DOI: http://doi.org/10.4038/sljfmsl.v12i2.7867

REVIEW

A critique of the application of DNA evidence in the criminal justice system of Sri Lanka in the light of developments in the United Kingdom, United States and Australia

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ABSTRACT

Introduction: This study is regarding the use of DNA evidence in criminal cases in Sri Lanka. There is no consistency in the application of DNA evidence in the criminal justice system of Sri Lanka mainly due to the inadequacies in the knowledge and skills of DNA evidence on the part of lawyers and judges to work within an adversarial system. In order to solve this problem Sri Lanka should learn from the experience of the United Kingdom, United States and Australia.

Objectives: To examine the use of DNA evidence in the criminal courts of Sri Lanka and how professional legal education and training may enhance its effective use.

Methodology: Judicial pronouncements in court cases and legislative enactments in Sri Lanka as well as other jurisdictions, recommendations in studies and reports in the United Kingdom, United States and Australia, views of experts and researchers in this field were considered and evaluated using a qualitative exploratory research methodology.

Results: The United Kingdom, United States and Australia endeavour to address issues such as wrongful convictions by the proper use of DNA evidence within their adversarial system of adjudication. This is the path that Sri Lanka too should follow.

Conclusion and recommendation: Adjudication of both civil and criminal cases in Sri Lanka is based on the adversarial system which may provide opportunities for the parties to win their case rather than finding the truth. Nevertheless, the interests of justice demand that the stakeholders in the legal and judicial process, in the criminal justice system in particular, be adequately equipped to meet the challenges in delivering justice.

Keywords: Administration of justice, adversarial system, criminal justice system, DNA evidence, legal education

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Article History
Received: 30.04.2021
Received in revised form: 13.09.2021
Accepted: 28.09.2021
Available online: 01.12.2021

INTRODUCTION

According to sections 184 and 199 of the Code of Criminal Procedure Act No. 15 of 1979[1] of Sri Lanka, criminal trials are conducted according to the adversarial system. The accusatorial or adversarial system has been defined as: "A system of criminal justice in which conclusions as to liability are reached by the process of prosecution and defence….while the judge acts as an impartial umpire…."[2]. In 2009 a critical report of the National Research Council in the United States has stated that the adversarial system is not suitable for finding scientific truth3. In this scenario DNA technology came into use in 1980s offering new opportunities

inter alia for identification purposes relating to forensic matters[3].

DNA evidence was introduced into court proceedings during mid-1980s[4]. It was in Hokandara Case5 that DNA evidence was used for the first time in Sri Lanka[6]. However, it appears from the decision of the Supreme Court in this case that the convictions had been based solely on circumstantial evidence and other scientific evidence such as chiral fingerprinting rather than DNA evidence[5]. Nevertheless, the importance attached to DNA evidence seems to have increased in a number of subsequent cases which will be discussed later in this paper.

The critical report in 2009 by the National Research Council of the United States on scientific evidence including DNA3 and a study commissioned by President Obama in 2015[7] have been referred to by the House of Lords in the United Kingdom in proposing improvements to the criminal justice system of the United Kingdom with a view to enhancing public trust in it[8]. Furthermore, the Federal Bureau of Investigation (FBI) in the United States has formulated standards for scientific evidence[9]. Similarly, the Scientific Working Group on DNA Analysis Methods (SWGDAM) has provided guidelines inter alia for the collection and interpretation of biological evidence[10].

As for Australia the report presented to the Department of Justice on the circumstances that led to the wrongful conviction of Farah Jama11 has made several proposals with a view to improving the use of DNA evidence in criminal proceedings. Such proposals include measures for improving the quality of DNA evidence as well as for updating the knowledge and competence of lawyers and judges in the use of such evidence[11].

Sri Lanka appears to have made considerable progress in adapting to the advances in the field of forensic science by learning from the experience of other countries[12]. Those improvements include a modern laboratory, equipment and training for staff in the Government Analyst's Department[12]. Nevertheless, it is not clear whether the legal profession in Sri Lanka is adequately equipped to make use of such developments in applying DNA evidence in criminal court proceedings. In the circumstances this research paper examines whether the lawyers and judges in Sri Lanka are equipped to effectively apply DNA evidence generated by forensic science. Hence, this study aims to generate transferable evidence on the efficacy of the application of DNA evidence in the legal process of the criminal justice system of Sri Lanka, with a view to making proposals and recommendations to the legislature and the providers of professional legal education.

OBJECTIVES

The main aim of this study is to investigate the application of DNA evidence in the legal process of the criminal justice system in Sri Lanka. Further we want to draw the attention of the authorities, particularly the legislative branch of the government of Sri Lanka, and the providers of professional legal education to the findings and recommendations of this study and necessary action.

MATERIALS AND METHODS

A qualitative exploratory research methodology was adopted to study how DNA evidence is used in the legal process of criminal litigation in Sri Lanka in comparison with the United Kingdom, United States and Australia. Hence, resources relevant only to criminal matters were included in this study and those dealing with civil matters were excluded. Primary legal sources, namely, statutes and court decisions in Sri Lanka, United Kingdom, United States and Australia were used when they were available and accessible. In addition, reports on this subject in the countries under consideration were utilised. Secondary sources such as journal articles had to be used to substantiate the arguments and proposals made in the paper or where primary sources were unavailable or inaccessible.

Reported and unreported cases which are in the public domain were accessed either by referring to the printed versions of the case reports or by accessing the soft copies available on the internet. Unreported cases not in the public domain were accessed from case records.

RESULTS AND DISCUSSION

Section 101 of the Evidence Ordinance of Sri Lanka introduces the principle that he who asserts must prove it[13]. Thus, in criminal cases the burden of proof is on the prosecution and as the House of Lords has declared in Woolmington v Director of Public Prosecutions, [14] the prosecution is required to prove its case beyond reasonable doubt. Consequently, an accused is presumed to be innocent until he is proved to be guilty. The presumption of innocence is enshrined in Article 13 (5) of our Constitution as a fundamental right[15].
Although these principles provide a high degree of protection to accused persons, cases in other jurisdictions like The Queen v Farah Jama[16] have

shown that there can be wrongful convictions unless further measures are in place.

The Supreme Court of Victoria Court of Appeal allowed the appeal of Farah Jama and quashed his conviction[16]. This case demonstrated a miscarriage of justice and the Ministry of Justice desirous of preventing such incidents commissioned Vincent to present a report on it[11]. The report he presented to the Ministry after conducting an inquiry into the circumstances that led to the conviction reveals how a miscarriage of justice can occur in trial courts. For instance, Vincent Report states that Jama would not have been convicted if the trial judge and lawyers possessed an adequate knowledge and experience relating to DNA evidence[11]. Consequent to this weakness they had relied so much on DNA evidence that it had even come into conflict with the highest standard of proof required in criminal cases[11].

Jama's conviction was based on a single piece of evidence, namely, a slide and a swab collected during a medical examination at the Austin Hospital and DNA scientists had attributed an extraordinary level of probability to it[11]. Forensic samples had been collected in the same unit of the same hospital from the female victim and another female with whom Jama had had sexual relationships[11]. On discovering that the DNA evidence may have been contaminated Jama's verdict was set aside by the Supreme Court of Victoria Court of Appeal[16].

A report of the House of Lords in the United Kingdom states at paragraph 125 that the knowledge and understanding of forensic science among lawyers and judges stands at variable levels and in some cases amounts to a lack of understanding[8]. In the United States the National Research Council at page 12 of its report discloses that judges and lawyers generally lack sufficient expertise in the application of forensic evidence[3]. Alwis, a retired judicial medical officer, recommends for judges and lawyers the courses on forensic medicine and science conducted by the Universities of Colombo and Peradeniya[17].

The above discussion reveals that an issue common to Sri Lanka, United Kingdom, United States and Australia; the lack or insufficient expertise of judges and lawyers to apply DNA evidence effectively. This must be resolved without delay in order to uphold justice and ensure fairness in criminal cases. As for Sri Lanka a curriculum revision committee under the chairmanship of Marsoof, a judge of the Supreme Court of Sri Lanka, made several recommendations in 2012[18]. Among these was a proposal to incorporate the subject of forensic science as a core module in the curricula at Sri Lanka Law College which is the sole institute that trains professional lawyers and conducts their examinations[18]. However, the curricula at Sri Lanka Law College[19] remains unchanged and this proposal has not been implemented to date.

Furthermore, recommendation 10 of the Vincent report has proposed the conduct of training courses on DNA evidence for lawyers and judges[11]. This proposal is worthy of emulation and it is proposed that the Bar Association of Sri Lanka should conduct programmes on DNA evidence for the benefit of lawyers while the Judges' Institute of Sri Lanka should have similar programmes for judges.

A selected number of criminal cases explain the status of the application of DNA evidence in Sri Lanka. The entire case of the prosecution before the High court in Sajeewa alias Ukkuwa and others v The Attorney General (Hokandara Case) [5] was based on circumstantial evidence and the accused persons were convicted. The Supreme Court affirmed the convictions but neither the judges nor the lawyers had raised the issue of DNA[5].

The circumstantial evidence in Hokandara Case comprised inter alia finger prints on a tin of biscuits which was objected to by the defence.5 Nevertheless, the Supreme Court rejected this objection being satisfied with circumstantial evidence[5]. It is arguable that it would have been fair if DNA evidence were considered in accepting or rejecting the said objection of the defence.

As the Court of Appeal has declared in Wahumpurage Wasantha v Attorney General[20], too much of reliance on one type of evidence by a judge may result in a miscarriage of justice[20]. Considering the views of the judges in this case and those of the cases referred to in it and the views of scholars like Vincent[11] and Kirby[21] the better view appears to be that all relevant evidence including DNA must be considered.

The above-mentioned comment that DNA evidence should have been used in the Hokandara Case may be substantiated with the approach of the High Court and the Supreme Court in Ambepitiya Murder case[22]. The High Court trial-at-bar, accepted that the DNA analysis had clearly established that the vomit found at the place pointed out by the eye-witness belonged to the 3rd accused in the case. It was further held that the said expert testimony of DNA evidence had corroborated the direct evidence of the eye witness[22]. All accused in this case were

convicted and their convictions were affirmed by the Supreme Court[22].

In Don Shamantha Jude Anthony Jayamaha v Attorney General[23] (Royal Park Murder Case) both the trial court and the appellate court appear to have given due weight to DNA evidence. The Court of Appeal has set aside the verdict of the High Court that had found the accused guilty of the lesser offence of culpable homicide not amounting to murder and convicted him of murder[23].

In the serial killings of 17 female victims in Kotakethana DNA was successfully utilised to identify some perpetrators and to exclude the innocent suspects while linking some murders committed by the same perpetrator at different places[24]. Those found responsible for the murders were convicted[24].

In Seya Sadewmi murder case25 DNA evidence was usefully utilised to exonerate innocent suspects arrested by the Police and indict the accused who was convicted by the High Court of Negombo[25]. Similarly, in Sivaloganathan Vithiya gang rape and murder case the Magistrate in Kayts ordered the Police to cause the suspects to undergo a DNA test[26]. Nine Accused persons were indicted before a Trial at Bar in Jaffna. Of them seven were convicted[26].

Rita Joan murder case[27] demonstrates a situation where the Attorney General had granted a conditional pardon to one of the accused under section 256 of the Code of Criminal Procedure Act No. 15 of 1979[1] for which he was criticised by the Supreme Court[27]. In this case the question of DNA evidence did not arise as there was sufficient other evidence to convict the accused persons. The rationale behind section 256 of the Code of Criminal Procedure Act No. 15 of 1979[1] appears to be the necessity to obtain evidence from an accomplice to successfully conduct prosecutions. However, now it may be argued that the use of this provision should be restricted as the grant of a pardon to an accomplice may not be just and equitable where scientific evidence including DNA is available.

The cases discussed in this paper demonstrate the different ways in which judges have performed the duty cast on them to determine the admissibility of evidence under section 230 of the Code of Criminal Procedure Act1 in relation to DNA evidence. Similar issues in other jurisdictions have been attributed to different levels of knowledge and understanding of forensic science of the lawyers and judges[3, 7, 8, 11]. As evident from the Sri Lankan cases [5, 20, 22-27] and the Australian case of The Queen v Farah Jama[16], this may lead to an inconsistency in the approaches by courts to scientific evidence. For instance, in Hokandara Case[5] it appears from the Supreme Court case report that the application of DNA evidence had not been raised as an issue[5]. In Wahampurage Wasantha v Attorney General[20] the conviction had been based solely on circumstantial evidence that led to a misdirection to the jury by the judge based entirely on circumstantial evidence other than DNA[20]. On the other hand, a balanced judicial approach to DNA evidence appears from Ambepitiya murder case[22] and the Royal Park murder case[23]. Similarly, in the other Sri Lankan cases discussed in this paper such as Kotakethana serial murder cases[24], Seya Sadewmi murder case[25] and Sivaloganathan Vithiya murder case[26] DNA evidence has been usefully utilised in exonerating innocent suspects and convicting the accused. In the Australian case of The Queen v Farah Jama[16] a miscarriage of justice has occurred by the comparison of DNA of the accused found in a hospital with a DNA database which resulted in his wrongful conviction.

The court decisions discussed above reveal an inconsistency in the legal and judicial approach to DNA evidence which may have an adverse effect on the administration of criminal justice. The recommendations suggested in reports in the United Kingdom8, United States[3, 7] and Australia[11] to address this issue include inter alia providing continuous education and training for the stakeholders such as Judges, prosecutors and defence counsel. It is recommended that Sri Lanka should draw from these recommendations in order to improve the administration of criminal justice.

CONCLUSION

It is important to prepare and continuously reform the legal environment in Sri Lanka to be conducive to the use of DNA evidence. The proposed curriculum development at Sri Lanka Law College18 will pave the way for preparing future lawyers and judges in discharging their professional duties including those relating to scientific evidence effectively. The Incorporated Council of Legal Education of Sri Lanka may give effect to this proposal under the rule making power conferred on it by section 7 of the Council of Legal Education Ordinance No2 of 190028 to provide for mandatory periodical curriculum development and annual review of curricula. In addition, the proposals relating to the updating of the knowledge and skills of practicing lawyers and sitting judges will equip them to meet the challenges in the application of DNA evidence. Furthermore, these recommendations would serve as the basis for

future research in order to enable Sri Lanka to keep pace with the developments in DNA evidence.

ETHICAL ISSUES

None

CONFLICTS OF INTEREST

None

AUTHOR CONTRIBUTIONS

WOR: Total work done by the author

REFERENCES

1. *Code of Criminal Procedure Act No 15 of 1979*. Available from: https://www.lawnet.gov.lk/ criminal-procedure-code/ [Accessed 27th June 2021]
2. Law J, Martin EA. *Oxford Dictionary of Law.* 7th ed. Oxford: Oxford University Press; 2013.
3. Committee on Identifying the Needs of the Forensic Science Community. *Strengthening Forensic Science in the United States: A Path Forward.* National Research Council. August 2009. Available from: http://www.nap.edu/ catalog/12589.html [Accessed 28th June 2021]
4. Lieberman JD, Carrell CA, Miethe TD, Krauss DA. Gold versus platinum Do jurors recognise the superiority and limitations of DNA evidence compared to other types of forensic evidence. *Psychology, Public Policy and Law*. 2008; 14(1): 27-62. Available from: https://doi.org/10.1037/ 1076-8971.14.1.27 [Accessed 28th June 2021]
5. *Sajeewa-alia U and others v The Attorney General (Hokandara Case)* [2004] 2 Sri. L.R.263. Available from: LawNet – Ministry of Justice – Sri Lanka https://www.lawnet.gov.lk [Accessed 22nd June 2021]
6. Fernando RA. National DNA Database for Sri Lanka. *Sri Lanka Journal of Forensic Medicine, Science & Law.* 2010 Vol. 1 No. 1. Available from: https://doi.org/10.4038/sljfmsl.v1i1.2710 [Accessed 28th June 2021]
7. PCAST Working Group. *REPORT TO THE PRESIDENT Forensic Science in Criminal Court: Ensuring Scientific Validity of Feature-Comparison Methods.* Executive Office of the President President's Council of Advisors on Science and Technology. September 2016. Available from: https://obamawhitehouse. archives.gov/blog/2016/09/20/pcast-releases-report-forensic-science-criminal-courts [Accessed 20th June 2021]
8. Science and Technology Select Committee. *Forensic science and the criminal justice system: a blueprint for change.* House of Lords. 3rd Report of Session 2017 – 19. Available from: www.parliament.uk [Accessed 29th June 2021]
9. Federal Bureau of Investigation. *Quality Assurance Standards for Forensic DNA Testing Laboratories.* Federal Bureau of Investigation. July 2020. Available from: https://www.fbi.gov/ file-repository/quality-assurance-standards-for-forensic-dna-testing-laboratories.pdf/view [Accessed 25th June 2021]
10. SWGDAM. *Guidelines for the Collection and Serological Examination of Biological Evidence.* Scientific Working Group on DNA Analysis Methods. January 2015. Available from: https:// www.swgdam.org/publications [Accessed 25th June 2021]
11. Vincent FHR. *Report: Inquiry into the Circumstances that led to the Conviction of Mr Farah Abdulkadir Jama.* Victorian Government Printer. PP No 301, Session 2006-10, May 2010. Available from: https://www.parliament.vic. gov.au>govpub [Accessed 26th June 2021]
12. Government Analyst's Department. *Performance Report 2018.* Government Analyst's Department. 2018. Available from: https://www.parliament.lk/uploads/documents/paperspresented/performance-report-government-analysts-department-2018.pdf [Accessed 26th June 2021]
13. *Evidence Ordinance No 14 of 1895*. Available from: https://www.lawnet.gov.lk/evidence-ordinance/ [Accessed 25th June 2021]
14. *Woolmington v Director of Public Prosecutions* [1935] AC 462. Available from: https:// www.bailii.org/ uk/cases/UKHL/1935/1.html [Accessed 26th June 2021]
15. *Constitution of the Democratic Socialist Republic of Sri Lanka 1978.* Available from: https:// www.parliament.lk/files/pdf/constitution.pdf [Accessed 28th June 2021]
16. *The Queen v Farah Jama* [2009] VSCA. Available from: http://netk.net.au/DNA/DNA7.pdf [Accessed 20th June 2021]
17. Alwis LBL De. Practice of Forensic Medicine – Then and Now. *Sri Lanka Journal of Forensic Medicine, Science & Law.* 2010 Vol. 1 No. 1. pp. 4-9. Available from: https://doi.org/10.4038/sljfmsl.v1i1.2709 [Accessed 17th July 2021]
18. Committee appointed by the Council of Legal Education of Sri Lanka to consider the revision of curricula and syllabi of the Sri Lanka Law College. *Final Report.* Council of Legal Education of Sri Lanka. 12th September 2012. Available from: https://www.academia.edu/10479415/ Report_of_Curriculum_Revision_Committee_ofSri_Lanka_Law_College [Accessed 15th June 2021).
19. Sri Lanka Law College. Available from: http:// www.sllc.ac.lk/index.html [Accessed 14th July 2021].
20. *Wahumpurage Wasantha v Attorney General* C. A. 114/2015. Available from: http:// courtofappeal.lk› download=5581:ca-hc-1. [Accessed 15th June 2021].
21. Kirby M. Forensic Evidence: Instrument of Truth or Potential for Miscarriage. *Journal of Law, Information and Science.* 2010; 20(1). Available from: http://classic.austlii.edu.au/au/journals/ JILawInfoSci/2010/2.html [Accessed 25th June 2021].
22. *Attorney General v Potta Naufer and Others (Ambepitiya Murder Case)* [2007] 2 Sri LR 144. Available from: LawNet – Ministry of Justice – Sri Lanka https://www.lawnet.gov.lk [Accessed 23rd June 2021].

23. *Don Shamantha Jude Anthony Jayamaha Vs. Attorney General (Royal Park Murder case)*, C.A.303/2006. Available from: Court of Appeal of Sri Lanka http://www.courtofappeal.lk [Accessed 23rd June 2021].
24. Vidanapathirana M, Ruwanpura RP, Illeperuma RJ, Attygalle U, Dasanayake PB, Wijewardene H et al. Medico-legal investigation of a series of female murders in Sabaragamuwa Province Sri Lanka. *Medico-Legal Journal of Sri Lanka* 2018; 6 (2). Available from: http://doi.org/10.4038/mljsl.v6i2.7375
25. Attorney General v Saman Jayalath HC/344/2015, decided on 15th March 2016. Available from: High Court of Negombo (Unreported).
26. *Attorney General v Pubalasingham Indrakumar alias Sinnaraja and Others* HC/ 2160/2017. Available from: High Court of Jaffna (Unreported).
27. *Ajith Fernando alias konda ajith and others v the attorney-general* [2004] 1 Sri LR 288. Available from: https://www.lawnet.gov.lk › ajith-fernando-alais-kond [Accessed 23rd June 2021].
28. Council of Legal Education Ordinance No. 2 of 1900. Available from: http://www.commonlii.org› legis›cole109268 [Accessed 10 July 2021].