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

In the matter of an Application for Revision in terms of Article 138 of the Constitution.

Court of Appeal Case No:

CPA/0042/2022

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

High Court of Kalutara

Case No: HC 454/17

Vs.

1. Weerasekarage Ajith Premalal

No. 70 C/4,

River Road, Gane Aramba,

Beruwala.

2. Weerasekarage Indrasena,

Gane Aramba,

Beruwala.

3. Don Seemon Koralalage Nandana

Deepthi Kumara,

Imbula Pitiya,

Ganegoda,

Elpitiya.

ACCUSED

AND NOW BETWEEN

Weerasekarage Indrasena,

Gane Aramba,

Beruwala.

2ND ACCUSED-PETITIONER

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Navodya Ganegoda for the 2nd Accused-Petitioner
	: Madhawa Tennekoon, DSG for the Respondent
Written Submissions	: 02-09-2024 (By the 2nd Accused-Petitioner)
Argued on	: 02-09-2024
Decided on	: 03-12-2024

Sampath B. Abayakoon, J.

This is an application by the 2nd accused-petitioner, who is the 2nd accused in the High Court of Kalutara Case No HC-454/17, seeking to invoke the discretionary remedy of revision granted to this Court in terms of Article 138 of The Constitution.

The 2nd accused-petitioner (hereinafter referred to as the petitioner) has been indicted by the Hon. Attorney General along with two others for committing the offence of murder, punishable in terms of section 296 read with section 32 of the Penal Code.

At the trial, prosecution witness No-01 has given evidence before the learned High Court Judge of Kalutara on 05-10-2021 and 13-01-2022, and has concluded her evidence-in-chief.

The petitioner is now seeking to challenge and set aside three orders made by the learned High Court Judge during the evidence of PW-01 on 13-01-2022, on the basis that the said orders are contrary to law and against the concept of fair trial towards him.

When this matter was supported for notice, having considered the facts and the circumstances and the relevant law, this Court decided to issue notice and also decided to call for the High Court case record for inspection by the Court. This Court also issued a stay order ordering that any further proceedings of this matter should be stayed until the final determination of the application.

Accordingly, upon notice, the learned Deputy Solicitor General (DSG) who represented the respondent, namely, the Hon. Attorney General informed the Court that the Hon. Attorney General will not object for the reliefs sought by the petitioner being granted, as it was the view of the Hon. Attorney General that the said orders are contrary to law and also against the concept of fair trial, and hence, he is not in a position to support the orders pronounced by the learned High Court Judge.

Although it was intimated to the Court that the Hon. Attorney General will not object to this revision application being allowed, since the questions of law that needed to be considered are of academic interest as well, this Court allowed both parties to file written submissions if they so wish.

Accordingly, the learned Counsel for the petitioner has filed written submissions citing several decided cases in support of the application, while, the Hon. Attorney General has not filed any written submissions in this regard.

Before I move on to the impugned orders pronounced by the learned High Court Judge of Kalutara, I find it appropriate to briefly state the background of the case that led to the impugned orders.

It appears from the proceedings that when PW-01 was called upon to give evidence, she has apparently deviated from what she stated to the police in her police statement. This has led to the learned prosecuting State Counsel questioning her in that regard. When questioned, PW-01 has stated that she is a person of ill health, she cannot remember what happened on the day of the incident, and what she said in the Court was what she could remember.

At this stage, the learned defence Counsel who represented the petitioner and the other accused has objected to the manner in which the learned State Counsel attempted to extract evidence from the witness on the basis that such a cause of action cannot be permitted under the law.

The learned prosecuting State Counsel has submitted to the Court that she is making an application to allow the witness to refresh her memory in terms of section 159 and section 160 of the Evidence Ordinance.

When this application was made, the learned High Court Judge has determined that since the witness has stated in Court that she is suffering from various illnesses and she cannot remember things, and because the witness has made a statement to the police, he is allowing the learned prosecuting State Counsel to verify whether the witness has made a statement in that regard to the police.

Although I do not find any meaning in the order made by the learned High Court Judge, it appears from the proceedings of 05-10-2021, the case has been adjourned on the above basis.

Thereafter, PW-01 has been recalled to give further evidence on 13-01-2022. While giving evidence for the 2nd time, she has maintained the same position she took on the 1st day as to what she saw when she came to the scene of the incident. This has led to the learned State Counsel who prosecuted putting several questions to her warning that if the witness states something contrary to the statement she made to police, which amounts to giving false evidence, she will be prosecuted by the Hon. Attorney General in that regard, and she may have to face a jail term and the State will take steps to initiate proceedings in future.

The way the learned prosecuting State Counsel addressed her own witness had led to the defence Counsel objecting for any questioning of that nature on the basis that it amounts to intimidating the witness.

The learned prosecuting State Counsel has maintained the position that her questioning does not amount to intimidation and the prosecution has a right to initiate proceedings against a witness for giving false evidence.

This has led to the 1st order pronounced by the learned High Court Judge on that day, marked as P-02, along with the petition, which appears as a part of the certified copy of the High Court brief.

For matters of clarity, I will now reproduce the said order marked P-2, which reads thus.

<u>නියෝගය.</u>

මේ අවස්ථාවේදී උගත් අධිනීතිඥ මහත්මිය ප්‍රශ්න යොමු කරන ආකාරය සම්බන්ධයෙන් විත්තිකරුවන් වෙනුවෙන් පෙනී සිටින උගත් නීතිඥ මහත්මිය විරුද්ධ වේ. ඇය සාක්ෂිකාරියට බලපෑමක් කරන ස්වභාවයෙන් ප්‍රශ්න අසන බවට අධිකරණයේ අවධානයට කැඳවා ඇත. මාගේ නිරීක්ෂණයට අනුව සාක්ෂිකාරිය මෙම නඩුවට පදනම් වූ සිද්ධිය සම්බන්ධයෙන් පොලිසියට ලබා

දුන් කටඋත්තරයට වෙනස් ආකාරයට සාක්ෂි ලබා දෙමින් සිටින බැවින්, එවන් සාක්ෂි දීමක් සිදුකරනු ලැබුව හොත් සාක්ෂිකාරිය රජයේ නිලධාරීන්ට අසත්‍ය තොරතුරු සැපයීම සම්බන්ධයෙන් අනාගතයේදී වෙනත් නඩුවකට මුහුණ පෑමට සිදුවිය හැකි බවට පෙන්වා දීමට කටයුතු කරයි. එය බලපෑමක් ලෙස මා නොදකිමි. මන්දයත්, රජයේ අධිනීතිඥවරිය වතර්මාන සාක්ෂිකාරිය සම්බන්ධයෙන් ගනු ලබන අනාගත පියවරක් සම්බන්ධයෙන් දැනුවත් කිරීමක් සිදුකොට කිසියම් කරුණු සැඟවීමක් කරන්නේ නම් ඉන් වැළකී සිටීමට අවවාදයක් මෙමඟින් කිරීම පමණක් මා නිරීක්ෂණය කරන හෙයින්ද, විශේෂයෙන්ම මෙම සාක්ෂිකාරිය දැනට මා ඉදිරියේ මා කැඳවන ලද සාක්ෂිකරුවෙක් ලෙස අධිකරණයේ සිටින හෙයින්ද, ඇයගේ අයිතිවාසිකම් රැකීමට මා පෞද්ගලිකව කටයුතු කරන හෙයින්ද, එවන් බලපෑමක් සිදුවන බව මා නොදකිමි. විශේෂයෙන්ම මා සඳහන් කර සිටින්නේ රජයේ උගත් අධිනීතිඥවරිය ශබ්දය ඉහළ මට්ටමකින් අදාළ ප්‍රශ්නය සාක්ෂිකාරිය බියවන අන්දමින් ඉදිරිපත් කරන බව නොවේ. එබැවින් අදාළ ප්‍රශ්නය වීමට හැකියාවක් නැත. මෙම සාක්ෂිකාරිය පෙර දින මෙන්ම අද දිනද අධිකරණයට කියා සිටින්නේ ඇය අපස්මාර රෝගයෙන් පෙළෙන බැවින් මතකය සම්බන්ධයෙන් ගැටළුවක් තිබෙන බවයි. කිසියම් ආකාරයකින් ඇයට මතක් කර දීමක් සිදු කරන්නේ නම් මතකය අළුත් කරවා ගෙන පිළිතුර දීමට කටයුතු කරන බව දන්වා සිටින අතර, ඒ අමතක වීම මත කිසියම් කරුණක් නොපවසනුයේ නම් එය තමාගේ රෝගී තත්වය නිසා උද්ගත වන කරුණක් විනා කිසිවක් සැඟවීමට ඇය කටයුතු නොකරන බවයි. මෙවන් තත්වය යටතේ සාක්ෂි ආඥා පනතේ 159, 160 ආදී වගන්තිවල විධිවිධාන පවතින බව මා පෙර අවස්ථාවකද මේ සම්බන්දව නියෝගයක් ලබා දී ඇත. ඒ පිළිබඳව කටයුතු කිරීමට රජයේ අධිනීතිඥ මහත්මියට බාධාවක් නොවන බව සැල කර සිටිමි.

අත් / කලේ,

මහාධිකරණ විනිසුරු - කළුතර.

(At page 43 and 44 of the case brief)

When this order was pronounced, the learned Counsel who represented the petitioner and the other accused has again taken up the position that if the witness is permitted to read her statement made to the police in order to refresh her memory, that will amount to a violation of the right for a fair trial guaranteed to an accused person in terms of the Constitution of the Republic, as well as International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007.

This has led to another order been made by the learned High Court Judge informing the learned Counsel for petitioner that it was not the intention of the High Court to cause prejudice towards the accused, and if the learned Counsel feels that no fair trial has been afforded to the petitioner and the other accused, once the evidence-in-chief is concluded, the learned Counsel is free to make an application before a competent Court and produce an order from that competent Court in relation to the order which allowed the learned prosecuting State Counsel to use the statement made by PW-01 to refresh the memory of the witness.

After the said order, the learned prosecuting State Counsel has proceeded to show the original of the statement made by PW-01 to the police and has made the witness to identify her signature. Thereafter, the learned prosecuting State Counsel has asked the witness whether she stated that due to an illness, she cannot remember things, and if her statement is reminded, she may remember things when she was giving evidence on the previous day.

Having asked that question, the learned prosecuting State Counsel has proceeded to read a portion of the statement made by PW-01 to the police in which she has implicated the accused indicted before the Court.

At that stage, the learned Counsel who represented the petitioner and the other accused has again objected to the manner in which learned prosecuting State Counsel led evidence stating that a statement of a witness can only be used for contradicting such evidence and not as substantive evidence before the Court. The learned prosecuting State Counsel has disputed this position and has cited a decided case of the Court of Appeal stating that she can still lead evidence in the same manner.

This has led to the learned High Court Judge making a yet another order which is the 2nd order sought to be challenged by this revision application.

The said order marked as P-03, reads as follows.

නියෝගය.

විත්තියේ උගත් නීතිඥ මහතා ඉදිරිපත් කරනු ලබන විරෝධතාවය මා හට පිළිගැනීමට හැකියාවක් නැත. සාක්ෂි ආඥා පනතේ 110(3) වගන්තියේ සඳහන් වන්නේ **"කිසියම් පුද්ගලයෙකු පොලිසියට කරනු ලැබූ ප්‍රකාශයක් අනුසන්දනය කිරීම හැර අන් කායර් සඳහා සාක්ෂි ආඥා පනතේ විධි විධාන යටතේ භාවිතා කළ හැකිය"** යන්නයි. අනුසන්දනය කිරීම යනුවෙන් ඉංග්‍රීසියෙන් සඳහන් වන්නේ Corroboration යන වචනයයි. එනම් මෙය සරල උදාහරණයකින් තේරුම් ගත යුතු කාරණයක් බව පෙනෙන්නට තිබේ. ඒ අනුව මා නිදශර්නයකින් මෙය පැහැදිලි කිරීමට කටයුතු කරමි. A **විසින් තමා ඇසූ කරුණක් සම්බන්ධයෙන් කිසියම් දිනයකදී කිසියම් පොලිස් ස්ථානයකට ප්‍රකාශයක් කරනු ලබයි**. A **විසින්ම පසු අවස්ථාවකදී අධිකරණයකදී අදාල සිදුවීම පිළිබඳ තමන්ට ඇසුණු තමා දුටු කාරණා සම්බන්ධයෙන් අධිකරණයකදී සාක්ෂි දෙනු ලබයි. එම අවස්ථාවේදී** A **විසින් තමන් අධිකරණයේදී සාක්ෂිදුන් කරුණ හා සමානවම පොලිසියටද එවන් ප්‍රකාශයක් ලබාදී තිබෙන බව කියා සිටීමට පැමිණිල්ලට නොහැකිය.** නැතහොත් අදාල සාක්ෂිකරු කැඳවන පාශර්වයට කියා සිටිය නොහැකිය. එවැනි කියා සිටීමක් අනුසන්දනයක් (Corroboration) වන බැවින් එවැන්නක් කල නොහැකිය. ඒ හැරෙන්නට අනෙකුත් ඕනෑම කාරණයක් සඳහා සාක්ෂි ආඥා පනත යටතේ විධි විධාන අනුව කටයුතු කල හැකි බව 110 වගන්තියේ සඳහන් වන හෙයින් අනුසන්දනය යන කාරණය වරදවා වටහා ගැනීම නිසා මෙම ප්‍රශ්නය උද්ගතව ඇති බව මා නිකර්ෂණය කරමි.

කෙසේ වෙතත් නැවතත් මා සඳහන් කර සිටින්නේ කවර පාශර්වයකට හෝ අයුක්තියක් සිදුනොවීම වෙනුවෙන් ප්‍රශ්න උත්තර ආකාරයෙන් රජයේ අධිනීතිඥ මෙනවියගේ සාක්ෂිකාරියගෙන් ප්‍රශ්න කිරීම වාතර්ා කිරීමට මා තීරණය කලේ සාමාන්‍ය ආකාරයෙන් මූලික සාක්ෂි සටහන් කිරීමේදී එවැනි ක්‍රියා මාගර්යක් අනුගමනය නොකලද මෙම අද දින විත්තියේ උගත් නීතිඥ මහතා දැඩි සේ මෙම සාක්ෂි මෙහෙයවීම සම්බන්ධයෙන් විරුද්ධත්වය පාන හෙයින් සුදුසු අධිකරණයකදී විවාදගත කරණය සම්බන්ධයෙන් සුදුසු නියෝගයක් ලබාගැනීමටත් අදාල ඉහල අධිකරණයේදී විනිශ්චයකාරතුමන්ලාගේ අවබෝධයට පහසු වන පිණිසත්ය. ඒ අනුව ප්‍රශ්න උත්තර ආකාරයෙන් ඇසීමට අවසර දෙමි.

අත්. කලේ. මහාධිකරණ විනිසුරු-කළුතර.

(At page 49 and 50 of the case brief)

As a result of the above order, the learned prosecuting State Counsel has proceeded to put leading questions to the witness using her statement made to the police.

Even after she was questioned in such a manner, the witness has stated that she still cannot remember whether she stated such things to police, but if she is allowed to read the statement, she may remember.

This has made the learned High Court Judge to make the 3rd order, which has been challenged in this application.

The said 3rd order marked as P-04 reads as follows.

> "මේ අවස්ථාවේදී සාක්ෂිකාරියට ඇය විසින් පොලීසියට ලබාදී තිබෙන කටඋත්තරය කියවා බැලීමට අවසර දෙමි. ඇය පවසා සිටින්නේ ඇයට මතක නැති බවයි.
>
> සාක්ෂිකාරිය විසින් පොලිස් ප්‍රකාශය කියවා බලයි.
>
> උ: කියෙව්ව ටික නම් හරි.
>
> (සාක්ෂිකාරිය විනාඩි 7 ක පමණ කාලයක් ඇය විසින් පොලීසියට කරන ලද ප්‍රකාශය කියවා බලන ලදී.)
>
> අත්.කලේ.
>
> .....
>
> මහාධිකරණ විනිසුරු-කළුතර.
>
> 2022.01.13"

(At page 51 of the brief)

Accordingly, witness has proceeded to give her evidence and when the learned prosecuting State Counsel has questioned about another statement made by the same witness to police, and wanted to use that statement as well to question the witness, the learned Counsel for the petitioner and the other accused has again objected on the same basis.

However, the said objection had also been overruled and the witness has been allowed to be examined the way the learned prosecuting State Counsel wanted.

When the PW-01's evidence-in-chief was concluded, the learned High Court Judge on his own motion has proposed that he can allow the defence to cross-examine on another day in order to facilitate the initiating of a revision application if the learned Counsel who represented petitioner and the other accused wish to challenge the orders he made during the examination-in-chief of the witness.

Accordingly, matter has been re-fixed for further trial, and in the meantime, the present revision application before this Court has been preferred by the petitioner seeking the remedies sought in the prayer of the petition.

As argued correctly by the learned Counsel for the petitioner and agreed by the learned DSG, I find that the learned prosecuting State Counsel as well as the learned High Court Judge were totally misdirected in relation to the applicable principles of law governing evidence and principles of fair trial.

The Article 13(3) of the Constitution reads as follows;

> **13(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent Court.**

It is clear from the proceedings before the High Court that the learned Counsel who appeared for the petitioner and the other accused, has rightly objected to the manner in which the prosecuting State Counsel was attempting to extract evidence out of the witness in her examination-in-chief, by intimidating the witness.

Although certain level of persuasion is permitted in order to ascertain the truth from a reluctant witness, it is my considered view that the way the prosecuting State Counsel had questioned the witness was way outside of the permitted parameters in that regard.

If the prosecuting State Counsel was of the view that the witness is giving evidence detrimental to the prosecution case, and she is willfully uttering untruth contrary to her statement made to the police, the proper procedure

would be to act in terms of section 154 of the Evidence Ordinance and take necessary steps, against the said witness at the conclusion of the trial.

When the witness maintained the position that she cannot remember things the prosecuting State Counsel has sought permission to act in terms of section 159 of the Evidence Ordinance and the application has been allowed, despite the legally valid objections raised by the defence.

The relevant section 159(1) and (2) of the Evidence Ordinance reads as follows;

> **159.(1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at the time fresh in his memory.**
>
> **(2) the witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.**

It is the view of the Court that this is not a provision that allows a lay witness who has made a statement to the police, read and refresh his memory while giving evidence in a case, but a section meant to be used by official witness when giving evidence.

This is because so, since official witness who may engage in several similar investigations and matters in their official capacity cannot be expected to have every official act performed by them in their memory.

The scope of section 159 of the Evidence Ordinance has been well considered in the case of **Simon Vs. State of Kerala decided on 16th February 1996 and published in 1996 (1) KLT 406 and 1996 (1) KLJ 348**, which reads thus;

> *"S.159 of the Evidence Act says that a witness may, while under examination, refresh his memory by referring to any writing made by*

himself at the time of the transaction concerned which he is questioned. The witness may also refer to any such writing made by any other person, and read by the witness within the time of the transaction or soon afterwards concerning the matter he is questioned. It is also necessary that the Court must consider that it is likely that the transaction was at that time fresh in the memory of the witness. So, the memory could be refreshed-with reference to some contemporaneous document prepared by the witness by himself or made by any other person which the witness had occasion to read. Generally, this right is being exercised by expert witnesses such as a doctor who gives evidence touching the post mortem certificate or wound certificate prepared by him. A commissioner deputed by the court can also refresh his memory at the time of giving evidence by referring to the report contemporaneously prepared by him. But this special privilege given to the witnesses under S.159 of the Evidence Act cannot be made use of by a witness in a criminal case to refresh his memory by referring to his earlier statement given to the police under S.161 Cr. P. C. This is because S.162 of the Code of Criminal Procedure specifically states that the statement recorded by the police officer under S.161 could only be used for certain specific purposes. Proviso to S.162 Cr. P. C. reads as follows:

"Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced-into writing, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by prosecution, to contradict such witness in the manner provided by S.145 of the Indian Evidence Act; and when any party of such statement is so used, any part thereof may also be used in the reexamination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

There are series of decisions to the effect that a statement recorded under S.161 Cr. P. C. is not admissible in evidence. Such statement could only be used to contradict the maker of the statement as envisaged under S.145 of

the Evidence Act. If such a statement is put to any other use it should be deemed to have been prohibited under S.162 Cr. P. C. So, the learned Sessions Judge was not justified in stating that a witness is competent to refresh his memory with the prior statement recorded under S.161 Cr. P. C. AS the statement made under S.161 Cr. P. C. is expressly made inadmissible, a witness cannot be allowed to refresh his memory by reading 161 statement and give evidence accordingly. That would amount to admitting by the back door evidence which cannot be welcomed at the front and it would definitely fly in the face of the legislative mandate given under S.162 of the Cr. P. C."

(It needs emphasis that the corresponding section to section 161 and 162 mentioned above is section 110 of our Code of Criminal Procedure Act No. 15 of 1979.)

In the case of **Chinnammal Vs. State of Tamil Nadu and Others decided on 20-11-1996 - Citation: 1997 (1) SCC 145**, it was observed by the Supreme Court of India that;

"*It is trite law that a case has to be decided on the basis of the evidence adduced by the witnesses during the trial and any previous statements made by any such witnesses can be used by the defence for the purpose of only contradicting or discrediting that particular witness in the manner laid down in section 145 of the Evidence Act. Under no circumstances can such previous statements be treated as substantive evidence as has been treated by the High Court in the instant case.*"

It is my considered view that the final order made by the learned High Court Judge (P-04) where it had been allowed the witness to read her statement made to the police while on the witness box has made an already illegal procedure from bad to worse, which was a thing unknown to the law. It is apparent that by allowing the witness to read her own statement in this manner, the learned High

Court Judge has disregarded the rules of evidence and the relevant provisions of the Evidence Ordinance.

I am of the view that all the impugned orders taken cumulatively has led to a clear violation of the principle of a fair trial towards the accused.

At this juncture, I find it appropriate to cite from the Indian Supreme Court judgment in **Varkey Joseph Vs. State of Kerala decided on 27-04-1993, Citations: 1993 AIR 1892, 1993 SCR (3) 390**, where the Indian Supreme Court considered a similar situation and observed:

> *"The most startling aspect we came across from the record is that the criminal trial was unfair to the appellant and the procedure adopted in the trial is obviously illegal and unconstitutional. The Sessions Court in fairness recorded the evidence in the form of questions put by the prosecutor and defence counsel and answers given by each witness. As seen the material part of the prosecution case to connect the appellant with the crime is from the aforestated witnesses. The Sessions Court permitted even without objection by the defence to put leading questions in the chief examination itself suggesting all the answers which the prosecutor intended to get from the witnesses to connect the appellant with the crime …*
>
> *Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answer to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness,*

with the permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give, his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act is intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness by answer merely "yes" or "no' but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account …"

For the reasons as considered above, I am of the view that the petitioner has established exceptional circumstances before this Court, which shocks the conscience of the Court, where the intervention of this Court to correct the situation that led to the deprivation of a fair trial towards the petitioner is necessary.

Accordingly, I set aside the orders marked P-02, P-03 and P-04 dated 13-01-2022 made by the learned High Court Judge of Kalutara, since the relevant orders as well as the several other orders made on that day makes the evidence led of PW-01 of no legal value.

I order that the evidence of PW-01, led on 05-10-2021 and 13-01-2022, shall be expunged from the case, as leaving it as it is, cannot be allowed. The learned High Court Judge of Kalutara is directed to recommence the trial afresh, follow the relevant principles of law and proceed therefrom.

Accordingly, this revision application is allowed.

I would also like to express my appreciation towards contribution made by the learned Counsel, for the petitioner for filing written submissions citing several relevant judgments in relation to the matter under consideration, which assisted this Court in pronouncing this judgment.

The Registrar of the Court is directed to communicate this judgment, forthwith, to the High Court of Kalutara together with the original case record of the High Court, which was previously called by this Court, for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal