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

In the matter of an application under and in terms of Section 331 of the Criminal Procedure Code.

Thelisinghe Mudiyanselage
Chandrawathie
And One other

CA/Case no: CA 238/2016
HC Case No: 137/2012
HC Kuliyapitiya

Accused-Appellant

Vs.

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

Respondent

Before	:	**Achala Wengappuli,J** **Devika Abeyratne,J**
Counsel	:	Nalin Ladduwahetty PC with Keerthi Gunawardhena and Haffeel Farisz for the Accused-Appellant Varunika Hettige DSG for the Respondent
Argued on	:	12th of February 2020 and 14th of February 2020
Decided on	:	02nd of July 2020

Devika Abeyratne,J

This is an appeal by the 1st accused-appellant *Thelisinghe Mudiyanselage Chandrawathie* who together with her son, the second accused (who was tried in *absentia*), were indicted in Case No HC 137/12 in the High Court of *Kurunegala*, for committing jointly and separately the twelve offences set out in the indictment.

The appellant was found guilty for the charges set out in Counts 1,2,7 and 8 and acquitted from Counts 4,5,6,1`0,11, and 12 in the indictment. The charges she was convicted are for offences under the Penal Code in terms of section 456 and section 403 read with Section 102 to be read with Section 113 (b). Aggrieved by the conviction and the sentence, the appellant has preferred this appeal.

The facts and the background to this case *albeit* briefly, are as follows;

The first accused is the sister-in-law of PW 1 the virtual complainant, who is described as a Roman Catholic Sister Marian Fernando, of Holy Family Convent Puttalam and the second accused is the son of the first accused and the nephew of PW1. The brother of PW1 was deceased at the time of the alleged offences.

It was the evidence of PW 1, that her father had gifted her the land of 2 acres and 7 lahas of paddy by deed No. 3668 dated 5.5 1992 attested by *Gladwyn Suriyaarchchi* Notary Public(P4) and her signature marked as P4a, was admitted by her and also that her deceased brother and his wife the appellant were the witnesses to that deed.

By Deed No 3852 dated 9.5.1993 (P2) of Notary *Gladwyn Suriyaarchch*i , the father of PW 1 has gifted another land to her and her signature as the donee in that deed (P2a) was identified and admitted by PW 1.

She testified that the properties were given to her as she had the responsibility of looking after one of her brother's who was mentally retarded and did not have the capacity to look after himself. PW1 has employed a person to look after him and is maintaining their ancestral house where the sick brother was being looked after from the income she receives from the lands that were gifted by her father.

It was the case for PW 1 that she did not alienate her lands to any party and that she did not sign any deed before any Notary and her signature was forged in the Deeds where she is alleged to have transferred her interest in the lands to the children of the appellant.

Deed No 1851 dated 4.9.2006 of *Notary Bandara Weerasuriya* was marked as P3 where the witnesses were the 1st and the 2nd accused and it was transferred to *Melani Anne Nileeka* the daughter and the sister of the 1st and the 2nd accused respectively. The name of PW 1 is the purported transferor and the signature of the transferor marked as P 3 a, was denied to be the signature of PW 1 in her evidence.

It was the evidence of PW 1, that the land described in P2 deed is purported to have been transferred to *Viraj Paul* another son of the first appellant by Deed No 1839 dated 26.08.2006 by Notary *Bandara Weerasuriya* (P1) and the witnesses to that deed are the 2 accused. The signature of the transferor which was marked as P 1 a was denied by PW 1.

According to PW 1, the originals of deed Nos. 3668 (P4) and 3852 (P2) that were in her almirah in the ancestral house has gone missing which fact she has got to know somewhere in the year 2005, which was prior to getting information that those lands were purported to have been sold to her niece and nephew.

She testified that when she inquired about the missing deeds from the second accused who was a frequent visitor to her ancestral home when she initially noticed the deeds were missing, he has got angry and tried to assault her. (page 340) She admitted not taking any action or lodging a complaint about the incident to the police. However, after

informing the Attorney at law and Notary Public *Mr Sooriyarachchi* who attested those deeds, through him, has obtained two certified copies of those deeds from the land registry.

It was PW 1's contention that she did not sign Deed P1 and P3 as she never intended to alienate her rights to the properties in question and that the 2 accused were instrumental in forging her signature in the execution of the two deeds in favour of the children of the appellant.

The prosecution led evidence of 8 witnesses and the only eye witness to the execution of the deed was PW 5 the Notary who executed the two deeds. This witness has been treated as an adverse witness.

At the hearing of the appeal, it was the contention of the counsel for the appellant that the learned High Court Judge has taken upon the role of a counsel and misdirected himself in law, and has gone on a voyage of discovery imputing that the appellant has committed an offence.

Some of the grounds of appeal urged by the appellant are; that the learned High Court Judge was gravely prejudiced in the conduct of the case, therefore erred in interpreting the application of section 165 of the Evidence Ordinance; evidence of PW 5 has been wrongly excluded and thereby the identity of the appellant has not been established ; there are factual errors in the judgment; in any event the sentence is too excessive.

The counsel for the appellant strenuously argued that the learned trial judge has adopted a prosecutorial role and there are many interjections by Court and that the questions run to 4 or 5 pages at times. The contention was that the judge has lost his impartiality and that the appellant was not afforded a fair trial.

Great emphasis was laid on the fact alleging that when the identity of PW 1 by PW 5 is in favour of the appellant, the Court

interjects for no reason, sometimes in midsentence, which is not warranted and prejudicial to the rights of the appellant.

It was also submitted that after treating PW 5 as an adverse witness, after cross examination by the defense counsel, when the attempt by the State Counsel to question PW 5 was objected to, the Court intervened and posed several questions from PW 5 which was unwarranted.

It was also the counsel's argument that as Court has rejected the evidence of PW 5, the identification of the appellant by PW 5 must also be excluded. Further that the contradictions and the omissions marked at the trial were not real contradictions.

I will now consider the evidence of PW 5, in the light of the grounds of appeal adverted to by the Counsel for the appellant.

PW 5 has testified that when the two Deeds 1839(P1) and 1851(P3) were executed by him, PW 1, the transferor of those deeds were present during the signing of the deeds with the two witnesses. He has admitted not knowing PW 1 personally, but that he knows the two witnesses, which fulfilled the requirement in the Notaries Ordinance.

It transpired in evidence that the wife of PW 5 is from *Kuliyapitiya* and during weekends he goes to his wife's parents house and was in the practice of executing deeds for people in that area, mostly known to his parents-in-law. It was stated that his father-in-law is a surveyor and through him contact was made with the appellant first by telephone and then personally and instructions have been received from the appellant to prepare the two deeds in question. (not from the transferor)

PW 5 clearly has testified that he met PW 1 only on the date of attesting the deed. It is also apparent from the evidence that PW 5 has met the two accused only twice, that is on the day of attestation and on one previous occasion.

In the circumstances can it be construed that the Notary was personally known to the witnesses? In view of the evidence that has transpired, definitely not in my opinion.

It is admitted that PW 5 has not checked the identity of PW 1. Only the Identity Card No of the 2nd accused, as a witness, is mentioned in the Deeds. From his evidence it appeared that he assumed that PW 1 did not have an identity card. However, it was the evidence of PW 5, who was shown PW 1 in court, that PW 1 is the person who signed the impugned deeds.

It is also established that PW 1 has not given any direct or specific instructions regarding the execution of the Deeds to PW 5 and that he has seen the person who attested the deed only on that day.

In page 155 of the Brief, PW 5 has also stated that the only time he attested a deed with regard to a nun was, when these two deeds were attested. It appears from the evidence of PW 5 that from the information he received from the witnesses, (the accused) he has assumed the identification of PW 1, who is alleged to have come to the office in the ancestral house of his wife and attested the deeds.

PW 1 totally denied meeting or instructing PW 5 or signing the deeds in issue in *Kuliyapitiya*. She has categorically stated that she saw PW 5 for the first time in Courts. There is no other evidence before Court to establish that either the witnesses or someone else accompanied or directed PW 1 to go to *Kuliyapitiya* to attest the Deeds. The appellant exercising her right to be silent has not helped her case in this regard, as there is no explanation how PW 1 was directed to come to *Kuliyapitiya*.

Whether the Notary knew the witnesses to the deeds (the accused) is also questionable as his evidence in page 123 of the brief is that he ***thought*** the first witness *Silver Guruge Julius Gratien* was the husband of the appellant, then later on in the evidence has stated that he ***thinks*** Gratien is her son. (Page 139). In page 140 he has stated that he

believes that they are mother and son although no one told him so. (emphasis added). This evidence is very unsatisfactory.

This fact shows that he was even unsure of the relationship of the two witnesses with each other. The question then is, how well did he know these witnesses, when admittedly, he has not done any transactions previously with either of them. He has stated that he acted on the trust he had of the witnesses who gave him instructions. What is the credibility of this witness who has met the witnesses only once before the deeds were attested, when he says that because he trusted them, without even verifying the identity of the transferor, executed deeds alienating the lands to the children of the appellant?, especially as he has not received any instructions from PW 1. It was PW 5's evidence that the instructions were by the appellant.

When considering PW 5's evidence, at one point it appears he had some doubts about the identity of PW1. (pages 134 and 135)

ප්‍ර : මේ අය ඊට කලින් දැකලා තියෙනවාද?

උ : ඔප්පුව ලියන කාලෙ දන්නේ.

ප්‍ර : ග්‍රේශණ අදුනන්නේ?

උ : ඔප්පුව ලියන්න ආවාට පසු ඒ තැනැත්තාගේ ජාතික හැඳුනුම්පත තිබුනා.

ප්‍ර : ඒ දවස් ගානට විත්තිකාරිය සහ ග්‍රේශන් විශ්වාස කර ගත්තේ කොහොමද?

උ : කථා කලා වනංචාවක් කරන්නේ නැති බවට සිතුනා. මෙම සිල්වමගුරුගේ ඊටා මේරියන්ස් එදා වෙස් වලා ගෙන සිටියාද දන්නේ නැහැ.

ප්‍ර : දීමනාකරු ලෙස අත්සන් කර තිබුනේ?

උ : මේරියන්ස් අත්සන් කර තිබෙනවා.

(emphasis added)

It is also noted that there have been somewhat contradictory evidence by PW 5 which will be highlighted later on in the judgment.

The submission of the counsel about the learned judge's many interventions and making order regarding PW 5 and the appellant, has to be considered in this background.

It was contended that the order made by the learned High Court Judge to remand the appellant after fixing the matter for day to day trial and ordering of surety bail for PW 5 is highly unusual and irregular lacking in merit in fact or in law. And that there is reason to believe that the said conduct of the trial judge was in order to harass and intimidate the witness and an usurpation of section 165 of the Evidence Ordinance. (page 5 of the Written submissions of the appellant). The submission of the counsel for the appellant was that the witness PW 5 was intimidated and harassed by the learned judge and the prosecutor.

It is correct that the learned judge has made order fixing the case to be taken day to day and remanding the appellant which is provided by law. (It cannot be forgotten that the 2nd accused, the son of the 1st accused was absconding).

The only eye witness who's testimony is very important was ordered surety bail. It is safe to infer that as his evidence was not concluded on the first day and the fact that the prosecution has made an application to treat him as an adverse witness, on the evidence adduced by him, the learned judge may have decided to order surety bail. One must not forget that although PW 5 is a Notary Public, he is a witness in a case.

It is further argued that the prosecution had no basis to treat PW 5 as an adverse witness and none of the contradictions marked was put to the witness prior to treating the witness as an adverse witness.

It is important to consider the evidence of PW 5 with regard to the identity of PW 1. It is apparent that PW 5 has taken different stances in this regard.

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ප්‍ර : මේරියන්ස් ප්‍රනාන්දු කිවුවොත් පිළිගන්නවාද?

උ : පිළිගන්නවා.

ප්‍ර : මේ උසාවියේ ඉන්න මේරියන්ස් ප්‍රනාන්දු කියලා තහවුරු කර ගැනීමට මොකක් හරි

බැලුවාද?

උ : ලේඛණයක් ලබා ගත්තේ නැහැ සාක්ශිකාරිය ගැන විශ්වාස තිබ්බා ඒ දෙන්නාගේ සහොදරියක් කියලා කියපු නිසා..

ප්‍ර : මේරියන්ස් ප්‍රනාන්දු කියලා විශ්වාස කලාද මේ චිත්තිකාරිය කියපු නිසා?

උ : ඇයගේ සහොදරියක් කියන කතාව විශ්වාස කලා.

ප්‍ර : තමුන්ට එච්චර විශ්වාසයක් ඇති වෙන්න තමුන් සහ චිත්තිකාරිය අතර ගනුදෙනු කර තිබෙනවාද?

උ : ගනුදෙනු කර නැහැ මීට පෙර ඔප්පු ලියලත් නැහැ.

ප්‍ර : ඊට කලින් දන්නවාද?

උ : මවුපියන්ගේ ඇදුනුම්කම් තිබෙනවා සති 3 , 4 කට පෙර කතා කලා ඊට පෙර දන්නේ නැහැ.

In page 131

ප්‍ර : අංක 1851 ඔප්පුවේ විකුනුම්කාරිය වන මේරියන්ස් ප්‍රනාන්දු අත්සන් කර තිබෙනවාද?

උ : ඔව්

ප්‍ර : අත්සන් කරන අවස්තාවේදී එම තැනැත්තියගේ අනන්‍යතාවය තහවුරු කර ගැනීමට ජාතික හැදුනුම්පත පරීක්ශා කලාද?

උ : ඒ අවස්තාවේදී තිබී නැහැ ඉදිරිපත් කලානම් සඳහන් කරනවා ඉදිරිපත් කර නැහැ

In Page No.148

ප්‍ර : ඔය අවස්තාවේ තමුන්ට විකුනුම්කාරියගේ අනන්‍යතාව අවශ්‍යතාවක් තිබුනද?

උ : තිබුනා. අනන්‍යතාව අහද්දී හැදුනුම්පත ඊටපස්සේ නැහැ කියන්න ඇති තිබ්බානම් අනිවාර්යෙන්ම ලියනවා

ප්‍ර : දැන් තමුන් අනිවාර්යෙන්ම සොයන්න ඕන නේද?

උ : එහෙමයි

ප්‍ර : සාමන්‍යයෙන් සේවාදයකයාගේ අනන්‍යතාවය තහවුරු කරනවා නේද?

උ : ඔව්

ප්‍ර : තමුන් එදා කන්‍යා සොයුරියගේ හැඩ රුව මත නැවත දුටුවොත් අදුරගන්න පුළුවන්ද?

උ : පුළුවන් කියලා සඳහන් කරනවා

ප්‍ර : අද දින අධිකරණයේ සිටිනවාද?

උ : 2006 දැක්ක තැනැත්තිය වගේ තැනැත්තියක් හිටියා.

ප්‍ර : හැඩහුරුකම් අනුව සිටියාද?

උ : ඒ වගේ මතක හැටියට හිටියා

ප්‍ර : කොහෙද හිටියේ?

උ : අධිකරණ භූමියේ සිටියා

<u>අධිකරණයෙන්</u>

ප්‍ර : කන්‍යා සොයුරිය කන්‍යා අදුමක් ඇඳ සිටියාද?

උ : හිටියා

ප්‍ර : ඒ තැනැත්තිය තමුන් ලග ඔප්පු ලියන්න ආවා කියලා විශ්වාස කරනවාද?

උ : මම විශ්වාස කරන්නේ එයා තමයි ආවේ

In page 154

ප්‍ර : සාක්ශිකරු තමාට පෙන්වන්න පුළුවන්ද 2006 08 26 වන දින තමා ඉදිරියේ පෙනීසිටි විකුනුම්කාරිය අඳ දින අධිකරණයේ සිටින කන්‍යා සහෝදරියද කියා?

උ : ඇය කියා මම විශ්වාස කරනවා.

ප්‍ර තවදුරටත් තමාට කියන්න පුලුවන්ද විශ්වාස කරන්නේ කුමන කරුණ මතද කියා?

උ : හැඩරුව අනුව වෙනසක් වෙලා ඇති වසර 10ක් නිසා ඇය කියා සිතනවා. එකම කන්‍යා සහෝදරිය ඇය පමණයි ඔප්පු ලිවීමට ආවා.

<u>අධිකරණයෙන්</u>

ප්‍ර : තමා ඇය බවට හැඩරුව අනුව කියන්නේ?

උ : එහෙමයි මැය කියා මතකයි

ප්‍ර : පැ.සා1 ගේ නම් විමසා සිටී?

උ : සීල්මගුරු රීටා මේරියන්ස් ප්‍රනාන්දු සිස්ටර්.

In Page no 155

ප්‍ර : තමා කොහොමද මුලින්ම මෙම සාක්ශිකරුවන් දෙන්නා දැන ගත්තේ?

උ : මාමන්ඩි හදුනනවා ඒ අනුව හදුනා ගත්තේ.

ප්‍ර : තමාගේම මාමන්ඩිගේ නම මොකද්ද?

උ : දිසානයක මිනින්දෝරු කෙනෙක්.

In Page No 204 and 205

ප්‍ර : තමාට මතක ඇති මූලික සාක්ශි තමාගෙන් විමසන කොට මුලින් අධිකරණයෙන් කන්‍යා සොයුරියගෙන් තමා හඳුනනවාද කියලා ඇහුවා?

උ : මතකයි.

ප්‍ර : තමා ඊට දුන්න පිළිතුර මොකද්ද?

උ : මට මතක හැටියට ඇය විය හැකියි කිවුවා..

ප්‍ර : සාක්ශිකරු තමා කිවුවා එම තැනැත්තිය කියලා විශ්වාස කරනවා කියලා?

උ : මගේ මතක හැටියට ඇය කියලා විශ්වාස කරනවා කියලා මම කිවුවා.

ප්‍ර : සාක්ශිකරු මම තමාට යෝජනා කරනවා තමා වසර දහයකට කලින් ලියූ ඔප්පුවේ තමාට අදිකරණයේ පෙන්වා සිටි කන්‍යා සොයුරිය විකුණුම්කාරිය ලෙස පෙනී සිටි අය කියලා අසත්‍යක් ප්‍රකාශ කලේ කියලා ?

උ : මට සියයට සියයක්ම කියන්න බැහැ සමහරවිට එහෙම විය හැකියි.

PW 1 being a member of a religious sector wears a special garment. It is unfortunate that the attire of PW 1 is not described in evidence. PW 1 has stated that she is a sister of Roman Catholic faith. It is not clear whether she wears a habit of a nun or whether it is a particular colored saree that some catholic nuns are allowed to wear. However, it is noted that PW 5 has stated she was wearing a habit. (Pg 116,148)

In Page No. 116

ප්‍ර : කන්‍යා සොයුරිය කවුරු කියලාද කිවේ?

උ : සහොදරියක් කියලා හඳුන්වා දුන්නා

ප්‍ර : ඒ තැනැත්තිය කන්‍යා සොයුරියක් විදියට ආවාද?

උ : ඇය කන්‍යා ඇදුමින් ආවා

ප්‍ර : කන්‍යා සොයුරියගේ අනන්‍යතාව තහවුරු කර ගත්තාද?

උ : නැහැ එහෙම බැලුවේ නැහැ. මේ තැනැත්තිය මා විසින් විශ්වාස කලා.

ප්‍ර : ඔවුන් කීව දේ විශ්වාස කලාද?

උ : සාක්කිකාරියගේ සහෝදරියක් කියලා කීවා අඳුනන නිසා විශ්වාස කලා.

According to PW 5 this was the only time he has attested a deed of a clergy person, and saw her only on the day the deeds were signed. That was in August 2006. He gave evidence in July 2016, ten years later. Can one expect to remember with certainty a person he has seen

only once in his life time 10 years earlier. It is a little hard to believe if you don't have a photographic memory. What one has to remember is that not only the witness, the Notary also has aged by ten years, where his power or remembering people who he has seen only once in his lifetime can be inferred to have diminished, and whether in such circumstances, the identification of PW 1 by just glancing at her in Courts for a few seconds or minutes could be taken as sufficient identification.

The counsel for the appellant has re- iterated that the Notary positively identified PW 1 as the person who attested the deed, But some of the answers of PW 5 does not elicit that view. It is apparent on a close scrutiny of his evidence that what he says at times is, that he ***believes*** it is PW 1. (emphasis added)

It appears that only the identity No of the 2nd accused is given in the Deeds. Neither PW 1's nor the appellant's Id Numbers are given. It is established that although the Notary stated he knows the witnesses it is not so, from his own evidence as he has met the witnesses only twice. His only knowledge of these witnesses are that they were known to his father-in-law.

Although the Notary was attempting and at times insisting that PW 1 was present at the execution of the deeds, from his own evidence it can be inferred that he went along with the request of the witnesses who he did not know well at all. And adding insult to injury testifying in court saying he trusted the witnesses he has met only on two occasions.

The Notary's comment that he does not know whether PW 1 was in disguise in page 135 of the brief and in page 205 is also a cause for concern, as it creates a doubt about his identification of PW 1.

The evidence of PW 5 as shown above, lacks professionalism and I am of the opinion that it is established that the Notary did not know the witnesses personally as required by the Notaries Ordinance.

Thus, from the evidence of the Notary himself, it is apparent that without having any personal knowledge about the witnesses he was required to know when executing deeds, even without ascertaining the identity of the transferor he has executed the deeds in favour of the children of the appellant.

The argument of the Counsel for the Appellant is that when the evidence of PW 5 is rejected as an adverse witness, all the evidence of the witness ceases to exist and that although in pages 457 and 466 of the brief the learned High Court Judge has stated the evidence of PW 5 would not be considered , the learned Judge has made observations and referred to the evidence of PW 5 to discredit the position of the appellant, and thus, it appears that the evidence has been considered.

The question to be considered by this Court now is whether the identification of the appellant by the Notary also should be excluded as argued by the counsel for the appellant as the Court has treated PW 5 as an adverse witness.

The maxim *falsus in uno,falsus in omnibus* is based on the concept that when a witness makes a false statement it affects his entire credibility.

In ***Dahanayake vs Kannagara*** 72 CLW 62, ***Queen Vs Abilinu Fernando*** 70 NLR 73 it was considered that the evidence of a hostile witness has no value and cannot be relied upon by either party. However, this rigid interpretation that was there earlier is no longer recognized fully.

In ***Keshoram Bora vs The State of Assam*** 1978 AIR 65-SC 1096 para 6 it was observed that *'while it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well settled that when once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely itself'on the evidence of such witness and hence, his version cannot be treated as the version of the prosecution".*

In ***Ugar Ahir & Ors v State*** *of Bihar* AIR 1965 SC 277, it was held, *"The maxim falsus in uno , falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. It is, therefore the duty of the Court to scrutinize the evidence carefully and in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its out of the rest."*

In ***Moses v. State*** [1999] 3 SLR Pg 401 It was held, *"Once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness, and hence his version cannot be treated as the version of the prosecution itself."*

In ***Sisirathunga v. Attorney-General*** [1995] 2 SLR Pg 64 It was held, *"If the evidence of a witness on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistence on a material point, his evidence is worthless and cannot properly be taken into consideration at all for the purpose of deciding that issue."*

In ***Samaraweera v. The Attorney General*** [1990]1 SLR Pg 256 where Justice *D.P.S.Gunasekera* has held, *".....Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safety be separated from the true."*

In the circumstances of the instant case, I do not see any reason why the identification of the appellant by PW 5, as the person who instructed him and also one of the witnesses who signed the deeds before him, which were never in issue before the court ,should be disregarded, especially when it was not denied by the appellant, only based on the fact that PW 5 is considered an adverse witness. It is observed that there is not even a suggestion in the trial court, that the appellant was not present when the deeds were attested. Therefore, it is my opinion that the argument of the counsel fails on that point, and the identification of the appellant by PW 5 is relevant evidence which can be accepted by Court.

Another contention on behalf of the appellants was that the accused were denied a fair trial as the learned High Court Judge, by his many interjections was prejudicial to the appellants and specially when the evidence is favourable to the appellant, the judge suppressed the question, which was unwarranted.

The learned Counsel for the appellant has referred this Court to a number of authorities to elucidate the role of a judge in an adversarial system. Some of the authorities refer to instances where the appellant or the accused or the witnesses for the accused were questioned by the learned judge. It is different in the instant case, as it is the prosecution witness who has been questioned by the trial judge who may have been anxious to understand the details of this case and asked questions to get them clear in his mind.

The question here seem to be whether the judge's intervention has prejudiced the appellants and affected their case adversely and whether there is a miscarriage of justice.

It is on record that whenever the trial judge has posed questions from the prosecution witnesses, he has given opportunity to both parties to examine the witnesses on matters arising from his questions. Neither party has questioned the particular witness, which can be construed that the judges questioning was not to the detriment of the accused, if it was so, the counsel would not have allowed the witness to leave without any clarification.

On a perusal of the evidence, it is noted that the learned judge has asked quite a number of Questions from the prosecution witnesses which he is authorized to do in certain circumstances as per section 165 of the Evidence Ordinance. Section 439 also provides for court at any stage of the case even to summon any person as a witness. All these provisions are laid down to assist court in its pursuit to attain truth and justice.

It is trite law that when some clarification is needed and the questioning of the prosecution is not sufficient to get a clear understanding of the issue, it is the duty of the judge to seek the necessary clarification that is needed to consider an acquittal or a conviction of the accused, at the end of the trial.

Section 165 provides as follows;

The Judge may,in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any question or order, nor, without any leave of the court, to cross examine any witness upon any answer given in reply to any such question; Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved'

In ***Wijeratne Banda vs State*** {1998}3 Sri. LR 86 at 92, *Kulathilake J* stated *'it is necessary to stress the powers given to a trial judge to put questions to a witness in terms of section 165 of the Evidence Ordinance. The trial judge in order to discover or to obtain proper proof of relevant facts may ask any question at any time of any witness or of any person about any fact* ***relevant*** *or* ***irrelevant.***(emphasis added)

In ***Sisilinona vs Balasooriya*** [2002] 1 Sr.LR 404.....it was held "*...,,,by section 165 Of the Evidence Ordinance a judge is vested with power to put questions to a witness in order to discover or to obtain proper proof of relevant facts,,,,,,,,,*"

In the given circumstances of the case, where the identity of PW 1 was of utmost importance, and the Notary's evidence regarding his personal knowledge about the witnesses he has met only twice during the transaction who vouched for the identity of PW 1, the judge's questioning cannot be said to be unusual or un warranted. A judge is required to be alert to any situation when a witness's credibility is being tested. Merely because the witness happens to be an Attorney and a Notary he should not be expected to be treated differently, as at the end of the case it is the judge who has to set down the judgment.

It is seen that at some points the judges questioning has gone to 3, 4 pages, but what is important to consider is whether these questions resulted in a miscarriage of justice. Merely because the judge has asked many questions should not be a ground to quash a conviction.

When considering the totality of the evidence of the Notary, I cannot fault the learned High Court Judge questioning the Notary at length for the purpose of ascertaining the truth. This Court observes that the nature of the questioning has not unfairly prejudiced nor affected the case of the appellant adversely.

Thus, In the instant case, I am convinced that the judge's questioning was well within the scope of section 165 of the Code and has not resulted in a failure of justice.

It was also commented by the counsel for the appellant that some of the conclusions arrived at by the judge is without any legal or factual basis, for example in page 435 of the Brief in the second paragraph it refers to Notary *Suriyaarachchi*, when those particular deeds were attested by *BandaraWeerasuriya*. It is obvious that it is not a material mistake. Another such conclusion referred to by the counsel is the learned judge assuming that the appellant has admitted the entries by Notary *Weerasuriya* being there on the deeds marked as V1 and V2 when they were submitted to the District Court of *Kuliyapitiya*.

Deed V1 is the photo copy of Deed No 1851 and Deed V2 is a photocopy of the original of Deed 3668 (page 231).

It is in evidence that there are two separate cases pending in the District Court of *Kuliyapitiya* with regard to the two deeds. In the case of the defendant who is said to be abroad in Italy, who is the son of the appellant, it is the appellant who is looking after the interest of the son, according to PW 1 who is the plaintiff of that action. She has evidenced in pages 302,303,310,311 of the Brief as follows;

In Page No. 302

ප්‍ර : තමුන් කීවා නේද සුරිය ආරච්චි මහත්මයා ඉස්සරහා ලියපු ඔප්පු දෙක නැති වූ බව?

උ : එහෙමයි.

ප්‍ර : කොහේදි හරි දැක්කාද?

උ : ඩී සී එකේ නඩුවට ගෙනත් තිබුණා.

ප්‍ර : දිසා අධිකරණයේ නඩුවට ඉදිරිපත් වුනේ?

උ : විත්තිය පැත්තෙන්

ප්‍ර : කවුද ඉදිරිපත් වුනේ?

උ : තුසිත විරාජ් වෙනුවෙන් එයාගේ අම්මා..

ප්‍ර : ඒ කියන්නේ විත්තිකාරියද?

උ : එහෙමයි

In Page No. 303

ප්‍ර : ඒ නඩු දෙකට ඔබතුමියගේ නැති වූ ඔප්පු ඉරිපත් කලාද?

උ : මෙහෙමයි නඩු දෙකක් ආවා. නඩුවක් ඉදිරියට ගියා පසුව අත් අකුරු වාර්තා ඕන බව කීවාම උසාවියට ගියා . එතකොට එදිනම ලොයර්ට කීවා කොහොමද ඔප්පු දෙක ආවේ එක පාරට මේ ඔප්පු දෙක හොරෙන් ගත්තු ඔප්පු දෙකක් කියලා..

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ප්‍ර : අංක 108 නඩුව යන්නේ කාට විරුද්ධව?

උ : තුශිත යන අයට

ප්‍ර : ඒ නඩු දෙකේ පාර්ශවකරුවන් ලංකාවේ ඉන්නවාද?

උ : දුව ඉන්නවා.

ප්‍ර : අනිත් නඩුවේ අය?

උ : ඉතාලි ඉන්නේ.

ප්‍ර : ඔහු වෙනුවෙන් නඩුවට පෙනී සිටින්නේ කවුද?

උ : අම්මා.

ප්‍ර : අම්මා කියන්නේ කවුද?

උ : චන්ද්‍රා තෙලිසිංහ.

ප්‍ර : විරාජ් කියන්නේ කවුද?

උ : චන්ද්‍රා තෙලිසිංහගේ 2 වෙනි පුතා..

ප්‍ර : විරාජ්ගේ නඩුවට පෙනී සිටින්නේ කවුද?

උ : අම්මා වන චන්ද්‍රා තෙලිසිංහ.

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ප්‍ර : තමා ලියා දුන්නේ නැත්නම් ඒ ඔප්පු දෙක එයාට ගියේ කොහොමද?

උ : මම දුන්නේ නැහැ. මේ ඔප්පු දෙක නැති වෙලා තිබුනා. මේ අය ගන්න ඇති කියා සිතනවා. මම ඒ ගැන අහන විට මට ගහන්න ආවා..

ප්‍ර : ඒ අනුව දිසා අධිකරණයේ අංක 108 සහ 112 කියා නඩු දෙකක් තිබෙනවාද?

උ : ඔව්

ප්‍ර : ඒ ඔප්පු දෙකට අදාල මුල් ඔප්පු දෙක විත්ති පාර්ශවයෙන් අධිකරණයට ඉදිරිපත් කලා?

උ : ඔව්.

This evidence was not seriously impugned or assailed by the accused appellant.

However, although there are some conclusions of the learned trial judge which are factually incorrect, they are not vital and material mistakes which have affected the overall conclusion of the case.

With regard to the counsel' s contention that PW 5 was harassed, it cannot be interpreted that the questions were put to him in the spirit of beating him down. PW 5 was no ordinary witness, he is an attorney at law and notary public and several attorneys were looking after the interest of that witness.

In the judgment, the learned judge has stated that he disregarded the evidence of PW 5 as he was treated as an adverse witness and has considered only the merits of the case on the circumstantial evidence, to decide whether the prosecution has proved the charges beyond reasonable doubt.

The senior assistant examiner *K. Kumudu Apsara* (PW 2) has testified for the prosecution marking the government analyst report as P 9. From her evidence it appeared that the marking of the documents sent to the government analyst department is somewhat different to the markings given in the trial court.

In fact this was elucidated by the intervention of the trial judge (page 263) otherwise if it went unnoticed, there would have been a major confusion in this regard. After the judge's intervention it was clarified by the learned State counsel and specific markings were given.

When the commission was issued from the District Court of *Kuliyapitiya* (page 243) the following markings were given, for example P1 for Deed 3852, P2 for Deed No 3678, P 3 for Deed 1839, P4 for Deed No 1851, P5 for the specimen signatures of PW 1. At the trial court, the disputed deeds with the signatures were marked as, Deed 1839 as P1 and Deed 1851 as P3. (emphasis added)

In page 252 of the appeal brief in her evidence, PW 2 has testified that the signatures in Deed 3852, Deed 3678 is similar with the specimen signature as well as the writing in documents submitted by PW 1 namely in documents marked as P 6 and P 7.

Further, that the signatures in the disputed deeds 1839 and 1851 are not similar to the specimen signature in P 5. Therefore, with the evidence of PW 2 it was established that the signatures in the disputed deeds were not of PW 1. This evidence was not assailed.

In the instant case the accused have not given any evidence, or a statement from the dock and have exercised their right to silence.

The learned judge has specifically stated that he is not considering the evidence of PW 5 and has relied only on the circumstantial evidence.

The prosecution has sufficiently established that PW 1 has not signed the 2 deeds in question, but the accused have conspired to project that PW 1 signed and alienated the properties to the benefit of the children and siblings of the two accused.

V1 and V2 deeds are copies of the original deeds which have to be in the possession of the *donee* that is PW 1. These deeds were said to be lost from PW 1's almirah. The copies of these were produced for the District Court case according to PW1 by the appellant mother of Viraj Paul who is abroad and whose interest the mother the appellant was looking after. There is no evidence to the contrary.

After evaluating and analyzing the evidence led by the prosecution, the trial judge has decided that the relevant circumstances are consistent with the guilt of the accused with regard to the charges that the judge has convicted the accused of, as the only inference that can be arrived at is consistent with the guilt of the accused only, and that no one else other than the accused had the opportunity of committing the offence they were charged with.

The learned judge has sufficiently analysed and evaluated the evidence and decided, that in this case the inescapable and irresistible inference and conclusion is that it was the accused who committed the crime that they were convicted of.

On a consideration of the totality of the evidence, I am satisfied that the prosecution has proved beyond reasonable doubt the charges the accused were convicted of and see no reason to interfere with the conviction of the learned trial judge.

However, I am of the view that the accused being first offenders the sentence being imposed is disproportionate to the offence convicted of. Therefore, we vary the sentence imposed by the learned trial judge and sentence the appellant to a term of 7 years imprisonment each, in respect of counts 1,2,7 and 8 and the sentences to run concurrently from the date of conviction i.e. 15.11.2016.

The rest of the sentence imposed by the learned trial judge for those counts to stand unchanged. The sentence is varied and subject to the variation the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI ,J

I Agree

JUDGE OF THE COURT OF APPEAL