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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka from the Civil Appellate High Court of Sabaragamuwa holden at Ratnapura in SC/HCCA/RAT/08/2010[F] dated 14.02.2013.

Weerasinghe Kankanamge Weerasinghe,
Pelwatta Road, Galahitiya,
Godakawela.

PLAINTIFF

S.C. Appeal No. 62/2014
S.C./H.C.C.A./L.A./109/2013
SP / H.C.C.A./RAT/08/2010[F]
D.C. Pelmadulla Case No. 230/M

Vs.

P.G. Ratnasiri,
Pelwatta Road, Galahitiya,
Godakawela.

1st DEFENDANT

K.G. Sandya Kumari,
Pelwatta Road, Galahitiya,
Godakawela.

2nd DEFENDANT

AND BETWEEN

P.G. Ratnasiri,
Pelwatta Road, Galahitiya,
Godakawela.

1st DEFENDANT-APPELLANT

K.G. Sandya Kumari,
Pelwatta Road, Galahitiya,
Godakawela.

2nd DEFENDANT – APPELLANT

Vs.

Weerasinghe Kankanamge Weerasinghe,
Pelwatta Road, Galahitiya,
Godakawela.

PLAINTIFF – RESPONDENT

AND NOW BETWEEN

Weerasinghe Kankanamge Weerasinghe,
Pelwatta Road, Galahitiya,
Godakawela.

PLAINTIFF – RESPONDENT – APPELLANT

Vs.

P.G. Ratnasiri,
Pelwatta Road, Galahitiya,
Godakawela.

1ST DEFENDANT – APPELLANT – RESPONDENT

K.G. Sandya Kumari,
Pelwatta Road, Galahitiya,
Godakawela.

2nd DEFENDANT – APPELLANT – RESPONDENT

Before: Hon. S. Thurairaja, P.C., J.

Hon. Janak De Silva, J.

Hon. Mahinda Samayawardhena, J.

Counsels: Githmi Wijenarayana on behalf of the Legal Aid Commission for the Plaintiff – Respondent – Appellant

Upendra Walgampaya with Tharushi Senevirathne instructed by Indika Jayaweera for the 1st and 2nd Defendant – Appellant – Respondents

Written Submissions: By the Plaintiff – Respondent – Appellant on 27.09.2019 and 12.10.2022

By the 1st and 2nd Defendant – Appellant – Respondents on 24.07.2014 and 14.10.2022

Argued on : 15.09.2022

Decided on : 30.10.2025

Janak De Silva, J.

The Plaintiff-Respondent-Appellant (Appellant) instituted this Aquilian action against the Defendants-Appellants-Respondents (Respondents) seeking a sum of Rs. 20,00,000/= in damages for injuries suffered due to an acid attack. The Respondents admitted the acid attack but contended that it was in the exercise of their right of private defense. According to the Respondents, it was the Appellant who first attacked the Respondents and their children. The Respondents made a claim-in-reconvention for a sum of Rs. 10,00,000/= in damages for the injuries they suffered due to the attack by the Appellant.

The learned District Judge entered judgment as prayed for by the Appellant. Aggrieved by this judgment, the Respondents appealed to the Civil Appellate High Court of

Sabaragamuwa Province holden in Ratnapura (High Court) which set aside the judgment of the District Court and dismissed the action of the Appellant.

Leave to appeal has been granted on the following questions of law:

1. *Have the learned High Court Judges erred in not taking into consideration the vital evidence presented in the District Court and holding against the Appellant?*
2. *Have the learned High Court Judges erred in not taking into consideration the vital evidence presented in the District Court, especially the judgments marked Z1 and Z2 and holding against the Appellant?*
3. *If all or any of the above questions of law are answered in the Appellant's favour, is the Appellant entitled to the reliefs prayed for in his plaint?*
4. *In a Lex Aquilian action is the Respondent liable to pay damages if the Respondent can justify his actions as being lawful?*

Before proceeding to examine these questions let me briefly set out the respective factual positions of the parties.

Version of the Appellant

At the time of this incident, the Respondents and their children were occupying the staff quarters of a particular tea, rubber and coconut estate in Godakawela. They were living in the staff quarters although the services of the 1st Respondent, as the Field Officer of this estate, had been terminated in 2000. During this period, the Appellant was employed as the watcher/labourer in this estate.

There was animosity between the parties. The Respondents had made several complaints to the Police against the Appellant. On 25.05.2005 at or around 4.00 p.m., the Appellant went to a stream in the neighbourhood to have a bath. On his way back, near the house of the Respondents, someone hit him with a blunt weapon on the back of his head.

The Appellant almost lost consciousness and was in a state of daze. When he regained full consciousness, he found himself inside the Respondent's house with blood on his face. Then he attempted to get to his feet, at which point the 1st Respondent threw acid on his face. The Appellant fell to the ground and shouted for water, and then the 1st Respondent poured something strong into his mouth, which the Appellant spat out.

As the Appellant pushed the 1st Respondent in an attempt to get to his feet, someone threw acid at him again. The Appellant later learnt that it was the 2nd Respondent, the wife of the 1st Respondent, who threw acid at him the second time. The Appellant stumbled out of the house. With great difficulty, the Appellant tried to make his way towards his house when he heard his wife's voice. He shouted warning her not to go to the 1st Respondent's house and then lost consciousness.

The Appellant was blinded by the acid attack. At the time of this incident, he was 52 years old and a father of three children. His eldest son was 19 years old. As a result of his father's impairment, the son was forced to abandon his vocational training and engage in casual labour to feed the family. The second child was 16 and was studying for her second attempt at the GCE O/L Examination, which she had to give up. The youngest was 12 years old and at the time of the proceedings in the District Court she was being supported by relatives.

As a result of the injuries suffered due to the acid attack, the Appellant has been deprived of fulfilling his duties to his children as a father. His wife too was unable to support the family financially as she was required to take care of her husband's needs after the incident.

Version of the Respondents

On 25.05.2005 the Respondents were called to the Rakwana Police Station for an investigation of a previous complaint made by them against the Appellant. The Appellant had not come to the Police Station. After returning home, the Respondents went to gather firewood near a stream, and as the house was within earshot, they heard someone near their house using abusive language. Their son came and informed them that it was the Appellant. By the time they reached the house the Appellant's son had escorted him home.

About an hour later when the 1st Respondent was preparing to go to the police to lodge a complaint of this incident, the Appellant had come with a knife, highly intoxicated, and slashed the 2nd Respondent, upon which the 1st Respondent struggled with him. The 2nd Respondent threw acid on the Appellant in the exercise of her right of private defence, as the Appellant's action created a genuine apprehension in the mind of the 2nd Respondent that he would cause serious injury or death to the Respondents and their children.

Judgment of the District Court

The learned Judge of the District Court has correctly characterized this as an Aquilian action. However, after considering Sections 89, 90 and 92(4) of the Penal Code, it was held that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The learned judge concluded that the Respondents had exceeded their right of private defence, and therefore entered judgment as prayed for in the plaint.

Judgment of the High Court

In view of the conclusion reached by the trial court, the High Court proceeded on the basis that the trial court did not accept the narrative of the Appellant. However, the High Court

observed that the District Court had erred in answering several issues in a manner inconsistent with this primary finding. For example, the learned trial judge has erred in answering the issue No. 13 (එකී සාධාරණය මත පිහිටා 2 වන විත්තිකාරිය තමන්ගේද, 1 වන විත්තිකරුගේද, තම දරුවන්ගේද ආරක්ෂාව පතා ක්‍රියාකරන ලද්දේද? / Did the 2nd Defendant act in the exercise of the right of private defence in order to protect herself, the 1st Defendant, and their children?) in the negative whereas it should have been answered in the affirmative.

There is no specific finding of the High Court on whether the Respondents exceeded their right of private defence. However, the claim-in-reconvention of the Respondents was dismissed for lack of evidence on the damages suffered. Thus, it is implicit that the High Court dismissed the action of the Appellant having concluded that the Respondents acted in the exercise of their right of private defence.

I must at this point refer to a fundamental error of law made by the learned District Judge. The right of private defence expounded in Sections 89, 90 and 92(4) of the Penal Code, provides a defence for an *offence* which is defined in Section 38 of the Penal Code to mean a thing made punishable by the Penal Code.

However, the foundation of the Aquilian action is not an *offence* in that sense. It is the committing of a wrongful act. No doubt, a person can be said to have committed a wrongful act by exceeding the right of private defence expounded in the Penal Code. Nevertheless, the right of private defence expounded in the Penal Code and the right of private defence available as a defence to an Aquilian action must not be equated. In my view, they have different contours.

Let me examine this issue by examining the scope of the Aquilian action.

Aquilian Action

I need not labour at length to examine the fundamental principles of the *Lex Aquilia* in view of the seminal decisions in ***Gaffoor v. Wilson and Another*** **[(1990) 1 Sri LR 142 at pages 144-145 at pages 301-304],** ***Prof. Priyani Soyza v. Rienzie Arsecularatne*** **[(2001) 2 Sri LR 293]** and ***C. Karunanayake and Others v. Mannapperuma Mohotti Appuhamilage Thushari Ranga Mannapperuma*** **[S.C. Appeal No. 137/2017, S.C.M. 21.02.2022, at pages 31-40]**.

The issue that arises for consideration is the availability of the right of defence to exculpate liability in an Aquilian action and its contours. This is not an issue which has been discussed in detail in the previous jurisprudence of Court except perhaps albeit briefly in ***L.W.D. Udaya Athula v. Wadutantirage Verjiniya Shirani Fernando & Others*** **[S.C. Appeal No. 143/2018, S.C.M. 25.03.2025 at page 8]**. Hence somewhat of a detailed analysis of the defence is warranted.

It is trite law that, under any perspective of the fundamental elements of an Aquilian action, the wrongfulness of the defendant's conduct is invariably recognized as an essential requirement**.**

Neethling and Potgieter [J. Neethling and J.M. Potgieter, Law of Delicts, 7th Ed., pages 33 and 34] states that:

> *"**An act which causes harm to another is in itself insufficient to give rise to delictual liability. For liability to follow, the act must be wrongful. Without wrongfulness, a defendant may not be held liable.** In essence, **wrongfulness lies in the infringement of a legally protected interest (or an interest worthy of protection)** in a legally reprehensible way. As point of departure, wrongfulness should be determined objectively ex post facto (diagnostically), in other words*

taking into account all the relevant facts and circumstances that were really present and all the consequences that really ensued. ***The determination of wrongfulness in principle entails a dual investigation. In the first place, one must determine whether a legally recognised interest has been infringed****, ie whether such interest has in fact been encroached upon. In other words, the act must have caused a harmful result.* ***In the second place, if it is clear that a legally protected interest has been prejudiced, legal norms must be used to determine whether such prejudice occurred in a legally reprehensible manner.*** *Violation of a legal norm must therefore be present; a harmful consequence in itself is insufficient to constitute wrongfulness.* ***The question of whether the factual infringement of an interest occurred in a legally reprehensible manner constitutes the essence of the investigation into the element of wrongfulness. Whether an interest is worthy of protection, as well as whether its infringement is legally unacceptable, is determined by the legal convictions of the community or boni mores criterion."*** (emphasis added)

The application of the *boni mores* test, namely, the legal convictions of the community as the basic criterion for determining the wrongfulness of a delictual action in South African law, was affirmed by the Constitutional Court of South Africa in ***Lee v. Minister for Correctional Services*** **[2013 (2) SA 144 (CC) at para. 53]**:

"In [Minister van Polisie v. Ewels], ***it was held that our law had reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the legal convictions of the community demand that the omission should be considered wrongful. This open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in all cases, not only omission cases.*** *The imposition of*

wrongfulness under this enquiry is determined with reference to considerations of public and legal policy, consistent with constitutional norms." (emphasis added)

Nevertheless, there are special situations where conduct, though seemingly wrongful by reason of an infringement of another's interests, may be considered as lawful if it does not amount to a breach of any legal norm. In reality, they are also practical expressions of what society accepts as reasonable in the ordinary course of human affairs. They derive justification from the legal convictions of the community and serve the function of reconciling the competing interests of different persons. In such circumstances, the harm occasioned cannot properly be regarded as unreasonable or contrary to public morals, and the apparent wrongfulness is thereby displaced. For instance, as I observed in my dissenting opinion in ***Colombo Municipal Council v. Sarosha Mandika Wijeratne,*** **[S.C. Appeal 117/2016, S.C.M. 21.02.2025, at p. 26]**, the contribution of the injured party's conduct to the damages suffered has been recognized as a defence, resulting in the reduction of the damages payable for centuries, in the tradition of civil as well as in common law.

However, in the present case, the duty of this Court is to determine whether the act of the Respondents, which is alleged to have been committed in the exercise of their right of private defence, amounts to such a special circumstance as would operate to completely exclude liability under an Aquilian action.

Roman Law recognized the exception of *necessity* to an Aquilian action. According to Justinian [The Digest of Roman Law: Theft, Rapine, Damage and Insult, Translated by C.F. Kolbert, Penguin Books (1979), page 97]:

"What is said about suing under the Lex Aquilia for damage done wrongfully must be taken as meaning that damage is done wrongfully when it inflicts wrong together with the damage, and this is inflicted, save where it is done under

compulsion of overwhelming necessity, as Celsus writes about the man who pulled down his neighbour's house to keep a fire off his own; for he writes here that there is no action under the Lex Aquilia because he pulled down the adjoining house in the reasonable fear that the fire would reach his own house. Celsus also thinks that there is no action under the Lex, regardless of whether the fire would actually have reached him or been put out first."

McKerron [R.G. McKerron, *The Law of Delict*, Platinum Edition, page 74] provides a succinct answer to this issue as follows:

> *"**In certain circumstances an act which would otherwise be an actionable wrong may be justified on the ground that it was an act done of necessity to avoid a greater harm. The defendant must show that there was 'actual presence of imminent danger and a reasonably apparent necessity of taking such action as was taken'.** The limits within which the defence is available do not admit of being precisely defined. But there are certain clear cases in which a prima facie wrongful act may be justified on this ground. Thus 'the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property'… **But the commonest example of the principle is the right of self-defence. Every person is entitled to defend himself against unlawful attack, provided the force he employs is not 'out of proportion to the apparent urgency of the occasion'. The right is not confined to the defence of one's own person. It extends to the defence of any person unlawfully attacked, and to the defence of a man's property or possession as well as to the defence of his person**."* (emphasis added)

Neethling and Potgieter [supra. at 88] have also taken a similar view:

> *"Private defence (or defence; "noodweer") is present when the defendant directs his actions against another person's actual or imminently threatening wrongful act in order to protect his own legitimate (legally recognised) interests or such interests of someone else. For example:* ***A acts in defence if he hits B over the head to prevent B from stabbing A with a knife. If B should institute a delictual action against A for damages caused by his head injury, A, by raising private defence, will be able to show that he acted reasonably and therefore lawfully. As a result, A will not be liable in delict for B's injury.****"* (emphasis added)

The Appellate Division of the Supreme Court of South Africa (as it then was) in ***Mabaso v. Felix*** **[1981 (3) SA 865 (A)]** considered a matter in which the appellant, Daniel Mabaso, a petrol attendant employed at a garage in Hillbrow, instituted action against the respondent, Manuel da Silva Felix, proprietor of Parktown Fish and Chips, a business situated across the street from the garage, seeking damages in the sum of R7 803,83. It was alleged in the particulars of claim that, on 30 June 1977, at approximately 6 p.m., the defendant assaulted the plaintiff by discharging two shots from a firearm, both of which struck the plaintiff, one in his right leg and one in his left leg, thereby causing bodily injury to both legs. In this case, the Court [at 876(F)] established that, in delicts affecting the plaintiff's personality and bodily integrity, the burden of proving the private defence as a justification rest upon the defendant.;

> *"Consequently,* ***according to substantive and adjective law the onus was on the defendant to prove that in shooting and injuring the plaintiff he acted in self-defence*** *and that such shooting was reasonably and legitimately required for defending himself."* (emphasis added)

According to Neethling and Potgieter [supra. at pages 89-92], for the right of private defence to operate as a justification in an Aquilian action, the following three requirements must be satisfied in relation to the attack against which the defence is exercised:

1. The attack must consist of a human act.
2. The attack must be wrongful; in other words, it must threaten or violate a legally protected interest without justification.
3. The attack must already have commenced or be imminently threatening but must not yet have ceased.

There is no bar to exercise the right of private defence against someone who is incapable of having a blameworthy state of mind such as an *infans* or an insane person. **[*R v. K*, 1965 (3) SA 353 (A)]**. Moreover, it is also not required that the attack to be directed against the defendant personally **[See *Ntanjana v. Vorster and Minister of Justice* (1950 (4) SA 398 (C)); *R v. Patel* (1959 (3) SA 121 (A))].**

In addition to the three requirements relating to the nature of the attack outlined above, Neethling and Potgieter [supra. at pages 92-97] explains three further requirements which must be satisfied for private defence to be accepted as a justification in an Aquilian.

They are:

1. The defence must be directed against the aggressor.
2. The defence must be necessary to protect the threatened right.
3. The act of defence must not be more harmful than is necessary to ward off the attack. According to *Willie's Principles of South African La*w, 8th ed., (Third Impression, January, 2003), pages 663-664), in order to establish this ground of justification it is, however, not necessary to show that the means employed by the

defender was comparable to the means employed by the wrongdoer. Also, the interest infringed need not necessarily be of lesser value than the interest protected. Nevertheless both these factors can play a role in the overall judgment whether the act of defence, *in that form*, was necessary and not excessive.

In ***Ntamo and Others v. Minister of Safety and Security*** **[2001 (1) SA 830 (Tk) at 836]**, Madlanga, AJP held that:

> *"[W]here the threatened harm can be avoided without the use of force; private defence cannot succeed."*

Similarly, it is also well-established that although absolute proportionality between the threatened interest and the interest infringed in defence cannot be a requirement for defence, extreme imbalance is unacceptable. **[*Ex Parte Minister Van Justice: In re S v Van Wyk*, 1967(1) SA 488 (A)]**.

The above exposition establishes that the right of private defence is available in an Aquilian action. However, it is subject to specific requirements, both in respect of the nature of the attack and the conduct of the defence. But, once these requirements are satisfied, the liability under the Aquilian action is excluded, as the impugned act is rendered lawful by virtue of its justification.

For the foregoing reasons I answer question of law No. 4 as follows:

> "In a *Lex Aquilian* action, the Respondent is not liable to pay damages if the Respondent can justify his actions as being lawful. Where the act of the Respondent is one made in the exercise of his right of private defence, it must be established that the defence was directed against the aggressor, that the defence was necessary to protect the threatened right and the act of defence was not more harmful than is necessary to ward off the attack."

Questions of Law Nos. 1, 2 and 3

It is well-established that a trial court enjoys the invaluable benefit of seeing and hearing the witnesses, whereas an appellate court relies exclusively on the documentary record or the narratives of those who appeared before the trial Judge**. [*Fradd v. Brown & Co. Ltd,* (1918) 20 NLR 282 at 283; *M. P. Munasinghe v. C. P. Vidanage,* (1966) 69 NLR 97 at 103; *K. M. Perera v. Martin Dias,* (1957) 59 NLR 1 at 7; *De Silva and Others v. Seneviratne and Another* (1981) 2 Sri LR 7 at 11]**.

However, in ***Attorney-General v. Gnanapiragasm*** **[(1956) 68 NLR 49 at 57]** Fernando, S.P.J. (as he was then) quoted the following observations of Lord Reid in ***Benmax v. Austin Motor Co*****. [[1955] 1 All ER 326]**:

> *"Where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the trial judge and ought not to shrink from that task."*

This observation by Lord Reid has been consistently reaffirmed by our superior Courts in several judgments delivered subsequent to the decision in ***Attorney-General*** **(supra). [**See ***De Silva and Others v. Seneviratne and Another*****, (1981) 2 Sri LR 7 at 13; *Sri Co-operative Industries Federation Limited v. Ajith Devapriya Kotalawala,* S.C. Appeal No. 02/2005, S.C.M. 03.04.2009 at 13]**

In fact, question of law No. 1 requires this Court to do just that in determining whether the High Court erred in not taking into consideration the vital evidence presented in the District Court and holding against the Appellant.

The sole object of this evaluation is to ascertain the most accurate version of the facts, particularly as the Appellant and the Respondents have taken divergent positions on the circumstances leading to the acid attack.

The Learned District Judge had identified 18 issues to be addressed. Issues Nos. 9, 10, 11, and 12 were particularly crucial for the Respondents, as they concerned the assessment of the accuracy of their version of the facts, which were outlined in the District Court judgment as follows:

> *" 09. පැමිණිලිකරු වර්ෂ 2005.5.25 දින හෝ ඊට ආසන්න දිනයක පස්වරු 4.00 ට පමණ විත්තිකරුවන් පදිංචිව සිටින ගොඩකවෙල ගලහිටියේ පැලවත්ත ගමේ නාවලවත්ත නමැති ඉඩමේ විත්තිකරුවන් පදිංචි නිවසට පැමිණ විත්තිකරුවන්ගේ දරුවන් කපා කොටා මරණ බවට තර්ජනය කර ගියේද ? "*
>
> (Did the Plaintiff, on or around 25.05.2005 at approximately 4:00 p.m., visit the residence of the Defendants at the property known as Nawalawatta in Pelawatta village, Galahitiya, Godakawela and threaten to kill the Defendants' children by cutting them?)
>
> "*10. එදිනම එනම් 2005.5.25 දින හෝ ඊට ආසන්න දිනයක හවස 4.30 ත් 5.00 ත් අතර කාලයේදී පැමිණිලිකරු නැවතත් කප්පාදු පිහියකින් සන්නද්ධව පැමිණ ඉහත කී විත්තිකරු පදිංචි නිවසේ කුස්සියේදී 2 විත්තිකාරියගේ දකුණු අත සහ වම් අත කපා කොටා තුවාල කරනු ලැබුවේද ? "*
>
> (On the same day, that is, on 25.05.2005 or on a nearby date, between 4.30 p.m. and 5.00 p.m., did the Plaintiff once again arrive armed with a machete and in the kitchen of the house where the Defendant was residing, cut the right hand and the left hand of the 2nd Defendant, thereby causing injuries?)
>
> "*11. ඒ අවස්ථාවේදී 2 විත්තිකාරිය බේරාගැනීම සඳහා 1 විත්තිකරු පැමිණිලිකරු සමඟ පොරබදමින් පැමිණිලිකරු අතතිබූ කප්පාදු පිහිය උදුරාගැනීමට වෙරදරන ලද්දේද ? "*

(At that moment, in order to rescue the 2nd Defendant, did the 1st Defendant struggle with the Plaintiff attempting to snatch away the knife held by the Plaintiff ?)

"12. අධික ලෙස බීමත්ව සිටි පැමිණිලිකරු 1 විත්තිකරු සමඟ පොරබදමින් සිටියදී එම උත්සාහය අසාර්ථක වුවහොත් පැමිණිලිකරුගෙන් 1 විත්තිකරුටද 2 විත්තිකාරියටද ඔවුන්ගේ දරුවන්ටද එක්කෝ බරපතල තුවාල සිදුවිය හැකි බවට නැතහොත් ජීවිත හානි සිදුවිය හැකි බවට සාධාරණ සැකයක් 2 විත්තිකාරිය තුල ඇතිවීද ? "

(While the heavily intoxicated Plaintiff was struggling with the 1st Defendant, did the 2nd Defendant have a reasonable apprehension that, if that attempt failed, either the 1st Defendant, the 2nd Defendant, or their children could suffer serious injuries or even loss of life at the hands of the Plaintiff ?)

The Learned District Judge answered all the above issues in the negative, thereby repudiating the version of the facts, put forward by the Respondents. Yet, equivocally, in the concluding observations of the judgment, the Learned District Judge has impliedly accepted for the version of the facts, put forward by the Respondents, thereby repudiating the sequence of events narrated by the Appellant, as follows:

"මෙම වත්මන් නඩුවේදී විත්තිකරුවන් විසින් පුද්ගලික ආරක්ෂාවේ අයිතිය පාවිච්චි කිරීම සඳහා ඇසිඩ් ප්‍රහාරයක් එල්ලකළ බව කියා සිටියද, පැමිණිලිකරු සහ අධිකරණ වෛද්‍ය නිලධාරී විසින් විස්තර කරඇති අන්දමට පැමිණිලිකරුගේ ඇස් දෙකම සදාකාලිකව අන්ධ කිරීමේ ක්‍රියාවක් කිරීම, ඉහතින් සඳහන් කල 92(4) වගන්තිය අනුව එවැනි පීඩාවක් කිරීමට නොපැතිරෙන බව මෙම අධිකරණයේ නිගමනය වේ. එබැවින් විත්තිකරුවන් විසින් පැමිණිලිකරු වෙත වන්දි ගෙවීමේ වගකීමට යටත්වියයුතු බවට නිගමනය කළ හැකි වේ."

(In the present case, although the Defendants contended that the acid attack was carried out in the exercise of the right of private defence, this Court concludes that,

as described by the Plaintiff and the Judicial Medical Officer, the act of permanently blinding both eyes of the Plaintiff does not fall within the scope of permissible harm under Section 92(4) referred to above. Accordingly, it can be concluded that the Defendants are liable to pay compensation to the Plaintiff.)

Question of law No. 2 on which leave to appeal was granted questions whether the Learned High Court Judges erred in failing to take into consideration the judgments marked Z1 and Z2.

Section 41(A)(2) of the Evidence Ordinance reads as follows:

> *"Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence,* ***being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence*** *or committed the acts constituting such offence."* (emphasis added)

Thus, where an appeal made against a judgment of a corresponding criminal case is still pending, such judgment is not relevant in the relevant civil suit. Of course, where there is an admission of guilt in a criminal case, it is relevant as an admission and ought to be taken into consideration in the civil suit **[*Nadarajah v. Ceylon Transport Board* (79(II) NLR 48)]**.

The Learned District Judge committed two serious errors of law in determining Issues Nos. 9 to 12 relying on පැ.5 and පැ.6.

Firstly, he considered the judgment marked in Case No. 14910 (Z1) (පැ.5) where the Respondents were found guilty on the identical facts as in this action. However, admittedly the judgment was in appeal and irrelevant in terms of Section 41(A)(2) of the Evidence Ordinance . In fact, it was set aside in appeal by the High Court of Ratnapura in Case No. A.P.L./38/2007.

Secondly, he erred in answering issues Nos. 9 to 12 relying on the judgment dated 27.06.2007 in Case No. 14938 (Z2)(පැ.6) where the Appellant was acquitted, on the identical facts as in this action, without making his own evaluation of the evidence led before him.

For the foregoing reasons, I answer question of law No. 2 in the negative.

As observed at the outset, the Appellant contended that the use of acid against him was a premeditated act intended to cause bodily harm, whereas the Respondents maintained that the act was carried out in the exercise of private defence.

In evaluating the narrative of the Appellant, it is important to examine the statements he made from time to time of this incident.

According to the statement made by the Appellant to the Police on 27.05.2005, he noticed the 1st Respondent hiding behind a coconut tree when he was passing the house of the Respondents after having a bath. After about passing one or two feet from where the 1st Respondent was hiding, the Appellant received a hard shot on his back and fell down. Then the 2nd Respondent and the children of the Respondents dragged him into their house.

However, in the short history the Appellant gave to the Medical Officer on the same day, no mention is made of the Appellant having seen the 1st Respondent hiding behind a coconut tree. The Appellant claimed that on his way after having a bath, the Respondents and their children accosted the Appellant, one of them hit him on the head and he lost consciousness. During his cross-examination in this action, the Appellant testified that he received a shot on the left side of his head.

However, the Medico-Legal Report does not contain any details of the nature, size, shape, disposition and site of any injury on the head of the Appellant. Some kind of injury should have been present on the head had the Appellant received a blow from a pole leading to losing consciousness.

The testimony of the investigation officer plays a pivotal role in assessing the narrative of the Appellant. According to him, the terrain from the stream to the house of the Respondents comprises of hills and slopes. A person cannot be dragged easily to the house. There were no telltale signs of an altercation in the garden near the house. The hook knife that was used to attack the Respondents was found at the scene.

The version of the Appellant that he was attacked outside and dragged into the house of the Respondents and then attacked is highly improbable. If the Appellant was struck on the head so as to lose consciousness, it was just a matter of pouring the acid on to him at the very place rather than drag him into the house.

In support of their version, the Respondents asserted that acid was readily available to them, as they were residing on a rubber estate where acid is customarily used to solidify the latex tapped from rubber trees.

By contrast, the principal contention advanced on behalf of the Appellant rests upon the following evidence, which challenges the probability that acid was available to the

Respondents as a weapon in the exercise of their right of private defence in an unexpected situation, and which further gives rise to a reasonable belief that acid was kept in the Respondents' residence as part of a premeditated attack against the Appellant.

1. The Respondents had 4 children who were 17, 15, 13 and 11 years old at the time of the incident and it is most improbable that a highly corrosive substance such as acid would be kept in such an easily accessible place as a matter of habit in a house that has an 11-year-old child living in it.
2. According to the evidence given by the 2nd Respondent, the acid was brought into their house in January 2000, when their youngest child was only 6 years old, which further renders the version of the Respondent improbable.
3. The acid had not been used for coagulating rubber after 2000, when the 1st Respondent's service as a field officer was terminated.

Nevertheless, these contentions must be examined in the context of the following evidence:

1. The 1st Respondent's service as a field officer was terminated on 03.06.2000.

   "ප්‍ර - ඒ සේවය ආරම්භ කරලා කවදා වෙනකම් ඒ වත්තේ සේවය කළාද ?

   උ - 2000.6.3. දින දක්වා සේවය කළා"
2. The Respondents' residence was a small house, 28 feet in length and 11 feet in width.

   "ප්‍ර - කොහේද ඇසිඩ් තිබුනේ ?

   උ - කුස්සියේ. අප පදිංචි නිවස අඩි 28 ක් දිග අඩි 11 ක් පළල කුඩා නිවසක්. ඒ නිසා කුස්සියේ කොටස අඩි 8 ක් පළලයි. කුස්සියේ තමයි සියලු උපකරණ තියෙන්නේ. හයදෙනෙක්

ඉන්නවා. දරුවන්ගේ පොත්පත් උපකරණ තියාගන්න අවශ්‍යයි. කුස්සියේ මුල්ලේ හාල් තියාගන්න පුටුවක් තියෙනවා. පුටුව මුල්ලේ ඇසිට් කෑන් එක තිබුනේ.”

Accordingly, at the time the acid was brought into the residence (January 2000), the 1st Respondent was employed as a field officer at the estate, and acid was generally kept and used on such estate premises to solidify the latex tapped from rubber trees. It is therefore impractical to suggest that the Respondents would not have acquired acid solely because they had a minor child. It must also be noted that the ease of accessibility to acid at the time of the incident cannot reasonably be presumed to reflect the situation five years prior, particularly in a manner injurious to a minor residing in the home.

Moreover, even the easier accessibility to the acid at the time of the incident must be assessed in light of the size of the residence. In a house of such dimensions, any placement of the acid can would have been similarly accessible. Moreover, at the time of the incident, the youngest child was 11 years old, and all children of the Respondents were capable of understanding the corrosive nature of acid and avoiding potential injuries.

Furthermore, although the services of the 1st Respondent had been terminated, it is reasonable that a remaining quantity of acid would have been retained, as such practices are common, particularly since the Respondents continued residing in their residence within the estate despite the termination of the 1st Respondent’s official duties.

Apart from the evidence adduced in relation to the availability and use of acid, the other most compelling evidence relied upon by the Appellant is founded on the Medico-Legal Report prepared following the examination of the Appellant on 23.06.2005 by Dr. Sisira Kumara Dissanayake, Resident Doctor of the General Hospital, Ratnapura, which discloses the following significant injuries on the Appellant:

1. A healing burnt area, due to corrosive liquid, all over the face involving both eyes and inner aspect of both lips. According to the Consultant eye surgeon, both eyes were permanently damaged specially in the right side.
2. An obliquely placed, healed cut injury, measuring 6cm, situated above the right eye brow. The medial end was in the mid line and the lateral end was 4cm above and at the longitudinal level of outer angle of the right side.
3. A healing burnt area, due to corrosive liquid, measuring 8 x 10cm situated in the upper and medial part of the left frontal chest with few longitudinal drip marks from that burnt area up to the upper abdomen in mid line.

In these circumstances, the Appellant submitted that for acid to cause permanent blindness in both eyes, and further to come into contact with an internal part of the body such as the inner aspect of both lips, a considerable quantity of acid must necessarily have been used. Therefore, it was contended, such a quantity is more indicative of a premeditated plan rather than an instinctive, sudden action taken in purported self-defense. The Appellant further invited the attention of this Court to the testimony of Dr.Dissanayake, which stated that the injuries sustained by the Appellant could not have been caused by accident or negligence and affirmed that the inside of the nose and mouth had been burnt, and that the injuries suggested that the acid had flowed horizontally, which is consistent with the Appellant's version that after acid was first thrown at him, causing him to fall to the ground, a strong burning substance was thereafter poured into his mouth, which he then spat out.

In evaluating the above evidence, this Court cannot remain indifferent to the fact that, under any version of facts advanced by both parties, the Appellant has endured a most pathetic and painful experience that no human being ought to suffer. Nevertheless, I must observe with due care that the persuasiveness of this evidence is not such as to compel

this Court to wholly repudiate the version of facts put forward by the Respondents and unreservedly accept that of the Appellant.

In my view, the two principal contentions raised here namely, the alleged use of a large quantity of acid and the suggestion of a horizontal flow of acid cannot be determined as possible only under the Appellant's version and wholly impossible under the Respondents' version. To explain further, it is not unreasonable to suggest that such a quantity of acid could have been already and naturally in the possession of the Respondents and, unfortunately, was employed on that scale in the heat of exercising their right of private defence. Likewise, the horizontal flow of acid cannot be deemed wholly improbable within the Respondents' case, as the evidence before this Court does not provide a sufficiently complete picture of the struggle between the 1st Respondent and the Appellant.

Moreover, it is quite easy to pontificate in hindsight what was and was not reasonable in the Respondents exercising their right of private defence. However, it is they and they alone who had to face the situation of the Appellant walking into their house with a hook knife and attacking the 2nd Respondent. The sense of fear each situation instils in a person cannot be the same. The way people react to fear differs depending on a multitude of factors including age, mental condition, education and social standing. To employ a subjective test will not meet the ends of justice. Hence, an objective test must be employed in determining the permissible limits of the right of private defence in any given circumstance.

However, in doing so, one must bear in mind the cautionary given by Van Winsen, AJ (as he then was), in ***Ntanjana v. Vorster and Minister of Justice*** **[1950 (4) SA 398 (C) at 406A]**, where he held that:

> *"The very objectivity of the test, however, demands that* ***when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic, wise after the event, weighing the matter in the secluded security of the courtroom****…"* (emphasis added)

As my final observation on the evidence adduced by the Appellant, and in addition to the principal matters already considered, I now turn to examine the following alleged deficiencies in the version of the Respondents presented to this Court by the Appellant:

1. The Respondents have contended that, following the termination of the 1st Respondent's service in the estate and the subsequent employment of the Appellant, the Appellant frequently visited the estate quarters (which the Respondents continued to occupy notwithstanding the termination) and harassed them and their children. It was further alleged that, on the very day of the incident, the Appellant publicly declared in the village that he intended to grievously harm the Respondents and their children. However, no independent witness from the village was called to substantiate this allegation. When questioned as to why no villagers were summoned, the Respondents replied that the villagers would not wish to waste their time in court.

2. The Respondents asserted that the Appellant was highly intoxicated at the time of arriving at their residence. But no medical report or testimony of a qualified medical officer was tendered to corroborate this claim.
3. The Respondents claimed that the 1st Respondent suffered injuries as a result of the same acid attack directed at the Appellant, stating that his eyes were in pain and his vision impaired. However, no medico-legal report was produced before this Court in respect of such alleged injuries. Likewise, while the 2nd Respondent asserted that her arm was cut by the Appellant with a knife, requiring eight stitches, no medico-legal report was tendered to confirm the true nature or extent of those injuries.

In my view, for this Court to rely upon the first and third deficiencies above in order to repudiate the version of the Respondents, the governing legal provision is Section 114 (f) of the Evidence Ordinance which states that:

> *"The court may presume that evidence which could be and is not produced would if produced, be unfavorable to the person who withholds it."*

Although the observation was made in the context of a criminal proceeding, the following observations made in ***Walimunige John v. The State*****, [76 NLR 488 at 496]** on the interpretation provided for Section 114(f) of the Evidence Ordinance is illustrative:

> *"**The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case** and where the reason-able inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution."* (emphasis added)

In the present case, the Appellant's hostility towards the Respondents and their children can be reasonably presumed over a considerable period, as the records before this Court clearly demonstrate a long-standing conflict between the parties. Especially, it is strongly evident from the Police complaints made by the 1st Defendant, 2nd Defendant and their daughter against the Appellant to the Rakwana Police Station over a period of several years on various charges including the threats to kill/assault/rape/intimidate (වි1- වි5).

Vide Page no 132 of X4 (Testimony of Mr. Navarathna Piyasena, Chief Inspector of Police);

"ප්‍ර - මෙම දෙපාර්ශවය අතර විවිධ ආකාරයේ ඉඩම් ආරවුල් තිබුණා කියලා කිව්වා ?

උ - එහෙමයි, ඉඩම් ආරවුල් සහ බැන තර්ජනය කිරීම් තිබුණා.

ප්‍ර - ඉඩම් ආරවුල් කිව්වාම විශේෂයෙන්ම සඳහන් කරන්න පුළුවන්ද යම් ආරවුලක් සම්බන්ධයෙන් ?

උ - මේ දෙපාර්ශවයම ඉඩම බලාගැනීමට සිටි අය. රත්නසිරිත් ඒකේ පදිංචිවී ඉන්නවා. නිතර නිතර ඒ සම්බන්ධයෙන් පැමිණිලි එනවා බැන්නා එහෙම කියලා.

ප්‍ර - මේ අය අතර සමගියක් ඇතිකිරීමට හැකියාවක් ලැබුණේ නැහැ ?

උ - අවවාද කලා. සමත මණ්ඩලයට යොමුකළා.

ප්‍ර - ඒ වගේම ඔබතුමා කියා සිටියා රත්නසිරි විසින් පැමිණිලි ගණනාවක් කරලා තිබෙනවා ?

උ - කිහිපයක් කරලා තිබුණා.

ප්‍ර - වැඩියෙන්ම පැමිණිලි කරලා තිබෙන්නේ වීරසිංහට විරුද්ධව කියලා කිව්වා ?

උ - එහෙමයි.

ප්‍ර - වීරසිංහ හැර වෙනත් අයට විරුද්ධව පැමිණිලි කරලා තිබුණද ?

උ - ඔහුගේ බිරිඳට විරුද්ධව තිබුණා."

In these circumstances, while a public declaration of intent to cause grievous harm would constitute a direct and strong proof of aggression against the Respondents, this Court is still entitled to reasonably infer the Appellant's hostile disposition from the evidence already on the record. Indeed, even in a hypothetical scenario where the Respondents' submission regarding such a public declaration by the Appellant were to be disproved, the established history of animosity would still sustain a strong case of the Appellant's aggressive mentality towards them. Therefore, I do not consider it essential for the Respondents to adduce separate proof of any such declaration, as the existence of hostility between the parties can be reasonably inferred.

With regard to the third deficiency, it is evident from the record that this issue was not raised for the first time before this Court but had already been considered before the trial court as well.

Vide Page no 184 of X4 (Testimony of the 1st Respondent);

> *"ප්‍ර - මහත්මයාට සිදුවූ තුවාල හෝ හානි සනාථ කිරීමට මෙම ගරු අධිකරණයේ තමන්ගේ උත්තරයකින්වත් වෛද්‍ය වාර්තාව සම්බන්ධයෙන් සඳහනක් නැහැ ?*
>
> *උ - ඒ සම්බන්ධයෙන් පැහැදිලි කරන්න අවශ්‍ය වෙනවා. මා ගොඩකවෙල රෝහලට ඇතුල්වෙලා මගේ ඇස් පරීක්ෂා කර වෛද්‍යවරයා යොමු කළා රත්නපුර රෝහලට. දවස් 3 ක් ප්‍රතිකාර ලබා වීරසිංහගේ වෛද්‍ය වාර්තාව ඉදිරිපත් කරන්න පැමිණි මාව පරීක්ෂා කර සියලු ඡායාරූප ලකුණු කර වෛද්‍ය වාර්තාවක් ගත්තා. වෛද්‍ය වාර්තාව පොලිසියෙන් අපිට ලබා දෙනවා කිව්වා. නඩුවට ඉදිරිපත් කළා කිව්වා. නමුත් ඉදිරිපත් කර තිබුනේ නෑ.*
>
> *ප්‍ර - නමුත් අද වෙනකම් මේ නඩුවට කැඳවන්න උවමනා කළේ නැහැ ?*
>
> *උ - උවමනාවක් තිබුනා. පැහැදිලි කරන්න අවශ්‍ය වෙනවා මා ඒ සම්බන්ධයෙන් විමසීමක් කලා. මේ සම්බන්ධයෙන් උපදෙස්ගත් නීතීඥ මහතා එවැනි දෙයක් කිරීමට උපදෙස් දුන්නේ නැහැ.*

ප්‍ර - අවම වශයෙන් කියපු වෛද්‍යතුමා තමන්ට උපදෙස් දීල තිබුනෙ නැහැ ඒ සම්බන්ධයෙන් ප්‍රශ්න කරන්න ?

උ - නැහැ.

ප්‍ර - මම යෝජනා කරනවා පැමිණිලිකරු වෙනුවෙන් වෛද්‍යවරයා කැඳවන්න මහත්මයාට තිබුනා වෛද්‍යවරයා කැඳවන්න මහත්මයා ඒ අවස්ථාව ගත්තේ නැහැ ?

උ - ඔව්. පැහැදිලි කරන්න අවශ්‍ය වෙනවා අද දිනයේත් මුදල් සොයා ගත්තේ බොහොම අපහසුවෙන්."

In light of these facts elicited during cross-examination before the trial court, it is reasonably established that the medical evidence in question had been unavailable to the Respondents due to circumstances beyond their control.

In ***Santiapillai v. Sittampalam*** **[(1948) 49 NLR 138 at 140]**, Basnayake, J. held that:

> *"When the case was taken up on July 3, 1947, the Price Control Inspector Sittampalam drew the attention of the Court to the fact that summons had not been served on Atputhan, witness No. 3, and Navaratnarajah, witness No. 2. The trial was finally fixed for July 23, 1947 and summons re-issued on witnesses Nos. 2 and 3.* ***When the trial was taken up on July 23, 1947, witness No. 3 was absent. Muthuvelupillai's evidence that the witnesses had left for India since the last date of trial is uncontradicted. In these circumstances I am unable to hold that the prosecution has withheld the evidence of this witness and presume under section 114 illustration (g) of the Evidence Ordinance that his evidence would, if produced, be unfavorable to the prosecution****"* (emphasis added)

Therefore, I hold that the third deficiency in the version of Defendants must also be disregarded by this Court as there is no applicability of Section 114(f).

In comparison to the other two, the second deficiency alleged by the Appellant in the Respondents' version stands on a different footing. It contends that the Respondents failed to establish, through medical evidence, that the Appellant was highly intoxicated at the time he arrived at their residence.

Section 102 of the Evidence Ordinance stipulates that;

> *"The burden of proof in a suit or proceeding lies* ***on that person who would fail if no evidence at all were given on either side****."* (emphasis added)

Illustration (a) and (b) elaborates this provision as follows:

> *"a) A sues B for land of which B is in possession, and which, A asserts, was left to A by the will of C, B' father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore, the burden of proof is on A.*
>
> *(b) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed, and the fraud is not proved. Therefore, the burden of proof is on B."*

Therefore, undoubtedly, the burden of proving the intoxication of the Appellant lies upon the Respondents, as it is they who advanced such an assertion before this Court. I am of the view that the alleged intoxication of the Appellant constitutes a key element in sustaining the rationality of the sequence of events as narrated by the Respondents.

However, the Medico-Legal Report of the Appellant issued on 27.05.2005 by Dr. Dissanayake has a blank in front of the question whether the patient was smelling of or was under the influence of liquor. All other questions have been answered.

On an overall evaluation of the evidence led, the necessary inference on a balance of probability is that it was the Appellant who proceeded to the house of the Respondents and attacked them.

The final question is whether the Respondents exceeded their right of private defence. I am of the view that based on the circumstances of this case, the exercise of the right of defence by the Respondents was directed against the Appellant who was the aggressor, the defence was necessary to protect the lives of the Respondents and their children and the act of defence was not more harmful than is necessary to ward off the attack.

For all the foregoing reasons, I answer question of law No. 1 in the negative.

The appeal is dismissed but without costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

Judge of the Supreme Court