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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/0360/2018

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

High Court of Kegalle

Case No: 2607/2007

1. Kankanamalage Dumith Chandana Dharmasena
2. Hetti Kankanamalage Kapila Mohan Wickramanayake
3. Nishshanka Pedige Jayathissa *alias* N.P.
4. Babaradeniya Aacharige Nishshanka Senarathne
5. Nishshanka Arachchilage Dharshana Shamika Prasad Ariyarathne
6. Weerasinghe Bandarage Indika Weerasinghe

7. Yatala Pallewala Gedara Mahesh Chaminda Suraweera

8. Garagodage Kokila Premalal Jayarathne *alias* Upali

9. Senanayakage Indika Ruwan

ACCUSED

AND NOW BETWEEN

Senanayakage Indika Ruwan

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Saliya Pieris, P.C. with Pasindu Thilakarathna and Nisal Hennadige for the Accused-Appellant

: Dishna Warnakula, D.S.G. for the Respondent

Argued on : 09-08-2024

Written Submissions : 02-10-2019 (By the Accused-Appellant)

: 03-12-2019 (By the Respondent)

Decided on : 25-10-2024

Sampath B. Abayakoon, J.

Nine accused persons including the 9th accused-appellant (hereinafter referred as the appellant) were indicted before the High Court of Kegalle for committing the following offences.

1. That they conspired on or about 24-03-2000 at a place called Narangoda, Bogala Pathala within the jurisdiction of the High Court of Kegalle to commit the offence of robbery of money belonging to Bogala Graphite Limited amounting to Rs. 1,900,000/- using firearms and committed the said offence of robbery as a result, and thereby committed an offence punishable in terms of the section 113B, 102 and 380 of the Penal Code read with section 44(a) of the Firearms Ordinance as amended by Firearms (Amendment) Act No. 22 of 1966.
2. At the same time and at the same transaction, the said accused persons committed the offence of robbery of a sum of Rs. 1,900,000/- and a jeep numbered 31ශ්-1183 belonging to Bogala Graphite Limited from the possession of Sooriyakumara Yatigammana, using firearms and thereby committed the offence of robbery punishable in terms of the sections 380 of the Penal Code read with section 44(a) of the Firearms Ordinance as amended by Firearms (Amendment) Act No. 22 of 1966.

The trial has proceeded against the 8th accused indicted in his absence in terms of section 241 of the Code of Criminal Procedure Act.

After trial, the learned High Court Judge of Kegalle found the appellant guilty as charged of his judgment dated 12-12-2018. The 1st to 8th accused were acquitted on the basis that the prosecution has failed to prove the charges against them beyond reasonable doubt.

After allowing the appellant to plead in mitigation and also having listened to the prosecution as to the aggravating circumstances, the learned High Court Judge has sentenced the appellant to life imprisonment on count 01. He was also ordered to pay a fine of Rs. 5000/-, and in default, sentenced to a period of 3 months simple imprisonment.

On count 2, he was again sentenced to life imprisonment and was also ordered to pay Rs. 5000/-with a default sentence of 3 months simple imprisonment.

Being aggrieved of the said conviction and the sentence, the appellant preferred this appeal.

Facts in Brief

This is an incident where the office premises of the Bogala Graphite Limited were robbed by a group of robbers in the early hours of 24-03-2000. The group who entered the said premises has unarmed and tied the security officers stationed there and had entered the office premises where a sum of Rs. 1,900,000/- was kept in an iron safe to pay the salaries of the workers on the following day. They have removed the iron safe from the office premises and had loaded it into the jeep numbered 31ශ්-1183 belonging to the factory, which was parked at the premises and taken away the iron safe and the jeep. In the process, the group of robbers has also fired some shots using firearms.

After being made aware of the incident, the management of the factory has informed the incident to Pindeniya police. After receiving the information, the Officer-in-Charge of Pindeniya police (PW-38) and a team of police officers have commenced their investigations. They have visited the factory premises and had recorded their observations. They have also found two spent cartridges at the place of the incident. In the process of their investigations, they have also recovered the jeep taken away by the group of robbers about 6 kilometers away, abandoned at a rubber plantain and had taken steps to call the officers from the Fingerprints Department to conduct their investigations.

After receiving an information, the OIC and a group of police officers have gone to the hotel known as Madilanda Walawwa, which was an old Walawwa transformed into a boutique hotel. This hotel was situated about 35 kilometers away from the Bogala Graphite Limited. They have reached the Walawwa around 8.50 a.m. on 26-03-2000 and when they reached there, only the 1st accused indicted had been present as the caretaker of the premises.

When they searched behind the reception desk of the hotel, they have been able to find a concealed firearm resembling a T-56 weapon with a magazine and also a hand grenade. They have also observed a torn off rope. Since they had the information that the iron safe robbed from the factory premises has been put into the toilet pit of the hotel, the OIC has taken steps to open the pit and had managed to recover the iron safe belonging to the factory. The iron safe has been forced open, and there was no money inside. Subsequently, the police have recovered several T-56 magazines and empty cartridges as well as some other firearm bullets from the ceiling of the premises.

Around 12.30 p.m. on the same day, the police have arrested the 2nd, 3rd, 4th and the 5th accused indicted when they came to the hotel and a sum of Rs. 137,240/- has been recovered from the possession of the 2nd accused indicted. During the process of their investigations, police have recovered Rs. 200,000/- concealed in a baffle which was kept in the living area of the hotel and also a drill machine as a result of the statement made by the 1st accused indicted. A sum of Rs. 100,000/- and another sum of Rs. 94,000/- has also been recovered from the houses of the 3rd and the 4th as a result of the statements made by them to the police. Another sum of Rs. 72,000/- has been recovered as a result of the statement made to the police by the 5th accused indicted from his house, and yet another sum of Rs. 130,000/- from a suitcase in the house of the 6th accused indicted as a result of his statement made to the police. The 6th to 9th accused had been arrested subsequently by the police. The 9th accused appellant had been the person who has obtained the old Walawwa premises on lease and running the boutique hotel.

Upon investigations, the Registrar of Fingerprints has found a fingerprint belonging to the 2nd accused indicted from the jeep that was robbed on the day of the incident. The Government Analyst who conducted investigations had confirmed that the 2 spent cartridges found in the factory premises had been fired using the automatic weapon found at the hotel, which has been marked as P-05 during the trial. The witnesses have also identified the iron safe and the jeep found abandoned, as the safe and the jeep robbed from the factory premises on the day of the incident.

Since the eyewitnesses to the incident had failed to identify any of the persons who came to the factory premises and committed the robbery, PW-25 is the person who was of paramount importance in this matter. PW-25 has been a painter engaged to paint the hotel premises. He has been introduced to the hotel management by the 3rd accused indicted and had been working there for about a month by the time this incident occurred. He has come to know all the accused indicted before the High Court during that period. He has identified the appellant as the Manager of the establishment and the others as persons who frequented the hotel. He has stated that the hotel had a three-wheeler where the 5th accused indicted was the driver.

It has been his evidence that all the accused indicted were at the hotel on the day of the incident from the morning, except for the 5th accused indicted who came to the hotel in the afternoon. Between 9.00 and 10.00 p.m. on that night, all of them have left the hotel in two three-wheelers including the one driven by the 5th accused. The appellant has informed him that they are going to attend a funeral in Aranayake area and for him to close the gate and sleep, and open the gate when they return. He has observed all of them wearing black-coloured clothes.

Although the appellant has stated that they are going to Aranayake, he has seen the two three-wheelers going the opposite direction towards Awissawella.

The persons have returned while he was sleeping in the corridor of the hotel, and the PW-25 has opened the gate for them. Apart from the two three-wheelers, a red-coloured jeep has also come into the compound and he has seen all the vehicles going towards the garage situated at the back of the hotel. Thereafter, he has heard something heavy being put on the ground and heard a sound like a heavy metal box being dragged on the ground. He has also heard some sound similar to cutting of iron and breaking something from the direction where the vehicles went. After some time, he has also heard some heavy metal object being dragged and a sound similar to putting a heavy thing into a pit. He has also observed that the jeep and the two three-wheelers leaving the hotel on the same night.

While he was attending to painting work on the 26th morning, a team of police officers has come and questioned him, but not recorded any statement from him or arrested him. According to his evidence, after some time, he has received a letter from the police to come to the police station and has given a statement thereafter. The fact that the said statement has been recorded 01 month and 9 days after the incident has been an admitted fact. It needs to be noted that the evidence of PW-25 has not been challenged in any material terms.

When the prosecution case was concluded and all the accused were called upon for their defence, they have made dock statements, and had denied that they committed the offences under which they were indicted.

The 1st accused indicted has claimed that he came to the hotel to meet one Jayaratne and he was arrested while waiting for him, and had claimed that he has nothing to do with the crime.

The 2nd accused indicted has claimed that he is a permanent employee of Bogala Graphite Limited, and he used to frequently sit and have his meals in the jeep that was taken by the robbers and later abandoned, and has also denied that he had any money with him when he was arrested.

The other accused have also made similar denials, while the appellant, who was the 9th accused indicted, has stated in his dock statement that he took charge of the hotel as his friend who originally had the lease fell ill, and because he had no knowledge of hotel keeping, he handed over the hotel to one of his friends Upali Kokila Jayaratne.

He has claimed that by that time, he was conducting classes throughout Kegalle district and because of that, he used to visit the hotel only 2-3 days a week. He has claimed that on the day of the incident claimed by the police, he was in Anuradhapura with his wife and child in order to fulfill a vow, and came home two days thereafter. He has stated that while conducting his classes as he used to be, the police team arrested him. He has denied any connection to the offence as well.

In his judgment, the learned High Court Judge has decided to acquit the 1st accused indicted on the basis that the only evidence against him was the fact that he knew the place where the iron safe was thrown and that fact alone is not sufficient to convict him for the offence.

2nd accused indicted also has been acquitted on the basis that since he was a regular employee of Bogala Graphite Limited, having his fingerprint on the jeep used in the robbery cannot be held against him.

The 3rd to 8th accused also have been acquitted on the basis that although money have been recovered based on their statements to the police, that money has not been produced before the trial Court, and also section 27 statement relied on by the prosecution can only infer that the said accused knew the places where the money was hidden and that alone is insufficient to convict them.

However, the learned High Court Judge has proceeded to convict the appellant on the basis that he was the person who had the full control and possession of the hotel, and PW-25's evidence has not been challenged as to the fact that the appellant was in the hotel right throughout on the day of the incident, and left the hotel in the night and returned. He has based his conviction on the evidence

of PW-25 as to the things he heard and observed subsequently. The learned High Court Judge has also determined the fact of the recovery of the automatic weapon used for the crime from the same hotel premises should also be held against the appellant who had the possession and control of the hotel.

The learned High Court Judge has rejected the dock statement made by the appellant on the basis that it has failed to create a doubt as to the evidence against him and also has failed to provide a reasonable explanation in that regard.

The learned High Court Judge has also determined that the alibi taken up by the appellant cannot be considered as he has failed to take necessary steps in terms of section 126A of the Code of Criminal Procedure, and has determined that in any way, his alibi has not dented the credibility of the prosecution evidence against the appellant.

Accordingly, the learned High Court Judge has acquitted the 1st to 8th accused indicted while convicting the appellant for the two charges preferred against him.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel formulated the following two grounds of appeal for the consideration of Court.

1. The learned High Court Judge has wrongly rejected the alibi taken up by the appellant.
2. The learned High Court Judge has misdirected himself on the circumstantial evidence in holding that the productions were in exclusive possession of the appellant since there was evidence that several other persons were also present in the premises.

The learned President's Counsel made submissions to the effect that the learned High Court Judge has relied heavily on the evidence of PW-25 who has given the same evidence on the other accused indicted who were acquitted. It was argued that the learned High Court Judge has failed to give reasons as to why he decided

to act on the evidence of PW-25 to convict the appellant and on the same evidence to acquit the other accused indicted.

It was contended that the learned High Court Judge has failed to apply the principles that govern the applicability of circumstantial evidence in its correct perspective and has made a wrong determination based on the possession and control of the hotel where the firearms and the iron safe was found.

He relied on the judgment pronounced by Their Lordships of the Supreme Court in **SC-Appeal No. TAB/001/23 decided on 08-08-2024** to stress his point that the Court has failed to explain reasons for acquitting the other accused and convicting the 9th accused based on the same evidence, and also submitted that the appellant should also be acquitted as there was no evidence placed before the Court that the appellant had exclusive possession of the hotel premises.

It was also submitted that the learned High Court Judge has refused to consider the alibi based on wrong legal principles, whereas, it should have been considered in favour of the appellant.

The Deputy Solicitor General (DSG) who re-presented the complainant-respondent was of the view that there was ample circumstantial evidence against the appellant placed before the Court, and hence, the conviction should stand.

It was her position that although PW-25's statement has been recorded belatedly, his evidence has not been challenged at the trial, and his evidence has been cogent and truthful. It was also submitted by the learned DSG that the claim of the appellant in his dock statement that he was away in Anuradhapura on the day of the incident cannot be considered as an alibi in that sense, because such a statement cannot rule out the possibility of the appellant committing the crime. It was her position that the appeal should stand dismissed.

The Consideration of the Grounds of Appeal

It is amply clear from the evidence placed before the trial court that the persons who faced the incidents of robbery have failed to identify any of the persons who

committed the crime. Therefore, this is a matter where the prosecution has relied entirely on circumstantial evidence against the appellant as well as the other accused indicted.

The evidence led at the trial clearly provides that after the incident, the police team who conducted the investigations have recovered two spent cartridges from the scene of the crime. It is undisputed that the police have raided the hotel on the 26-03-2000 after receiving a tip-off with regard to the robbery. They have recovered several weapons as well as the iron safe taken away from the factory premises. They have also recovered the jeep taken away by the robbers some six kilometers away from the scene of the crime.

The prosecution has also established that the police fingerprint experts had extracted a fingerprint from the jeep belonging to the 2nd accused indicted. They have also recovered money from several of the accused indicted, including the appellant based on their statements made to the police, and had marked the relevant extracts that led to the discovery in terms of section 27 of the Evidence Ordinance. The Government Analyst has opined that the spent cartridges recovered from the scene of crime have been used in the T-56 weapon found in the hotel premises.

Since this is a matter where circumstantial evidence has been used against the appellant and the other accused indicted, I find it appropriate to mention the relevant legal principles that have been established by way of case law in that regard.

In the case of **The King Vs. Abeywickrama 44 NLR 254** it was held:

> Per **Soertsz, J.**,
>
> *"In order to base a conviction on circumstantial evidence, the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypotheses of his innocence."*

In the case of **Don Sunny Vs. The Attorney General (1998) 2 SLR 01**, it was held:

1) *When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards only inference that the accused committed the offence. On consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.*

2) *If on a consideration of the items of circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.*

3) *If upon consideration of the proved items of circumstantial evidence the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

However, when considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately, may only be suspicious in nature.

In the case of **King Vs. Gunaratne 47 NLR 145**, it was held:

> *"In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.*

The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."

In the case of **Regina Vs. Exall (176 English Reports, Nisi Prius at page 853)**, Pollock, C.B. considering the aspect of circumstantial evidence remarked;

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like of a rope composed of several codes. One strand of the rope might be insufficient to sustain the weight, but stranded together may be quite of sufficient strength."

It was observed in the case of **Karunaratne Vs. Attorney-General (2005) 2 SLR 233,**

Per Jagath Balapatabendi, J.,

"*The primary advantage of circumstantial evidence is that the risk of perjury is minimized since it, unlike direct evidence, does not emanate from the testimony of a single witness. It is therefore more difficult to fabricate circumstantial evidence, than it is to resort to falsehood in the course of giving direct evidence.*

There is no principle of the law of evidence which precludes a conviction in a criminal case based entirely on circumstantial evidence. There are no uniform rules for the purpose of determining the probative value of circumstantial evidence. This depends on the facts of each case."

In the case of **Krishantha de Silva Vs. The Attorney General (2003) 1 SLR 162**:

Per **Edirisuriya, J.,**

"It is admitted that this is a case of circumstantial evidence. In such a case, circumstances relied upon should be consistent with the guilt of the accused

and inconsistent with his innocence. If the circumstantial evidence relied upon can be accounted for on the supposition of innocence then the circumstantial evidence fails. Circumstantial evidence can be acted upon only if, from the circumstances relied upon the only reasonable inference to be drawn is the inference of guilt. If the circumstances are consistent both with guilt and with innocence then the case is not proved on circumstantial evidence. The hypothesis of innocence must be excluded by the circumstances relied upon and the circumstances must point to one conclusion alone, i.e. the guilt of the accused. The learned trial Judge has in detail discussed these principles to be followed in appreciating circumstantial evidence in the instant case."

As I have stated before, the uncontradicted evidence of PW-25 clearly establishes the fact that the appellant had been the person who had the control of the hotel. Apart from that, his evidence shows beyond reasonable doubt that the appellant along with the other persons indicted had been in the hotel throughout the day where the incident of armed robbery took place. According to the evidence of PW-25 who knew all the accused well, they have left the hotel in the night wearing dark clothes stating that they are going to attend a funeral at Aranayake. But he has observed them going the opposite direction towards Awissawella where the Bogala Graphite mine is also situated.

They have returned on the same night in the two three-wheelers they left, and a red-coloured jeep has also been driven into the hotel. In the evidence of PW-25 he has explained in detail the things he heard after the return of the accused, which had not been disputed at any point.

The appellant has taken up an alibi to claim that he was away at Anuradhapura on that day, when he was called upon for his defence.

It is well settled law that an alibi is not actually a defence, but a question of fact, where it is the duty of the prosecution to eliminate such a possibility when an alibi is taken up by an accused person.

It is with that in mind, our legislature in its wisdom has brought in a specific provision as to the requirement of notice of alibi by amending the Code Of Criminal Procedure Act No. 15 of 1979 by the Amendment Act No. 14 of 2005 by introducing section 126A to the Act.

The relevant section reads as follows.

> **126A. (1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has –**
>
> **(a) stated such fact to the police at the time of his making his statement during the investigation; or**
> **(b) stated such fact at any time during the preliminary inquiry ; or**
> **(c) raised such defence, after indictment has been served, with notice to the Attorney-General at any time prior to fourteen days of the date of commencement of the trial:**
>
> **(2) The original statement should contain all such information as to the time and place at which such person claims he was and details as to the persons if any, who may furnish evidence in support of his alibi.**
>
> **(3) For the purposes of this section "evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission."**

As determined correctly by the learned High Court Judge, the appellant has failed to show that he fulfilled any of the requirements that make him entitled to take up an alibi at the trial. He has taken up that position only when he was

called upon for his defence. He has failed to show any reason that can be justified as to his failure in taking up the alibi at that delayed stage of the trial.

He has failed to confront the PW-25 who has stated in no uncertain terms that the appellant was present at the hotel throughout that day.

Besides that, it is also settled law that an alibi should not be a mere statement, but taking up of the impossibility of a person being at the scene of a crime due to the fact he was somewhere else. The appellant merely stating that he went to Anuradhapura to fulfill a vow cannot exclude the possibility of him being a participant in the crime.

In the case of **Banda and Others Vs. The Attorney General (1999) 3 SLR 168**, it was held that:

> *"There is no burden whatsoever on an accused who puts forward a plea of alibi and the burden is always on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence."*

E.R.S.R. Coomaraswamy in his book **The Law of Evidence- Volume 01 at page 278,** discusses the defence of alibi with reference to the relevant case law. At page 279 it has been stated that;

> *"An alibi is not an exception to penal liability like the general exceptions and special exceptions laid down in the Penal Code. When the defence of alibi is taken, there is no burden of proof on the accused. The defence evidence on alibi has merely to be weighed in the balance with the prosecution evidence. If the evidence of alibi is not believed, it fails. If it is believed, it succeeds. But if it is neither believed nor disbelieved but creates a reasonable doubt as to the prosecution case on identity, the accused is entitled to be acquitted."* **(See- Pollock C.B. in Rex Vs. Muller (1864) 60 C.C.C. Sess. Pap. 461, and Punchi Banda Vs. The State (1973) 76 NLR 293 at 307-309)**

I am of the view that the prosecution has proved the case against the appellant beyond reasonable doubt and the circumstantial evidence made available to the Court shows that he was a member of the group that conspired to commit the robbery using firearms and committed the offence as stated in the incitement.

I am of the view that the learned High Court Judge has correctly convicted the appellant for the charges preferred against him.

However, I also find that the learned High Court Judge has been misdirected when he decided to acquit the 1st to 8th accused indicted on the charges preferred against them as there was ample circumstantial evidence against them as well.

I am of the view that since the complainant-respondent has failed to challenge the judgment on that premise, the fact of not convicting the other accused on the same evidence that led to the conviction of the appellant is not a thing that can be made used to argue that the appellant should also have been acquitted.

I find that in the Supreme Court judgment in **SC-Appeal No. TAB/001/23**, the determination had been that the High Court Trial-at-Bar was wrong in determining that there was no evidence against the 1st accused indicted in that case, whereas there was evidence against him, and using the same evidence to convict the 2nd accused on the basis of his culpability to the crime.

However, as I stated before, in the matter under consideration in this appeal, the circumstantial evidence has been overwhelming against all the accused indicted, although the learned High Court Judge may have been misdirected in convicting the appellant on the basis of the possession and control of the hotel, where the weapons used in the crime and the looted iron safe was also recovered.

I find that in view of the provisions of Article 138 of the Constitution and as provided in section 436 of the Code of Criminal Procedure Act No 15 of 1979, and also the relevant case law, what needs to be looked at is whether the irregularity in the consideration of the evidence has caused any material prejudice to the appellant or has occasioned a failure of justice.

The proviso of Article 138 of the Constitution reads as follows;

> **Provided that no judgment decree or order of any court shall be revered or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.**

The similar statutory provision in section 436 of the Code of Criminal Procedure Act reads as follows;

> **436. Subject to the provisions hereinbefore, contained in any judgement passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-**
>
> **(a) Of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this court; or**
>
> **(b) Of the want of any sanction required by section 135,**
>
> **Unless such error, omission, irregularity or want has occasioned a failure of justice.**

The following test was formulated by Viscount Simon L.C. in the case of **Stirland Vs. D. P. P.- (1944) A.C. 315 at 321,** which reads;

> *"A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where aa reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."*

In the case of **Lafeer Vs. Queen 74 NLR 246,** H.N.G.Fernando, C.J. stated;

> *"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

For the reasons as considered above, I find no basis to agree with the learned President's Counsel in that regard, as no miscarriage of justice has been occasioned towards the appellant.

Accordingly, the appeal against the conviction is dismissed for want of merit, and the conviction dated 12-12-2018 is affirmed.

However, when considering the sentences imposed upon the appellant it is clear that the 2nd count preferred against him should have been considered as an alternative count to that of the 1st count preferred, as both the counts relates to one and the same incident. Therefore, I am of the view that there had been a misdirection when the appellant was sentenced to both the counts. Hence, I set aside the sentence imposed on the 2nd count preferred against him.

Subjected to the above variance to the sentence, the appeal against the sentence is also dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal