THE APPLICATION OF ELLENBOROUGH DICTUM IN THE CRIMINAL JURISPRUDENCE OF SRI LANKA

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Introduction

There are many areas of Substantive law and Adjective law. Substantive law mostly concern with rights, duties, and liabilities of persons. Criminal Law, Family law, International Law are included in this category. On the other hand, the law of procedure and the law of evidence are included under Adjective Law. These laws defined pleadings and procedures through which these substantive laws are implemented. Therefore, the Law of Evidence is considered as an important element in Criminal Law.

When we consider about *the law of evidence*, it means that contains an exposition of the facts which may be proved in a judicial proceeding, the mode by which these facts may be established, and the persons who are competent to offer testimony in regard to material facts. (Peiris 1998, p.2) It is identified that there are three elements of the law of evidence as follows:

- It determines what facts are relevant
- It states how relevant facts may be proved in a judicial proceeding
- It governs the production and effect of different types of evidence. (Peiris 1998, p.3)

The Evidence Ordinance, No.14 of 1895 focused on each of these elements of the law of evidence. There are different types of methods to give evidence. They are Oral evidence, documentary evidence and public documents. There are some other classifications of evidence which are relevant to Sri Lankan Law as follows:

I) Best Evidence and Inferior Evidence
II) Original Evidence and Hearsay Evidence
III) Direct Evidence and Circumstantial Evidence IV) Prima facie evidence and Conclusive evidence V) Primary and Secondary evidence.

Direct Evidence consists of the testimony of the witness who perceive the fact or the production of the document which constitute the fact. Circumstantial Evidence is evidence of facts from which a disputed fact can be inferred. Circumstantial evidence may be very useful to the following issues:

- To establish the fact in issue when there is no direct evidence
- To corroborate or to supplement direct evidence when there is a

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> doubt or when the effect of direct evidence is too difficult to proof of the facts in issue. (Peiris 1998, p.26)

The writer can observe that the Circumstantial evidence has advantages and limitations when comparing with direct evidence. Risk of perjury is minimized and less capable of fabricated. In the case of direct evidence, the judge has to be depending on the particular witness. Therefore, we should focus on many things such as the power of observation, their memory, and their truthfulness. It cannot be guaranteed the accuracy of the witnesses" original observation. There is a risk of forgetfulness of the witnesses. Because we don't know whether he is interested witness or belongs to conspiracy. However, the direct evidence is generally simple in effect, but the circumstantial evidence may have the complex processes in some cases.

When analyse more on the subject we can understand the value of the circumstantial evidence. Take for example, in a case circumstantial evidence may be taken to be sufficient to rebut the presumption of innocence. When there are gaps and deficiencies in the circumstantial evidence, presented in the court does not meant the less value of prove. Therefore, the judge has to be depending on the consistency of each circumstance in the evidence of the rest of the chain of evidence and they have logical accuracy of the inference drawn by the judge.

It is important that the trial Judge should explain clearly to the jury. It must be altogether inconsistent with the accused's innocence. It was held that there is no direct evidence, but the Crown established circumstantial evidence to prove the guilty of the accused. But the *Dias S.P.J.* said that the Crown was not entitled to succeed, since the circumstantial evidence did not meet the hypothesis of innocence of the accused *Podisingho* (1951) 53 N.L.R.49. Furthermore, in circumstantial evidence, there are several possible hypotheses. If it gives position to two hypothetical possibilities, we have to wipe out the other alternative.

Analysis

In addition to that there is a significant value that the accused person must explain each and every circumstance relied on by the prosecution. There is statement dictum pronounced by *Lord Ellenborough* in ***Rex v. Lord Cochrane and others*** **Gurney"s** reports (1814) 479as follows:

> "No person accused of crime is bound to offer any explanation of his conduct, or of circumstances of suspicion which attach to him; but nevertheless, if he refused to do so, where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exists, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence, so suppressed or not adduced would operate adversely to his interest."

In other words, prosecution has to bring very strong case against accused using circumstantial evidence. Accused in his own knowledge should be given reasonable explanation. But, if he fails, there may be

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many consequences. Court can draw an adverse inference and it can be taken into account to convict the guilty party. In addition to that it won't be favourable to him and the State prosecution may get prefer.

According to this view, the burden shift to accused to offer reasonable explanation. Take for example; the prosecution established that the accused came with the blood stained knife. But the accused has to say I saw the knife in the body and removed it. It is reasonable to the accused to disprove his burden.

When analyse the application of aforementioned dictum in the criminal jurisprudence of Sri Lanka with recent cases, we can observe that the court applied this dictum in some cases. On the other hand the court refused to adopt this dictum.

The dictum of *Lord Ellenborough* was firstly applied in Sri Lanka in ***Inspector Aroundstz v. Peiris*** (1938) 10 CLW 122 which depended on circumstantial evidence. Subsequently this dictum was applied in ***Queen v. Sumanasena*** (1963) 66 NLR 350. The learned Judge's opinion was that this dictum was pronounced by *Lord Ellenborough* in 1814 before *the Criminal Evidence Act.* And also, at that time the accused did not have the right to give evidence on his behalf. The dictum of *Lord Ellenborough* has no value in our criminal law.

Basnayake C.J. stated as follows:

> "The learned Judge's direction is wrong. Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. Finally the conviction was quashed." (1963) 66 NLR 351

This dictum was applied in *King v. Seeder de Silva* (1940) 41 N.L.R.337 in the Court of Criminal Appeal. A strong prima facie case was made against the appellant based on evidence which was sufficient to prove the reasonable possibility of someone else having committed the crime. There was no explanation by the appellant. Therefore, the appellant was identified as guilty.

Howard C.J stated as follows:

> "Perusal of the charge indicates that the passages with regard to the arrangement of the body, the lighting of the candle, the closing of the door and the supplying of information to the Police without a word to anyone invite the jury to find an innocent as well as a guilty explanation of such circumstances…….recognized that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant."(1940) 41 N.L.R.344

Here we can understand that the trial judge should explain to the jury about the main principles to be followed in circumstantial evidence. Through analyzing each circumstance the judge can identify the innocent or the guilty person.

This opinion was stated in ***The Queen v. Santin Singho*** (1962) 65N.L.R.445. The accused person must explain each and every circumstance established by the

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prosecution is wrong and would completely negative a direction given earlier by him. The circumstances must not only be consistent with the accused person's guilt but should also be inconsistent with his innocence. In other words, the direction that if a prima facie case is made out the accused is bound to explain is wrong and misleading.(1962) 65 N.L.R.450

In cases of ***Prematilake v. the Republic of Sri Lanka*** (1972)75N.L.R.506 and ***Illangatilaka v. Republic of Sri Lanka*** (1984) 2 SLR 38the Courts did not follow the opinion of ***Basnayake C.J.*** **in** ***Queen v. Sumanasena*** (1963) 66 NLR 350.

In ***Sumanasena v. A.G*** (1999) N.L.R.137 it was held that the learned Judge, in these circumstances, was entitled to draw the necessary inferences and compelling inferences from the circumstance. It is from the failure of the accused to offer an explanation of the highly incriminating circumstances established and in the face of the strong case established against him by the prosecution. In addition to that the dictum of *Lord Ellenborough* is equally applicable to the facts of the instant case ***Sumanasena v. A.G*** (1999) N.L.R.143.

In a case of circumstantial evidence, there is an obvious danger in an attempt by the trial judge to prefer one hypothesis. The jury would only be too strongly to follow the one accepted by the trial Judge. In ***Queen v. Kularatne*** (1968) 71 N.L.R.529 it was held that when the case entirely based on circumstantial evidence, it is necessary to examine evidence. It for the purpose of considering that evidence made for the appellants, whether there has been misdirection on the evidence. In addition to that it is important to identify whether the verdict is unreasonable or cannot be supported having regard to the evidence. ***Queen v. Kularatne*** (1968) 71 N.L.R.532

When analyse the case laws further, there are some cases where the trial judge gives a wrong statement. Therefore, the evidence was incriminated against the accused and was convicted. In ***The King v. Haramanisa*** (1944) 45 N.L.R.532, the accused was charged with murder. The evidence against the accused was of purely circumstantial evidence. The trial judge made an erroneous statement of fact with regard to finger impressions of the accused were proved to have been discovered on a glass chimney found near the dead body of the deceased. Here *Howard C.J*. stated in the Court of Criminal Appeal, the accused had been prejudiced in his defence and the conviction set aside.

The murder case of the High Court Judge *Sarath Ambepitiya* was considered as an important evidence case with regard to the Ellenborough dictum in Sri Lanka. It is cited as ***Mohamed Niyas Naufar and others v. The Attorney General***. (2007) 2 SLR 144 The leaned President's counsel for the first accused appellant submitted as follows:

- There was no case called Lord Cochrane and others
- Gurney's shorthand report of the case does not contain the words attributed to *Lord Ellenborough* by *Wills* in his work on *Circumstantial Evidence.*
- The words attributed to *Lord Ellenborough* appear to be a "creation of Wills" and that it

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> "appears to be a fabrication of Wills."

Further he submitted that there was no dictum called „*Ellenborough dictum'* It is not considered as a part of the Sri Lankan law in particular cases. *Gamini Amaratunga J.* stated that the President's Counsel omitted to refer to the judgment of T.S. Fernando J. in the case of *The* ***Queen v. Seetin*** (1968) N.L.R.316with referred to the passage of *Basnayake CJ* in ***Queen v. Sumanasena*** as follows;

> "…….Even in 1814, an accused, although not competent to give evidence himself, was not denied the right to call witnesses and to make an unsworn statement from the dock. What has been referred to above as the dictum of *Lord Ellenborough* is, if I may say so, not a principle of evidence but a rule of logic. Therefore, it is not surprising that this dictum is not ordinary to be met with in books on Evidence."

It is also submitted that " It is no longer good law even in England". But the judge said that it is good law there even as it is here in Ceylon…..If *Lord Ellenborough's* dictum was bad law, the words of *Chief Justice Shaw* should also have been held to be bad. It is important to note that Justice Shaw's opinion was adopted in ***Santin Singho's*** (1962) 65 N.L.R.445 case in Sri Lanka. There are other judicial dicta in England which are similar in effect of the dictum of *Lord Ellenborough.*

E.R.S.R. Coomaraswamy has commented on the present legal position of Sri Lanka as follows;

> "The recent tendency of the Supreme Court of Sri Lanka also appears to be to expect an explanation of telling circumstances…..A party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive…." (The Law of Evidence, p.21)

Shirani Bandaranayake J. said to state as follows;" ……there is no principle in the law of evidence which precludes a conviction in a criminal cases being based entirely based on circumstantial evidence. And the fact that the appellants, decided not to offer any explanations regarding the vital items of circumstantial evidence led to establish the serious charges against them.

Therefore, due to the absence of an explanation from the first accused the learned trial judges adopted the rule of logic of *Lord Ellenborough* to decide the first accused appellant as guilty.

Finally, *Gamini Amaratunga J.* refused the submission of the President's Counsel which said that the dictum of *Lord Ellenborough* in not a part of Sri Lankan Law.

When analyse the dictum of *Ellenborough* it is important to concern on the very recent case ***Badrudeen v. Hon.Attorney-General***. (Bar Association law Reports, 2011 p.116) The case for the prosecution rested solely on circumstantial evidence. It was absolutely unsatisfactory to warrant a conviction. The learned counsel for the accused submitted that the judge of the High Court has misdirected with regard to the application of the law relating to the

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burden of proof beyond reasonable doubt and comparing the version of the prosecution with the dock statement.

It is also identified that the learned High Court Judge has unnecessarily much reliance on *the Ellenborough* dictum. The accused-appellant gave an explanation but the learned trial judge has drawn adverse inferences. He fails to concern about the applicability of *Ellenborough* dictum. There is only a limitation that when the prosecution establishes a prima facie case against the accused and the accused fail to explain, then the court can form an adverse inference against the accused. The misapplication of *the Ellenborough* theory has caused serious prejudice to the accused-appellant. Therefore, *A.W.A. Salam J.* stated that finally the conviction and sentence cannot be allowed in this case.

Conclusion

Through analysing case laws, the writer's conclusion is that *the Ellenborough dictum* has been cited with approval in many cases in Sri Lanka where a strong *prima facie* case has been made out against the accused.

As discussed earlier, *the Ellenborough dictum* was firstly applied in Sri Lanka in ***Arendstz v. Wilfred Pieris*** (1938) 10 CLW 122. Some have argued that there is no single decision in Common Law which had followed the Lord Cochrane decision to support any particular area of law. They also criticize that even there are many weaknesses, the Supreme Court of Sri Lanka had adopted this dictum and had quashed the conviction and sentences even the Death sentence.

Therefore, it is observed that the last decision before this *Arendtz case* was ***The King v.Elliyatamby*** (1937) 39 N.L.R. 53. In this case *Abraham C.J,* applied *the Woolmington rule* ***Woolmington v Director of Public Prosecution***, (1935) A.C.256 and allowed the appeal. *Mr.Lakshman Marasinghe* has argued that it is noted that any of the subsequent cases didn't follow *the Woolmington rule* even just after one year. However, the authority of *the Ellenborough dictum* continued until today. In 2006, the Learned Judge believe that this dictum must be somewhere in the judgement of *Sarath Ambepitiya* murder case.

However***, Article 13(5)*** of the Constitution guaranteed that "Every person shall be presumed innocent until he is proven guilty." The burden of proof regarding particular facts is placed on an accused person. But, *Article 15(1)* makes restrictions on Article 13(5) and 13(6), in the interests of national security and emergency regulations. Therefore, in terrorist crimes, often evidence can't be met. The prosecution based on solely on confessions made by the accused person.

The writer believes that even there are many laws in the Sri Lankan Criminal Law and the Law of Evidence, the laws of the country are not quite adequate deal with the rise in crime. However, the writer states that everyone has to bear in mind the Cardinal principle;

> "In justice is done not only where an innocent accused is convicted, but also when a guilty accused is acquitted. The desirable object in devising a system of criminal

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procedure is therefore to avoid either situation."

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