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

In the matter of an appeal against an order of the High Court-at-Bar, in terms of the Section 451 (3) of the Code of Criminal Procedure Act No. 15 of 1979, as amended, read with Article 128 of the Constitution.

SC (TAB) 02/2023
HC (TAB) 2899/2021

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

COMPLAINANT

Vs.

Hemasiri Fernando
11A,
Sri Saranankara Road,
Pamankada,
Dehiwala.

ACCUSED

And now between

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

COMPLAINANT-APPELLANT

Vs

Hemasiri Fernando
11A,
Sri Saranankara Road,
Pamankada,
Dehiwala.

ACCUSED-RESPONDENT

Before : **P. PADMAN SURASENA, J.**
YASANTHA KODAGODA PC, J.
KUMUDINI K. WICKREMASINGHE, J.
MAHINDA SAMAYAWARDHENA, J. &
ARJUNA OBEYESEKERE, J.

Counsel : Priyantha Nawana PC, SASG, with Dileepa Peiris, SDSG, and Sudharshana de Silva, DSG, for the Complainant-Appellant

Mohan Weerakoon PC, with R. Manivannam for the Accused-Respondent.

Argued on : 04-07-2023, 05-07-2023, 06-07-2023, 03-08-2023, 08-08-2023, 11-08-2023, 08-09-2023

Decided on : 05-11-2024

P. PADMAN SURASENA, J.

On 21-04-2019, seven incidents of suicide bomb explosions occurred in seven different places of this country. These explosions claimed the lives of 268 people and caused injuries to 586 people. The Victims were those gathered at three churches namely: St. Anthony's Church, Kochchikade, Colombo; St. Sebastian's Church, Katuwapitiya in Negombo; Zion Church, Batticaloa, as well as those gathered at four hotels namely: Shangri-La Hotel, Colombo; Kingsbury Hotel, Colombo; Cinnamon Grand Hotel, Colombo; and New Tropical Inn, Dehiwala.

In relation to the above suicide explosions, the Accused-Respondent who held office as the Secretary of the Ministry of Defence of the country, stood indicted before High Court-at-Bar under 855 counts. The charges in these 855 counts could be categorized and tabulated in the following manner:

	Places of the Suicide Bomb Attacks and the Names of the suicide bombers.	**Description of Charges.**	**Count Nos. in the indictment.**
1.	*Place:* *Shangri La, Colombo 01* *Names of the suicide bombers:* 1. Mohamad Cassim Mohamad Zahran alias Zahran Hashim 2. Mohamad Ibrahim Ilham Mohamad	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 01-33: S.296 read with S.102 of the Penal Code;	33 Counts: (Count Nos. 01-33)
		Count No. 34-67: S.300 read with S.102 of the Penal Code.	34 Counts: (Count Nos. 34-67)
2.	*Place:* *St. Anthony's Church Kochchikade* *Names of the suicide bomber:* Alawudeen Ahammath Muwath	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 68-123: S.296 read with S.102 of the Penal Code;	56 Counts: (Count Nos. 68-123)
		Count Nos. 124-268: S.300 read with S.102 of the Penal Code.	145 Counts: (Count Nos. 124-268)

3.	*Place:* *St. Sebastian's Church Katuwapitiya Negombo* *Names of the suicide bomber:* Achchi Mohamad Mohamad Hasthun	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 269-383: S.296 read with S.102 of the Penal Code:	115 Counts: Count Nos. 269-383
		Count Nos. 384-690: S.300 read with S.102 of the Penal Code.	307 Counts: (Count Nos. 384-690)
4.	*Place:* *Kingsbury Hotel, Colombo 01* *Names of the suicide bomber:* Mohamad Asam Mohamad Mubarak	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 691-699: S.296 read with S.102 of the Penal Code;	09 Counts: (Count Nos. 691-699)
		Count Nos. 700-722: S.300 read with S.102 of the Penal Code.	23 Counts: Count Nos. 700-722
5.	*Place:* *Cinnamon Grand Hotel, Colombo 03* *Names of the suicide bomber:* Mohamad Ibrahim Insaf Ahamed	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 723-744: S.296 read with S.102 of the Penal Code;	22 Counts: Count Nos. 723-744
		Count Nos. 745-762: S.300 read with S.102 of the Penal Code.	18 Counts: Count Nos. 745-762

6.	*Place:* *Zion Church, Batticaloa* *Names of the suicide bomber:* Mohamad Nazar Mohamad Asad	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 763-793: S.296 read with S.102 of the Penal Code;	31 Counts: Count Nos. 763-793
		Count Nos. 794-853: S.300 read with S.102 of the Penal Code.	60 Counts: Count Nos. 794-853
7.	*Place:* *New Tropical Inn, Dehiwala* *Names of the suicide bombers:* Abdul Lathif Jameel Mohamad	*Facilitating the suicide bomb attack by illegal omission to prevent the commission of the crimes set out in:* Count Nos. 854 and 855: S.296 read with S.102 of the Penal Code.	02 Counts: Count Nos. 854-855
	Total number of incidents - 07	Number of counts under S. 296 (Murder)	268
		Number of counts under S. 300 (Attempted Murder)	587
		Total Counts	855

The High Court-at-Bar on 22-11-2021 had read out charges to the Accused-Respondent. He had pleaded not guilty to each count upon which the High Court-at-Bar had commenced the trial against him.

The Prosecuting Counsel had made the opening address in terms of Section 199 (1) of the Code of Criminal Procedure Act No. 15 of 1979 as amended (hereinafter sometimes referred to as the CCPA). The admissions[1] were then recorded in terms of Section 420 of the CCPA on many matters. Some of those admissions are: the fact that the Accused-Respondent had held the office of the Secretary of the Ministry of Defence during the relevant time period including *inter alia* the occurrences of the bomb attacks; the contents of the Postmortem reports of the

[1]Admissions recorded in the Record of Proceedings of the High Court at Bar case No. HC (TAB) 2899/ 2021 dated 15-12-2021, at pages 2-3.

deceased; the contents of the Medico Legal Reports of the Injured; and the contents of the Government Analyst's Reports relating to the crime scenes.

During the trial in the High Court-at-Bar, the learned Deputy Solicitor General had led the evidence of the following Prosecution Witnesses (PW):

1) Nilantha Jayawardena, Director/State Intelligence Service (SIS) (PW1);
2) Brigadier Chula Ratnasiri Kodithuwakku (Retired), Director/Military Intelligence (DMI) (PW 1057);
3) Dinush Jayakody, Senior News Manager of Derana Media Network (PW 1216);
4) Rev. Anton Sudharshana Samera Rodrigo, (PW 922), St. Sebastian's Church, Katuwapitiya;
5) P. Upali Rathnayake, Director General of Tourism, Tourism Development Authority (PW 1030);
6) Dilendra Ruwan Wijewardena, then State Minister for Defence, (PW 932); and,
7) Hakamuwa Lekamlage Chamila Damayanthi, Deputy Registrar of the Colombo High Court.

On 19-01-2022, the Prosecution had informed the High Court-at-Bar that it would close its case. The learned High Court Judges upon the Prosecution closing its case on 19-01-2022, had adjourned the hearing for 18-02-2022 to consider whether they would call for the defence from the Accused-Respondent. On the next date i.e., on 18-02-2022, the High Court-at-Bar had pronounced the Order in that regard, and decided not to call for the defence from the Accused-Respondent. The High Court-at-Bar acting under Section 200 (1) of the CCPA, had decided to acquit the Accused-Respondent without calling for his defence.

Being aggrieved by the said decision of the High Court-at-Bar, the Attorney General has appealed to this Court seeking to have the said High Court-at-Bar decision set aside by this Court.

CHARGES IN THE INDICTMENT:

The Attorney General has framed the charges against the Accused-Respondent on the basis that he had abetted the suicide bombers to commit the respective crimes on the respective dates mentioned in several counts in the indictment. The said abetment is alleged to have been committed by the Accused-Respondent by an illegal omission on his part to take any

action to prevent the commission of those respective crimes in his capacity as the Secretary of Defence, even after he was in receipt of the five pieces of information more fully set out in the Schedule attached to the indictment. It is on that basis that the Accused-Respondent is alleged to have committed all the offences set out in the several counts in the indictment served on him. One set of charges are in respect of the deaths of persons who became victims of the afore-said bomb explosions which are punishable under Section 296 read with Section 102 of the Penal Code; the other set of charges are in respect of injuries sustained by the persons who became victims of the afore-said bomb explosions which are punishable under Section 300 read with Section 102 of the Penal Code. It is those charges which have been set out in afore-said 855 counts in the indictment. At the outset, it must be noted that the count No. 511 was in respect of the same deceased person as in count No. 501 and hence the learned Judges of the High Court-at-Bar had disregarded count No. 501.

The afore-said five pieces of information which form the foundation of the charges in the indictment which have been distinctly identified in the Schedule attached to the indictment are reproduced below for easy reference.

Information No. 01

The first of those pieces of information is an information sent to the Accused-Respondent by the Chief of National Intelligence (CNI) on 08-04-2019. This information will hereinafter sometimes be referred to in this Judgment as "Information No. 01" or "Information No. 01 received on 08-04-2019". The Prosecution has relied on the document produced, marked **P 8**, to prove that the Chief of National Intelligence had in fact sent the Information No. 01 to the Accused-Respondent on 08-04-2019.

Information No. 01 received on 08-04-2019 is as follows,

I. *ජාතික බුද්ධි ප්‍රධානී විසින් 2019.04.08 වන දින වුදින වෙත පෙන්වා සිටින ලද රාජ්‍ය බුද්ධි සේවයේ අධ්‍යක්ෂ වෙත 2019.04.05 දින දානමින් විදේශ බුද්ධි මූලාශ්‍රයකින් ලද පහත සඳහන් ලිඛිත තොරතුර.*

"As per an input, Sri Lanka based Zahran Hashmi of National Thowheeth Jamath and his associates are planning to carry out suicide terror attack in Sri Lanka shortly. They are planning to target some important churches. It is

further learnt that they have conducted reconnaissance of the Indian High Commission Sri Lanka and it is one of the targets for the planned attack.

2. *The input indicates that the terrorists may adopt any of the following modes of attack.*
   a. *Suicide Attack*
   b. *Weapon Attack*
   c. *Knife Attack*
   d. *Truck Attack*

3. *It is also learnt that the following are the likely team members of the planned suicide terror attack.*
   i. *Zahran Hashmi*
   ii. *Jal Al Quithal*
   iii. *Rilwan*
   iv. *Sajid Moulavi*
   v. *Shahid*
   vi. *Milhan and others*

4. *The input may kindly be enquired into on priority and a feedback given to us."*

Information No. 02.

The second of those pieces of information is an information sent to the Accused-Respondent by the Director State Intelligence Service (DSI) on 18-04-2019. This information will hereinafter sometimes be referred to in this Judgment as "Information No. 02" or "Information No. 02 received on 18-04-2019". The Prosecution has relied on the document produced, marked **P 12**, to prove that the Director State Intelligence Service had in fact sent the Information No. 02 to the Accused-Respondent on 18-04-2019.

Information No. 02 received on 18-04-2019 is as follows,

II. *2019.04.16 වන දින කාත්තන්කුඩි පොලිස් වසමේ නාලංකුඩාහි දී යතුරු පැදියක් පුපුරුවාහැරීමට අදාළව රාජ්‍ය බුද්ධි සේවයේ අධ්‍යක්ෂ විසින් වුදිත වෙත යොමු කරන ලද පිපිරීම සිදු වූ ස්ථානයෙහි ඡායාරූප කිහිපයක් අඩංගු තොරතුරු.*

[Copies of the screenshots which depict the above messages sent to the Accused-Respondent from the Director of State Intelligence, DIG Nilantha Jayawardena, is attached at the end of the schedule confirming that the above information has been sent.]

Information No. 03.

The third of those pieces of information is an information by the Staff Assistant to the Inspector General of Police, DIG D. Priyantha Chandrasiri on 20-04-2019. This information will hereinafter sometimes be referred to in this Judgment as "Information No. 03" or "Information No. 03 received on 20-04-2019".

Information No. 03 received on 20-04-2019 is as follows,

III. 2019.04.16 වන දින කාත්තන්කුඩි පොලිස් වසමේ තාලංකුඩාහි දී යතුරු පැදියක් පුපුරුවාහැරීමට සම්බන්ධව පොලිස්පතිගේ මාණ්ඩලික නියෝජ්‍ය පොලිස්පති ඩී. ප්‍රියන්ත චන්ද්‍රසිරි විසින් වුදිත වෙත 2019.04.20 දින යොමු කරන ලද 2019.04.14 සිට 2019.04.20 දක්වා කාලයට අදාළ බුද්ධි වාර්තාවෙහි සඳහන් කර ඇති පහත තොරතුර.

" Explosion

On 16 April 2019, around 2120 hrs, an explosion had occurred at Thalankuda area in Kaththankudi. Investigators, who had inspected the venue of the explosion had reportedly observed small particles of a heavily damaged motorcycle (Scooty) and extensive damages caused by the flying shrapnel to the objects in the immediate surroundings. Investigations are in progress. A special report indicating suspected networks was sent to IGP and SDIG/CID on 18 April 2019."

In the course of his submissions, the learned Senior Additional Solicitor General informed Court that the Prosecution would not rely on the Information No. 03 as the said information has not been sent to the Accused-Respondent in this case but to the Inspector General of Police. Therefore, the learned Senior Additional Solicitor General conceded that the Information No. 03 cannot be the basis to prove any charge against the Accused-Respondent in this case. Therefore, it would not be necessary for me to consider the Information No. 03 in this Judgment any further.

He however stated that the Accused-Respondent as Secretary to the Ministry of Defence is in receipt of the other 4 items of information set out under I, II, IV and V.

Information No. 04.

The fourth of those pieces of information is an information sent to the Accused-Respondent by the Director State Intelligence Service (SIS) on 20-04-2019. This information will hereinafter sometimes be referred to in this Judgment as "Information No. 04" or "Information No. 04 received on 20-04-2019". The Prosecution has relied on the document produced, marked **P 15**, to prove that the Director State Intelligence Service had in fact sent the Information No. 04 to the Accused-Respondent on 20-04-2019.

Information No. 04 received on 20-04-2019 is as follows,

IV. *රාජ්‍ය බුද්ධි සේවයේ අධ්‍යක්ෂ විසින් වූදිත වෙත යොමු කරන ලද රාජ්‍ය බුද්ධි සේවයේ අධ්‍යක්ෂ වෙත 2019.04.20 දින දානමීන් විදේශ බුද්ධි මූලාශ්‍රයකින් ලද පහත සඳහන් බුද්ධි තොරතුර.*

"Sir,
According to a foreign counterpart.

As per a reliable input, Zahran Hasim of National Thowheeth Jamath of Sri Lanka and his associates have hatched a plan to carry out an Isthishhad attack in Sri Lanka. it is further learnt that they have conducted a dry run and caused a blast with explosives laden Motor cycle at Palmunai near Kattankudy in Sri Lanka on 16.04.2019 as part of their plan.

It is learnt that they are likely to carry out their Isthishhad attack in Sri Lanka at any time on or before 21.04.2019. They have reportedly selected 08 places including a church and a Hotel, where Indians inhabit in large number. Further details awaited.

Director SIS"

Information No. 05.

The fifth of those pieces of information is an information sent to the Accused-Respondent by the Director State Intelligence Service (DSI) on 21-04-2019. This information will hereinafter sometimes be referred to in this Judgment as "Information No. 05" or "Information No. 05 received on 21-04-2019". The Prosecution has relied on the document produced, marked **P 16**, to prove that the Director State Intelligence Service had in fact sent the Information No. 05 to the Accused-Respondent on 21-04-2019.

Information No. 05 received on 21-04-2019 is as follows,

V. *රාජ්‍ය බුද්ධි සේවයේ අධ්‍යක්ෂ විසින් වුදිත වෙත යොමු කරන ලද රාජ්‍ය බුද්ධි සේවයේ අධ්‍යක්ෂ වෙත 2019.04.21 දින දාතමින් විදේශ බුද්ධි මූලාශ්‍රයකින් ලද පහත සඳහන් බුද්ධි තොරතුර.*

"Following info was received by me from the counterpart.
[21/04, 08:27 Respected Sir,
Good morning,
They are likely to operate between 0600 hrs and 1000 hrs today.. sir, One of their target is Methodists Church, Colombo. Further details awaited.

Actions were taken to alert the Police. Will deploy my surveillance teams.
Director SIS"

These pieces of information set out under Item Nos. I, II, IV, V are respectively the information set out in the documents produced respectively marked පැ**8**, පැ**12**, පැ**15,** and පැ**16**.

For more convenience the following chart would show the co-relation between the five items of information and the documents produced in the trial.

Information	Documents produced at the trial	Date of receipt of the Information by the Accused-Respondent
Item No. 1	P 8	08-04-2019

Item No. 2	P 12	18-04-2019
Item No. 3	Prosecution had not marked this document in evidence.	09-04-2019
Item No. 4	P 15	20-04-2019
Item No. 5	P 16	21-04-2019

Having set out briefly, the background of this case, let me now turn to the provision of law upon which this Court must decide the issue of the case at hand. Since the order impugned in this instance is one made under Section 200 (1) of the CCPA, let me at the outset, reproduce that Section. It is as follows:

Section 200(1) of the CCPA

"Court may acquit without calling for defence, or call for defence.

(1) When the case for the prosecution is closed, if the judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal; if however the judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence.

It is important to bear in mind that the learned Counsel for both parties namely, the learned Senior Additional Solicitor General Mr. Priyantha Nawanna PC, appearing for the Attorney-General, and Mr. Mohan Weerakoon PC, appearing for the Accused-Respondent have relied on the Court of Appeal Judgment in the case of Attorney General vs Baranage.[2] It is also important to note that the learned High Court Judges also in their Judgments have opted to follow the judicial principles laid down in that case. Thus, in the course of the proceedings of this case before this Court no party had any complaints against the said Court of Appeal Judgment in Attorney General v Baranage. They indeed have placed reliance on the principles of law enunciated by Hon. Justice Gamini Amaratunga[3] for the purposes of their respective cases.

[2] (2003) 1 SLR 340.
[3] As he was then.

According to Section 200 of the CCPA there are only three instances under which the trial Judge can record a verdict of acquittal without calling for the defence from the Accused. These three instances can be identified in the Section in the following way:[4]
If the Judge:

A. wholly discredits the evidence on the part of the Prosecution; or,
B. is of the opinion that such evidence fails to establish the commission of the offence against the Accused in the indictment: or,
C. is of the opinion that such evidence fails to establish any other offence of which he might be convicted on such indictment;

he shall then record a verdict of acquittal.

The fourth instance in the Section is the circumstance under which the trial Judge can call upon the Accused for his defence. It is set out in the Section in the following way:[5]

D. If, however, the Judge considers that there are grounds for proceeding, he shall call upon the accused for his defence.

Thus, one would observe that the grounds set out in (A), (B) and (C) above are specific in nature but to the contrary, the ground set out in (D) above is very wide. This is because "grounds for proceeding" have not been specifically set out in the Section and hence are not exhaustive. Moreover, the phrase "If, however," used in (D) above would serve to make the ground in (D) above, a proviso to the grounds set out in (A), (B) and (C) above.

Admittedly the decision of the learned High Court Judges, not to call for the defence is not based on (A) above. On the other hand, neither party made any submission before this Court in relation to the testimonial trustworthiness of the Prosecution witnesses as it was not the focal point in this appeal. Therefore, it is not necessary for me to consider the credibility of the witnesses who provided evidence for the Prosecution.

In the above circumstances, I only have to consider two critical questions. The said questions are: firstly, whether the learned High Court Judges have erred in holding that the evidence adduced by the Prosecution has failed to establish the commission of the offence against the Accused in the indictment or any other offence of which he might be convicted on such

[4] I have marked these instances as 'A', 'B' and 'C'.
[5] I have marked this instance as 'D'.

indictment.; secondly, whether there were grounds before the High Court-at-Bar which compels it to have proceeded further with the trial under (D) above.

JUDGMENT OF THE HIGH COURT-AT-BAR

After the Prosecution closed its case on 19-01-2022, and after the adjournment of the hearing, the High Court-at-Bar on the next date i.e., on 18-02-2022, had pronounced two Judgments in this case. One is a majority Judgment by two Judges and the other is a Judgment by a single Judge (the other Judge). The conclusion arrived at, at the end of each Judgment is the same.

In the majority Judgment a fundamental misdirection on law can be clearly observed. In that Judgment the learned High Court Judges have taken the view that the Prosecution is obliged to adduce very 'strong and penetrating evidence' (ප්‍රබල හා කාවදින සාක්ෂි) against the Accused-Respondent to enable the Court to conclude that the Accused-Respondent is responsible for the abetment of the crimes described in the indictment as a principal offender as per Section 107 of the Penal Code. The said view of the High Court Judges can be seen clearly from paragraphs 124 to 139 and also in paragraphs 173 to 179 of the majority Judgment. Thus, let me now consider whether Section 107 of the Penal Code has become relevant in the instant case. To start with, Section 107 of the Penal Code is reproduced below.

> *"Abettor present when offence is committed.*
> ***107**. Whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence."*

The Attorney General has not filed charges against the Accused-Respondent on such basis. Indeed, it is the learned High Court Judges who have imported Section 107 of the Penal Code in to the charges in the indictment of this case. Having imported that Section in to the charges by themselves, the learned High Court Judges now have concluded that the Prosecution is obliged to place evidence before Court in such a way that the Accused-Respondent could be held responsible as a principal offender in terms of Section 107 of the Penal Code .

A mere glance of the above Section is enough to say that Section 107 of the Penal Code has no application whatsoever to this case. Indeed, the purpose of Section 107 has been clearly set out in the very quotation cited by the learned High Court Judges in paragraph 137 of their Judgment. The said quotation is as follows:

> *"A point which needs emphasis in connection with section 107 is that the principal which it embodies, is applicable only in circumstances where all the essential elements of abetment are established, so that the accused would be liable as an abettor, had he not been present at the commission of the offence. Section 107 does not impose criminal liability on a person who, although present when the offence was committed, would not have been liable as an abettor if he had been absent. In other words, presence at the commission of the crime, in itself, is not a decisive consideration and does not necessarily facilitate proof of the independent requirements of abetment. Whether the accused is absent or present, the burden of establishing the requisite elements of abetment devolves on the prosecution. The only effect of the provision contained in section 107 is that, after all these elements are proved, the further circumstance of the accused's presence enables him to be dealt with qua the principal offender, and not merely as abettor."*[6]

As has already been adverted to above, the Attorney General has not charged the Accused-Respondent under Section 107 of the Penal Code. Therefore, there is absolutely no justification for addition of Section 107 to the charges in the indictment by the learned High Court Judges. It is relevant and significant to note the time at which the learned High Court Judges have adopted this interpretation. The time is after the Prosecution closed its case. Thus, obviously, it was not practically possible for the Prosecution to place evidence before Court in such a way that the Accused-Respondent could be held responsible as a principal offender in terms of Section 107 of the Penal Code. In my view, this conclusion reached by the learned High Court Judges is grossly erroneous and unwarranted in light of the facts and circumstances of this case. Such a conclusion is untenable.

This misconception of law which the two learned High Court Judges had strongly entertained had prompted them to look for strong and compelling evidence (ප්‍රබල හා කාවදින සාක්ෂි) in the Prosecution case in order to hold the Accused-Respondent responsible as the principal

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[6]G.L. Peiris, *General Principles of Criminal Liability in Ceylon (Sri Lanka),* (2nd Revised edn, Lake House 1980) 401.

offender. This was not the charge presented in the indictment. This was not the case presented by the Prosecution. Thus, the necessary inference from the above position is the fact that the two learned High Court Judges had totally failed to consider whether the evidence adduced by the Prosecution has established the case presented by the Attorney General against the Accused-Respondent. This misdirection on the part of the two learned High Court Judges in the majority Judgment is so serious and so grave. Thus, the learned High Court Judges in the majority Judgment could not have lawfully taken the view that the evidence adduced by the Prosecution has failed to establish the commission of the offence against the Accused-Respondent in the indictment in terms of limbs (B) or (C) in Section 200 (1). This is simply because they had failed to understand the charges presented in the indictment and the case presented by the Prosecution against the Accused-Respondent. Thus, the charge they had in mind when they proceeded to consider evidence in the process of ascertaining whether the evidence adduced by the Prosecution has failed to establish the commission of the offence against the Accused in the indictment, was not the charge mentioned in the indictment. Hence the final conclusion reached in the majority Judgment based on such misconception becomes untenable for that reason alone. Therefore, the majority Judgment by the two learned High Court Judges cannot be permitted to stand on that account.

Let me now turn to the second question I need to consider. That is the question whether there were grounds before the High Court-at-Bar which compels it to proceed further with the trial under (D) above. The primary position taken up by Mr. Mohan Weerakoon PC, appearing for the Accused-Respondent, in the course of his submissions before this Court is that the Prosecution has failed to prove that the Accused-Respondent in his capacity as the Secretary of the Ministry of Defence, is obliged in law to answer the charges which are based on the alleged illegal omission on the part of the Accused-Respondent in his capacity as the Secretary of the Ministry of Defence.

Indeed, while it is not possible to clearly ascertain the distinct basis upon which the learned Judges in their Judgments had decided not to call for the defence from the Accused-Respondent, the following basis can be gleaned from the aforementioned paragraphs of the majority Judgment.

I. The Accused-Respondent was not in a position to organise actions to be taken due to the prevailing political instability in the country.

II. There was no reliable information received by the Accused-Respondent when considering the reliability of such information at the time of its receipt by the Accused-Respondent.

III. The Prosecution has not proved any specific action that the Accused-Respondent should have taken.

In the light of the above positions, let me now consider whether the decision of the learned High Court Judges not to call for the defence from the Accused-Respondent could be justified in view of the evidence adduced by the Prosecution in the trial.

In order to cut a long story short, let me at the outset refer to the media interview given by the Accused-Respondent which is contained in the CD produced, marked **P 22**. The Prosecution has produced its transcript also marked **P 23**. It is worthwhile to reproduce this media interview at this juncture. It is as follows:

Media: *Who you believe carried this out?*

Mr. Hemasiri: *There are so many so many information moving here and there saying that defense ministry was aware of it and well we knew certain things were happening. But this country is truly democratic today there is no emergency laws nothing. So there is hardly anything that we also can do. We can go to certain extent collecting information and things like that.*

Media: *What did you intelligence warning said?*

Mr. Hemasiri: *Small group. But very well organized and powerful was responsible and we most of the findings I will not able to disclose because you know still we are doing it and your FBI is with us today and the same way the Interpol is coming tomorrow. And we are going to dig into this fully.*

Media: *You issued a warning you had intelligent?*

Mr. Hemasiri: We had to a certain extent but little weight.

Media: *Wasn't the church protected. Why weren't all the churches?*

Mr. Hemasiri: *We have alerted related agencies and now for example you know even during the height of the war right. We never provided security for the hotels. Hotels security was looked after by their own security. They*

always hired senior military officers, police officers and they looked after. And when something like this happen they say they didn't do anything. Even in the future we are not going to look after the hotels. They have to their any they are lucrative and they have to look after their security. We are here to secure the security of the general public and the property.

Media: *Why weren't the churches protected if you had a warning?*

Mr. Hemasiri: *How many churches to be protected. But we informed we informed that there is a. We never expected an attack of this magnitude.*

Media: *But you had warnings about a suicide bomber?*

Mr. Hemasiri: *Not to this extent. It say isolated you know may be one or two attacks here and there and various things. We never expected it to be so big.*"

While the media interview reproduced above, given by the Accused-Respondent is self-explanatory, the following positions can be clearly deduced from that interview.

i) The Accused-Respondent, at least to a certain extent, has had previous knowledge of the incidents that had taken place in the country on 21-04-2019.

ii) Under no circumstances, the Accused-Respondent would have provided security on the information he had possessed, to protect the hotels, as the hotels have enough resources as they earn sufficient money to arrange their own security.

iii) Even after those incidents occurred on 21-04-2019, the Accused-Respondent would not have provided security to protect the hotels.

iv) Under no circumstances, the Accused-Respondent would have provided security on the information he had possessed, to protect the churches as there were a large number of churches.

v) Although the Accused-Respondent did not expect attacks of that magnitude, he did expect some isolated *'one or two attacks here and there and various things'*.

The Accused-Respondent is the Secretary to the Ministry of Defence under whose purview the Police Department was placed. He has been in that position since 30-10-2018 and the Police Department had been brought under the Ministry of Defence since December 2018. The Accused-Respondent has admitted the receipt of all the items of information relied upon by the Prosecution as information supplied to the Accused-Respondent in his capacity as the

Secretary of the Ministry of Defence. Thus, the Accused-Respondent had the authority: to direct/take necessary steps to probe/further probe, the impending happenings; to direct/take some measure however they may be small/ineffective to avert such occurrences; at least in the end, to direct/take some action however they may be small/ineffective to find out as to which official under his purview is responsible for any lapse. What measures (however much they are small/ineffective) had he taken to avert the hitherto impending terrorist activities divulged in the information he had received in advance? In the trial, none. This is because there was no opportunity afforded for him to do so as the learned High Court Judges did not call upon him to explain by way of calling for his defence. If one is to go by the excuses the Accused-Respondent had provided in the media interview reproduced above, for the failure to prevent occurrence of those calamities, that may not be sufficient. Furthermore, it is not an explanation the Accused-Respondent had intended to provide for the Court case against him. Thus, it is nothing but fair to grant him an opportunity to place his side of the case before Court.

Information No. 04 was sent to him on 20-04-2019 (**P 15**). This information contained the specific reliable information as to the possible places of the imminent impending terrorist attack including the information about those who were involved in planning the said attack. On the other hand, this information must be interpreted in the light of the other information previously supplied to the Accused-Respondent. **P 12** (Information No. 02), which was received by the Accused-Respondent on 18-04-2019, contains specific information about the persons in relation to the incident of the *dry-run* where a motorcycle was exploded in Kaththankudi on 16-04-2019. This was considered to be the precursor and the rehearsal carried out by the attackers who were then getting ready to launch the attack on 21-04-2019. What measures (however much they are small/ineffective) had the Accused-Respondent taken to verify/investigate/consider/avert the impending subversive activities divulged in the information he had received? Did he intentionally ignore them totally? The Accused-Respondent owes an explanation in that regard. However, the learned High Court Judges did not give an opportunity for the Accused-Respondent to explain (if he has any) by way of calling upon him to place his defence.

Let me briefly advert to at this stage to the proof of mens rea in this case. For the Court to convict a person for a criminal offence, there must be proof that such person has committed the relevant act with the required degree of intention.

In the course of the argument, the following extract from the Judgment of Weerasuriya J., in the case of *Samy and others v Attorney-General (Bindunuwewa murder case)*,[7] was highlighted:

> *"Having regard to the departmental orders referred to above if the Officer-in-Charge has exercised his discretion bona fide and to the best of his ability, he cannot be faulted for the action he has taken even if it may appear that another course of action would have proved more effective in the circumstances."*

However, I observe that Weerasuriya J in that case, has stated that paragraph in his Judgment when he was dealing with the case against the 4th Accused in that case who was a Police Officer. The charges against the said 4th Accused (Police Officer) were based on illegal omissions which consisted of the general allegation of intentional failure to comply with the duty imposed by law and certain specific illegal omissions in his capacity as a Police Officer. The charges against the 4th Accused in that case, were based under Section 146 of the Penal Code. The Court in that case had held that there was no evidence to establish that the 4th Accused being a Police Officer, had intentionally joined the unlawful assembly with the object of causing hurt to the detainees. Furthermore, the High Court-at-Bar in that case had called for the defence from the said 4th Accused and the 4th Accused in that case had provided an explanation and the reasons for not shooting at the attackers directly. His explanation was his inability to distinguish between the detainees and the villagers in the commotion. It was in the face of the said defence placed by the 4th Accused that Weerasuriya J in that case had held that the mere fact that there was a duty to act in the given circumstances and death had resulted due to the said failure to act, will not be sufficient to establish the offence.[8] One has to be mindful that in the instant case, the Accused-Respondent has not yet provided an explanation or reasons as the High Court-at-Bar decided not to call for the defence from him. Thus, the facts and circumstances of *Bindunuwewa murder case* is also clearly distinguishable from the facts and circumstances of the instant case. Furthermore, the phrase *'if the Officer-in-Charge has exercised his discretion bona fide and to the best of his ability,'* found in the dictum quoted above from the Judgment of Weerasuriya J in *Bindunuwewa murder case,*[9] shows clearly that it is incumbent upon the accused to satisfy Court that he has exercised his discretion bona fide and to the best of his ability which in that case, the 4th Accused had done.

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[7] (2007) 2 SLR 216.
[8] Supra at page 237.
[9] (2007) 2 SLR 216, at 239.

Moreover, I also must emphasize here that the intention is a state of mind which under normal circumstances, is inferred from other proven facts and circumstances. Indeed, this was the same thinking in the case of *The King v Marshall,* where Dias J re-iterated that *"the intention of an abettor must be presumed from the nature and effect of the facility given by him to the doer of the act"* as laid down in *Rex v. Kadirgaman*.[10]

I must also mention here that under the fourth limb of Section 294 of the Penal Code, the offence of Murder is constituted, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. In light of the facts and circumstances of this case, the phrase "without any excuse" mentioned in the fourth limb of Section 294 of the Penal Code assumes a greater importance. Who has to provide the excuse in such circumstances? If there is no apparent excuse, all that the Prosecution can prove is just that. It would then be the accused who must take steps to place the excuse if he has one. If there is none, according to the fourth limb of Section 294 of the Penal Code, any act falling under the description therein, may constitute the offence of Murder.

Thus, having regard to all the facts and circumstances of the instant case, I am of the view that the High Court-at-bar, should have considered about the proof of the intention; degree of such intention; whether knowledge on the part of the Accused-Respondent would amount to the required intention, at the end of the case, i.e., after calling for the defence from the Accused-Respondent.

As stated previously, the pieces of information set out under Item Nos. I, II, IV, V, which are the pieces of information which the Accused-Respondent was allegedly in receipt, are respectively the information set out in the documents produced, respectively marked **පැ 8**, **පැ 12,** **පැ 15,** and **පැ 16**. It is based on these information that the Accused-Respondent is alleged to have committed all the offences set out in the several counts in the indictment served on him. The Defence has admitted that they do not dispute the accuracy of the contents of the said pieces of information as per the admissions recorded in the court proceedings dated 15-12-2021, in the Trail-at-Bar. The said admission is reproduced below.

[10] 41 NLR 534 at pages 535-536.

> "මේ වන විට මෙම නඩුවේ කාර්ය සඳහා සළකුණු කොට ඉදිරිපත් කර ඇති . පැ.01 සිට පැ.22 දක්වා වූ ලේඛන වල අන්තර්ගතය සහ නිරවද්‍යභාවය හඹ නොකරන බව විත්තිය වෙනුවෙන් පවසා සිටී"[11]

The Court has to go on the proven fact that the Accused-Respondent had indeed received this documentation on the respective dates they are said to have been sent to him (according to the Prosecution). The Prosecution's case is that the Accused-Respondent had not taken any action following the receipt of the information set out in the four items (I, II, IV and V) set out in the Schedule to the indictment. What is the action the Accused-Respondent had taken upon the receipt of these information? None on record. Then, is it justifiable for the learned High Court Judges to decide not to call for the defence from the Accused-Respondent in light of the evidence adduced by the Prosecution in the trial? The answer in my view, is certainly in the negative. This is because the circumstances referred to above, are grounds before the High Court-at-Bar which compels it to proceed further with the trial under (D) above by calling upon the Accused-Respondent for his defence.

Thus, I am of the view that the Accused-Respondent is obliged in law to explain these circumstances (than mere argument by Counsel) in order to show that he has discharged his legal duty in his capacity as the Secretary of the Ministry of Defence of this country.

I also observe that in the case of *Sinha Tissa Migara Ratnatunga v Hon. Attorney General,*[12] G. P. S. de Silva CJ did not think of interfering with the following observation made by the learned High Court Judge in his Order deciding to call for the defence from the Accused in that case. The said observation is reproduced below and clearly underline the importance of the Accused giving an explanation rather than mere argument of Counsel for him.

> *"Where the words are prima facie defamatory, as in this case, and if the accused intends to set up the defence that the words bore a non-defamatory sense and assign some particular non-defamatory meaning to them (words) and allege the special circumstances which he relies upon as supporting that (innocent) meaning it is not enough for his counsel to merely say from the Bar that in the circumstances in which they were published the words bear a non-defamatory*

[11] Proceedings of the Court, dated 15-12-2021, in case No. HC (TAB) 2899/2021, at page 2.
[12] SC (SPL) LA No. 336/1996, decided on 22-07-1996.

meaning. The stance of the learned President's Counsel in regard to these matters is not as definite as one would have wished it to be and is as fluid as fluid can be but what the learned defence counsel seem to be saying is that, if I had understood him (or them) correctly, the writing in question represents humorous, gently, light banter marked by pleasantry said more or less in jest and not meant seriously or in earnest. Assuming that this is so, it is the writer if he be the accused, who must say so in evidence or at least, in a statement from the dock and not his counsel for a counsel's submission do not attract to itself the weight of evidence and cannot be treated as such."

Thus, on the submission of the learned Counsel for the Accused-Respondent I have to conclude that the High Court should have called upon the Accused-Respondent to explain as to how he had treated the relevant four pieces of information which he had received. This is because, in the absence of any explanation from the Accused-Respondent as to why he did not take any action, or if he did in fact take certain action, in the absence of any explanation as to what those actions were, I am unable to affirm the decision of the trial Judges not to call for the defence of the Accused-Respondent. I have to reiterate here that the learned Counsel for the Accused-Respondent did not refer to any action attributed to the Accused-Respondent before this Court for consideration.

The instant case is not a simple straightforward murder case. The charges have been based on abetment by illegal omissions attributed to the Accused-Respondent. Thus, having regard to the complexity and magnitude of this case, I am of the view that this is not a fit case in which the learned High Court Judges should have acquitted the Accused-Respondent without calling for his defence.

For the foregoing reasons, I have no basis to permit the Judgment of the High Court-at-Bar to stand. Therefore, I set aside the Judgment dated 18-02-2022 pronounced by the High Court-at-Bar. I hold that that there are grounds for the High Court-at-Bar to proceed with the trial and therefore direct the High Court-at-Bar to call upon the Accused-Respondent for his defence and continue with the rest of the trial.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC J.

I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI K. WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I have had the privilege of reading the draft judgment of my brother, Justice Surasena, with which I entirely agree.

This appeal concerns the correctness of the decision of the High Court Trial at Bar, made under section 200(1) of the Code of Criminal Procedure Act, No. 15 of 1979, in acquitting the accused without calling for the defence immediately after the close of the prosecution case. I must acknowledge that the correct application of section 200(1) of the Code of Criminal Procedure Act, commonly referred to as the "no case to answer" application, is fraught with difficulty and presents considerable complexity. This issue is not unique to Sri Lanka but extends to many other jurisdictions with similar provisions. Hence, I decided to write a separate opinion by way of emphasis and to provide further grounds for allowing this appeal.

Virtual end versus technical end

The general rule is that the Court shall take the decision to convict or acquit the accused after the trial. There are two main exceptions to this general rule. The Court can acquit the accused:

(a) before the close of the prosecution case, and

(b) soon after the close of the prosecution case.

Before a case reaches its technical or formal end, it may come to a virtual end. This occurs when the prosecution case has "crashed", either during its presentation or through cross-examination, leaving the prosecution "without a case". If the prosecutor still persists, it amounts to persecution rather than prosecution, as there is no purpose in "flogging a dead horse". If, for instance, in a rape case, no reasonable Court can accept the evidence of the prosecutrix that the sexual act took place without her consent, there is no reason to wait until the evidence of all prosecution witnesses is led to acquit the accused. The Court can acquit the accused after the evidence of the prosecutrix. It is not a rule of law but a rule of practice now hardened and crystallized into law.

The landmark case in which this rule was recognized is *Pauline de Croos v. The Queen* (1968) 71 NLR 169, decided over fifty-six years ago on 24.03.1968, where T.S. Fernando J. stated at page 172:

> *The procedure actually adopted by the learned judge in this case is, to our knowledge, not infrequently resorted to by judges in this Country when it becomes apparent to the Court and counsel that to continue is to waste precious time and that there is no purpose in "flogging a dead horse". We ourselves have no desire, at this stage of the development of the practice of stopping trials at their virtual though not their technical end, to insist on technicality to the point almost of sanctifying it.*

The Five Judge Bench decision of this Court in *Attorney General v. Gunawardena* [1996] 2 Sri LR 149 at 158-159 illustrates the scope and applicability of this principle in the following manner:

> *Section 212(2) of the Administration of Justice Law provides: When the case for the prosecution is closed, if the Judge considers that there is no evidence that the Accused committed the offence he shall direct the Jury to return a verdict of "not guilty".*
>
> *Under this provision the Judge can direct the Jury to return a verdict of not guilty only at the close of the prosecution case. A practice appears to have developed in our Courts of Judges stopping a case even before that stage is reached. This matter is referred to in a judgment of the Court of Criminal Appeal in Pauline de Croos v. The Queen 71 NLR 169.*
>
> *"The procedure actually adopted by the learned Judge in this case, is to our knowledge, not infrequently resorted to by Judges in this country when it becomes apparent to*

the Court and counsel that to continue is to waste precious time and that there is no purpose of "flogging a dead horse". We ourselves have no desire, at this stage of the development of the practice of stopping trials at their virtual though not their technical end, to insist on technicality to the point of almost sanctifying it."

There is no reason to disagree with this dictum; if it is apparent to Court as well as to counsel that to continue is to waste time and to flog a dead horse, the case should of course be stopped. Again, if prosecuting counsel concedes or is constrained to admit that all the evidence on which the prosecution case is based has been led and what remains to be led is formal evidence or other supporting evidence which will not take the case any further, then the virtual end of the prosecution case has been reached and a court may fairly act under Section 212(2). But if there is such other evidence still to be led on behalf of the prosecution which the Judge has to reckon and give weight to in considering whether there is a case to go to the Jury, it appears to us that a Judge will be acting contrary to S.212(2) in making a direction before he hears that evidence.

Nevertheless, some raise doubt as to whether this principle of terminating trials at their virtual end applies only to jury trials, primarily because the *Pauline de Croos* case involved a jury trial. In my view, this is a not correct.

When the *Pauline de Croos* case was decided in 1968, High Courts were non-existent, and according to section 29 of the Courts Ordinance, the criminal sessions of the Supreme Court were conducted before a judge and a jury. Following the establishment of High Courts with the enactment of the Administration of Justice Law, No. 44 of 1973, section 193 mandated that all trials before the High Court be tried by a jury before a judge. After the enactment of the Code of Criminal Procedure Act, No. 15 of 1979, section 161 stipulated that all serious offences were to be tried on indictment in the High Court by a jury. This provision was amended by the Code of Criminal Procedure (Amendment) Act, No. 11 of 1988, which provides that all prosecutions on indictment in the High Court shall be tried by a judge unless the accused elects to be tried by a jury. In practical terms, following this amendment in 1988, all trials in the High Court are conducted before a judge alone, making jury trials virtually obsolete.

The practice of stopping trials at their virtual, though not technical, end is equally applicable to jury trials as well as non-jury trials. Over two decades ago, in *Attorney General v. Baranage*

[2003] 1 Sri LR 340, Justice Amaratunga affirmed this view, stating at page 352, "*This practice is applicable not only to trials before a jury but also to trials by a judge without a jury*."

If a judge in a jury trial can direct the jury to acquit the accused halfway through the prosecution case on the basis that continuing with the trial is merely "flogging a dead horse", there is no reason why the same approach should not apply when the judge is deciding the case alone, without a jury. It is crucial to maintain procedural integrity consistently across both types of trials.

However, the Judge must not make this decision arbitrarily. He must act judicially, adhering to the fundamental principles of natural justice. After the evidence of the main witnesses has been led, if the Judge firmly forms the opinion that there is no reasonable prospect of proving the charge against the accused, he should inform the prosecuting counsel of this in the presence of the defence counsel and afford both parties an opportunity to be heard before making a final decision.

In the United Kingdom, as a general principle, an accused cannot be acquitted before the close of the prosecution case. However, in *R v. N Ltd and Another* [2008] 1 WLR 2684 at 2693, Lord Justice Hughes, delivering the judgment on behalf of the Court of Appeal, clarified that such a course of action is permissible with the agreement of both parties:

> *That does not mean that it may not sometimes be appropriate and convenient for the parties to agree to ask the Judge to rule as a matter of law whether on agreed or admitted facts the offence charged is made out. A simple practical example is the situation where the end of the Crown case is nigh, subject only to outstanding evidence which it can be known will take a particular form, for example the police interviews. It may be administratively convenient for the parties to ask, or for the Judge to suggest, that an expected submission of no case be made then rather than half a day later, perhaps so that the jury is not unnecessarily inconvenienced. The key point is that the outstanding evidence is known for certain; it is admitted or agreed what it will be. And although the argument may be taken at that point, and a ruling made, any direction to the jury to return a verdict of 'not guilty' ought ordinarily to await the end of the Crown case, unless of course the Crown bows to the ruling and offers no further evidence, as it might. Similarly, it may often happen that in advance of the calling of any evidence at all the parties may agree that it would be helpful for the Judge to rule upon the question whether, on agreed, admitted or assumed facts, the offence*

charged would be made out. That may well be done with a view to the Crown accepting that it may offer no evidence if the ruling is against it, just as it may be done with a view to a defendant considering whether to plead guilty if the ruling is otherwise. The difference from the power here claimed is that the Judge is invited to proceed upon established, or assumed and agreed, facts, and has no power to compel acquittal until the end of the Crown evidence.

Acquittal after the close of the prosecution case

After the close of the prosecution case, the Court may acquit the accused. If it is a trial by the Judge, section 200(1) of the Code of Criminal Procedure Act, No. 15 of 1979 (which is identical to section 210(1) of the Criminal Procedure Code, No. 15 of 1898 and section 183(2) of the Administration of Justice Law, No. 44 of 1973) is applicable, and if it is a Jury trial, section 220 of the Code of Criminal Procedure Act, No. 15 of 1979 (which is identical to section 234 of the Criminal Procedure Code, No. 15 of 1898 and similar to section 212 of the Administration of Justice Law, No. 44 of 1973) is applicable.

This appeal pertains to the interpretation and applicability of section 200(1) of the Code of Criminal Procedure Act, No. 15 of 1979. The crux of the argument of learned Additional Solicitor General was that the High Court Trial at Bar erred in law by acquitting the accused after the close of the prosecution case by misapplication of section 200(1), even without an application made on behalf of the accused to do so.

At the close of the prosecution case, and prior to the accused being called to present a defence, the trial Judge may, either on the application of counsel or *ex mero motu*, acquit the accused on the ground that there is no case to answer. An application on behalf of the accused is not a mandatory prerequisite for making such a determination.

Section 200(1) reads as follows:

When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record a

verdict of acquittal; if however the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence.

When the case for the prosecution is closed, section 200(1) permits the Judge to acquit the accused on two main grounds:

(a) If he wholly disbelieves the evidence led by the prosecution or
(b) even if he wholly believes such evidence, if such evidence fails to establish the commission of the offence charged in the indictment or of any other offence of which he might be convicted on such indictment.

It further states:

(c) If, however, the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence.

It is clear that (a) and (b) above, favour the accused and (c) above favours the prosecution. The test contained in (c) above, requires the Judge only to consider whether there are grounds for proceeding with the trial. As Justice Salam points out in *Jansen v. Attorney General* [2015] BLR 159, the words in (c) above grant the Judge greater discretion to continue with the trial. My brother, Justice Surasena, endorses this view. I do not take a different view, but I must stress that (a) and (b) above constitute the operative part of the section. If there is an inconsistency within a section or a section with the other parts of the Act, the operative part of the section shall take precedence and the other parts must give way to the operative part of the section (*Sunpac Engineers (Private) Limited v. DFCC Bank* (SC/APPEAL/11/2021, SC Minutes of 13.11.2023 at pages 20-25).

Total discredit of the evidence

Let me now turn to the operative part of section 200(1). If I may repeat, under (a) above, if the Judge wholly discredits the evidence on the part of the prosecution, there is no need to call for the defence. A partial disbelief is not sufficient; it should be a total disbelief.

As I stated previously, section 200(1) of the Code of Criminal Procedure Act relates to non-jury trials, and section 220(1), which I have quoted below, applies to jury trials:

> *When the case for the prosecution is closed, if the Judge considers that there is no evidence that the accused committed the offence he shall direct the jury to return a verdict of "not guilty".*

E.R.S.R. Coomaraswamy in his treatise, *The Law of Evidence*, Vol II, Book I, page 267 states that the term "no evidence" has often been referred to as not a scintilla of evidence.

It may be on the rarest occasions that an indictment would be filed by the Attorney General in the High Court without a scintilla of evidence. The Attorney General performs a quasi-judicial function and is not tasked with securing convictions at any cost, but rather with upholding the rule of law independently and impartially, ensuring the proper administration of justice. However, there may be instances where the evidence presented by the Attorney General is so grossly unreliable that no reasonable Judge or Jury could ever believe it. In such cases, the accused shall be acquitted without calling for the defence.

The Attorney General v. Ratwatte (1967) 72 CLW 92 is a case where the judge has wholly discredited the evidence for the prosecution. The 1st accused in that case, at the time of the alleged offence, was the Private Secretary of the Prime Minister of Ceylon who was also the Minister for Defence and External Affairs, responsible for decisions relating to the grant of citizenship. The 1st accused was indicted for accepting a bribe of Rs. 5000 given in two instalments for granting citizenship in terms of the Citizenship Act to a Malaysian national whose visit visa had expired. The trial judge acquitted the 1st accused, concluding that no reasonable Court could accept the testimony of the main witness. On appeal by the Crown, T.S. Fernando J. (with the agreement of H.N.G. Fernando C.J.) affirmed the acquittal and cited with approval the following extract from the judgment of the trial Court:

> *But in my view no reasonable court can accept the oral testimony of Papuraj that this gratification was given to the first accused. Here is a person holding a responsible post under Government and one day in the afternoon on the 16th March 1964 an unknown car drove up to the compound. The car contained some people unknown to him, one of the persons possibly known to him – there is no proof even of that fact – walks up to him who has by now come up to the parties and hands him quite openly Rs. 1000 which he accepts without any hesitation and he puts it into his shirt pocket. Similarly, on the night of the 18th March 1964 an unknown car drives up to his house – in this*

> *case the ancestral walauwa of the 1st accused – that the same person who on the previous occasion is said to have given him Rs. 1000 walks up to him and the 1st accused who has now come to the entrance of his house accepts this Rs. 4000 and puts it his shirt pocket to be seen by the unknown persons in the car. On both occasions the 1st accused does not appear to have been in anyway hesitant about accepting the money. He does not appear to have been anxious to conceal the acceptance from any person who may have seen it. He does not take the precaution even of accepting the money without being seen by the unknown persons. It cannot be said that he is unaware of the seriousness of the offence he is committing. He does not seem to care as to whether he is led into a trap or not. I do not think any ordinary person would accept a bribe in such a manner, least of all a person in the position of the 1st accused who holds such a responsible post under Government.*

In interpreting section 234(1) of the Code of Criminal Procedure Act of 1898, which was identical to section 220(1) of the Code of Criminal Procedure Act of 1979, the Court of Criminal Appeal in *The Queen v. Kularatne* (1968) 71 NLR 529 at 555 made the crucial distinction between (a) the establishment of an offence by evidence and (b) the decision that there is no evidence that the accused committed the offence. According to the Court of Criminal Appeal, while the former is a question of fact that must be left to the Jury, the latter is a question of law that must be decided by the Judge.

> *Lastly, there is the question whether the learned trial Judge should have given a direction to the jury at the close of the case for the prosecution under section 234(1) to return a verdict of not guilty. That section casts a duty upon the trial Judge to direct the jury to acquit, if he is of opinion that there is no evidence that the accused has committed an offence. This provision is in accordance with the principle underlying a criminal trial by judge and jury that matters of law are for the Judge to decide and matters of fact for the jury. It does not appear to us to be a departure from that principle. It has always been considered that the question whether there is no evidence upon an issue is a question of law. Thus, in cases where an appeal is given on a matter of law, a plea that there was no evidence to support a determination is always permitted to be raised as a question of law. Whether there is sufficient evidence or whether the evidence is reasonable, trustworthy or conclusive, or, in other words, the weight of evidence is a question of fact. Accordingly, the Judge has to decide whether there is evidence upon the different matters which the prosecution has to prove in*

order to establish the guilt of the accused. It is for the jury to decide whether those matters are proved by such evidence and guilt established. Thus, in a case, which the prosecution seeks to prove by direct evidence, the Judge has to decide whether there is evidence upon the different matters required to be proved to establish the commission of the offence and the jury has to decide whether it believes that evidence and whether the evidence accepted by them establishes those matters to their satisfaction. In a case of circumstantial evidence, the Judge has to decide whether there is evidence of facts from which it is possible to draw inferences in regard to the matters necessary to establish the guilt of the accused. It is for the jury to decide what facts are proved and whether it is prepared, in the circumstances, to draw from them inferences in regard to guilt and whether in all the circumstances those inferences are the only rational inferences that may be drawn or are irresistible inferences.

Failure to establish the commission of the offence

The second ground for acquittal as embodied in section 200(1) is that "*such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment*." This means that even if the evidence presented is wholly reliable, if it does not establish the essential elements necessary for a conviction on (a) the charge in the indictment, or (b) any other offence for which the accused might be convicted on such indictment, the accused should be acquitted.

Standard of proof

The next question, which is the most challenging, concerns not the onus of proof but the standard of proof expected from the prosecution at the close of its case. There is no explicit provision setting out the applicable legal standard for a "no case to answer" application. Therefore, it is necessary to determine an appropriate legal standard that aligns with the statutory framework and the principles governing the burden of proof.

Throughout the trial, the burden remains on the prosecution to prove the charge against the accused "beyond reasonable doubt", and it never shifts. In the celebrated House of Lords decision of *Woolmington v. DPP* [1935] AC 462 at 481, Viscount Sankey L.C., with the concurrence of Lord Hewart L.C.J., Lord Atkin, Lord Tomlin and Lord Wright, recognized this principle as the "golden thread" running through the fabric of criminal law.

At this juncture, it may be appropriate to briefly clarify the meaning of "proof beyond reasonable doubt", a standard that has historically perplexed both prosecutors and judges due to its lack of a precise definition. The classic definition of "proof beyond reasonable doubt" is widely regarded as that of Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372, where he stated at page 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.*

Justice Kodagoda in *Sivathasan v. Attorney General* [2021] 2 Sri LR 290 at 304-305 emphasized that a reasonable doubt is a real, substantial doubt arising from objective consideration of the facts, not an imaginary or flimsy one:

> *A reasonable doubt is a real or actual and a substantial doubt, as opposed to an imaginary or flimsy doubt that may arise in the mind of the decider of facts (judge or the jury, as the case may be), following an objective consideration of all the attendant facts and circumstances. It is a doubt founded on logical and substantial reasoning (well-founded) which a normal prudent person with not less than average intelligence and learnedness in men, matters and worldly affairs, would naturally and inevitably develop in his mind following a comprehensive, objective, independent, impartial and neutral consideration of the totality of the evidence and associated attendant circumstances. It is a doubt that makes the case for the prosecution significantly less probable to have occurred than in the manner purported to have occurred.*
>
> *A reasonable doubt is not the type of doubt that arises due to incorrect, abnormal or unreasonable comprehension of testimonies and other material which amount to evidence presented at the trial, or due to irrational fear, inappropriate sympathy, or unjustifiable mercy. It is not a doubt that develops in the mind of an imbecile, indecisive or timid person, or in a weak or vacillating mind. A shadow of a doubt, an imaginary doubt, a vague doubt or a speculative or trivial doubt should not be confused*

> *with a reasonable doubt. A reasonable doubt is not a doubt that a partisan individual with vested interests would entertain in his mind, or a doubt that such a person would advocate that purportedly exists.*

As this Court held in *Karunarathna v. OIC, Police Station, Rambukkana* (SC/APPEAL/61/2023, SC Minutes of 09.10.2024 at page 20):

> *The prosecution must prove the accused's guilt beyond a "reasonable doubt", not beyond "any doubt". A reasonable doubt refers to a doubt based on logical reasoning through proper evaluation of evidence. This requires the trier of fact to weigh all evidence supporting guilt against evidence suggesting innocence, considering the strengths and weaknesses on both sides. If, after this evaluation, the evidence overwhelmingly favors the prosecution and eliminates any reasonable doubt about the guilt of the accused, the case can be deemed proven beyond a reasonable doubt. This standard applies to the totality of the evidence as a whole, not to each individual piece of evidence the prosecution relies on to prove the guilt of the accused.*

It is also important to point out that there can be degrees of proof within the standard of proof of beyond reasonable doubt. The degree of proof must be commensurate with the occasion and proportionate to the subject-matter. This aspect was discussed by this Court in *LOLC Factors Limited v. Airtouch International (Private) Limited* (SC/CHC/APPEAL/20/2015, SC Minutes of 03.04.2024).

In *Bater v. Bater* [1950] 2 All ER 458, the wife sought for divorce against the husband on the ground of cruelty. The trial judge held that she must prove her case beyond reasonable doubt. On appeal, the Court of Appeal affirmed it. Denning L.J. stated at page 459:

> *The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof is required in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there*

> *may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter.*

As explained by the International Criminal Court in *The Prosecutor v. William Samoei Ruto and Another* (Case No. ICC-01/09-01/11, decided on 03.06.2014), the primary rationale underpinning the acquittal on the basis of "no case to answer" is "*the principle that an accused should not be called upon to answer a charge when the evidence presented by the prosecution is substantively insufficient to engage the need for the defence to mount a defence case. This reasoning flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial, which are reflected in Articles 66(1) and 67(1) of the [Rome] Statute*."

Prima facie case or case proven beyond reasonable doubt?

By quoting *Attorney General v. Baranage* [2003] 1 Sri LR 340 at 354 and *Sinha Ranatunga v. The State* [2001] 2 Sri LR 172 at 188-189, Mr. Mohan Weerakoon, learned President's Counsel for the former Secretary of Defence submitted that at the stage of the close of the prosecution case, the standard of proof required of the prosecution is proof beyond reasonable doubt. I must acknowledge that I was initially more inclined to accept this position during the course of the argument.

In *Attorney General v. Susantha Kumara* (HCC/0055/22, CA Minutes of 24.11.2022), Kaluarachchi J. stated:

> *At the stage of deciding whether the accused should be called upon for his defence, it is not necessary to consider whether there is evidence to prove the charge beyond a reasonable doubt. However, at the very least, there must be some evidence on each element of the offence to call the defence, because an offence would not be*

constituted if there is no evidence of one of the basic elements required to prove the charge.

In *Edrick de Silva v. Chandradasa de Silva* (1967) 70 NLR 169 at 173, H.N.G. Fernando C.J. acknowledged that what needs to be established at that stage is a *prima facie* case.

The question of the standard of proof required from the prosecution at the close of its case is indeed contentious and remains a subject of considerable debate, extending beyond local jurisprudence. After careful and prolonged consideration, I regret that I am unable to concur with the submission of learned President's Counsel.

There is no duty cast on the prosecution to prove the guilt of the accused beyond a reasonable doubt at the close of its case. At the stage of the close of the prosecution case, the proper question for the Court to consider is whether the prosecution has made out a *prima facie* case to call upon the accused for his defence, not whether the prosecution has proved the case beyond reasonable doubt. The decision whether the accused is guilty of the charge beyond reasonable doubt should be reserved until the conclusion of the entire trial.

The next question is what is the meaning of *prima facie* case? There is a difference between *prima facie* case and *prima facie* evidence. *Sarker's Law of Evidence*, Vol I, 14th edition (1993), page 45 defines *prima facie* evidence as "*evidence which, if accepted, appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. It is not conclusive*." In *Ex parte Minister of Justice, re R v. Jacobson & Levy* (1931) A.D. 466, Statford J.A. states that "*Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.*"

If the same yardstick is applied to a *prima facie* case, it would imply that a *prima facie* case is one made out by the prosecution on evidence which, if unrebutted, would warrant the conviction of the accused. However, I find this definition unacceptable for a *prima facie* case as contemplated under section 200(1).

After the Court calls for the defence on the basis that the prosecution has established a *prima facie* case, if the accused remains silent and closes the defence case, the Court cannot

automatically enter a conviction. The Court has a duty thereafter to meticulously reassess and reconsider the entirety of the evidence as a separate exercise in determining the guilt of the accused, applying the beyond reasonable doubt standard. The decision to call for the defence has no bearing on the onus of proof, which rests on the prosecution throughout the trial.

In *Sinha Ranatunga v. The State* (*supra*) at page 189, Yapa J. in the Court of Appeal stated that in an application for no case to answer under section 200(1), "*A prima facie case necessarily means a case beyond reasonable doubt – at first sight i.e. on the evidence available on record as at the close of the prosecution case*." With respect, I find myself unable to accept this definition. A *Prima facie* case and proof beyond reasonable doubt are two different and irreconcilable concepts. *Prima facie* is a Latin term which means "at first sight". *Prima facie* evidence is neither conclusive nor irrefutable. A *prima facie* case may not stand or fall by itself.

At the close of the prosecution case, it is not prudent to consider whether the prosecution has proved its case beyond all reasonable doubt, as this could undermine a fundamental principle of the criminal justice system that an accused person is presumed innocent until proven guilty. This presumption extends not only until the conclusion of the prosecution case but persists until the entire trial is completed, ensuring that both parties are given the opportunity to be heard in accordance with the principles of natural justice. However, if no *prima facie* case is established against the accused, he is entitled to an early acquittal. If proof beyond reasonable doubt were to be accepted as the standard at the close of the prosecution case, then, should the accused choose to remain silent after the defence is called, it would necessarily lead to an automatic conviction.

Lord Parker C.J. (with the concurrence of Ashworth and Fenton Atkinson JJ.) elucidated the applicable test at the close of the prosecution case in his "Practice Directions" reported in [1962] 1 All ER 448 as follows:

> *Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.*

> *A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.*
>
> *Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.*

It is essential to recognize that the quality of the evidence is not evaluated at the mid-trial stage. If sufficient evidence exists to warrant the continuation of the trial, the Court must treat this evidence as reliable, call upon the defence, and defer a comprehensive evaluation of the evidence until the conclusion of the entire case to determine whether the prosecution has established its case beyond a reasonable doubt.

In *State of Kerala v. Mundan* (1981) CRILJ 1795 at paras 8-8A it was held:

> *We are of the view that the words "no evidence" in Section 232 Cr.P.C. [in India] cannot be construed or interpreted to mean absence of sufficient evidence for conviction or absence of satisfactory or trustworthy, or conclusive evidence in support of the charge. The judge has to see whether any evidence has been let in on behalf of the prosecution in support of their case that the accused committed the offence alleged, and whether that evidence is legal and relevant. It is not the quality or the quantity of the evidence that has to be considered at this stage. If there is any evidence to show that the accused has committed the offence, then the judge has to pass on to the next stage. It is not open to him to evaluate or consider the reliability of the evidence at this stage….It is a salutary principle in a sessions trial that no final opinion*

as to the reliability or acceptability of the evidence should be arrived at for the Judge until the whole evidence before him and has been duly considered.

What is expected from the prosecution at the end of the prosecution case and what is expected from the Judge at the end of the whole case was lucidly explained by Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ. on behalf of the High Court of Australia in *May v. O'Sullivan* (1955) 92 CLR 654 at page 658:

When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a "case to answer" has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in Wilson v. Buttery (1926) SASR 150 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. Morgan v. Babcock & Wilcox, per Isaacs J. (1929) 43 CLR 163 at 178. But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a "case to answer" may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made "a prima facie case", but it does not follow that in the absence of a satisfactory answer the defendant should be convicted.

The Court of Appeal judgment in *Attorney General v. Baranage* (*supra*) is largely founded on the seminal judgment of the Court of Appeal of the United Kingdom in *R. v. Galbraith* [1981] 1 WLR 1039 decided on 19.05.1981. It was a Jury trial. At the close of the prosecution evidence, a submission was made that there was no case for the accused to answer, which the Judge rejected. The principal ground of appeal was that the Judge had erred in this regard. Lord Lane C.J. articulated the test at page 1042 as follows:

> *How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence, (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.*
>
> *There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.*

After reviewing the evidence, Lord Lane C.J. concluded that the trial judge's decision to call for the defence was correct.

The *Galbraith* directions, however, do not support the proposition that the standard for assessing a "no case to answer" submission is that of proof beyond a reasonable doubt.

After quoting the *Galbraith* directions, *Blackstone's Criminal Practice* (2017), Oxford University Press, page 1813 states:

> *The following propositions are advanced as representing the position that has now been reached on determining submissions of no case to answer:*
>
> *(a) If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.*
> *(b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.*

(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value.

(d) The question is whether a witness is lying is nearly always one for the jury, save where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that it would not be proper for the case to proceed on the evidence of that witness alone.

The Privy Council judgment in the case of *How Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49 is a landmark judgment on the question of "no case to answer", which was delivered on 22.06.1981, one month after the Court of Appeal judgment in *R v. Galbraith*. The Privy Council judgment stemmed from three appeals from the Court of Criminal Appeal of Singapore.

Section 188(1) of the Criminal Procedure Code of Singapore, at that time, read as follows: "*When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence*." Section 180 of the Criminal Procedure Code of Malaysia also was drafted in identical terms. Although *prima facie* reading of this section suggests that the case must have been proved beyond a reasonable doubt at the close of the prosecution case, the Privy Council in *How Tua Tau v. Public Prosecutor* did not endorse such an interpretation. Lord Diplock with the agreement of Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill and Sir Ninian Stephen held:

> *The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence: for what are the essential elements in*

any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict: but, if there is some evidence, the judge must let the case go on. It is not the function of the jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had an opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordship's view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

In Malaysia, doubts were expressed regarding the correctness of this judgment, notwithstanding that it was delivered by the Privy Council. These concerns were addressed by

the Seven Judge Bench of the Federal Court of Kuala Lumpur in the case of *Arulpragasan Sandaraju v. Public Prosecutor* (1996) 4 CLJ 597, where it was held (with one Judge dissenting) that the standard of proof required of the prosecution at the close of its case is proof beyond a reasonable doubt, and if the accused elects to remain silent and calls no witnesses in his own defence, the Court must convict him without further ado. This decision was in conflict with the Privy Council decision.

However, the matter did not rest there. The Seven Judge Bench decision was effectively overruled in the following year by the amendment to the Criminal Procedure Code in Malaysia in 1997, which explicitly stated that the standard of proof at the end of the prosecution case is a *prima facie* case, while the standard of proof at the conclusion of the trial is beyond reasonable doubt.

> *180. (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.*
>
> *(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.*
>
> *(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.*
>
> *(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.*
>
> *182a. (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.*
>
> *(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.*
>
> *(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.*

Section 230(1)(j) of the Criminal Procedure Code in Singapore (revised edition 2012) states that "*if after considering the evidence referred to in paragraph (e), the court is of the view that there is some evidence which is not inherently incredible and which satisfies each and every element of the charge as framed by the prosecutor or as altered or framed by the court, the court must call on the accused to give his defence*".

The International Criminal Court, in the case of *The Prosecutor v. William Samoei Ruto and Another* (*supra*) holds the same view:

> *23. As an initial point, a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case. Whereas the latter test is whether there is evidence which satisfies the Chamber beyond a reasonable doubt of the guilt of the accused, the Chamber recalls that the objective of the 'no case to answer' assessment is to ascertain whether the Prosecution has led sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial. It therefore considers that the test to be applied for a 'no case to answer' determination is whether or not, on the basis of a prima facie assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber could convict the accused. The emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial.*
>
> *24. The determination of a 'no case to answer' motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. Such matters – which go to the strength of evidence rather than its existence – are to be weighed in the final deliberations in light of the entirety of the evidence presented.*

Let me summarize the applicability of section 200(1) of the Code of Criminal Procedure Act of 1979. At the end of the prosecution case, if the Judge wholly, as opposed to partly, disbelieves the evidence led by the prosecution, i.e., no reasonable Judge would act upon such evidence, the accused shall be acquitted. This is articulated in the first part of section 200(1). If there

exists, on *prima facie* basis, some evidence (not inherently incredible) which, if accepted by the Judge as accurate, would establish the essential elements of the offence charged in the indictment or any other offence of which the accused might be convicted on such indictment, the Judge shall call for the defence. This is addressed in the second part of section 200(1). If the Judge decides against the prosecution in either of these two instances, the Judge need not call for the defence but shall acquit the accused, unless there are other "grounds for proceeding with the trial" as referred to in the last part of section 200(1).

Strong and cogent evidence

In the majority judgment, the phrase "strong and cogent evidence" (ප්‍රබල සහ කාවදින සාක්ෂි) is used repeatedly with special emphasis, highlighting the required standard of proof. I have no doubt that the Trial at Bar anticipated a high degree of proof from the prosecution by the end of its case. I do not for a moment say that the approach adopted is consciously wrong and the majority deliberately or knowingly resolved to ignore the settled law regarding standard of proof expected at the close of the prosecution case. In my view, the law was not settled at the time of the delivery of the impugned order of the Trial at Bar.

As Justice Surasena has pointed out, the case at hand is not an ordinary murder or attempted murder case to be proved by direct or circumstantial evidence. It is a very complicated high-profile trial where for the first time in our history, a Secretary of Defence was indicted by the Attorney General to impute criminal liability on illegal omissions. There was, and still is, a public outcry that those in authority, including the accused, failed to take action despite being well aware in advance of the series of suicide attacks launched on Easter Sunday in 2019. The Presidential Commission of Inquiry presided over by a sitting Supreme Court Judge made recommendations regarding criminal prosecutions. In fundamental rights applications filed by the victims of this carnage, the Supreme Court held several persons liable for violating their fundamental rights and ordered heavy compensation. I make these observations not to suggest that trial Judges should consider extraneous matters when deciding whether to call for the defence, but rather to highlight the challenge—especially in a case of such complexity and magnitude—of arriving at accurate findings without the benefit of counsel's assistance from both parties.

Questions of fact

The major part of the judgment of the Trial at Bar is set apart to say that the accused has taken adequate steps to prevent suicide attacks whereas the prosecution version is that the steps alleged to have been taken by the accused are grossly inadequate. That is not a question of law but a question of fact which should be decided at the end of the trial, not at the end of the prosecution case. While my view is provisional and not binding, I concur with Justice Surasena that the accused did not take adequate steps that he could or ought to have taken to prevent the suicide attacks. I do not wish to elaborate on this aspect further, given the final conclusion reached by Justice Surasena, with which I entirely agree.

If I may stress what Justice Surasena has already stated, in *Samy and Others v. Attorney General (Bindunuwewa Murder Case)* [2007] 2 Sri LR 216 at 239 what Justice Weerasuriya stated was "*if the officer in charge has exercised his discretion bona fide and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances*." It is within the knowledge of the accused that he performed his duties and exercised his discretion *bona fide* and to the best of his ability. Who can explain this? Only the accused can explain this, not the counsel or the Judge. This opportunity was denied to the accused by the Trial at Bar. The Trial at Bar did not even invite the learned President's Counsel to explain this.

Intention

The Trial at Bar has also taken the view that the prosecution has failed to prove intention on the part of the accused as required by section 100 of the Penal Code by strong and cogent evidence (ප්‍රබල සහ කාවදින සාක්ෂි). In addition to the defence taken up by learned President's Counsel for the former Secretary of Defence that adequate steps were taken to prevent the suicide attacks, his other principal defence was grounded in the absence of intention on the part of the accused. It is true that in terms of section 100 of the Penal Code "*A person abets the doing of a thing who intentionally aids, by any act or illegal omission, the doing of that thing*." Intention is an essential ingredient in proving the offence. Learned Additional Solicitor General, in his written submissions, has cited several foreign legal authorities to argue that intention can be imputed when the accused foresees the result of his illegal omissions as virtual certainty. The relationship between knowledge and intention in a charge of abatement by illegal omission has also been a subject of considerable debate.

In my view, the question of intention was not seriously and adequately addressed at the argument before us; the primary focus was on the adequacy and inadequacy of the steps taken by the accused to prevent the suicide attacks. The question of intention is not a pure question of law to be raised for the first time on appeal. It is a mixed question of fact and law. The question of intention was not explicitly raised as a distinct issue before the Trial at Bar. There was no opportunity for the Attorney General to make submissions before the Trial at Bar regarding the question of intention or any other matter. Therefore, the Trial at Bar did not have the advantage of hearing both parties before it decided that there was no intentional aid on the part of the accused by illegal omission that enabled the suicide bombers to launch the attacks.

The Trial at Bar has simply gone on the basis that the prosecution has failed to prove that the omission was intentional. For the Trial at Bar, it was so obvious. When something is obvious, we tend to refuse to afford a fair hearing stating that hearing makes no difference as the end result would be the same. This is a misguided notion. A fair hearing could uncover critical insights and perspectives that were not initially apparent. Megarry J. in *John v. Rees* [1970] Ch 345 at 402 elucidated this point as follows:

> *As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

In light of the final conclusion reached by Justice Surasena, with which I concur, I shall refrain from exploring the question of intention further in this judgment. Let the Trial at Bar first decide the question of intention by calling for the defence and hearing counsel for both parties.

Alternative charges

There is another important matter trial Judges tend to overlook when an application under section 200 is made. At the close of the prosecution case, the Judge must consider not only whether there is *prima facie* evidence to call for the defence in respect of the offence charged in the indictment, but also whether there is *prima facie* evidence to call for the defence in respect of any other offence for which the accused might be convicted on the indictment. The

phrase "the accused *might* be convicted" indicates that there need not be strong and cogent evidence on any other offence.

The Trial at Bar *ex mero motu* considered section 298 of the Penal Code as an alternative charge and rejected it, but learned Additional Solicitor General stated that the accused at least might have been convicted under some other section, such as section 112 of the Penal Code.

As Justice Surasena points out, the majority judgment has seriously fallen into an error when they evaluated the facts of the case in light of section 107 of the Penal Code whereas the accused was charged under section 102 read with sections 296 and 300 of the Penal Code. These obvious mistakes could have been avoided if the Trial at Bar took the decision after hearing counsel for both parties.

Hearing after the close of the prosecution case

The gravamen of the complaint of learned Additional Solicitor General was that the Trial at Bar acquitted the accused without affording the Attorney General an opportunity to be heard. Conversely, learned President's Counsel for the accused submitted that there is no legal requirement in the Code of Criminal Procedure Act to afford a hearing once the prosecution has closed its case and before the Court decides whether to call for the defence.

In some jurisdictions it is mandatory to hear both sides before taking a decision on "no case to answer". For instance, in India, section 232 of the Code of Criminal Procedure 1973 states:

> *If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.*

While accepting that there is no such express provision in our Code of Criminal Procedure Act requiring to afford a hearing at that stage, I must state that there is no prohibition either against inviting counsel for both parties to address the Court, particularly when the Court is considering acquitting the accused in a complex case of this nature. As stated by Tambiah J. in *Hevavitharana v. Themis de Silva* (1961) 63 NLR 68 at 72, quoting with approval the famous dictum of Mahmood J. in *Narasingh Das v. Mangal Dubey* (1883) 5 Allahabad 163 at 172:

> *Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.*

If a statute is silent on the requirement to afford a hearing to the party who will be affected by a decision, the Court will imply a rule within the statutory provision that the principles of natural justice are observed. Procedural fairness demands such a course of action to be followed. In *Gamini Dissanayake v. M.C.M. Kaleel and Others* [1993] 2 Sri LR 135 at 179 this Court observed that "*today the courts presume, unless the contrary appears, that the legislature intended that powers conferred by it be exercised fairly, for although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature*." (William Wade, *Administrative Law*, 11th Edition (2014), page 377, *De Smith's Judicial Review*, 8th Edition (2018), page 392, J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, 1st Edition (1973), page 333)

In the UK case of *Barking and Dagenham Justices, ex parte DPP* (1995) 159 JP 373, it was held that when the justices are provisionally inclined to uphold a submission of no case to answer, they must first invite the prosecution to address the Court. This procedure ensures that the prosecutor has the opportunity to argue why the case should not be dismissed. In *R v. Brown* [1998] Crim LR 196, the Court of Appeal held that if, at the end of the evidence, the trial judge considers that no reasonable jury properly directed could safely convict, "*he should raise the matter for discussion with counsel even if no submission of no case to answer is made*". If, after considering the submissions, the judge still holds this view, he should withdraw the case from the jury.

I agree with the final conclusion of Justice Surasena that the impugned order of the Trial at Bar dated 18.02.2022 must be set aside and the case remitted to call for the defence.

JUDGE OF THE SUPREME COURT