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

SC Appeal No.32/11
SC SPL LA No.304/2009
HCMCA no. 595/04
Magistrate's Court of Maligakanda
No. 7923/C

In the matter of an application under and in terms of Section 9(a) of the High Court of Provinces (Special Provisions) Act No.19 of 1990

Officer-in-Charge.
Police Station, Maradana.

Complainant.

Vs.

01. Galabada Payagalage Sanath Wimalasiri,
No.D/1/2, Police Quarters,
Gonahena, Kadawatha.
02. R. Jeganathan,
No.139, Ericwatte,
Galaha

Accused.

AND BETWEEN

Galabada Payagalage Sanath Wimalasiri,
No.D/1/2, Police Quarters,
Gonahena, Kadawatha.

Accused-Appellant.

Vs.
Officer-in-Charge.
Police Station, Maradana.

Complainant-Respondent

AND NOW BETWEEN

Galabada Payagalage Sanath
Wimalasiri,
No.D/1/2, Police Quarters,
Gonahena, Kadawatha.

Accused-Appellant-Petitioner

Vs.

Officer-in-Charge.
Police Station, Maradana.

Complainant-Respondent-Respondent

Honourable Attorney General,
Attorney-General's Department,
Colombo 12.

Respondent.

BEFORE: WANASUNDERA, PC, J
ALUWIHARE, PC, J
GOONERATNE, J

COUNSEL: Saliya Peiris for the Accused-Appellant-Appellant
Thusith Mudalige, SSC for the Attorney General

ARGUED ON: 15.07.2015

DECIDED ON: 30.11.2016

**ALUWIHARE, PC. J**

The Accused-Appellant (hereinafter referred to as Appellant) was charged along with another accused before the Magistrate's Court for committing an act of gross indecency between two persons in terms of Section 365A of the Penal Code as amended.

At the conclusion of the trial the Magistrate had found the Appellant and the other accused guilty and having convicted them for the said offence had imposed a term of imprisonment of one year and in addition a fine of Rs.1,500 with a default sentence of six months, was also imposed on the Appellant and the other accused.

Being aggrieved by the judgment the Appellant appealed against the conviction and the sentence so imposed by the Magistrate to the High Court and the High Court having considered the appeal, affirmed the conviction and the sentence.

The Appellant then moved this court by way of Special Leave to Appeal and Special Leave was granted by this court on the questions of law set out in sub paragraphs (a), (b), (c) and (d) of paragraph 8 of the Petition of the Appellant which are reproduced below:

a. Is the conviction of the Appellant vitiated by the failure of the learned Magistrate and the learned High Court Judge to adequately consider the evidence of the 3rd witness for the prosecution Nihal Premaratne?

b. Did the learned Magistrate and the learned High Court Judge fail to consider that the evidence of the 3rd witness for the prosecution Nihal Premaratne casts a reasonable doubt on the prosecution and

lends credence to the defence position that the Petitioner was falsely implicated the police officers who had an altercation with him?

c. Did the learned High Court Judge fail to consider the serious errors of law made by the learned Magistrate in evaluating the Dock Statement of the Petitioner?

d. In the alternative to (a) to (c) above, in all circumstances of this case was the sentence imposed on the Petitioner excessive and done without consideration of the provisions of Section 303(1) of the Criminal Procedure Code?

The facts of this case are as follows:-

Sergeant Wijetunga of Maradana Police had been on "beat" duty with P.C.24473 Dissanayake on the day in question. Around 9.15 p.m. while they were walking from the direction of the Technical junction towards the Maradana Police Station, they had received information to the effect that two persons were engaged in oral sex, inside a vehicle that was parked at a vehicle park nearby. Accompanied by the informant the two police officers had walked up to the vehicle which was found to be a van and had seen two males engaged in the act referred to. Having requested them to come out, both the Appellant and the other accused were placed under custody and had produced them at the Police Station. Under cross examination sergeant Wijetunga stated that the person who gave the information is one Premarathne who runs a tea kiosk close to the Technical junction and he recorded a statement from Premarathne. Sergeant Wijetunga also testified to the effect that the appellant was under the influence of liquor at the time and did not cooperate with him in the discharge of his duties, refusing to disclose his identity or to producing his identity card. When he was

produced before the Officer-in-Charge of the Maradana Police Station, however he had got to know that the Appellant is a sub-inspector of Police.

It had been suggested to this witness on behalf of the Appellant that both the Appellant and the other accused were seated on the rear seat of the van and were engaged in a discussion, which was refuted by Sergeant Wijetunga. Prosecution had led the evidence of P.C. Dissanayake who had corroborated Sergeant Wijetunga on all material particulars.

Prosecution also called witness Premarathne who was alleged to have given the information to the Police officers. This witness however had gone back on his statement and the prosecution had moved court to grant permission to treat this witness as a 'hostile' witness in terms of Section 154 of the Evidence Ordinance, and court had granted permission. Premarathne, in his evidence simply said that he did not know anything about this incident and that the Assistant Superintended of Police came to his house and had wanted him to make a statement as a favour and that was the reason why he signed the statement. At the close of the prosecution case the appellant made a dock statement and the other accused remained silent. In his dock statement, the appellant had stated that he is a sub inspector of police serving at the Police Record Division and on the day in question he left office around 7.00 p.m. and on the way he consumed a small quantify of alcohol at the police officers mess.

On his way, in front of the Eye hospital a person had beckoned him to stop the vehicle and when he did so, he saw the other accused, who had told him, that he beckoned the vehicle to stop by a mistake, thinking it was some other vehicle. The appellant however had offered him a ride and he had got into the vehicle. When he reached the Maradana roundabout, though he wanted to turn in the direction of "Panchikawatta" due to heavy traffic he could not make the turn and had proceeded towards Pettah. Then he had driven the vehicle to the vehicle

park, the one referred to by the police officers, and had stopped the vehicle. At this point the other accused had got off the vehicle and had proceeded towards Pettah on foot.

The Appellant says that he was carrying Rs.100, 000 cash in his brief case which was on the rear seat and wanted to check whether the money was intact. It had taken the appellant about 10 minutes to open the combination lock and having satisfied himself that the money is intact; he had kept the brief case on the seat and had got down from the van. At that point, according to the appellant the two Police officers had approached him and had questioned him.

The Appellant alleges in his dock statement that this led to an altercation between him and the two Police officers. At this point he had seen the other accused who had got off his vehicle some time before, coming towards him. The appellant also had alleged that the two Police officers demanded a bribe through the other accused and the appellant says that he refused to accede to the demand. This, the appellant says in his dock statement, led to a heated situation and ended up with Sergeant Wijetunge and him exchanging blows. He also admits that both the other accused and he were produced before the Magistrate the following morning. He had concluded his dock statement by stating that this allegation was false.

When one considers the version of the prosecution and the version placed before court by the appellant it is significant to note that apart from the denial on the part of the Appellant with regard to the act of engaging in oral sex with the other accused, the inconsistencies are very few. It is common ground that this incident took place in the car park in front of Cinecity Cinema and in the presence of the Appellant and the other accused as well. It is also common ground that the accused was not in the driving seat but in the rear section of the van. The appellant's version is, as he got down from the van after checking his brief case,

the two police officers approached him and questioned him as to what he was doing. The appellant confirms the version of the Police officers by admitting that he consumed liquor before he started his journey.

Of the four questions of law on which leave was granted, the first two in sub paragraphs (a) of (b) of paragraph 8 of the Petition deals with the issue of the failure on the part of both the learned Magistrate and learned High Court Judge to consider the evidence of witness Premarathne in the correct perspective and that both courts had failed to consider whether the evidence of Premarathne, had cast a reasonable doubt in the prosecution case.

It was the position of both police witnesses that they acted on the information given by Premarathne who was cited as a prosecution witness. Premaratne was cited as a prosecution witness. When he went back on his evidence, the Magistrate having considered the application made in terms of Section 154 of the Evidence Ordinance, permitted the prosecution to put questions to witness Premarathne that might have beeen put in cross examination. In the course of the hearing of this appeal the correctness of the decision of the Magistrate with regard to the application made in terms of Section 154 of the Evidence Ordinance was not challenged. The question then is, what is the evidentiary value of such a witness. According to E.R.S.R.Coomaraswamy (The Law of Evidence Vol II Book 2 818) there are two views on the question of the evidentiary value of the evidence of a witness who has been treated as hostile. According to one view, the evidence is of some value and is not to be disregarded altogether and the other view, the evidence is of no value and cannot be relied on for the party calling the witness and or <u>for the other party.</u> It is doubtful whether the maxim, *falsus in uno falsus in omnibus* could be applied to this class of cases. The underlying principle for allowing the party to subject their own witness to virtual cross examination, stems not so much because the witness is necessarily

untruthful, more so because the witness shows hostility towards the party who called the witness.

If the evidence given by a discredited witness in terms of Section 154 is to be used it must be done with great caution and care and should not be acted upon unless parts of his testimony is corroborated by some independent evidence.

In the instant case, this issue does not arise. Witness Premarathne's testimony was to the effect that he had no knowledge whatsoever of the incident and on a certain date, the Assistant Superintendent of Police requested him to sign a statement as a favour.

If the argument of the Counsel for the Appellant is to succeed, then the Court must be in a position to place credence at least on part of Premarathna's testimony.

Premarathne's evidence to my mind is highly improbable. Firstly would the police bring in a total outsider who had nothing to do with the incident, to corroborate the evidence of the two police officers with regard to, a chain of events that is alleged to have taken place knowing very well that there is every risk of the witness contradicting the police version. What was the difficulty for the two police officers to record the incident as their own detection? According to the dock statement of the appellant he speaks of the involvement of an Assistant Superintendent of Police only with regard to the conducting of a disciplinary inquiry.
Premarathne says the Assistant Superintendent of Police made the request on the 21st of August, three days after the incident and after facts were reported to Court. If the inclusion of Premarathne was an afterthought, the two police officers would not have been in a position to refer to the information they

received from Premarathne, in their investigation notes nor the report filed before the Magistrate.

When the police officers were under cross-examination, this fact could have been easily elicited if that was the case. Not a single question had been put to the witness on this aspect.

Thus it appears that evidence of Premarathne, admittedly a reconvicted criminal, is so improbable that one cannot find fault either with the learned Magistrate or the learned High Court Judge for not placing any reliance on his evidence.

I also wish to refer to the view expressed by Justice T.S.Fernando in the case of *Dahanayake Vs. Kannangara, 72 C.L.W 62* at page 65,that where a witness summoned by a party is disbelieved by the trial judge, it would be wholly unreal to utilise ***against*** such party the evidence so given, merely because such evidence has been produced or led on his behalf. (emphasis added)

Considering the above I answer the questions of law raised in sub paragraph (a) and (b) at paragraph 8 of the Petition in the negative, in that I hold, both the learned Magistrate as well as the learned High Court Judge were correct in not placing any reliance on the evidence of Premarathne, and disregarding his testimony.

The 3rd issue on which leave was granted is, whether the learned High Court Judge failed to consider the serious error made by the learned Magistrate in evaluating the Dock Statement of the Petitioner.

As I referred to earlier, apart from the "Actus reus" that constitute the offence, to a great extent the contents of the dock statement are consistent with the version of the prosecution, as presented by the two police officers in their testimony.

Although the learned Counsel for the appellant submitted that the learned Magistrate had rejected the dock statement for two specific reasons, namely that the dock statement was not subjected to cross examination which in turn diminished its evidentiary value, it was contended on behalf of the Appellant that the learned Magistrate ought to have considered the dock statement as evidence subject to the infirmities, in that it was not subject to cross examination and not one made under oath. In fairness to the learned Magistrate, at several places in the judgment he had referred to the dock statement and had finally come to the conclusion that the dock statement does not even cast a shadow of doubt on the prosecution case.

Even if one assumes that the learned Magistrate had not considered the dock statement as he ought to have, still the Appellant in my view is not entitled to any relief, unless it can be shown that the non-direction has occasioned a failure of justice.

According to the dock statement of the appellant, the two police officers solicited a bribe through the other accused, who suddenly surfaced having got off the vehicle at least ten minutes before the police officers arrived. Here is a situation of two low ranking police officers demanding a bribe from a senior police officer. If a bribe was solicited on that occasion the natural and the probable conduct on the part of the Appellant would have been to introduce himself as a sub inspector of police. It is highly improbable to conclude that a police officer of a very junior rank would for no reason implicate a senior officer on a trumped up charge.

When Sergeant Wijetunga was under cross examination it was suggested to him on behalf of the Appellant that both the Appellant and the other accused were seated in the rear seat engaged in a discussion, whereas the Appellant in his dock statement had said that the other accused arrived at the scene after the Police officers confronted him. These are some of the factors that make the defense version so improbable, and I am of the view that both the learned Magistrate as well as the learned Judge of the High Court were correct in rejecting the dock statement. Thus I hold the question of law raised in sub paragraph (c) of paragraph 8 of the Petition also in the negative.

In view of the conclusions referred to above I see no reason to interfere with the finding of guilt of the Appellant.

The final question on which leave was granted is, as to whether the sentence imposed on the Appellant is excessive in the circumstances of this case and as to whether this is a fit case to invoke Section 303(1) of the Code of Criminal Procedure.

There is no question that the individuals involved in the case are adults and the impugned act, no doubt was consensual. Section 365A was part of our criminal jurisprudence almost from the inception of the Penal Code in the 19th century. A minor amendment was effected in 1995, however, that did not change its character and the offence remains intact.

This offence deals with the offences of sodomy and buggery which were a part of the law in England and is based on public morality. The Sexual Offence Act repealed the sexual offences of gross indecency and buggary in 2004 and not an offence in England now.

The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and may be the *rationale* that led to repealing of the offence of gross indecency and buggery in England.

The offence however remains very much a part of our law. There is nothing to say that the appellant has had previous convictions or a criminal history. Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual, and absence of a criminal history on the part of the other accused as well. In my view this is a fit instance where the offenders should be afforded an opportunity to reform themselves.

In view of the above I am of the view that imposing a custodial sentence is not warranted in the instant case. Furthermore the incident had taken place more than thirteen years ago.

Considering the above I set aside the sentence of the one year term of imprisonment and substitute the same with a sentence of 2 years rigorous imprisonment and acting under Section 303(1) of the Code of Criminal Procedure Act, suspend the operation of the term of imprisonment for a period of 5 years effective from the date the sentence is pronounced by the learned Magistrate.

Subject to the variation of the sentence referred to above, the conviction is affirmed.

Registrar of this court is directed to have this judgment conveyed to the learned Magistrate for the purpose of pronouncement of the sentence. Subject to the variation of the sentence, the Appeal is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA, PC
I agree

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONERATNE
I agree

JUDGE OF THE SUPREME COURT