a sum which is excessive almost invariably has the effect of an order refusing bail. If the unconvicted person is a young lad standing his trial on a bailable offence, such a procedure is almost always indefensible. I have ascertained from the statistics maintained by the Prison authorities that during the year 1948 the number of unconvicted persons remanded for failing to furnish security amounted in the Colombo jails alone to 7,154, and during the first half of this year to 3,215. I find it difficult to satisfy myself that in every one of these instances the judical discertion which was vested in the Magistrate was wisely and cautiously exercised.

Orders quashed.

51 NLR 25

[COURT OF CRIMINAL APPEAL]

1949 *Present :* **Jayetileke A.C.J. (President), Canekeratne and Gunasekara JJ.**

THE KING *v.* JAYEWARDENE

APPEAL 30 OF 1949 WITH APPLICATION 80

S. C. 1—M. C. Kandy, 31,177

Evidence Ordinance—Bad character of accused—Evidence of—Admissible to prove motive or state of mind—Sections 8 and 14.

Under section 8 of the Evidence Ordinance evidence can be led by the prosecution to prove a motive for any fact in issue or relevant fact, and under section 14 evidence of a previous conviction can be given if it will throw light on the motive or state of mind of an accused person with immediate reference to the particular occasion or matter.

APPEAL, with application for leave to appeal, against a conviction in a trial by a Judge and Jury.

G. E. Chitty, with *N. M. de Silva* and *Vernon Wijetunge*, for the appellant.

R. R. Crossette-Thambiah, Acting Solicitor-General, with *A. C. M. Ameer, Crown Counsel*, for the Crown.

Cur. adv. vult.

July 15, 1949. JAYETILLEKE A.C.J.—

The appellant was tried on an indictment charging him with having committed murder by causing the death of one S. M. Samarasinghe, an offence punishable under section 296 of the Penal Code.

The deceased was a youth of the age of about 16 years at the time of his death which occurred on January 21, 1948. On that day when he returned from school he found a parcel which had been sent to him by post awaiting him. He took it to his room and when he opened it a bomb which was inside it exploded and caused him very serious injuries which resulted in his death.

The evidence shows that two parcels addressed to the deceased and to his sister Mrs. Seneviratne were posted on January 20, 1948, at the Havelock Town Post Office, and two other parcels addressed to Miss Dissanayake, a cousin of the deceased, and to Podi Nilame, a brother of the deceased at the General Post Office. The senders of the parcels have not been traced. A fifth parcel was handed over to the Police by Ukku Banda the manager of a boutique at Undugoda. Ukku Banda said that two well-dressed men came to the boutique and left the parcel there. All the parcels contained locally manufactured bombs. Mr. Chanmugam, the Government Analyst, who dismantled one of the bombs,

said that the main component of it was a stick of dynamite about 2¼ inches in length and about 1¾ inches in diameter which was tightly fitted into a thick cardboard tube the two ends of which were secured by two wooden stoppers. There were two holes bored in each stopper into which two detonators were fixed one at each end. Inside the detonator there was some gunpowder and into this gunpowder a lighting element similar to those found in the bulbs of electric torches was found. The tube or cylinder was encased in a larger cardboard cylinder the open ends of which were secured by wooden stoppers on either side. In a little space between the two cylinders two small dry cells of the strength of about 1½ to 2 volts were found at one end. The switching device was on the outer cardboard tube. Two copper strips were tied to the cylinder about two inches apart, one lead from the battery and one from one end of the filament being connected to each copper strip. A thick copper wire about eight inches long was passed under the copper strips and was prevented from making electrical connection between the two strips insulating a short portion of the wire which was arranged to be under one of the copper strips. To each end of the wire were attached a tag labelled "Pull". Pulling of the wire in either direction shifted the insulation from under one copper strip and caused the filament to spark. That ignited the detonator and the gunpowder which finally exploded the dynamite. The bomb was harmless as long as the wire to which the tag labelled "Pull" was attached was not pulled. He said further that as a result of inquiries he learnt that dynamite of this particular thickness and detonators of this particular type were not available to civilians and that civilian dynamite would not have fitted the inner cylinder.

The deceased lived with his father in a village called Kabbagamuwa in the District of Kegalla up to about the year 1944 when his father sent him to Dharmarajah College and made him a boarder in the dispensary of one Gampaha Vederala in King's Street, Kandy. In the year 1945 he left that boarding-house and came to the house of the appellant in Trincomalee Street. The appellant was a tailor by occupation. He was not married. There is no evidence as to his age but the learned Judge in his summing-up has referred to him as an adult. He used the front portion of his house as his tailoring establishment and he lived in the back portion. The deceased lived in the appellant's house up to the beginning of 1947 when he left owing to some displeasure with the appellant and resided in the boutique of one Alwis Appuhamy at Buwaliadde for about a month. In April 1946 when the deceased went home for the holidays the appellant wrote to him a letter P25. It reads:—

> "Do you mean to board in another place this term? Do you not consider about the College boarding? If you do not like it I will find another place for you. I would not hesitate to buy or to rent another place for you . . . . How can I without your friendship in the future? Otherwise . . . . I have nothing to console myself."

This letter shows that the appellant had a deep affection for the deceased but that the deceased had more or less made up his mind to leave the appellant's house. Early in 1947 at the deceased's request Kodikara,

who was a friend of the family, found accommodation for him in the house of Alwis Appuhamy at Buwaliadde. The evidence of Kodikara and Alwis Appuhamy shows that after the deceased left his house the appellant tried hard to get him back and when he failed he threatened on several occasions to do him harm. The evidence of Simon and Jayasinghe also shows that the appellant uttered similar threats. Kodikara said that, three days after the deceased left, the appellant went to his workshop and told him,

> "This boy was living with me. I fed him, clothed him and did everything for him. He has left my place having removed a ring of mine. He is a very bad boy. Please get him out of the place where he is boarded at present and send him back to me".

He conveyed to the deceased what the appellant said but the deceased did not agree to go back. Two days after that visit the appellant went again to his workshop and asked him how the matter stood and he told the appellant that the deceased would not go back. The appellant asked him to consider whether the deceased would be sent back or not and went away. A day or two later the appellant paid a third visit to him. On that occasion he told the appellant that he did not wish to be disturbed and asked him to go away. Thereupon the appellant drew a kris knife from his waist and said,

> "If I cannot destroy him (deceased) with anything I will destroy him with this."

Alwis Appuhamy said that, about six days after the deceased came to his house, the appellant came to see him and told him that the deceased got angry with him and left and requested him not to keep the deceased in his house. About four or five days later the appellant came again and repeated his request. Ten days later the appellant came again and said,

> "I have already told you on two occasions not to keep that boy in your place. If you continue to keep him you will also get into trouble I will kill that boy if he does not come back to me."

He got alarmed at this threat and asked Kodikara to take the deceased away. Shortly afterwards the deceased's elder brother Podi Nilame arranged with Jayesinghe, the Assistant Manager of the Tarzan office, Kadugannawa, for the deceased to stay in the Tarzan office. On March 3, 1947, the deceased left Alwis Appuhamy's house.

Jayesinghe said that, a few days after the deceased came to reside in his office, the appellant came there and asked him to send the deceased back to his house. He asked the appellant why he wanted the deceased and the appellant replied,

> "My business is going down. It is a good omen to have the boy in my house. He has a pleasant face and is good-looking. It is pleasant to have him in the shop."

On March 24, 1947, the appellant met the deceased on the road and assaulted him. Podi Nilame went to the appellant's shop and asked

industrialist, and after weighing the evidence in the light of the submissions made by both sides, decide for reasons stated in writing and no other, that the licence will be granted or refused. The decision and the reasons should be communicated to the industrialist and the persons who raised objections.

Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved. In the matter before us, none of these elements were present and in my view the first and fifth respondents acted in an arbitrary manner in suspending the authorization granted earlier. In fact the first and fifth respondents, during the hearing, stated that they were prepared to permit the resumption of work, thereby acknowledging the fact that the suspension was an ill-considered act.

In the circumstances, I hold that the first and fifth respondents violated Article 12 (1) of the Constitution and I make order quashing the suspension of authority to proceed with the setting up of the Saw Mill as set out in the letter of the first respondent dated the 27th of January, 1997.

The fifth respondent is directed to pay the petitioner a sum of Rs. 10,000 as costs.

PERERA, J. – I agree.

GUNAWARDENA, J. – I agree.

Relief granted.

CINEMAS LIMITED
v.
SOUNDERARAJAN

COURT OF APPEAL
JAYASURIYA, J.
CA.LA 66/97
CA NO. 382/987 (REVISION)
DC KANDY CASE NO. 2365/RE
JUNE 12, 1997.

Civil Procedure Code – s. 154, Explanation s. 404 – Failure to object to document when first tendered – Failure to contradict by cross–examination and lead evidence in rebuttal – Evidence Ordinance – Proof – Omnia praesumuntur rite et solenniter esse acta, donec probetur in contrarium.

(1) In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal – S. 154 CPC (explanation).

(2) Where one party to a litigation leads prima facie evidence and the adversory fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, it is a "matter" falling within the definition of the word "proof" in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting, to a misdirection.

(3) Once a Court accepts and acts on a proxy or a power of attorney presumably because no defect appears on the face of such document, any party who desires to question the authority of that document has the onus of showing, the want of authority. This rule is based on the presumption – *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium.*

(4) In the determination on an issue in regard to substitution under section 404, the trial judge has the discretion.

Cases referred to:

1. *Perera v. Seyed Mohomed* 58 NLR 246.
2. *Adaicappa Chettiar v. Thomas Cook & Sons* (1930) 31 NLR 385.
3. *Silva v. Kindersley* 18 NLR 85.
4. *Eldrick Silva v. Chandradasa* 70 NLR 169.
5. *Wijesinghe v. Incorporated Council of Legal Education* 65 NLR 368.

APPLICATIONS for leave to appeal and revision.

S. Mahenthiran for petitioner.

A. K. Premadasa, PC with *C. E. de Silva* for respondent.

Cur. adv. vult.

June 12, 1997.

JAYASURIYA, J.

I have heard the learned counsel for the petitioner in the revision application and for the applicant in the leave to appeal application. The learned counsel for the petitioner is seeking to impugn the order made by the learned District Judge of Kandy dated 20.03.1997 which had been produced marked A. His principal contention is that the learned District Judge had relied in his order on documents marked P2 and P2A which is a certificate of heirship in succession issued by Regional Controller of Revenue Ejodu dated 20.09.1994. The learned counsel contends that this document does not come within the category of public documents of a foreign country, in that there

is no certificate under the seal of a notary public or British consul or diplomatic agent, that the said officer is a functionary having an official character and that it is certified by an officer having the legal custody of the original which is referred to in section 78 (6) (11) of the Evidence Ordinance. What is paramount in considering this submission which has been trotted out in appeal for the first time is that this objection was never taken when this document was adduced before the District Judge at the inquiry. In those circumstances this Court has necessarily to consider the provisions of section 154 in regard to tender of documents in evidence at trial or inquiries and the effect of the explanation to section 154 of the Civil Procedure Code which applies to all inquiries and trials in the District Court. Explanation reads thus: "If the opposing party does not, on the document being tendered in evidence, object to it being received and if the document is not such as is **forbidden by law** to be received in evidence, the Court should admit". Thus, in civil proceedings it is of paramount importance for the opponent to object to a document if it is inadmissible having regard to the provisions of the Evidence Ordinance. Where he fails to do so, the objections to admissibility cannot be raised for the first time in appeal. The principle and rationale behind this rule is easily understood. Had objection been taken, the party proposing to adduce the document would have tendered to the Court evidence aliunde and by the failure to take the objection the opposing party has waived the objection. Clearly, document P2 is not a document which **is forbidden by law** to be received in evidence. Justices Sinnetamby and L. W. de Silva (acting Judge) in *Perera v. Seyed Mohomed*[1] proceeded to distinguish between a document which is inadmissible having regard to the provisions of the Evidence Ordinance and a document which is forbidden by law and their Lordships held the failure to object by the opponent to certain deeds belonging to strangers to the action which were inadmissible having regard to the provisions of the Evidence Ordinance at the trial, rendered those deeds and documentary evidence admissible evidence in the case and their Lordships were of the considered view that no objection can be taken to them in appeal. This is a point of difference between criminal proceedings and civil proceedings. In a civil case when a document is tendered the opposing party should **immediately** object to the document. Where the opposing party fails to object, the trial Judge has to admit the document unless the document is forbidden by law to be received and no objection to its admission can be taken up in appeal. Vide as authorities for this proposition *Adaicappa Chettiar v. Thomas Cook and Sons*[2]; *Silva v. Kindersley*[3]; *Perera v. Seyed Mohomed*[1] *(supra)*. Therefore, I hold that it is not

open to learned counsel for the petitioner and the applicant to object to the adduction of document P2 in appeal, inasmuch as no objection was taken to this document when it was sought to be immediately marked in evidence at the inquiry.

At the inquiry witness Govindasamy Krishnamoorthy gave evidence and in the course of his evidence in-chief he has stated that the party proposed to be substituted – V. R. Sounderarajan is the eldest son of A. R. L. S. Ramanathan Veerappan Ramanathan Chettiar, the deceased hereditary trustee. When he stated that the proposed party to be substituted is the eldest son of the said deceased, that oral testimony has not been contradicted by the process of cross examination. Equally, at the inquiry, when the defendant-respondent had the unfettered and unrestricted opportunity and right to lead rebutting evidence on this point the defendant-respondent has completely failed to lead such rebutting evidence. In this situation the principles laid down by Justice H. N. G. Fernando in *Eldrick Silva v. Chandradasa*[4] come into operation – "where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, that is a special feature in the case and it is a "matter" falling within the definition of the word "proof" in the Evidence Ordinance and if any Court were to fail to take cognizance of this feature and matter, that would be a non-direction amounting, to a misdirection." I am in respectful agreement with the principles laid down by Justice H. N. G. Fernando and I hold that these principles are applicable to the situation under consideration. The defendant-respondent failed to contradict by cross-examination, the oral evidence of Govindasamy Krishnamoorthy when he stated that V. R. Sounderarajan, the proposed substitute was the eldest son of the said deceased trustee – Ramanathan Veerappan Ramanathan Chettiar. Neither was evidence in rebuttal led therefore the District Judge was entitled to act on this prima facie evidence which became cogent and overwhelming evidence by reason of the failure to contradict the witness and by the failure to lead evidence in rebuttal. The order of the District Judge is tenable and could be upheld having regard to these two considerations. In addition, there were three other documents marked, that is, P1 which is the Decree in DC Kandy Case Number 10804/X, P3 the power of Attorney dated 9.1.1995 and P5 the declaration dated 20.08.94; when all these documents were tendered and marked, they were not objected to and the provisions of the aforesaid explanation to section 154 of the Civil Procedure Code would be applicable to these documents.

In the petition the petitioner has attempted to impugn before this Court, the power of Attorney which has been produced and marked in evidence as P3. The principles laid down by Justice Sansoni in *Wijesinghe v. Incorporated Council of Legal Education*[5] with regard to powers of Attorney and proxies, answer the matters raised in the revision petition. Once a Court accepts and acts on a proxy or a power of Attorney presumably because no defect appears on the face of such document, any party who desires to question the authority of that document has the onus of showing, the want of authority. Justice Sansoni relied upon and applied the presumptions which attach to a power of Attorney or a proxy in such situation. Vide His Lordship's remarks at page 368. This rule is based on the presumption *omnia praesumunturr ite et solenniter esse acta donec probetur in contrarium.* This is a complete answer to the matter raised in the petition of the revision application. In the determination of an issue in regard to substitution under section 404 of the Civil Procedure Code, the trial judge has a discretion and I hold in the instant situation the District Judge of Kandy has correctly exercised his discretion on a consideration of the material placed before him.

In the circumstances I refuse notice to issue on this revision application and I proceed to dismiss this revision application without costs. I also refuse leave to appeal against the order of the learned Distict Judge of Kandy dated 20.03.1997.

Notice refused.

SUMANAWATHIE PERERA
v.
ATTORNEY-GENERAL

COURT OF APPEAL
ISMAIL, J.,
J. A. N. DE SILVA, J.
CA 152/96
HC NEGOMBO 147/93
MARCH 23, 1998.

Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984 – S. 54A (b), (c) and (d) – Trafficking – Importation – Heroin – Possession – Intention to possess or knowledge that one does possess a prohibited substance – Reasonable doubt.

Held:

(1) Whether in the circumstances the accused should be held to have possession of the substance, rather than mere control Court should consider all the circumstances – the modes or events by which the custody commences and the legal incident in which it is held.

(2) The accused has succeeded in creating a reasonable doubt in regard to the question whether she did possess the requisite knowledge required for the purpose of proving charges in the indictment against her.

APPEAL from the judgment of the High Court of Negombo.

Cases referred to:

1. *Warner v. Metropolitan Police Commissioner* (1968) 52 Criminal Appeal Report 373.
2. *Re v. Edmond Levis* – 87 Criminal Appeal Report 270.
3. *R. v. Boyesen* 82 AC 768.

Dr. Ranjith Fernando with *Miss Anoja Jayaratne* and *Miss Subashini Godagama* for the accused-appellant.

Jayantha Jayasuriya, SSC for Attorney-General.

Cur. adv. vult.

March 23, 1998

ISMAIL, J.

The accused-appellant was charged on an indictment dated 13.9.93 on three counts with trafficking in 204.69 grams of heroin on 08.07.92 at Katunayake, and at the same time and place aforesaid and in the course of same transaction with having imported 204.69 grams of heroin and with having been in possession of the said quantity of heroin, offences punishable under section 54 A (*b*), 54 A (*c*) and 54 A (*d*), respectively of the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984. The accused-appellant was convicted after trial on 21.6.96 on the charge of importing 204.69 grams of heroin on count 2 of the indictment. She was acquitted on counts (1) and (3) in respect of the offences of trafficking in and with possession of the said quantity of heroin.

It appears from the evidence that the accused-appellant had returned at night at the Katunayake airport from a flight from Madras on 08.07.92. On arrival her bag was seized by officers of the Narcotics Unit on suspicion that it contained heroin. On examination of her bag, it was found to contain the body of a ceiling fan in which was concealed a parcel which contained about 400 grams of a brown-coloured powder. On analysis the said quantity of brown powder was found to contain 204.69 grams of pure heroin.