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

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the Judgement dated 02.12.2021 of the Court of Appeal.

SC APPEAL NO. 82/2022

SC SPL.LA NO. 33 /2022

CA. APPLICATION NO. PHC/APN/174/2017

HC COLOMBO CASE NO. HC/6233/2012

Democratic Socialist Republic
of Sri Lanka

COMPLAINANT

Vs.

Selvarasa Kirubakaran of Pulloly East, Point Pedro.
presently in the New Magazine Remand Prison, Colombo 8.
ACCUSED.

And Now Between

The Attorney General
Attorney General's Department
Colombo 12.
COMPLAINANT-RESPONDENT-APPELLANT

Vs.

Selvarasa Kirubakaran of Pulloly East, Point Pedro.
presently in the New Magazine Remand Prison, Colombo 8.
ACCUSED-PETITIONER-RESPONDENT

Before : Hon. Jayantha Jayasuriya, PC, CJ

Hon. E.A.G.R. Amarasekera,J

Hon. A H.M.D.Nawaz, J

Counsel : Ms. Lakmali Karunanayake , SDSG for the Respondent-Appellants.

Amila Palliyage with Ms. Ranitha Gnanarajan, Ms. Sandeepani Wijesooriya, Mrs .C. Udugampola, Subaj De Silva and Lakitha Wakishta Arachchi for the Accused Petitioner-Respondent.

Written Submissions: Complainant-Respondent-Appellant on 03.05.2023 and 26.09.2024
Accused-Petitioner-Respondent on 14.03.2023 and 27.09.2024

Argued on : 07.12.2023, 11.09.2024 and 12.09.2024

Decided on : 12.11.2024

Jayantha Jayasuriya, PC.CJ.

The Attorney-General invoked the jurisdiction of this Court and impugned the Order of the Court of Appeal dated 02.12.2021. The Petitioner-Respondent (hereinafter referred to as "the 1st Accused-Respondent" or "the Respondent") stands indicted with two others in the High Court of Colombo and the trial is in progress. Two hundred and thirty counts in the indictment are framed under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended and Emergency Regulations promulgated under the Public Security Ordinance. Offences in the indictment include the conspiracy to commit the murder of a specified person – the army commander, aiding and abetting to commit attempted murder of the army commander and series of offences of murder, attempted murder, causing injury by a bomb attack that were committed in the course of the same transaction of the offence of conspiracy and abetment to commit attempted murder of the army commander.

One of the main items of evidence against the 1st Accused-Respondent is a purported statement he has made to a Superintendent of Police (SP) in the course of investigation. The 1st Accused-Respondent was in custody at the time the purported statement was recorded. When the prosecution moved to produce the aforesaid statement through the relevant Superintendent of Police, an objection was raised on the basis that 1st Accused-Respondent did not make a statement to the witness. The Learned High Court Judge thereafter had proceeded to hold an inquiry to examine whether the purported statement had been made voluntarily. At the inquiry, the evidence of the relevant Superintendent of Police, several police officers who brought the 1st Accused-Respondent to the SP from the place of detention and took him back, the typist who prepared the statement of the Respondent and the doctor who examined the 1st Accused-Respondent had been presented by the prosecution. All these witnesses had been cross-examined by the Learned Counsel who represented the 1st Accused-Respondent. Thereafter, the 1st

Accused-Respondent had made a statement from the dock and called a witness on his behalf. Thereafter the Learned High Court Judge by his Order dated 25th August 2017, has allowed the prosecution to produce the impugned statement as evidence. The Learned High Court Judge has held that the prosecution has proved beyond doubt that the 1st Accused-Respondent had made the impugned statement to the relevant SP. Furthermore, he had held that the impugned statement has been made voluntarily and the 1st Accused-Respondent has failed to show that the aforesaid statement was made involuntarily or that it was obtained by the SP by a threat, promise or inducement.

Being aggrieved by this Order, the 1st Accused-Respondent invoked the revisionary jurisdiction of the Court of Appeal and the Learned Justices of the Court of Appeal by their Judgment dated 02.12.2021, set aside the aforementioned Order of the High Court. The Learned Justices of the Court of Appeal held that the *"confession recorded in the instant case is in contravention of the provisions of section 24 of the Evidence Ordinance".* It was further held that the *"……ASP translating the entirety of the confession on six long days causes doubt as with regard to the voluntariness of the same".*

The Attorney-General impugns the Judgment of the Court of Appeal and move that the Order of the High Court be restored. This Court has granted leave to appeal on the following questions of law:

1) Has the Court of Appeal erred in Law in deciding that the adduced statement of the Accused which was sought to be produced by the prosecution under Section 16 of the P.T.A. is irrelevant in terms of Section 16(2) of P.T.A?

2) Whether the Court of Appeal erred in Law by failing to properly consider the evidence adduced in the course of the *voir dire* inquiry?

3) Whether the Court of Appeal erred in Law and fact by misdirecting itself on the valuation of evidence adduced in the *voir dire* inquiry?

The main issue in this matter revolves round the manner in which the relevant statement was recorded. It is common ground that the document the prosecution moved to produce at the trial is typewritten in Sinhala. According to the evidence of the prosecution, the 1st Accused-Respondent

made the statement in the Tamil Language to the SP and it was the SP who translated the said statement into Sinhala. Furthermore, it is contended that certain parts of the statement were made by the 1st Accused-Respondent in Sinhala.

The Learned Deputy Solicitor General impugns the findings of the Court of Appeal on the basis that the Learned Justices did not consider the evidence of all relevant witness and thereby erred in arriving at the finding that the recording of the relevant statement is in contravention of Section 24 of the Evidence Ordinance. The Learned Deputy Solicitor General further contended the Court of Appeal erred by failing to properly analyse the dock statement of the 1st Accused-Respondent and other evidence presented at the *voir dire* inquiry. It was her contention when all evidence presented at the inquiry was properly analysed and considered there is no reason or a valid legal basis to set aside the Order of the Learned High Court Judge. It is her contention that the relevant provisions of the PTA as well as the Evidence Ordinance has been fully complied with and the exclusion of one of the most important items of evidence caused grave prejudice to the prosecution

The Learned Counsel for the 1st Accused-Respondent challenged the contention of the learned Deputy Solicitor-General. He contended that the Learned Justices of the Court of Appeal had based their decision on relevant legal principles. He contended that the Learned Trial Judge had failed to appreciate these relevant legal principles. He further contended that the legal principles governing a trial cannot be directly applied to a *voir dire* inquiry. It is his contention that the difference between the burden and standard of proof in a criminal trial and a *voir dire* inquiry has been correctly recognised and adopted by the Court of Appeal. Accordingly, the Learned Justices of the Court of Appeal has proceeded to examine the issue whether the statement in question has been made voluntarily, ignoring the fact that the Counsel appearing for the 1st Accused-Respondent had taken contrary defences. It is his contention that the Learned Justices of the Court of Appeal has acted with utmost fairness to the 1st Accused-Respondent. He further contended that at an *voir dire* inquiry, proof of facts as enumerated in Section 3 of the Evidence Ordinance does not arise and the court must reject the confession if it appears to the Court that the statement is not voluntary.

As the indictment on which the 1st Accused-Respondent is tried in the High Court contains offences under the PTA and Emergency Regulations made under the Public Security Ordinance one of the statutes governing the trial is the PTA.

Section 16 of the PTA reads:

> "16 (1) Notwithstanding the provisions of any other law, where any person is charged with any offence under this Act, any statement made by such person at any time, whether –
>
> (a) It amounts to a confession or not;
> (b) Made orally or reduced to writing;
> (c) Such person was or was not in custody or presence of a police officer;
> (d) Made in the course of an investigation or not;
> (e) It was or was not wholly or partly in answer to any question,
>
> may be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance;
>
> Provided however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent.
>
> (2) The burden of proving that any statement referred to in sub section (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant."

Section 24 of the Evidence Ordinance reads:

> "A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession **appears to the court** to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, or proceeding from another person……..and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds which would appear to

him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him". (emphasis added)

It is trite law that in a criminal trial the burden of proving the guilt of the accused remains right throughout with the prosecution and such proof should be "beyond reasonable doubt". It is sufficient for an accused to raise a "reasonable doubt" on the evidence of the prosecution to secure an acquittal. Therefore, the burden on the prosecution to secure a conviction of an accused is to "prove" charges "beyond reasonable doubt". According to Section 3 of the Evidence Ordinance "proved" is defined as *"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"*. However, a court could reject a confession as irrelevant, if it ***appears*** to the court that the statement is made due to threat, promise or inducement as stipulated under Section 24 of the Evidence Ordinance (Emphasis added). The Learned Counsel for the Respondent drew our attention to the Judgment of the two Judge Bench of the Supreme Court in ***Vivekanandan v Selvaratnam*** 79(1) NLR 337, on the manner in which a Court should make an assessment in deciding the irrelevancy of a confession of an accused person as provided under Section 24 of the Evidence Ordinance. It is pertinent to observe, that the issue before the court in the said case was whether the accused had made the impugned confession due to threat, promise or inducement. In the said matter the Learned Justices of the Supreme Court had observed that the main witness who had recorded the impugned statement had been evasive when he was questioned in relation to matters that had a bearing on the voluntaries of the confession. The Court observed that *"Going through his evidence I come to the inescapable conclusion that, to say the least, this witness has been most evasive in the manner he had given his evidence"* (at page 340). Justice Malcolm Perera further observed that *"It is most unfortunate that this witness has displayed an aversion to answer simple questions in a straightforward manner. He has sought too often to seek refuge in his often repeated formula, 'it is possible, but I cannot recollect'. I cannot over look his performance, as these questions and answers are most relevant to the vital issue of voluntariness of the statement of the first accused produced as P21".* (at page 342). Having considered the evidence of this witness, the Learned Justice of the Supreme Court has formulated the main issue that he has to determine in the following words: *"The question*

that I have to determine is whether the evidence of witness de Silva, and the surrounding circumstances ***disclose a probability that there was a threat, inducement or promise*** *offered by de Silva to the first accused to make the Statement P21".* (at page 343 – emphasis added). The test formulated by the Learned Justice of the Supreme Court is whether it is probable and not whether it is possible that the statement was made due to threat, promise or inducement. Not mere possibility of the existence of such circumstance was the basis of rejecting the confession.

In this context it is of paramount importance to clearly identify and demarcate the parameters within which Section 24 of the Evidence Ordinance could be invoked. It is clear that a determination on the irrelevancy of any statement in the context of Section 24 of the Evidence Ordinance is, confined and limited to the circumstances where presence or existence of a threat, promise or inducement is in issue and could not extend to encompass situations or circumstances where the admissibility of any statement is challenged or any other ground. In a latter scenario, the determination of that particular issue would be governed by the legal principles applicable to the trial. As an illustration, if an accused person takes up the position that he never made a statement to a witness who claims that the accused made a confessionary statement to him, the burden on the prosecution is to prove that the accused made the statement as claimed by the witness, beyond reasonable doubt. It does not have a burden to prove that the accused made such a statement to mathematical precision. For a Judge not to act on such evidence a reasonable doubt should exist. It is not lawful for the court to make a determination on the issue whether the confession was made or not on the premise that "***it appears*** to court that no such statement has been made".

In ***Mariadas v The State*** [1995] 1 SLR 96, the Court of Appeal considered the admissibility of a confession in a situation where the accused denied making such a confession. In this process the Court identified several infirmities in the prosecution case including the failure to call the typist who recorded the confession, the failure to produce the pocket notebook of the investigating officer and the failure to present evidence to rebut the allegations of assault. Having considered all evidence transpired at the trial and having identified the aforementioned infirmities in the prosecution case the Court held that *"...****the prosecution has failed to prove beyond reasonable doubt****, that the confession was in fact made by the accused-appellant".* (at page 107 – emphasis added).

Therefore, when the fact whether the accused made the confession or not is in issue, it is the duty of the prosecution to prove beyond reasonable doubt that the accused made the confession. In such a situation it is not lawful for a court to reject a confession on the basis that "it appears to court that the accused did not make the confession".

However, when the fact that the statement was made by the accused as claimed by the witness is proved beyond reasonable doubt, then the court is obliged to consider whether it appears to court that the statement was made involuntarily and should hold the statement irrelevant if it appears to court that the confession has been made due to threat, promise or inducement as described by Section 24 of the Evidence Ordinance. In my view this is the protection granted to an accused under Section 24 of the Evidence Ordinance and the fairness to an accused in criminal proceedings should be assessed within such parameters in the context of assessing the voluntariness of a confession. However, when a Court embarks on examining the voluntariness of a confession court is obliged to act according to law, including the provisions of the Evidence Ordinance. The Court should not act on conjecture or surmise. Different standards of proof would be applicable when a Court is considering the relevancy of a confessional statement of an accused and the proof of his guilt. Furthermore, under Section 16(2) of the Prevention of Terrorism (Temporary Provisions) Act as amended states that the burden of proving that a confessional statement of an accused person made to an person of the rank of ASP or above shall be on the person asserting it to be irrelevant under Section 24 of the Evidence Ordinance.

It is also pertinent at this stage to note, Sections 109(2) and 110 (1) of the Code of Criminal Procedure Act No. 15 of 1979 as amended (Code) set out the general law relating to recording of statements by police officers. According to the proviso to Section 109(2) of the Code, an officer or inquirer may record the statement in any of the national languages, in the event it is not possible to record the statement in the language in which it is given and the person who makes the statement is unable to make the statement in writing. In such a situation the statement so recorded shall be read over to the witness or interpreted in the language he understands by the officer who recorded the statement.

In this context it is pertinent to note that in ***The King v Karaly Muttiah et al.*** 41 NLR 172, Moseley J at Page 174 observed that;

"Another ground of objection was that the confession was made in Tamil to the Superintendent who claims to have a knowledge of that language. It was, however, recorded in English and was read over by the Superintendent to the accused in Tamil. It does not seem to me that that procedure offends in any way against any provision in law. It may be open to Counsel to submit to the jury that mistakes may have been made in translating the confession from Tamil into English, and that further mistakes may have been made by the translation back into Tamil for the benefit of the accused. That is a submission which Counsel is clearly entitled to make, and it may be that such a confession recorded in such circumstances will be treated somewhat carefully, but as I have already said I can see no reason for holding a confession made in such circumstances to be inadmissible".

The statutory provision stipulated in the Code of Criminal Procedure Act referred to hereinbefore, is in no conflict with the aforesaid legal principle enumerated by Justice Moseley.

Therefore, there is no illegality *per se* in recording a statement of a witness in one of the official languages, even though the statement is made in a different language. In my view the Court of Appeal erred when it observed that *"…it is essential to record any confession recorded under the PTA in the language it was made, rather than translating it to a language alien to the maker of the alleged statement in view of requirements of section 24 of the Evidence Ordinance"* in ***Kedeeshwaran v The Attorney-General***, CA/HCC/0194/2017, Judgement dated 25.05.2022. Introducing such a requirement by way of a judicial pronouncement in the absence of such provision in any of the relevant statutes including the Evidence Ordinance, the PTA or the Code of Criminal Procedure Act as amended, amounts to the court making an attempt to legislate. Especially when such a proposition is contrary to the statutory provisions in the Code of Criminal Procedure Act. No Court could embark on such a process. The Court's duty is to interpret the existing law and make determinations accordingly.

Let me now turn to the evidence presented before the High Court based on which, the Learned High Court Judge made the Order dated 25th August 2017 and allowed the prosecution to produce the statement the 1st Accused-Respondent made to the SP. Such examination of

evidence becomes necessary to consider the legal issues (2) and (3) on which leave has been granted by this Court.

On behalf of the prosecution, evidence of ten witnesses had been presented. These witnesses include the SP to whom the 1st Accused-Respondent alleged to have made the statement in question, the typist who recorded the statement, six police officers who brought the 1st Accused-Respondent from his place of detention to the SP and took him back, the police officer who produced the Respondent before the JMO after the statement was recorded and the JMO. All these witnesses had been cross examined by the Learned Counsel who represented the Respondent in the trial Court.

According to the evidence of the typist, the typewritten statement in Sinhala was recorded on five days between 19.04.2010 to 27.04.2010. More particularly, it had been recorded on 19th, 20th, 22nd, 26th and 27th April, 2020. This witness has identified in Court the statement she prepared. The witness confirmed that the Respondent and the SP placed their signatures at the conclusion of each day of recording the statement. Furthermore, according to her it was prepared on paper where pages are serially machine numbered. The whole statement including a sketch drawn by the Respondent that ran into four pages comprises of thirty nine pages. According to this witness the SP translated the statement the Respondent made in Tamil into Sinhala and she typed the statement in Sinhala. She further had said that the Respondent in certain instances spoke in Sinhala too. She further said that the SP communicated with the Respondent in both languages. At the end of the cross examination of this witness, it had been suggested to her that she never recorded the statement but it was one Maheshika who typed written the statement and the statement was not typed in the presence of the Respondent. The witness had denied these suggestions and reiterated that it was she who typed the statement in the presence of the Respondent and the SP.

Testimonies of the six witnesses who brought the Respondent from the place of detention to the SP and returned back on different dates reveal that there had been no challenge to the fact that they handed over the Respondent to the SP on the respective dates on which they claimed that they took charge of the Respondent from his place of detention and produced before the ASP on each day, other than a bare suggestion to one such witness that all what he testified are lies.

The Judicial Medical Officer (JMO) who examined the Respondent on both occasions (ie: on 19.04.2010 and 03.05.2010) had said that she communicated with the Respondent in Sinhala and she observed that the Respondent spoke well in Sinhala. Furthermore, she said that the history recorded in the medico legal report was provided to her by the Respondent in Sinhala where the Respondent has said that he was an active member of the L.T.T.E and was arrested on 08th August 2009. The JMO had not observed any injuries nor the Respondent had complained of any such incident. The JMO had further concluded that he did not show any signs of any mental illness. In cross examination it had been suggested that the Respondent did have no knowledge in Sinhala, but the witness has refused to accept the suggestion. She had further explained that if the Respondent spoke in Tamil, she would have made a record of the person who assisted her with the translation and no such requirement arose as he spoke in Sinhala. Furthermore, this witness has refused the suggestion by the Learned Counsel that the witness at no stage examined the Respondent but handed over the perfected form to the police officer without examining the Respondent.

The Police officer to whom the statement in question was made has been promoted to the rank of Superintendent of Police (SP) after completion of thirty seven years of service. He had served as an Assistant Superintendent of Police (ASP) for eight years before been promoted to the rank of Superintendent in the year 2008. According to his testimony in the examination in chief, he has recorded around forty confessions from persons suspected of being involved in terrorist activities, during his tenure in the police department. He works in three languages namely Sinhala, Tamil and English. It is conceded that his competency is deficient to the extent that he is unable to read or write in Tamil. According to him, during the first nine years of his education he got the opportunity to attend Tamil medium classes at certain instances. Furthermore, he had said that he grew up in an area where Tamil was commonly used. Thereafter, during his service in the Police Department as a Sub Inspector and an Inspector he had served in many areas where predominantly Tamil language is used. He had testified in courts in Tamil language. In relation to the matters relevant to the case under consideration, he had initially received a direction from the Director, Terrorist Investigation Division to meet with the Respondent and attend to his need. According to the notes available, the Respondent has indicated to a police officer where he was held in detention, that he wishes to speak to a senior police officer. Accordingly, the Respondent was produced before him for the first time on 15th April 2010. The witness had inquired the

reason for his request and the Respondent had replied expressing his desire to make a statement on the activities he was involved in. Thereafter, the witness having explained the consequences of making such a statement had further interviewed the Respondent to satisfy himself that the Respondent is not under any threat, promise or inducement. He had spent one hour with the Respondent and thereafter had been handed over back to the police officer who produced him. Thereafter, the witness had met the Respondent on the 19th April 2010. Having verified whether the Respondent is under any threat, promise or inducement and been satisfied on his voluntariness, the witness has commenced the interview after an adjournment during which period he had the opportunity to examine the report of the JMO. When the witness requested the Respondent to provide the statement in writing the latter had wanted it to be recorded by the authorities, considering the volume of material that he had to disclose.

According to the witness all these discussions with the Respondent took place in Tamil. Furthermore, the Respondent has not had any objections for the statement been recorded in Sinhala. Thereafter, the statement has been recorded with the assistance of a typist who recorded the statement in Sinhala. This witness also says that certain parts of the statement were made in Sinhala. This process has continued in all four days through which the statement was recorded. This witness has been subjected to cross-examination. Even during the cross examination, this witness reiterated the manner in which he gained proficiency in Tamil language and no specific challenge has been made to the ability of the witness to speak in Tamil. He had not been challenged on the basis that no proper translation took place. Whereas the suggestion of the Learned Counsel had been that the statement in question was never recorded before him.

At the conclusion of the evidence of the prosecution, the Respondent has opted to make a statement from the dock. He says that he was born in Jaffna and received education up to G.C.E. (ordinary Level). At a later stage he had come down to Colombo and was engaged in some textile business. The Respondent was 39 years at the time he was making the dock statement (in 2017). In his dock statement the Respondent says that Nimal Ratnayake (SP) told him the latter is interested in learning the Tamil Language in response to a query the Respondent raised as to the purpose for which he was brought. The Respondent takes up the position that he never made a statement to the SP but signed some papers due to the threats made by one Subair. He further denies the claim that he was conversant in Sinhala but says that he learned Sinhala while in

custody. He claims that it was one Subair who forced him to sign few papers and further claims that he was subjected to assault when he initially refused. He says that a police officer was present in the room when the JMO examined him. He denies that the JMO examined him. It is also pertinent to note that the Respondent is silent on the prosecution's evidence that it was the Respondent who drew the sketches and made a note in his hand writing in Tamil language in the last four pages of the statement.

The other witness called on behalf of the Respondent was the OIC of the Terrorist Investigation Division. According to this witness, in the year 2010 it was Chief Inspector Prasanna Alwis (as he then was) who served as the Officer in Charge (OIC) of the Terrorist Investigation Division. Having examined an Information Book that was maintained in April 2010, the witness has said that OIC Prasanna Alwis has placed an entry on 7th April that he was travelling overseas for training. Furthermore, according to the said entry, IP Jayakantha has been appointed to cover up duties and CI Prasanna Alwis had left the roaming number to contact for necessary advice. He had reported back for duties on 21st June 2010. However, this witness had not been able to say whether CI Prasanna Alwis did engage in any official duties while overseas.

It appears that the objective of the last-mentioned evidence was to challenge the prosecution evidence that the recording of the statement in question was made on the directions of the then OIC, Prasanna Alwis. In particular the police officer who produced the Respondent before the SP on 27th April 2010 had said that OIC Prasanna Alwis directed him to produce the Respondent before the SP. In this regard it is pertinent to note that as per the evidence of PS 6747 Wijeratne, while he was on guard duty on 2nd April 2010 the Respondent has expressed his desire to speak to a higher officer. Accordingly, the witness has conveyed this request to Prasanna Alwis, the OIC by an entry in the Information Book. According to the evidence of witness Nimal Ratnayake, the OIC Prasanna Alwis has placed an entry addressed to the Director, below the entry of witness Wijeratna. On 3rd April 2010, SP Ratnayake has received a direction from the Director, TID to attend to the needs of the Respondent. It is also pertinent to note that there was an appointment made to cover up the duties of the OIC during his physical absence from office due to overseas training. Therefore, the inconsistency as to who made the directions thereafter to produce the Respondent before the SP to record the statement in my view neither makes the whole process illegal or unlawful nor creates a doubt on the rest of his testimony on matters

connected to the recording of the statement in question. In fact the Learned Trial Judge has disallowed an application by the prosecution to call Prasanna Alwis as a witness in rebuttal.

It is based on the evidence set out hereinbefore, the Learned Trial Judge made the Order dated 25th August 2017. In his twelve page Order, the Learned Trial Judge has analysed the evidence of each witness as well and has considered evidence as a whole in making the final determination. In deciding on the voluntariness, the Learned Judge has considered all material including the evidence of the JMO as well as the dock statement of the Respondent. Similarly, in deciding on the competency of the ASP to translate the statement made by the Respondent in Tamil into Sinhala, the Learned Trial Judge has taken into account all relevant evidence including an instance where the SP himself corrected the translation of the official interpreter in the course of his evidence in court. In this regard, neither the Respondent in his dock statement disputed the competency of the SP to communicate in Tamil nor the Counsel suggested a contrary to the SP on his evidence relating to his competency in spoken Tamil. The Learned Trial Judge has also considered evidence of all witnesses who claimed that they conversed with the Respondent in Sinhala including the evidence of the JMO and of PS Wijeratne on the evidence relating to the Respondent's ability to communicate in Sinhala. In this regard it is pertinent to note that the Learned Trial Judge had the opportunity to observe the demeanour and deportment of all witnesses including the Respondent, who appeared before him.

In fact, the Learned Justices of the Court of Appeal, in their Judgment had not specifically referred to any matter on which the Learned High Court Judge erred. In their Judgement the Learned Justices of the Court of Appeal has said *"The main contention of the petitioner was that the petitioner was tortured and inhumanly treated before obtaining the confession and thus it was not at all voluntary and apart from that the typist who recorded the confession was dictated by the ASP Nimal Ratnayake and not by the petitioner or the translator"* (at page 5). This passage in the Judgment reflects that the learned Justices of the Court of Appeal have misapprehended themselves on the position of the Respondent. The Respondent's position is that he never made a statement to SP Nimal Ratnayake and, at a later part in the Judgment, the learned Justices had correctly observed that *"The position taken up by the petitioner at the inquiry is that he never made the statement and in fact what he made was a statement to an officer named Subair and no other. But it is observed that the ASP was not cross examined on*

this, furthermore ***the evidence given by the ASP is uncontradicted and consistent****"* (at page 6 – emphasis added)

The Learned Justices however, having held as mentioned above observed that *"...what has to be decided here is whether the learned High Court Judge errored (sic) in deciding that the above mentioned confession was made voluntarily or not"* (at page 6). In this process, thereafter, the Learned Justices had not proceeded to consider the Respondent's assertion that he was subjected to assault and the evidence of prosecution witnesses including the JMO who examined the Respondent twice, but observed *"The fact that whether the ASP to whom the confession was made to was able to translate the same this court has to consider very seriously"* (at page 6).

In my view, by adopting the approach as reflected in the above portions of the Judgment, the Learned Justices had failed to apprehend the distinction between these two issues, namely voluntariness in the context of Section 24 of the Evidence Ordinance and the issue on the competency of the ASP to translate the statement, which has nothing to do with the issue on voluntariness based on "threat, promise or inducement" as set out in Section 24 of the Evidence Ordinance.

As I have already enumerated in this Judgement, the distinction between the challenges to a confession based on voluntariness and challenges on other grounds has a clear impact on the standard of proof. In the latter instances it is necessary to have a **"reasonable doubt"** whereas in the former instance a confession can be declared irrelevant if it **"appears to court"** that the confession is made due to threat, promise or inducement.

In fact, having examined the evidence of the SP in this regard, the Learned Justices had to come to a finding that there is a "reasonable doubt" on the competency of the SP to translate the statement from Tamil to Sinhala. Presence of a mere doubt is insufficient to declare a confession irrelevant. Acting on conjecture or surmise cannot be permitted. The view of the Learned Justices that *"..... the ASP himself translating the confession raises a doubt as to whether the statement of the petitioner was translated in verbatim to the typist or not..."* (at page 7), in my view appears to have reached on conjecture and not on a reasonable doubt based on evidence available. This is further reflected in their finding that *"...to the petitioner it may have been a*

daunting experience when the ASP himself was translating in view of his official position" (at page 7). It is rather difficult to comprehend this reasoning. The lack of clarity on the reasoning of Learned Justices is further reflected in the following passage of the Judgment: *"Therefore this court is of the view that since the recording of the confession expanded to nearly six days,* ***the most prudent thing the ASP could have done is to obtain the services of a translator on at least on one or two days****"*. (at page 7 - emphasis added). It is on this basis the Learned Justices of the Court of Appeal held that *"...the confession recorded in the instant case is in contravention of the provisions of section 24 of the Evidence Ordinance".* (at page 7). A clear distinction exists on prudency and illegality. Lack of prudency does not necessarily lead to an illegality or unlawfulness.

It is also pertinent to note that the learned Justices of the Court of Appeal has used the SP's evidence that he referred to the dictionary in certain instances in explaining legal provisions to conclude that there is a doubt whether the whole of the statement was translated in verbatim. In this regard it is pertinent to note that the SP's evidence on this aspect is clear and the use of dictionary was confined to the instance where he translated legal provisions in the Sinhala text to Tamil. He does not say that he had to seek the aid of the dictionary in any other instance.

In my view the Learned Justices of the Court of Appeal erred by failing to analyse and evaluate all relevant evidence presented at the *voir dire* inquiry, as required by law. Furthermore, the Learned Justices of the Court of Appeal had erred by failing to adopt the proper legal tests as enumerated hereinbefore, in holding that the confession is irrelevant under Section 24 of the Evidence Ordinance. In view of these findings, I answer all three legal questions in the affirmative.

I will now consider the submission of the Learned Counsel for the Respondent, that this is a fit case to act on the proviso to Section 334 (1) of the Code of Criminal Procedure Act No 15 of 1979 as amended even if the Court finds that the Learned Justices of the Court of Appeal had erred. It is trite law that the dismissal of the appeal under this provision could take place if and only if no substantial miscarriage of justice has actually occurred. In this instance, due to the Judgment of the Court of Appeal, the prosecution has been deprived of the opportunity to present one of the main items of evidence available against the Respondent at the trial. Such deprivation

has caused grave prejudice to the prosecution. Hence, this is not an instance where the Court could dismiss the appeal.

For the reasons I have enumerated hereinbefore, I allow the appeal and set aside the Judgement of the Court of Appeal dated 02.12.2021 and affirm the Order of the High Court dated 25.08.2017.

Chief Justice

E.A.G.R. Amarasekera,J

I agree

Judge of the Supreme Court

A H.M.D.Nawaz, J

I agree

Judge of the Supreme Court