Appellant.
Chethiya Goonesekera P.C. ASG with Yuresha de Silva DSG for the Complainant-Respondent-Respondent

ARGUED ON : 09th June, 2023

DECIDED ON : 05th December, 2025

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ACHALA WENGAPPULI, J.

The accused-petitioner-appellant, who initiated the instant appeal process (hereinafter referred to as "the Appellant"), was indicted by the Hon. Attorney General (hereinafter referred to as "the Respondent") for committing the offence of rape on *Kaludurage Champika.* The Appellant pleaded not guilty to the indictment and elected a trial without a jury. After trial, the trial Court found

him guilty as charged and was accordingly sentenced by imposing a ten-year term of imprisonment on him. The appeal preferred by the Appellant, challenging the validity of the said conviction and sentence, was dismissed by the Court of Appeal. The Appellant thereupon sought Special Leave to Appeal against the said judgment of the Court of Appeal.

On 18.01.2021, this Court, having heard the parties, thought it fit to grant Special Leave to Appeal to the Appellant in respect of following two questions of law;

i. Whether the prosecution has proven beyond reasonable doubt that the ingredients of the offence of rape relating to sexual intercourse without the consent of the prosecutrix?

ii. Whether the learned High Court Judge has evaluated the evidence led at the trial and arrived at conclusions in terms of the law?

At the hearing of the instant appeal, the primary contention presented by the learned Counsel for the Appellant for consideration of this Court was that the prosecution has failed to prove one of the essential elements of the offence of rape, being that the Complainant did not consent to the act of sexual penetration by the Appellant. The Appellant, in his statement from the dock, admitted that he has had sexual intercourse with the Complainant *Champika* and claimed that it was consensual.

The prosecution, in support of its case, presented the evidence of *Champika,* one of her immediate neighbours, *Sriyalatha,* the medical officer, who examined

Champika and the police officers, who investigated her complaint of rape. When the trial Court called for the defence, the Appellant made a statement from the dock. He did not call any witnesses.

The Appellant's grievance is that his defence of consensual sex was not properly considered by the Courts below. He contended that owing to that very reason; both Courts have erroneously concluded that he had sexual intercourse with *Champika* without her consent. In order to impress upon the validity of his said defence on this Court, apart from his own evidence, the Appellant heavily relied on the conduct on the part of the Complainant, during the entire period he was with her that evening.

In order to determine the validity of the Appellant's said contention, it is necessary to examine *Champika's* evidence, in a more detailed manner.

Champika, a 30-year-old married woman and a mother of four, was living with her husband at *Wasanagama* in *Sevanagala* area of *Embilipitiya.* Her husband, *Pushpa Kumara,* being a freshwater fisherman, supported his family with that income. They lived in a house with two rooms, a common area and a kitchen. They had no electricity and were relying on bottle lamps for lighting purposes. The main entrance was secured with a wooden door, but the back door was only a corrugated metal sheet put across the doorway, when not in use.

On the day of the incident, at about 9.30 p.m., the Appellant came to *Champika's* house and called out her husband's name. When *Champika* responded saying that her husband is not at home, the Appellant enquired where he was. The Appellant then said that he came there to ask for a piece of a cigar. Once told that *Pushpa Kumara* was away, the Appellant went over to the house in front. The Complainant heard him talking to her neighbour *Sriyalatha*.

She then went to sleep. Her 12-year-old son, *Akila,* being the eldest, slept in the adjoining room. *Champika,* was woken up suddenly that night, as she felt someone trying to sit beside her on the bed. She initially thought it was her husband but soon realised that it was the Appellant. Being perplexed with this unexpected intrusion into her house by the Appellant, *Champika* shouted for her son *Akila*. He did not wake up to *Champika's* calling. After the Complainant had recognised the Appellant, she wanted to know why he returned. The Appellant then said that he just wanted to have few words with *Champika,* over his affair with one *Kanthi,* which apparently had suffered a setback due to some utterance attributed to the Complainant. He was angry over the fact that his affair had to be terminated. Then, the Appellant himself led *Champika* out of her house through its backdoor. They talked for about 20 minutes under an acacia tree, over the issue with *Kanthi*. The Appellant, at that point, requested some water. When *Champika* returned with a glass of water, the Appellant suddenly hugged her tightly and had dragged her back into the kitchen.

At the kitchen, the Appellant, after threatening her with a knife, removed her outer and under garments. He then took his sarong off and laid it on the kitchen floor, pushed her on to it and penetrated her. After the act the Appellant had walked away. *Pushpa Kumara* returned home sometime later in that same night, but *Champika* did not mention the act of sexual violence committed by the Appellant. The Complainant feared that if she disclosed what happened that evening, her husband would have done something very violent. She thought he might even kill the Appellant and, as a result of which, she would become destitute with their children.

The Appellant once again returned to *Champika's* house in the same night and chatted for some time with *Pushpa Kumara*. The Complainant's took this act,

on the part of the Appellant, as an attempt to gauge the situation and particularly her husband's reaction. After the incident, *Champika* was frightened, felt helpless and dejected. She contemplated taking her own life. In the following morning, with that intention in her mind, *Champika* has taken her children to her mother's place. She thought she would leave them with her mother for their safety and then go to buy some pesticides. The moment *Champika's* mother asked where she is going by leaving behind her children, she could not hold her emotions any longer and started crying. Only then *Champika* narrated her dreadful experience with the Appellant.

The position taken up by the Appellant in his statement from the dock that he had consensual sex with the Complainant was in fact put to *Champika,* by his Counsel, during cross-examination. The Appellant suggested to her that they met earlier on that day and he visited her that evening on the invitation she had extended to him. It was also suggested that it was she who disclosed that her husband would be away that evening. She was also suggested by the Appellant they had an ongoing "*affair*" (සම්බන්ධයක්). The Appellant, further suggested that, one *Ananda* had seen they were together in that evening. It was also suggested that *Ananda,* being her step-father, thereupon found fault with *Champika* for her immoral act, which in turn prompted her to make a false complaint to police against the Appellant. *Champika* denied all these suggestions.

The Appellant also relied on an admission made by *Champika* that she knew him from her childhood and he was helping out her husband regularly in his vegetable cultivation in order to support his assertion that their extramarital "*affair*" commenced only during that time.

The Appellant, describing the incident in his evidence stated that, after the nightfall, he went over to *Champika's* house at about 9.30 p.m. They chatted for a

while and then had consensual sex. While returning from *Champika's* house, the Appellant was accosted by *Ananda* (step-father of *Champika*) near his house. The Appellant, however, did not respond to *Ananda's* act and simply walked away from the situation without creating a scene over it.

With the admission of the Appellant that he had sexual intercourse with *Champika,* there is no question that the element of penetration, being another essential element of the offence of rape, was established. They knew each other well before the incident and therefore there is no contest on the identity of the Appellant either. What remains is essentially a question of fact; whether *Champika* had consensual sex with the Appellant or he had forcibly penetrated her without consent, which had to be determined by the trial Court.

Perusal of the judgment of the trial Court, particularly the segment that dealt with this aspect, reveals that it had considered the following factors, before accepting *Champika's* evidence as a credible and reliable account of the incident;

a. the fact that *Champika* called out her son loudly is a fact corroborated by *Sriyalatha*, who also confirmed that the Appellant came to her house during that evening for no apparent reason. The trial Court found it is probable that the Complainant, being alarmed by the unexpected intrusion of the Appellant into her house, hurriedly called out for her son, and taken it as a factor that supports *Champika's* claim that she had no idea that the Appellant would come into her house that night. The trial Court noted that it runs contrary to a claim of the Appellant of being invited to visit her that night.

b. The fact that *Sriyalatha's* confirmation of the Appellant's visit to her house in that late evening was taken by the trial Court as another factor that supported her version for that Court said that there was no other reason for the Appellant to freely roam around in the neighbourhood, if *Champika* expected his arrival during the period in which her husband was away from home and make his presence in that late night known to others.

c. the fact that the Appellant had entered through the rear entrance to *Chamipka's* house by simply removing the corrugated metal sheet, which she had kept across it as a door, is supportive of the fact that the Appellant had entered uninvited and surreptitiously into her house,

d. the reason given by *Champika,* as why she did not shout calling out for help when the Appellant removed her clothes after threatening with a kitchen knife, was that she feared for the safety of her young daughter and the other children, which was accepted by the trial Court as a probable and sufficient explanation of her conduct.

e. the evidence of the medical expert, who examined *Champika* in confirming that she had a "*fresh tear in the posterior vaginal wall*", which in his opinion could have been caused when she was subjected to forceful penetration during sexual intercourse, was taken by the trial Court as another factor consistent with her

claim of non-consensual intercourse, and thereby corroborating her version, although it might also result during consensual sex.

The trial Court had thereafter acted on her emphatic assertion that she did not consent to have sexual relationship with the Appellant in convicting him for the offence of rape.

In consideration of the appeal of the Appellant, the Court of Appeal reviewed the evidence relevant to the complaint that the prosecution had failed to prove the absence of consent to the sexual act to the required degree of proof. The appellate Court, after considering the reasoning adopted by the trial Court in coming to the conclusion that there was no consent, decided that the said ground of appeal is without any merit.

Even before this Court, learned Counsel for the Appellant made submissions on the same footing and invited attention to the evidence that referred to the conduct of *Champika* during her interaction with the Appellant. He submitted that *Champika* had willingly followed the Appellant out of her house and walked up to the acacia tree, in order to facilitate their discussion, during the initial phase. Learned Counsel also relied on her failure to seize the opportunity to run away from him or at least to cry out for help, when his attention shifted to take off his sarong and to lay it on the ground. Learned Counsel argued that the Appellant had unwittingly provided an opportunity to the Complainant by letting off his hold on her, but surprisingly, *Champika* did not even make an attempt to run away from him, which according to the Counsel, is a factor that strongly resembles the conduct of a willing party to the sexual act.

Learned Counsel for the Appellant, after making reference to the evidence of the Complainant that the Appellant had forcibly removed her garments, and in the process tore out a part of her blouse, which she identified during trial, in order to pose the question as to how all this could have been done by his client, without the Complainant "*struggling, screaming, or running away*", as the answer is unclear to him.

These aspects of the evidence presented by the prosecution had already been considered by the trial Court as well as by the appellate Court, in the respective judgments, quite in detail. The trial Court accepted *Champika's* explanation that she was threatened by the Appellant with a knife and she was fearful that her young daughter too would be ravished by the Appellant. The appellate Court concurred with that view.

However, in view of the submissions made before this Court by the learned Counsel, particularly in placing heavy reliance on the conduct of *Champika,* that it is reasonable for his client in these circumstances to assume she consented to the sexual act, I cannot help but to note that the said submission is necessarily founded on a preconceived notion, entertained by the Appellant that, under the given situation, *Champika* should have acted in the exact manner he expected her to act, if she did not consent, i.e., by struggling, screaming and running away. On the other hand, the Appellant's contention in this regard could also be construed as the failure on the part of the Complainant to act in any one of these specific ways would naturally be a justification for him to act on the assumption that she is a consenting party to the sexual act.

This type of societal notions which the Appellant had relied on in presenting these submissions are generally referred to as '*stereotypes in sexual relations*' and '*rape myths*'. They do form an area of interest that attracted the

attention, not only of sociologists, but of those who are associated with the administration of criminal justice systems of many a jurisdiction. Learned State Counsel, in reply to the said submission of the Appellant, relied on a judgment of the Canadian Supreme Court in ***R v Ewanchuck*** (1999) 1 SCR 330. This judgment reproduces a section from a book, authored by *D. Archard,* titled ***Sexual Consent*** (1998), where it is stated that (at p. 131);

> "*[M]yths of rape include the view that women fantasise about being rape victims; that women mean 'yes' when they say 'no'; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lessor harms than sexually 'innocent'); that women often deserve to be raped on account of their conduct, dress and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexual activity include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the 'possession' by a man of a woman, and that heterosexual activity is paradigmatically penetrative coitus.*"

In the United Kingdom, *The Crown Court Compendium* (updated version of April 2025), is a compilation of specimen directions, covering over a wide range of issues that might come up before a trial Court, on which the presiding Judge is expected to provide guidance to the jury to determine them in line with the applicable law. The specimen found in the said *Compendium,* with regard to rape myths and stereotypes, provide assistance to Judges in the United Kingdom, in formulating their addresses to the jurors, in relation to issues that arise during prosecutions conducted on sexual offences which they must determine (vide p.

467). In ***R v Miller*** [2010] EWCA Crim 1578, following specimen direction to the jury received approval of the Court of Appeal;

> *"The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits."*

In my view, although some of these stereotypes and rape myths referred to in this judgment and also in the specimen direction inserted in the compendium might differ from its Asian versions, perhaps due certain cultural and socio-economic differences, yet it is important that the trial Judges as well as Counsel, who assist Courts, on behalf of the prosecution as well as the defence, should be alive to such popularly held but unreliable societal notions, and their adverse effects on the respective cases, not only in assessing credibility of the witnesses but also in determining imposition of criminal liability on those who are accused of sexual offences.

Even in South Asian setting such stereotypes might have the potential of preventing the Courts from understanding the realities of a situation, as they

might tend to subconsciously cloud its ability to arrive at a fair judgment on the narrative of the Complainant. The Supreme Court of India published a handbook titled "***Combating Gender Stereotypes***" (updated in 2023), in which contained 15 such stereotypes identified as are prevalent in Indian society. The authors have arranged them under the heading (at p. 16) *"Stereotypes concerning sex and sexual violence"*. One such stereotype identified by that Court is "*[I]f a woman does not scream for help, attack the rapist or if she does not have any injuries on her body such as cuts and scrapes, she has not been raped."*

The Explanation (ii) to Section 363 of the Ceylon Penal Code, as amended, seems to have been enacted to address this very issue as it states *"[E]vidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent"*. In the case of ***State of Uttar Pradesh v Chhotey Lal*** (2011) 2 SCC 550, Supreme Court of India stated "*[I]t is wrong to assume in all cases of intercourse with women against will or without consent, there would be some injury on the external or internal parts of the victim"*.

Since the core issue presented before this Court is whether the Courts below have considered and determined the disputed fact in issue, namely, did *Champika* consent to have sexual intercourse with the Appellant correctly, it is necessary to understand the nature of the evidence, which the Appellant relied on as indicative of her 'consent', in terms of the definition given to the consent in sexual matters by the superior Courts, an essential element of the offence of Rape.

But, before even I venture in that direction, it is important to take note of an observation made by Professor *G.L. Peiris* in his book titled ***Offences under the Penal Code of Ceylon*** in this regard (at p.222). Learned author states "*[I]t is a fundamental principle that, where the woman's consent is an issue, a conviction of rape*

will be upheld only in circumstances where the prosecution succeeded in establishing absence of consent beyond a reasonable doubt. If proof of this element is lacking, the cause of the prosecution is necessarily incomplete. Consequently, no burden devolves on the defence in these circumstances. Any departure from this position culminates in a miscarriage of justice." The trial Courts as well as appellate Courts must constantly be reminded of this fundamental principle, in determining criminal liability in cases of Rape.

The question what exactly is denoted by the word "*consent*" that contained in Section 363 of the Penal Code had received attention of the superior Courts on several occasions. Professor *Peiris*, in that book (at p. 223), quotes from a case decided in 1919, where a more complete description to the word consent could be found. In the case of ***Kalimuttu*** (6 C.W.R. 142) *Schneider* J observed "*[C]onsent is not mere submission. There can be no consent where there is no proper knowledge of the nature of the act. Consent cannot be implied unless the conscious mind had considered the nature and consequences of the act and had then submitted to it*". This Court respectfully agree with the description given to the word 'consent' by *Schneider* J, in relation to the offence of Rape.

Even though the said observation refers to an '*implied consent*', such consent, is in turn hinges on the affirmative answer to the question whether a "*conscious mind had considered the nature and consequences of the act and had then submitted to it.*" Thus, in a situation where there are no words either spoken or written, or any other reliable mode of communication by which consent could explicitly be indicated by an individual, consent could be implied only when in fact there are indications that a "*conscious mind had considered the nature and consequences of the act and had then submitted to it.*" Whether this qualification was

satisfied or not at the given time, could only be answered by the very person, whose consent is required by law.

Coming back to the set of circumstances revealed in the instant appeal, it is clear that the trial Court had found the evidence of *Champika* is well corroborated by material particulars and therefore could be taken as a truthful and reliable narrative of what had taken place in that night, and accordingly the Court could act upon it safely. The Appellant did not take up the position of a mistake, in inferring her consent. Instead, he relied on her alleged invitation, extended to him to pay a visit when her husband was away, as an act indicative of consent. He also claimed that they had sexual relations prior to this instance. Thus, the Appellant appears to have inferred *Champika* had impliedly consented to have sexual intercourse with him purely on the strength of such an invitation. In addition, he relied on the conduct attributed to the Complainant during his interaction with her claiming that too suggestive of her consent.

The evidence of the Appellant, presented through his statement from the dock, was rejected by the trial Court and there is no complaint by the Appellant on the findings of the trial Court or of the appellate Court in that regard in relation to either of the two impugned judgments. That conclusion left only the issue of 'implied consent' for the Appellant to harp on, and that too by placing reliance on the 'conduct' of the Complainant, inviting this Court to determine whether the prosecution was able to establish the element of absence of the Complainant's consent, beyond a reasonable doubt.

It appears that the Appellant's contention, presented before this Court, particularly in relation to the first question of law that had been formulated on the issue of consent, is based on the premise that the trial Court, even after accepting *Champika's* evidence as a truthful and reliable account of what had

taken place, it must once again scrutinise her evidence, this time, looking for signs of any "*implied consent*" that could be inferred from her conduct. Perusal of the relevant section of the judgment of the trial Court reveals that there is in fact a finding made by the trial Court to that effect, when it held " ... **කැමැත්ත ඇතිව ලිංගික ක්‍රියාවක යෙදෙන කාන්තාවකගේ හැසිරීම පැ. සා. 1 ගෙ ක්‍රියාවන් අනුව අනාවරණය නොවන බව තීරණය කරමි.**". Elsewhere in that judgment, the trial Court already found *Champika's* evidence as credible and a probable version after making reference to evaluation of specific items of her evidence. This is indicative of an evaluation of the Complainant's evidence on the issue of consent twice over. Once the Court is satisfied with her testimonial trustworthiness and then, on the issue of implied consent. This particular approach adopted by the trial Court could not be taken as an approach that is in conformity with the applicable principles of law.

Only *Champika* knows, whether she acted in the manner attributed to her, after her "*conscious mind had considered the nature and consequences of the act and had then submitted to it.*" She categorically denied that the Appellant had sexual intercourse with her consent. In this context, a very relevant observation that has been made by the Canadian Supreme Court in ***R v Ewanchuck*** (*supra*) which must be reproduce here. The Court said *"[T]he trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus of sexual assault is proven".*

The underlying premise on which this pronouncement was made by that Court is described therein as follows;

> *"The trial Judge's conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he [the Judge] found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies woman's sexual autonomy and implies that women are in a state of constant consent to sexual activity."*

In the instant appeal too, it must be reiterated that *Champika,* either with spoken words or in any other manner did not express her consent to have sexual intercourse with the Appellant. On the other hand, it is her clear evidence that the Appellant had ravished her like a "*madman*" after ignoring all her pleas not to (**"පිස්සෙක් වගේ මට කරදර කලා, මම එපා කියද්දි කරදර කලා"**). *Champika* also said that she had prostrated before the Appellant, begging and pleading with him to go away without harassing her sexually. During cross-examination of the Complainant, the Appellant did not challenge any of these factual assertions made by her. The Court of Appeal, in order to reach its conclusion to affirm the conviction of the Appellant, too had noted these items of evidence and relied on them. The said assertions of *Champika* makes it clear, without leaving room for any ambiguity, that not only she did not consent but explicitly conveyed her mind to the Appellant that she had no such intentions. However, the Appellant's contention appears to be founded upon the fact that he had perceived her invitation as indicative of implied consent, which the trial Court considered independent of the issue of credibility, but rightly decided in favour of the prosecution, before finding the Appellant guilty of the charge.

In view of the description of the 'consent', in the observation of *Shnider* J in the judgment of ***Kalimuttu*** (*supra),* I am persuaded by the said reasoning

adopted by the Canadian Supreme Court to hold that, after the trial Court already found *Champika's* evidence is credible and reliable, the claim of implied consent, sought to be deducible from the conduct attributed to the Complainant, during her interaction with the Appellant, should not have been considered by the trial Court as it had already been established in the negative by her evidence.

Thus, in view of the above reasoning, I proceed to answer the two questions of law on which the instant appeal was argued before this Court, in the affirmative. The judgments of the Court of Appeal and the High Court are hereby affirmed, along with the sentence imposed on the Appellant.

But before I conclude this judgment by proceeding to dismiss the Appellant's appeal, it is important to note a very serious and a disturbing lapse on the part of the prosecution.

On 19.09.2016, learned State Counsel, by way of a Motion, moved Court to call for the DNA report from GENETECH. On 27.10.2016, the High Court received the report sent by GENETECH and issued a copy to the prosecution. During cross-examination of the investigating officer, the Appellant questioned the official witness whether his blood samples were taken for a DNA analysis. The witness answered in the affirmative.

However, for the reasons best known to the prosecution, the DNA report was not tendered as an item of evidence for the prosecution. The said report indicate the DNA of the Appellant was identified in the underskirt worn by the Complainant that night. Since the Appellant admitted having sexual intercourse in his statement from the dock, the said failure had not resulted in a serious miscarriage of justice. The serious lapse on the part of the relevant prosecutor is

obvious. But I think, even the trial Judge too had been at remise in this regard for it is her primary duty to discover the truth.

Before I part with this judgment, it is noted that the Appellant was imposed a ten-year term of imprisonment by the trial Court on him for committing rape on the Complainant. The High Court imposed the said sentence on 20.09.2018. The Appellant's appeal preferred against the said conviction and sentence was dismissed by the Court of Appeal on 10.03.2020.

With the pronouncement of the judgment on the appeal of the Appellant by this Court, the Appellant in effect had been in remand for a total period of 87 months, pending determination of his two appeals. The consideration of the time spent in remand by an appellant pending determination of his appeal by the Court of Appeal is governed by the statutory provisions contained in Section 333 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

Section 333(5) of the said Act states that the time during which an appellant if in custody "*… shall not count as part of any term of imprisonment under his sentence*" and " *… shall subject to the directions or order of the Court of Appeal be deemed to … begin to run … as from the day on which the appeal is determined …*". The Court of Appeal in its judgment, did not make any such order, regarding the time spent in remand. Thus, in terms of Section 333(5) the Appellant's sentence is deemed to begin to run only from 10.03.2020.

However, the proviso to Section 333 states thus;

> " *… the Court of Appeal may, in appropriate cases, order that the time spent by an appellant in custody pending the determination of his appeal and any time spent in custody prior to the conviction, such time not having been considered as part of his sentence passed at the time of his conviction*

by the court of first instance, be considered as part of his sentence ordered at the conclusion of his appeal".

If the sentence is deemed to run from the date of judgment of this Court, as the law provides for, the ten-year term of imprisonment imposed on the Appellant should begin to run from the date on which this judgment is pronounced. The resultant position would be the Appellant is incarcerated for a total period of 207 months, inclusive of the term of imprisonment of 120 months. In the circumstances, I am of the view that this is an appropriate case, where an order of Court should be made to the effect, that the ten-year term of imprisonment should deem to have commenced from the date on which his appeal to the Court of Appeal was dismissed, i.e., 10.03.2020 and not from the date of the judgment of this Court.

The appeal of the Appellant accordingly stands dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT