

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

In the matter of an Appeal in terms of  
Section 331 of the Code of Criminal  
Procedure Act No.15 of 1979.

C.A.No. HCC No.0204/2015

H.C. Kuliyapitiya No. 260/2007

Joseph Nilantha Rodrigo

Accused-Appellant

Vs.

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

Complainant- Respondent

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BEFORE : ACHALA WENGAPPULI, J.  
DEVIKA ABEYRATNE, J.

COUNSEL : Niranjan Jayasinghe for the Accused-Appellant.  
Rohantha Abeysuriya A.S.G for the respondent

ARGUED ON : 24.02. 2020 and 04.03.2020

DECIDED ON : 26. 06. 2020

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ACHALA WENGAPPULI, J.

The accused-appellant (hereinafter referred to as the "Appellant") was indicted before the High Court of Kuliayapitiya by the Hon. Attorney General alleging that he committed murder of *Jayakody Arachchige Nilochanie Sheila Navaratne* on or about 3<sup>rd</sup> March, 2006.

Upon election of the Appellant to be tried before a Sinhala speaking jury, his trial commenced on 12<sup>th</sup> October 2015. At the conclusion of the prosecution case, when the trial Court ruled that the Appellant had a case to answer, he made a statement from the dock. The trial Court summed up the jury on 2<sup>nd</sup> November 2015. The jury returned a unanimous verdict of guilt and after his conviction, the Appellant was sentenced to death by the trial Court.

Being aggrieved by the said conviction and sentence, the Appellant sought to challenge its validity on the following grounds of appeal;

- a. the evidence in relation to the alleged telephone conversation between the prosecution witness No. 1 and the Appellant is contradictory and unsafe to act upon,
- b. the evidence that the Appellant was wearing a blood stained trouser at the time of his arrest is doubtful,
- c. the prosecution had failed to establish a nexus of the items said to have been recovered from the three wheeler to the Appellant and that evidence fails the probability test,
- d. the trial Court, by allowing the discovery of the identity card of the deceased and a photograph without proving them, caused grave prejudice to the Appellant,
- e. evidence presented on the recovery of a sword is weak and unsafe to act while the directions of trial Court in this regard caused grave prejudice to the Appellant,
- f. the language used by the trial Court in directing the jury had removed the rights of the Jury to determine facts of the case,
- g. the trial Court had failed to address the jury on the principles governing voice identification,
- h. directions of the trial Court on the Appellant's evidence to the Jury had indirectly resulted them rejecting the same,
- i. the directions of the trial Court on the difference between Section 293(2) and 294(3) are inadequate since the injuries were sufficient to cause the death in the ordinary cause of nature.

Of these multiple grounds of appeal, it is possible to identify most of them under two broad areas of concern. Such grouping facilitates effective considerations of closely related grounds of appeal.

One such area of concern would be the grounds of appeal that hinges on the question of sufficiency of evidence in relation to certain items of circumstantial evidence as presented by the prosecution while the other general area would be the alleged instances of misdirection or non-direction on law and fact made by the learned trial Judge during his summing up to the jury.

The grounds of appeal reproduced under (a) to (e) could be grouped into the first category as identified above and the remaining grounds of appeal i.e. (f) to (i) could be grouped into the second.

Before this Court ventures to consider these multiple grounds of appeal of the Appellant, under the two groupings referred to above it is necessary to make a brief reference to the items of circumstantial evidence that had been presented by the prosecution.

The deceased *Jayakody Arachchige Nilochanie Sheila Navaratne* was in her mid-thirties at the time of her death. She had married quite young when she was sitting for her ordinary level exams to one *Kumara Tissera* and had two children. They separated over about 18 years ago and the deceased found regular employment in the middle eastern countries where she served as a domestic

helper. She used to visit Sri Lanka regularly and would find shelter with her sister *Indrani Sheila Navaratne* (PW1) who resided in *Narangalla*. Since her return to the island in 2003, the deceased continued to live with her sister. The deceased preferred to travel by three wheelers and through these regular taxi rides, the deceased became acquainted with the Appellant as he who drove them around regularly. After sometime the witness realised that the deceased was having a romantic relationship with the Appellant. She had warned the deceased when she learnt that the Appellant was already married. *Indrani* knew that the deceased used to remit her earnings directly to the Appellant during this period and it was he who looked after her children.

It was revealed that the Appellant opted to leave his family and start a new life with the deceased since he admitted that he cannot provide for two women. The Appellant then requested witness *Indrani* for a plot of land owned by her in *Narangalla* for him to live with the deceased. The witness had declined. This state of indecisiveness remained for some time. In 2005, the deceased and the Appellant, have agreed to part ways. The deceased had thereafter consented to remarry and *Indrani* had looked for a suitor. The deceased in the meantime, had requested the Appellant to return her money.

It is not clear whether he had agreed to do so, but the circumstances indicate that there had been two prior occasions in which the deceased was to meet up with the Appellant in this regard. *Indrani* had learnt from the deceased sister that in February and March in 2006 that she expects the Appellant to return her money. The Appellant, having agreed to return her money initially, phoned

her that he does not have funds to return her money and cancelled their meeting over the phone.

On 3<sup>rd</sup> March 2006, *Indrani* received a call from the deceased and was informed that the latter was to meet the Appellant that day over her money. The witness suggested her sister to go with someone. However, she learnt that the deceased had proceeded alone to meet up with the Appellant. At about 2.00 p.m. she was told that the bus in which the deceased travelled had mechanical problems. The deceased had reached her destination at about 3.45 p.m. and the anxious witness, called her between 4.00 and 4.15 p.m.

During that conversation the deceased told witness that the Appellant had just arrived. The witness had then described the circumstances under which the Appellant too had spoken to her over the phone. According to her, the Appellant had then grabbed ("අශ්‍රම අරගෙන") the phone from the deceased and said that he would neither return her money nor would send the deceased back ("වුම් ගෙදර එච්නේ නැහැ. සල්ල දෙන්නෙන් නැහැ"). Having conveyed his intentions to the witness, the Appellant had ended the phone conversation abruptly. The witness claimed that she had identified the voice of the Appellant and has had heard his voice over the phone in her previous conversations with him.

Witness *Rita Fernando* was residing adjoining the *Kuliyapitiya* General Cemetery at *Hettiwatta*. She recollects an incident of homicide in 2006 but unable to recollect the exact date. On that particular day, she heard scream of a woman coming from the Crematorium area in the said Cemetery. She saw someone lying near the Crematorium. She also saw a cream coloured three wheeler going out

to the main road from the Cemetery gates. She had informed her husband over this happening and having rushed to the scene, saw the body of a woman with bleeding injuries. She had identified the three wheeler marked "P9" as having a similar body colour to the one she saw leaving the Cemetery. She also said the Appellant too had lived in close proximity to the said Cemetery. *Kapila Bandara* too had lived in the same neighbourhood and confirms that they saw the body of a woman with injuries.

On 3<sup>rd</sup> March 2006 at 6.20, p.m. *Kuliyapitiya* Police received information regarding a body of a woman, in front of the Crematorium of the Cemetery. Having reached the scene at 6.40 p.m. IP *Sirisena* saw the body of the deceased, lying face up. He also noted the deceased had several gaping wounds on her head and neck. There were two large blood patches, located two and six feet away from the body and tyre marks, apparently left by a three wheeler. The officer had recovered two broken pieces of gold chain, one lying close to the body and the other near her shoulder. There was a mobile phone, which rang whilst being under her buttocks, and it was retrieved only after the completion of scene visit by the Magistrate.

Witness *Indrani* meanwhile became anxious after the abrupt end of the telephone conversation. She had repeatedly tried to contact her sister by dialling her number. At about 5.30 p.m. a male had answered her call and conveyed that her sister had died. She then tried the number again and was answered by a woman. The witness then contacted her brother, a police officer attached to *Kurunegala* Police Station, and conveyed this information.

CI *Amarakoon* of *Kuliyapitiya* Police Station had visited the scene. Thereafter, he made arrangements for the Magistrate to visit the scene. After the scene visit, one *Sebastian Tissera* identified the body and provided information in relation to the Appellant as a person who had a close relationship with the deceased. Having removed the body to the Hospital morgue, the witness received information about the Appellant and had arrested him at 10.28 p.m., when they met him at *Meegahakotuwa- Hiriliyedda* main road, driving a three wheeler, produced as "P9".

The witness noted blood stains on the T shirt and the pair of shorts worn by the Appellant at the time of his arrest. Search of the three wheeler yielded a pink coloured bag, which in turn contained an umbrella, a travelling bag, a purse, a blouse, woman's underwear, a brush, bottle of body lotion, a vial of deodorant and some sanitary pads. This bag also had the NIC of the deceased.

Subsequent to the arrest of the Appellant, the witness had recorded his statement at 10.35 p.m. and followed him to the rear part of the compound of his father-in-law *Aloysius Fernando*, where the Appellant pointed out a blood stained sword lying in the shrubs.

Witness *Sujeewa* said the three wheeler marked "P9" was with the Appellant since January 2006 until he took its possession from the Magistrate's Court upon executing a bond on 16.06.2006. The Appellant had transferred its

ownership to the witness on 07.03.2007, in favour of the witness over a prior financial transaction between them.

The Government Analyst confirmed that human blood was identified on the pair of trousers and also on the blade of the sword. The expert witness also of the opinion that the pattern of the several human blood marks observed on the trousers worn by the Appellant could be a result of blood splashing from the wounds, as they are being inflicted on the deceased.

Death of the deceased was due to shock following excessive bleeding. The medical expert testified that the deceased has suffered a total of 16 cut injuries and the 1<sup>st</sup> to 5<sup>th</sup> injuries that were located on the head and torso, were the serious injuries. Of these injuries, 1<sup>st</sup> to 5<sup>th</sup> and 8<sup>th</sup> cut injuries would cause death in the ordinary course of nature since they contribute mostly for the loss of blood. It is his opinion that the 1<sup>st</sup> injury had resulted in cutting into the skull bone and also cutting into brain matter. The medical witness also observed an impression coupled with abrasions, over the stomach of the deceased, caused by a vehicle running over her. The 5<sup>th</sup> injury on the neck had partially cut the 5<sup>th</sup> cervical vertebra. These two injuries also could have splashed blood in droplet form on the attacker, if he or she was about 2 feet from the deceased.

In his opinion, the attacker had inflicted each of the 16 cut injuries by striking with a heavy sharp weapon such as the sword recovered upon the information provided by the Appellant ("P10"), by separate individual strokes. The attacker had used the sharp edge of the weapon in inflicting all these injuries, except for the injury No. 11, where he had used the blunt edge of the

weapon. The 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> injuries were defensive injuries when the deceased attempted to ward off the attack on her. Medical expert also noted an imprint abrasion over the stomach of the deceased caused by vehicle running over her.

It is in the light of these items of circumstantial evidence, this Court must consider the multiple grounds of appeal as urged by the Appellant.

The grounds of appeal that hinges on the question of sufficiency of evidence in relation to certain items of circumstantial evidence as alleged by the Appellant, namely;

- a. the evidence in relation to the alleged telephone conversation between the prosecution witness No. 1 and the Appellant is contradictory and unsafe to act upon,
- b. the evidence that the Appellant was wearing a blood stained trouser at the time of his arrest is doubtful,
- c. the prosecution had failed to establish a nexus of the items said to have been recovered from the three wheeler to the Appellant and that evidence fails the probability test,
- d. the trial Court, by allowing the discovery of the identity card of the deceased and a photograph without proving them, caused grave prejudice to the Appellant,
- e. evidence presented on the recovery of a sword is weak and unsafe to act while the directions of trial Court in this regard caused grave prejudice to the Appellant,

should be considered by this Court at this stage.

These grounds of appeal are essentially impinging on the issue of credibility of evidence. In *Thurairatnam v The Queen* 68 NLR 347, the Court of Criminal Appeal reiterated that the questions of fact that arose in the trial should be left to the jury to be decided by them and them alone. They have the right to decide credibility of the prosecution witnesses and whether to accept their evidence or not since credibility is a question of fact. However, it was said by the Court of Criminal Appeal, in *Walimunige John v The State* 76 NLR 529, that it is "incorrect in law to say that a mistake of fact by the jury is incapable of being corrected." The question of the status afforded to a conclusion reached by a properly directed jury upon a question of fact, when challenged before an appellate Court, was considered in *R v Cooper* [1969] 1 Q.B. 267. In this judgment Widgery L.J. stated;

*"It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing up was impeccable, this Court should not lightly interfere."*

The evidence of *Indrani* in relation to the brief telephone conversation, she claimed to have had with the Appellant, forms the basis of this complaint. It was contended on behalf of the Appellant that the times referred to by the witness of the calls she initiated and received on the day her sister died did not find support from the documentary proof by which the call details between the witness and the deceased were revealed. It could not also be reconciled with that of the evidence of the other witnesses.

Witness *Indrani* testified that the deceased called her "at about 2.00" p.m. (2.00 ට විතර) informing of the breakdown of her bus and again at about 3.45 (3.45 ට විතර). In between 4.00 and 4.10 p.m. ( 4.00ත් 4.10ත් අතර ), she received another call informing her of the Appellant's arrival. Then she said it is at 5.30 p.m. she called her sister and a policeman answered the phone.

During trial, the prosecution presented documentary evidence from the relevant service provider as to the call details from the witness's mobile phone connection No. 0773210181 during the relevant time period. The detailed bill ("P1") in relation to the above mobile phone connection was presented by the prosecution. The relevant parts of the call details that are listed under "Outgoing Dialog to Dialog" on 3<sup>rd</sup> March 2006 from the mobile phone connection No. 0773210181 are tabulated below for easy reference.

Sequence	Date	Time	Phone number	Units
30	03.03.2006	13:08:51	779614218	1
31	03.03.2006	13:10:37	773545060	1
32	03.03.2006	16:16:31	779614218	1
33	03.03.2006	16:21:07	779614218	1
34	03.03.2006	16:28:17	779614218	1
35	03.03.2006	17:09:20	779614218	2
36	03.03.2006	20:09:59	779614218	1

37	03.03.2006	20:10:40	779614218	4
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The claim that the deceased was in constant contact with her sister *Indrani* on the day the former had met with her death is clearly borne out by the call details. Only the time of calls the witness had initiated after the death of the deceased shows a significant gap. She said that when she called the deceased at 5.30 p.m. a male person spoke. The call records as well as the evidence of IP *Sirisena* indicate that the witness's call on the deceased's phone was only answered after 8.00 p.m.

IP *Sirisena* said even though he heard the phone ringing, did not retrieve it by disturbing the body, since the visiting Magistrate was to record his observations. The Magistrate had arrived at the scene sometimes after 7.30 p.m. that evening and left having spent about 40 minutes making observations. The time gap between the 5.09 p.m. call and 8.09 p.m. call is three hours. This evidence supports the position that after the 5.09 p.m. call, the deceased's phone was not used, until it was retrieved by IP *Sirisena*.

The witness was anxious as to the fate of her sister after the abrupt end of her conversation with the Appellant. The witness was in disbelief when IP *Sirisena* conveyed that her sister had been killed. Desperately she tried to contact her relation, in order to ensure that the deceased is safe.

This Court notes in this context the time gap between the incident and her testimony before the jury, as relevant consideration in evaluating evidence of a

witness as per *Gunasekara v Director General, Commission to Investigate Allegations of Bribery or Corruption* CA 210/2008 – decided on 21.06.2011. The indictment reads the date of offence as 3<sup>rd</sup> March 2006. The witness gave evidence only in October 2015. There is a gap of more than nine years exists between these two points of time. Naturally her memory would have faded over the years as to the exact timing.

In view of these considerations, the inaccuracies as to the exact timing of the calls could easily be understood as she had to rely on her memory to recall the timings.

Thus, it is clear there was sufficient evidence that had been led before the trial Court in relation to the calls initiated and received by the witness *Indrani*. The Appellant contended before this Court that her attribution of certain utterances to him is a fabrication. No contradiction or omission was highlighted by the Appellant nor he made any suggestion to her that it is a fabrication.

The acceptance of her claim of making calls and what had been conveyed to her by the deceased as well as the Appellant during these calls therefore purely depends on her credibility as a witness.

Whilst directing the jury, the trial Court had addressed them on these lines over the issue and invited them to consider the question whether it is reasonable to expect such discrepancies in her evidence in such circumstances.

There is no complaint by the Appellant that the learned trial Judge did not adequately directed the jury how to evaluate evidence for its credibility and the weightage they should be attaching to them if they found the evidence is credible. In fact, as noted above, the learned trial Judge had adequately and correctly directed the jury on evaluation of credibility of witnesses and the applicable tests in evaluating evidence, and, in addition, had drawn their attention to the inconsistencies pointed out by the Appellant.

This Court would not therefore intervene to disturb the determination of fact reached by the properly directed jury unless their determination could be termed as perverse. There is no material before this Court to conclude it is so.

The grounds of appeal that deal with the items of evidence that the Appellant was wearing a blood stained trouser at the time of his arrest and items said to have been recovered from the three wheeler to the Appellant and that evidence fails the probability test could be considered together since they revolve around the circumstances under which the Appellant was arrested and a weapon was recovered.

Learned Counsel for the Appellant submitted that the prosecution version indicates that his client was arrested on a public road and by then he had already concealed the blood stained sword in a shrub. He then raised the question, according to the prosecution the Appellant had the presence of mind to conceal any incriminating items that tends to connect him with the murder of the

deceased, and if that is the case, would it be a probable conduct on his part for him to be still wearing the blood stained trouser at the time of his arrest?

This contention requires the applicability of the probability test to the prosecution claim that the Appellant, although he concealed the sword, yet was wearing a blood stained trouser at the time of his arrest.

The evidence indicate that the deceased had suffered her injuries, which resulted in her death, in the evening at about 5.30 p.m. The Appellant was arrested after about three hours, i.e. at 8.28 p.m. in the same evening. The prosecution presented evidence that the Appellant knew the place where a sword with human blood on its blade was found. At the time of arrest, the Appellant was clad in a pair of blue shorts. The blood like patches were observed by IP Amarakoon at that point of time. The sword was recovered from a place, located about 300 meters away from where he was arrested.

The Government Analyst, in his evidence described the pattern of the blood patches that were found on the trouser. There were five places where blood patches were noted as groups (සමඟ වශයෙන), in addition to several other individual ones smaller in size.

The time was dark and the trouser is of blue colour. The blood patches were distributed over the fabric forming few clusters and several individual ones as well. In these circumstances, it is more probable that the Appellant would not

have noticed the presence of few dark stains against blue background in the limited light of late evening, if he was more keen to conceal the weapon as soon as possible.

The jury were properly warned to assess the evidence by applying the probability test, objectively based on their life experience. This direction is in line with the description of the probability test, as described by this Court. The judgment of *Addaraarachchi v The State* (2000) 3 Sri L.R. 393, where the Court made certain observations in relation to applying the test of probability on the evidence of a prosecutrix. It is stated therein;

*"... there is no other way to apply the test of probability and improbability except by considering the yardstick of accepted and expected behaviour of women in society. In other words, it is the application of the test of normal human conduct. As Jayasuriya J. observed in the case of *Wickramasuriya v. Dedoleena & others*,*

*" A judge in applying the test of probability and improbability relies heavily in his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."*

*In this case it would appear that both the trial Judge and the learned Senior State Counsel who prosecuted (as observed from his written submissions) seem to have been imbued with an erroneous notion that when applying the test of probability and improbability it is the*

*subjective test and not the objective test that has to be resorted to,  
..."*

In the summing up, learned trial Judge had adequately and correctly directed the jury in applying the test of probability when they proceed to evaluate credibility of the witnesses by making references to the normal human conduct and it should be applied objectively.

It is important that the second segment of the submission also is considered in this context. It had been submitted on behalf of the Appellant that if the Appellant was keen to conceal any incriminating evidence as the prosecution claim, then why he would keep the deceased's hand bag in his three wheeler? Compounding this submission, the Appellant complains that the prosecution had failed to prove that the bag in fact belonged to the deceased.

In the light of these submissions, it is appropriate to consider whether the prosecution had proved that the hand bag that had been found in the three wheeler at the time of arrest of Appellant, actually belonged to the deceased as the first consideration since if the answer in the negative, then its recovery has no relevance to the prosecution except to the limited extent that an inference could have been drawn that the bag must have belonged to a woman.

IP *Samarakoon* said that the bag was recovered from the rear part of the three wheeler. It is only through a search of the vehicle, the officer had seen the

bag and took charge of it. If the Appellant has caused the injuries to the deceased with a sword, as the prosecution alleges, then it is reasonable to infer that he would distance himself from the weapon with the first available opportunity. If one were to apply the three categories of knowledge as per *Ariyasinghe & Others v Attorney General* (2004) 2 Sri L.R. 357, the evidence clearly indicate that it was the Appellant himself who concealed the sword given the facts that the land belonged to his father-in-law, the relatively short period of time since the incident and the recovery. The sword was recovered from the shrub of the back yard of his father-in-law's property. This factor indicates that the Appellant had deliberately chosen a place where the possibility of an accidental recovery of the sword by a third party is placed at its minimal.

The important question is then whether the bag belonged to the deceased. IP *Samarakoon* said in evidence that the NIC of the deceased, bearing number 7274438438V, was found in it. The witness, having entered the recovery of NIC in his notes, had thereafter produced it along with other contents of the bag under PR 571/2006 to the Station. These productions were handed over to the custody of Court at a subsequent stage.

However, the NIC was not produced during the trial before the jury and its recovery details were only elicited in the re-examination of the witness by the prosecution. The Appellant, although afforded an opportunity to further cross examine the witness on this issue, had no questions.

It was decided in *Edrick de Silva v Chandradasa de Silva* 70 NLR 169, that;

*"... Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the Word "prove" in section 3 of the Evidence Ordinance, and as trial Judge or Court must necessarily take that fact into consideration in adjudicating the issue before It ...".*

More recently, in an unreported judgment of *Phillipu Mandige Nalaka Krishantha Kumara Thisera v Attorney-General-* CA 87/2005 - CAM 17.5.2007 this Court has held that;

*"... whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness.".*

Production clerk of the Magistrate's Court of Kuliyanpitiya said that he had received a parcel containing the NIC along with other productions from the police under PR 571/2006 on 15.03.2006.

In these circumstances, the effect of the evidence presented by the prosecution on this aspect deemed proved since it was left unchallenged.

During summing up, learned trial Judge had however directed the jury to disregard the evidence presented by the prosecution on recovery of the deceased's NIC since it had not been produced before them.

In *Gunapala v Attorney General* (2007) 1 Sri L.R. 273, one of the grounds upon which the validity of the conviction was challenged is non-production of the "murder weapon" by the prosecution during trial. In delivering judgment *Ranjith Silva J* rejected this contention and stated;

*"The provisions of the Evidence Ordinance itself have made a clear distinction with regard to documentary evidence on the one hand and real evidence on the other. Section 91 of the Evidence Ordinance excludes parole evidence whereas Section 60(1) and (2) of the Evidence Ordinance enacts that if the oral evidence refers to a fact which could be seen or perceived by any other sense or in any other way, it must be the evidence of the witness who says that he saw or perceived that fact by that sense or in that manner, that should be led to prove that fact, although the Court may, if it thinks fit, require the production of such material thing for its inspection. (Section 165 of the Evidence Ordinance) Thus the prosecution was entitled to lead oral evidence of a witness without producing the material object."*

Similar view was expressed in *Sudu Banda v Attorney General* (1998) 3 Sri L.R. 375, where Jayasuriya J, having compared the English law on the point had concluded that;

*"... the contention that as the gun was listed as a production in the indictment, its non-production at the trial is fatal to the conviction is an untenable proposition certainly as far as the law of Sri Lanka is concerned."*

In relation to the appeal before this Court, the recovery of the NIC was another item of circumstantial evidence presented before the jury. Thus, the withdrawal of the evidence in relation to the recovery of NIC of the deceased from the three wheeler as an item of circumstantial evidence against the Appellant by the learned trial Judge, although contrary to the principle enunciated in the said judgment, had resulted in placing him in an advantageous position since it had deprived the prosecution of an important item of evidence.

Apparently, the submission of the Appellant that the prosecution had failed to establish a nexus between him and the bag was made on the footing that the NIC was the only item of evidence that connected the bag to the deceased. It is clearly not so.

Witness *Indrani* had identified the hand bag and the blouse found in the said bag as items that belonged to the deceased. She gave a convincing reason for the positive identification of the blouse, and her assertion was not contested

by the Appellant. *Indrani* claimed it is her blouse and it had been gifted to the deceased by her.

The Jury was directed upon this item of evidence in considering the question of fact whether the bag belonged to the deceased or not. Therefore, the submission of the Appellant on this point does not reflect the available evidence before the jury, when they proceeded to evaluate the evidence after the summing up. Contrary to the claim of the Appellant, when the evidence that had been presented before the jury is considered in the proper perspective, the finding of fact by the jury could not be assailed since this Court is of the view that the relative probabilities tilts heavily towards the prosecution.

The two remaining grounds, namely that the trial Court, by allowing the discovery of the identity card of the deceased and a photograph without proving them, caused grave prejudice to the Appellant and also the evidence presented on the recovery of a sword is weak and unsafe to act while the directions of trial Court in this regard caused grave prejudice to the Appellant, should be considered now.

In relation to the evidence of recovery of the NIC of the deceased has already been dealt with in the preceding paragraphs. The basis of the complaint of a photograph was due to an attempt by the prosecution to mark a photograph in which the Appellant and the deceased appeared in the background of a three wheeler. Learned trial Judge, in his summing up, had clearly directed the jury to

totally disregard that evidence from their consideration. The Appellant, however, now claim the failed attempt to admit the photograph had prejudiced the jury in arriving at a finding against him.

What the prosecution sought to achieve by producing the photograph must have been to convince the jury of his association with the deceased and that he owned a three wheeler. As already referred, the prosecution had led the evidence of current owner of the three wheeler marked as "P9" in order to establish that it was in the possession of the Appellant on the day the deceased was killed. His evidence remained unchallenged since there was no cross-examination by the Appellant. On the question of the Appellant's association with the deceased, the prosecution led the evidence of *Indrani* who had personal knowledge of the nature of their relationship. In his statement from the dock, the Appellant too admits that he had known her and had sexual relations with her upon payment of money.

Moving on to the consideration of the last ground of appeal in this segment, that the evidence of recovery of a weapon is "weak and unsafe to act" while the directions of trial Court in this regard caused grave prejudice to the Appellant, it is noted, that this submission has two inbuilt components to it. Firstly, it claims the evidence of the recovery of a weapon is weak and unsafe to act. Then, secondly, it claims that the direction of the trial Court on the same had caused grave prejudice to the Appellant.

As far as the evidence in relation to the recovery of the sword is concerned, the Appellant's submission was even for his arrest, the prosecution did not place any evidence why he was suspected and it also had failed to call the father-in-law, in whose land the recovery of the sword was made.

IP *Amarakoon*, in his evidence described the circumstances under which the recovery of the sword was made. He had recorded the statement of the Appellant at the place of the arrest. Then the Appellant had led the police officer to a shrubby back yard of a property located about 300 meters away from the place of arrest and pointed out the blood stained sword. It was later revealed that the recovery was made on a land belonged to the Appellant's father-in-law, and his wife was also in her father's house at that point of time. The Appellant challenged the place of his arrest by suggesting that he was arrested at the residence of an Attorney-at-law while waiting there with a person called *Aloysius*. He challenged the place of the recovery of the three wheeler by suggesting that it was taken charge from a place on *Delgahakotuwa* Road. Both these suggestions were denied by IP *Samarakoon*.

The Appellant also did challenge the witness on the recovery of the sword from his father-in-law's property by simply suggesting to the witness that his statement is a lie. The witness denied this suggestion as well. The Appellant had stated in his dock statement that his father-in-law had told him, once he was enlarged on bail, that his fish knife was taken by the police. This position was not put to the witness who said the weapon was recovered upon the Appellant's information and therefore it lacks consistency. This claim could also be taken as a

statement bordering falsehood since the prosecution evidence, that the sword was handed over to the reservist on the same day after it was recovered, and that fact was not challenged by the Appellant. Obviously the jury had disbelieved the Appellant's evidence.

In these circumstances, this Court is not inclined to accept the Appellant's contention that the evidence in relation to the recovery of the weapon is "*weak and unsafe to act*" as it is clearly a misstatement, in view of the evidence referred to above.

It is appropriate at this juncture to consider another ground of appeal raised by the Appellant. He complained that the language used by the trial Court in directing the jury had removed the rights of the Jury to determine facts of the case. This claim was basically stems from two statements from summing up. One of impugned statements read "... අශේර් සාක්ෂිය මතාව ගැලපෙන බවත් බැලුබැල්මට පෙනී යතව" while the other statement read "... වරදක් සිදු කිරීමේදී හාටිනා කරනලද යම් හාඳුවයක් නිඛෙන ද්‍රානයක් විත්තිකරු දැන සිටිය...".

A similar contention was placed before the Court of Criminal Appeal in *Albert Singho v The Queen* 74 NLR 368, where the Court cited words of Lord *Reading*, in the judgment in *Leo George O'Donnell* 12 Cr. App. R. 219, which stated that "...in the course of his summing up such language as leads them (the jury) to think that he is directing them, that they must find the facts in the way which he indicates" in determining the appellant's complaint.

The above quoted direction with the adjective “මතා” in addressing the jury in assessing testimonial trustworthiness of *Indrani* is a mere observation of the learned trial Judge when he presented police evidence for their consideration. It was said in the context of *Indrani's* evidence that since her conversation with the Appellant, which abruptly ended, she had repeatedly tried her sister's number to establish contact with her. After repeated attempts, finally a male answered the phone. Then she tried the number once more, and a female answered. Learned trial Judge, having referred to evidence of IP *Sirisena* who said in evidence it was he who answered the phone for the first time, and when it rang for the second time, he had handed it over to a woman who was there asking her to take the call. Learned trial Judge made the comparison of the two witnesses and alluded the said remark. In this context, it is not possible for this Court to conclude that the trial Judge has led the jury to find the facts “*the way he indicates*”.

Other disputed direction, the Appellant had relied on, was “... වරඳක් සිදුකිරීමේදී ගාවිතා කරන ලද යම් භාණ්ඩයක් තිබෙන දේහයක් විත්තිකරු දැන සිටිය...”. Here, the trial Court refers to the knowledge of the Appellant as to a place where a sword with traces of human blood on its blade was found. Obviously, it is not natural in the ordinary circumstances to find a sword with human blood on its blade. Clearly the trial Court is justified in referring to the sword as “වරඳක් සිදුකිරීමේදී ගාවිතා කරන ලද”. If the trial Court directed the jury by adding the Appellant, before the said quotation and thereby directed that “විත්තිකරු විසින් වරඳක් සිදුකිරීමේදී ගාවිතා කරන ලද” instead of what it did use to direct the jury, then that addition would definitely qualify to be termed as a misdirection by this Court. If one reads through the remaining part of this segment of directions,

it would reveal that the trial Court had thereafter clearly directed the jury that the recovery of the weapon does not entitle them even to treat it as a mere hint ("உதியல்") that he did commit the crime. Therefore, this direction is unable to be termed as a direction prejudicial to the Appellant.

The several grounds of appeal that had been considered thus far are without any merit when considered in the light of the entire body of evidence that had been placed before the jury. These grounds of appeal that are essentially founded upon credibility and sufficiency of evidence therefore necessarily fails.

Learned Counsel for the Appellant, in his submissions also raised several grounds of appeal on the deficiencies in the summing up. In order to refresh memory, these grounds are reproduced below once again, after rearranging them for convenience of dealing in with more clarity;

- i. directions of the trial Court on the Appellant's evidence to the Jury had indirectly resulted them rejecting the same,
- ii. the directions of the trial Court on the difference between Section 293 and third limb of Section 294 of the Penal Code are inadequate since the injuries were not necessarily fatal ones and are only sufficient to cause death in the ordinary course of nature,
- iii. the trial Court had failed to address the jury on the principles governing voice identification.

The Appellant made a lengthy dock statement. In his statement, the Appellant admits that he had prior sexual relations with the deceased upon monitory terms. He states that he provided transport, when she was to meet up with her clients, without directly attributing that she was engaged in prostitution. Referring to her death, the Appellant claimed that he lived adjacent to the cemetery where she was found with bleeding injuries and when he saw her that evening, he thought that he should inform the police of his relationship and therefore sought legal assistance.

It was submitted that the directions given to the jury regarding the evaluation of the dock statement of the Appellant had indirectly resulted in rejecting his evidence. The grievance of the Appellant in this particular ground of appeal is the perceived impression created in the minds of the jury upon the directions by the trial judge in evaluating his evidence, which he alleges resulted in rejecting his evidence. These directions appear in pages 906 to 912, where the trial Court directed the jury in applying the tests of consistency and probability by making reference to the evidence of the Appellant.

Perusal of these directions coupled with the evidence did not reveal any error in fact or in law. Learned trial Judge had directed the jury in evaluating the Appellant's evidence, once in general terms and repeated them on specifically in relation to the evidence presented before them.

In *Yahonis Singho v The Queen* 67 NLR 8, the Court of Criminal Appeal laid down the rule in relation to evaluation of a dock statement, that the jury must be directed on the intermediate position where there was neither an acceptance nor a rejection of it. The judgments of *The Queen v Kularatne* 71 NLR 529 and *Somasiri v Attorney General* (1983) 2 Sri L.R. 225 have further added

that, if there are no directions to the jury as to if they believe it then they must act on it, if it raised a reasonable doubt the prosecution case, the defence must succeed and it should not be used against any other accused, then such a failure constitutes a non-direction on an important aspect of the law.

In the instant appeal, not only the trial Court had adequately directed the jury on all these important principles of law and repeated them once more when it directed them in relation to valuation of the dock statement for its credibility with specific references to the evidence. Learned trial Judge, ventured further into the territory of safeguarding the interest of the Appellant by inviting the jury to a factor in favour to him as it was directed that;

“මා පෙර සඳහන් කළා විත්තිතරු විත්ති කුඩාවේ සිට ප්‍රකාශයක් කළ විට එය සාක්ෂියක් වශයෙන් සැලකිය යුතු බවට. එය සැලකීමේදී මා පොදුවේ සඳහන් කළ මෙම පරිත්‍යාච මත විත්තිකරුගේ සාක්ෂියද භාරණය කළයුතු වෙනවා. එයේ වුවද බරපතල ලෝද්‍යාවකට මූහුණදී සිටි විත්තිකරුගේ සාක්ෂි සළකා බැලීමේදී යම් ආකාරයකට අනික්‍රීත සාක්ෂි කරුවන්ට වඩා ඔහු යම් මානයික කැළම්මක හෝ විත්ත වෝද්‍යාවකින් යුතුව සිටිමට හැකියාවක් ඇති බවත එවැනි අවස්ථාවකට පත්ව සිටින අයෙකු සාක්ෂි දෙන විට ඔහුගේ සාක්ෂිය සළකා බැලීමේදී යම් ආකාරයක සානුකම්පිත දැයකින් යුතුව බැලීමද යුතු වෙනවා. මේ ආතාරයේ විත්තියේ සාක්ෂිය සළකා බැලීමේදී මෙම කාරණාවට යවත්ව අනික්‍රීත සාක්ෂිවල විශ්වාසත්වය සළකා බලන ආකාරයට සළකා බැලීම සිදුකළ යුතු වෙනවා.”

Hence, it is clear that this ground of appeal is devoid of any merit.

The contention of the Appellant that the learned trial Judge had failed to direct the jury in respect of the distinction between the “intention of causing such bodily injury as is likely cause death” as described in Section 293 of the Penal

Code with the "*intention of causing bodily injury intended to be inflicted is sufficient in the ordinary course of nature*" as in third limb of Section 294, and thereby deprived the jury of the option imposition of lesser culpability on him resulting in grave prejudice should be considered now.

This submission appears to have stemmed from the evidence of the medical expert that none of the 16 injuries suffered by the deceased were necessarily fatal ones and only some of them were sufficient to cause her death in the ordinary course of nature.

In view of this submission, it is helpful to refer to some of the judicial precedents which already dealt with this contentious issue and had laid down the applicable governing principles, because, it is against the background of those principles only that this Court intends to evaluate the directions to the jury given by the learned trial Judge on this particular aspect.

The "intention" referred to in third limb of Section 294 of the Penal Code was described by Basnayake J in *Farook v Attorney General* (2006) 3 Sri L.R. 174. It is stated by his Lordship that;

*"The intention that is required, is to cause the injury in fact inflicted. If the intended injury is sufficient to cause death in the ordinary course of nature, the offence is murder. The law is crystal clear on this point",*

It was decided by Sisira de Abrew J in *Vithana & Another v The Republic of Sri Lanka* (2007) 1 Sri L.R. 169, that;

*"... the intention that is contemplated in the third limb of sec. 294 is the intention to cause bodily injury. This injury should be sufficient, in the ordinary course of nature, to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary course of nature and not on the intention. This position is amply justified by illustration 'c' to sec. 294 which is reproduced below:*

*"A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."*

*This illustration says that 'A' is guilty of murder although he may not have intended to cause the death of 'Z'. This shows that prosecution can prove a charge of murder even if the accused, charged with murder, did not entertain murderous intention at the time of inflicting the bodily injury, if the accused entertained an intention to inflict bodily injury and that this injury is sufficient, in the ordinary course nature, to cause the death of the victim. In my view an accused person charged with murder cannot claim, when the victim has succumbed to the injury which is sufficient, in the ordinary course of nature, to cause death, that he did not intend to cause the death of the victim but he only intended to inflict bodily injury and that he should be exonerated from the charge of murder."*

His lordship further added,

*"... the intention contemplated in the 3<sup>rd</sup> limb of sec. 294 is the intention to inflict a bodily injury. According to 3<sup>rd</sup> limb of sec. 294, this injury must be sufficient to cause death in the ordinary course of nature. The emphasis in the 3<sup>rd</sup> limb of sec. 294 is on the sufficiency of the injury in ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature which evidence must be elicited from the doctor who conducted the post-mortem who is called upon to express an opinion on the post-mortem report."*

In relation to the "high probability of causing death" resulting from an injury, Jayasuriya J, in *Sumanasiri v Attorney General* (1999) 1 Sri L.R. 309, acted on the principle that "*clause 3 of section 294 requires that the probability of death resulting from the injury inflicted was not merely likely but very great though not necessarily inevitable*".

The basis of determination of the question of fact whether an accused has had the requisite "intention of causing bodily injury to any person", as referred to in the third limb of Section 294 of the Penal Code, was also considered in *Farook v Attorney General* (supra). The Court stated thus;

*"The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the*

*offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not."*

In relation to the question, whether a particular injury could be termed as an injury which is "sufficient in the ordinary course of nature to cause death", Jayasuriya J in acted on the consideration that "*where death is caused by bodily injury, the person who inflicted the wound will be held to have caused death although by resorting to proper remedies and skilful treatment death might have been avoided.*"

Having reproduced some of the recent judicial pronouncements on the applicable legal principles in relation to the requisites the prosecution must prove if it alleges murder under 3<sup>rd</sup> limb of Section 294 of Penal Code, it is very relevant to quote the judgment of *Chandrasena v Attorney General* (2008) 2 Sri L.R. 255, where it had been explicitly laid down that;

*"In order to establish a charge of murder under third limb of Section 294 of the Penal Code, prosecution must prove the following ingredients beyond reasonable doubt:*

1. *The accused inflicted a bodily injury to the victim.*
2. *The victim died as a result of the above bodily injury.*
3. *The accused had the intention to cause the above bodily injury.*
4. *The above injury was sufficient to cause the death of the victim in the ordinary course of nature."*

Returning to the consideration of the complaint of the Appellant, it is important at this stage of the judgment to consider the directions of law as given by the learned trial Judge to the jury, on this important aspect.

The segment of the summing up dealing with the issue commences from pages 819 to 821 and continues from pages 853 to 855..

In his directions to the jury, learned trial Judge, having informed of them of the offence of culpable homicide not amounting to murder and the difference between the murderous intention and mere knowledge of likelihood of death, had thereafter directed that, if they find the Appellant only had knowledge, then he is entitled to the benefit of imposition of lesser culpability and accordingly to find him guilty to culpable homicide.

He then directed the jury on the applicability of the general exceptions, and further directed them to consider their relevance, in spite of the total denial as asserted by the Appellant.

Learned trial Judge, in providing a bridge to the direction of law on lesser culpability and the evidence that had been presented before the jury, had invited their attention to the fact that among the 16 injuries seen on the body of the deceased there were only two injuries, namely injury Nos. 3 and 4, that had been described by the medical expert as "fatal in the ordinary course of nature". He then directs them to decide the nature of the intention the Appellant had by considering the location, number and nature of the injuries.

Another reference was made of murderous intention and knowledge, when the learned trial Judge had referred the medical evidence to the jury and had reminded them once more of the lesser culpability in his concluding segment of the summing up. Thus, this Court is of the considered view that

adequate directions were issued on the jury of the availability of the option of finding the Appellant guilty to lesser culpability.

The jury had the evidence before them that the Appellant was to meet up with the deceased on prior arrangement. He did meet with her. She was then taken to the cemetery in a three wheeler which appeared similar to the one used by the Appellant. The screams of a woman heard by neighbours indicate the deceased was alive at that point of time. Then her body was seen with cut injuries. The injuries were linked to the sword recovered upon information by the Appellant. It is thus clear that when the deceased was taken into the cemetery, the Appellant had the sword with him, indicating he had already thought a design in relation to the deceased negating any issue of private defence.

In view of these considerations, this Court is of the opinion that the jury had sufficient evidence to arrive at the conclusion they eventually did, if there were adequate and proper directions by the trial Court to guide them to arrive at that conclusion. Since above analysis clearly indicate that the jury were adequately and properly directed by the trial Court, accordingly this ground of appeal too fails.

In view of the conclusions reached upon the several grounds of appeal as referred to above, it is opportune at this stage to pause for a while to consider the role of an appellate Court in determining the grounds of appeal raised by an appellant after a jury trial.

The provisions of Section 2(1) of the Criminal Appeal Act of 1966 in England, provides that the Court of Appeal shall allow an appeal against conviction, if they think the conviction is "unsafe".

*R v Cooper* [1969] 1 Q.B. 267. In this judgment Widgery L.J., in determining what is meant by it is unsafe to allow a conviction to stand;

*"... the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experience it."*

This test, referred to as the "lurking doubt test" in the English legal literature, was adopted in Sri Lanka by the Supreme Court, in its judgment of *Mendis v The Republic of Sri Lanka* (1992) 1 Sri L.R. 124, when it reproduced the above quoted statement of Widgery L.J. and proceeded to hold;

*"We agree with the interpretation given to the phrase "unreasonable or cannot be supported having regard to the evidence" by Moseley, S.P.J. in *The King v. Mustapha Lebbe* 44 NLR 505 and in the English cases as unsafe or unsatisfactory.*

*The verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory even though all the material was before the jury and the summing-up was impeccable."*

The Court of Criminal Appeal in *The King v. Mustapha Lebbe* (*ibid*) had spelt out its approach in appeals, by adopting certain principles of law enunciated in English judgments, as follows;

*"This Court has, however, repeatedly laid down that, assuming a proper direction by the Judge, it is not its function to re-try a case unless it has been shown to the satisfaction of the Court that the verdict is unreasonable or that it cannot be supported having regard to the evidence"*

A divisional bench of the Supreme Court, in delivering its judgment of *Mannar Mannan v Republic of Sri Lanka* (1990) 1 Sri L.R. 280, agreed with the submissions of the Additional Solicitor General, as it is stated therein;

*"As submitted by Mr. Marapone, Additional Solicitor-General, the enacting part of sub-section (1) of section 334 " mandates " the Court to allow the appeal where (a) the verdict is unreasonable or cannot be supported having regard to the evidence, or (b) there is a wrong decision on any question of law, or (c) there is a miscarriage of justice on any ground. We are here concerned only with ground (b) set out above. As regards the proviso, it is relevant to note, first, that it clearly vests a discretion in the Court and, secondly, that recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. Moreover, it seems clear that on a plain reading of the sub-section there is no warrant for the view that the Court is precluded*

*from applying the proviso in any particular category of " wrong decision " or misdirection on question of law as, for instance, burden of proof."*

In the instant appeal, this Court is of the firm view that, for the reasons enumerated in the preceding paragraphs, the Appellant had failed to impress it that the verdict of the jury is unreasonable or that it cannot be supported having regard to the evidence, by placing reliance upon the several grounds of appeal that had been dealt with by the Court thus far.

Lastly this Court should now consider the ground of appeal based on the failure of the trial Court to direct the jury on voice identification of the Appellant.

It was contended strongly by the learned Counsel for the Appellant that the prosecution had heavily relied on the alleged telephone conversation between the witness *Indrani* and the Appellant when the deceased initiated the call to inform her sister that the Appellant had come to meet her that evening. It was submitted that the prosecution utilised this item of evidence to convince the jury of their allegation by the words attributed to the Appellant during the alleged conversation indicated that he had no intention of returning the money belonged to the deceased nor he had any intention of letting her return back to *Indrani*.

In his summing up to the jury, learned Counsel contended, that the trial Judge had failed to direct them as to the manner in which they should consider the issue of voice identification. It was also highlighted the last telephone conversation between *Indrani* and the Appellant had taken place over 10 years

prior to the one relied upon by the prosecution. The Appellant therefore contends that this vital non-direction is fatal to the conviction since the absence of proper guidance to the jury on voice identification, the prejudicial value of this item of evidence far exceeds its relative probative value.

Learned Additional Solicitor General had rightly conceded that the trial Court had unfortunately failed to direct the jury on this issue. However, it was submitted by the learned ASG that the conviction could nonetheless be sustained, in view of the proper legal directions given on remaining items of circumstantial evidence.

In *Bandaranaike v Jagathseña* (1984) 2 Sri L.R. 394, the Supreme Court remarked that "*the witnesses did not have that degree of familiarity with the voices of the respondents and others in the assembly to identify them by their singing*", placing emphasis on the degree of familiarity of the witness with the voice he claims to have identified, if weightage is to be given on the claim of voice identification.

The non-direction by the trial Court as to the voice identification would have resulted in a misdirection, if there was only that items of evidence to establish that the Appellant did meet the deceased that evening. In *Mendis v The King* 52 NLR 486, the Court of Criminal Appeal, having quoted English judgments which dealt with determining the circumstances under which a non-direction could be considered as a misdirection, stated thus;

*"The question whether there has been misdirection by reason of non-direction is not an abstract question of law. R. v. Stoddart (1909) 2 CAM. 217, Lord Alverstone C.J. said that mere non-direction is not necessarily misdirection and that those who allege misdirection must show that something wrong was said or that*

*something was said which would make wrong that which was left to be understood. Again in R. v. Warnn (1912) 7 CAM. 146, Lord Alverstone C.J. said ' That to have any effect in itself the mis-statement of the evidence or the misdirection as to the effect of the evidence must be such as to make it reasonably probable that the jury could not have returned their verdict of guilty if there had been no mis-statements ".*

It is correct, as the Appellant submitted, that the words attributed to him, not only brings him to the presence of the deceased but extends to indication of his intentions that he would not let the deceased return to *Indrani* nor would he return her money.

In eliciting the disputed conversation with the Appellant during examination in chief of the witness *Indrani*, learned prosecutor failed to clarify the attendant circumstances that may have had assisted the jury in assessing that item of circumstantial evidence. When the witness said that the Appellant had grabbed the phone ("କେବେ କରିଲାଏନ"), there was no probe as to why she described the incident in that fashion. It is obvious that she could not see actions of the Appellant since it was only a voice call, yet she had ascribed such an act to the Appellant. Then there was a failure to elicit, the details of conversation that had apparently taken between the two. The witness merely stated in summary form that the Appellant had asserted that the deceased will not be sent back and he would not return her money.

It appeared that the prosecutor had unwittingly starved the essential details of the conversation as to its duration, its content in proper context, and the witness's familiarity with the voice of the Appellant over a phone conversation. A mere reference in this regard was found when the witness said that he would address her as "*Indrani Akke*" on his part. The Appellant did not cross examine the witness on this aspect and in his statement from the dock, there was no denial of this conversation with *Indrani*.

Upon examination of relevant evidence, it is clear that this is not the only item of evidence available to the prosecution to present before the jury to convince them that the Appellant did meet the deceased that evening. The evidence is that just prior to "grabbing" the phone from the deceased, she had confirmed to *Indrani* that the Appellant had arrived there. The recovery of a bag containing the NIC and personal items of the deceased, further supports not only they met that evening, but also the fact that she had travelled with him to the cemetery where she sustained the injuries which resulted in her death. The absence of any substantial amount of cash with the body of the deceased or with her belongings, indicate the Appellant, although had undertaken to return, never did return her money that evening.

The absence of a direction as to voice identification by trial Court could well be attributable to the closing addresses of the Counsel since if they had placed emphasis on this item of evidence, it would compel the trial Court to issue directions. Be that as it may, the evidence of a phone conversation was

unfortunately left before the jury to determine the weightage they should attach it, by the trial Court, unaided by proper directions.

The Supreme Court, in delivering judgment of *Mannar Mannan v Republic of Sri Lanka* (supra) adopted the test formulated in the English case of *Stirland v D.P.P.* 30 Cr. App. Rep. 40, when it acted on the proviso to Section 334(2), after considering the question whether "*a reasonable jury, properly directed, would inevitably and without doubt have returned the same verdict*". Having answered the said question in the affirmative in relation to the appeal before Court, their Lordships have thereafter proceeded to dismiss the same on that premise.

In the circumstances, this Court must then examine whether "*a reasonable jury, properly directed, would inevitably and without doubt have returned the same verdict*" in view of the body of evidence presented before it.

Even if the prosecution did not place the evidence of these words attributed to the Appellant by *Indrani*, there were other convincing evidence before the jury to arrive at the same finding.

The evidence presented by the prosecution therefore supports the reasonable inference that the deceased had met the Appellant that evening prior to her death, travelled with him in his three wheeler and was later found in a cemetery with multiple cut injuries, thus significantly reducing the probability of the jury solely acting on the impugned item of evidence in coming to the

conclusion as to the guilt of the Appellant, in the absence of proper directions as to how they should set about in considering it. Hence, the said non-direction could not be termed as a misdirection which by necessary implication vitiate the conviction, by applying the criterion as laid down in *Mendis v The King* (supra).

In applying the test whether "*a reasonable jury, properly directed, would inevitably and without doubt have returned the same verdict*", this Court firmly holds the view that it would in view of these other items of circumstantial evidence referred to earlier on.

In these circumstances, this Court affirms the conviction and sentence imposed by the trial Court on the Appellant by applying the proviso to Section 334(2) since no substantial prejudice had been caused to the Appellant by the non-direction.

Before this Court parts with the judgment, although the ground of appeal raised on voice identification was decided on a different consideration, it is appropriate to refer to the areas of concern affecting the quality of voice identification.

The identification of voice by a witness who is familiar with the voice of an accused, as an item of evidence in relation to his identity, had received considerable attention from the jurisdictions all over the world. In American jurisprudence, such witnesses are referred as "ear witnesses" following the

universal description of a witness who saw something relevant is called an eye witness.

If the witness is considered truthful, then the next question that arises is the weightage that should be attached to the claim of voice identification. Over the years, the claim of voice identification has been evaluated by Courts, by developing many considerations for that purpose, depending mostly on the manner in which the witness has heard the voice of the accused. Whether the witness heard the voice of the accused in its natural form or through some electronic device seemed the basic line of division in identifying the applicable criterion.

In relation to identification of voice, by a witness simply on his familiarity with the voice of the accused, with no electronic device adding distortion, the English Courts would expect the prosecution to carry out a voice comparison exercise by placing the suspect among several volunteers and getting them to recite a specific text while the witness to make the identification by voice, as per *Hersey* [1999] Crim LR 281, a procedure somewhat akin to that of holding an identification parade in cases of visual identification.

If the voice was heard by the witness through some device, such as a phone, a listening device or by through a recorded conversation; then a technical evaluation is insisted by English Courts. Such technical evaluations would be in the form of opinion of a voice expert or of an acoustic phonetician, expressed after an auditory analysis.

In *Flynn and St John* [2008] EWCA Crim 970, following principles were identified in this regard;

- " 1. Identification of a suspect by voice recognition is more difficult than visual identification,
- 2. Identification by voice recognition is likely to be more reliable when carried out by experts using acoustic and spectrographic techniques as well as sophisticated auditory techniques, than lay listener identification,
- 3. The ability of a lay listener correctly to identify voices is subject to number of variables. There is at present little research about the effect of variability but the following factors are relevant;
  - a. the quality of the recording of the disputed voice or voices,
  - b. gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice,
  - c. the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person,
  - d. the nature and the duration of the speech which is sought to be identified as important. Obviously, some voices are more distinctive

than others and the longer the sample of speech the better the prospect of identification,

- e. the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.

The judgment of Court of Appeal in *Attorney General's Reference (No.2 of 2002)* [2003] 1 Cr App Rep 21, added another important factor in voice identification. It stated "... *the key to admissibility is the degree of familiarity of the witness with the suspect's voice. Even then the dangers of a misidentification remain; ...*". This judgment also added a requirement of a warning to be given for the benefit of the jury about the use of such evidence and the need for some explicit modified directions in the lines of *Turnbul* [1977] QB 224, where such were formulated to warn the juries of the potential dangers of acting on witnesses who made mistaken visual identifications.

These concerns expressed by English Courts were cited here in order to stress the point as to the extent to which the Courts have developed safeguards to ensure the reliability of voice identification and also to highlight some areas of concern to the trial Judges in their judicial work. In the appeal before this Court, the Appellant's ground of appeal that no direction to the jury on voice identification by the trial Court was decided upon utilisation of a different consideration. Hence, adaptation of these concerns as expressed by the English Courts into Sri Lankan context and to the extent to which it should be done, did not arise in this instance, and is therefore left to a future Court to deal with.

In view of the foregoing, this Court sees no basis to interfere with the conviction and sentence in relation to any of the grounds of appeal as raised by the Appellant. Accordingly, his appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**DEVIKA ABEYRATNE, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**