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

WP Padma Wickramaratne

Aggrieved Party Appellant

Vs

CALA 5/2008
CA 131/2008
HC Negombo 326/2003

1. M Suresh Gunasena
2. JA Nalin Chandimal
3. HA Prasad Dilhara Perera
4. HM Asela Kumara Herath
5. EA Amila Thushantha
6. AM Vineetha Banadara

Accused Respondents

The Attorney General

Complainant Respondent

Before : Sisira de Abrew J &
KT Chitrasiri J

Counsel : Ranjan Mendis for the Aggrieved Party Appellant.
ShanakaRanasinghefor the 1st, 2nd 3rd 5th 6th respondents
Prince Perera for the 4th respondents
DSG Ayesha Jinasena for the Attorney General

Argued on : 26th,28th,29th of June 2012, 4th,5th,10th, 11th,12th and 19th of July 2012.

Decided on : 18.10.2012

Sisira de Abrew J.

The accused respondents (accused) in this case were charged under Section 2(4) of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994 read with Section 32 of the Penal Code. After trial they were acquitted by the learned high

Court Judge of Negombo (trial judge) by her judgment dated 21.4.2008. Being aggrieved by the said judgment, the aggrieved party, the wife of the victim, has appealed to this court. After hearing both parties and the Attorney General this court granted leave to appeal.

The case for the prosecution is that a police party comprising six accused arrested the victim Gerad Perera, brought to the Police station of Wattala and tortured at the police station. Prosecution relied upon circumstantial evidence to prove the charge of torture. All six accused made dock statements and called witnesses.

Padma Wickramaratne says that six accused persons arrested her husband Gerad Perera. All six accused persons in their dock statements admit that they arrested Gerad Perera and brought to the Police Station Wattala. Therefore the arrest of Gerad Perera was established beyond reasonable doubt and it is not necessary to debate on this point.

The 1st, 2nd, and 3rd accused take up the position, in their dock statements, that when the police party was bringing the victim to the police station, Gerad Perera ran away from their vehicle when they stopped the vehicle near a tea boutique to have tea. According to the notes made by the 1st accused, Gerad Perera ran away on a gravel road on several occasions. It is necessary to consider whether the position taken up by the 1st, 2nd and 3rd accused is true or creates a reasonable doubt in the prosecution case. PS Ratnayake who was in charge of the reserve duty at the police station Wattala says that when the 1st accused handed over Gerad Perera to him on 3.6.2002 at 13.25 hours, he (Gerad Perera) did not have any injuries. At this

stage one must not forget that according to the notes made by the 1st accused, Gerad Perera had fallen on the gravel road on several occasions. Thus one would expect Gerad Perera to sustain injuries. Prof. Ravindra Fernando who examined Gerad Perera at Nawaloka Hospital says that the injuries sustained by the victim could not have taken place when minimum force being used by police when he attempted to run away from police custody (Vide page 263 0f the brief). It is important to note that the 1st 2nd and 3rd accused had not taken up this position in their affidavits filed in the Supreme Court in the Fundamental Rights Application filed on behalf of the victim against the 1st 2nd, 3rd and others. The above material would establish that the position taken up by the 1st,2nd and 3rd accused that is to say that the victim ran away from the police vehicle and fell on the ground is a false story and that this story is not capable of creating a reasonable doubt in the prosecution case.

Learned counsel for the appellant Mr. Mendis submitted that the 1st accused made the above entry as he had planned to assault the victim after taking the victim to the police station and to take up the defence later that the injuries caused by him were sustained as a result of the victim falling on the ground. In my view there is merit in this argument and the learned trial judge should have considered it. When I consider all these matters, I am of the opinion that the position taken up by the 1st, 2nd, and 3rd accused that is to say that victim ran away from the police custody and the entry made by the 1st accused in the Information Book Extracts (IBE) to the effect that the victim fell on the ground several times whilst running are not true. The above story of them is nothing but a pack of lies. Why did they tell this lie? If they did not make this false entry they knew that it was not possible for them to explain the injuries of the victim. Therefore the motive

for the lie is the realization of guilt and the fear of truth. Further the position taken up by the 1st, 2nd and 3rd accused is clearly shown to be a lie by the evidence of PS Ratnayake and Prof. Ravindra Fernando. This lie relates to a very important issue. What is the effect of a lie told out of court or in evidence or dock statement? The answer to this question is found in the judgment of Lord Lane CJ in Rex Vs Lucas [1981] 2 All ER 1008 at 1011. His Lordship held thus: "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realization of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example in an attempt to bolster up a just a cause, or out of shame or out of a wish to conceal a disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated that is to say by admission or by evidence from an independent witness."

In Ajith Samarakoon Vs The Republic [2004] 2 SLR 210 His Lordship Jayasuriya J held: "The accused had uttered a deliberate lie on a material issue- love letters written by the deceased to the accused- because he knew that if he told the truth he could be sealing his fate, if such was the motive the utterance of such lie would corroborate the prosecution case.
The principle is that a lie on some material issue by a party may indicate consciousness that if he tells the truth he will lose."

His Lordship Justice Athukorale in Karunanayake Vs Karunasiri Perera [1986] 2 SLR 27 followed the principles laid down in Re x Vs Lucas (supra).

Applying the principles laid down in the above judicial decisions, I hold that if a lie told by an accused person out of courts or in a dock statement or in evidence satisfies the following criteria it would corroborate the prosecution case.

1. It must be deliberate.
2. It must relate to a material point.
3. The motive for the lie must be a realization of guilt and a fear of the truth.
4. The statement must be a clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated.

I have earlier held that the position taken up by the 1st, 2nd and 3rd accused that the victim running away from the police jeep is a false story. In my view the position taken up them satisfies the above criteria. I therefore hold that the above position taken up by the 1st,2nd and 3rd accused and the false entry made by the 1st accused corroborate the prosecution story. The learned trial judge has not considered these matters in her judgment.

Chief Inspector Suraweera was the Officer-in-charge of the police station Wattala and IP Navaratne was the OIC Crimes. Learned counsel for the accused respondents tried to contend that both CI Suraweera and IP Navaratne should be held responsible for what happened in the police station. Leraned counsel therefore contended that a reasonable doubt had been created in the prosecution case and that since the case depended on circumstantial evidence, finding the accused guilty was not the one and only decision that could be reached. When I consider this contention I must not forget the fact that the police team comprising 1st to 6th was appointed by SP

Kelaniya to investigate into the triple murder at Alwis Town Wattala and that this team was responsible for the ASP Paliyagoda and the supervision of investigation had been removed from CI Suraweera. The police team was under the supervision of ASP Paliyagoda. This was the evidence of CI Suraweera. IP Navaratne says that the police team had to report to ASP Paliyagoda. If supervision of the police team had been removed from the supervision of CI Suraweera and if the team had to report to ASP Paliyagoda how can CI Suraweera or IP Navaratne be held responsible for the investigation about the triple murder. Learned counsel for the accused respondents tried to contend that CI Suraweera being the OIC and IP Navaratne being the OIC Crimes should be held responsible for what happened inside the Police Station. But from the evidence of IP Suraweera and IP Navaratne it is clear that that the police team comprising 1st to 6th accused was not under them. They were supervised by ASP Paliyagoda. One must not forget that the incident relating to this case took place in the course of the investigation into the triple murder. Learned trial judge has not rejected their evidence. When I consider all these matters I am unable to accept the above contention of learned counsel for the accused respondents.

When Ranjith Perera, the brother of Gerad Perera went to the police station between 5.00 p.m. and 6.00 p.m. on the day of the arrest of Gerad Perera, he did not find his brother in any of the cells of the police station. Later when he was seated on a bench near the Reserve Duty Officer's table he saw his brother who was assisted by SI Renuka and another police officer walking towards the OIC's room. Learned trial judge observed that failure to call SI Renuka had created a reasonable doubt in the prosecution case. I will now advert to this observation. According to the

evidence of Ranjith Perera, victim Gerad Perera was inside the police station around 5.00 p.m. on 3.6.2012. If there was a necessity to take Gerad Perera to OIC's room and if he was unable to walk, somebody in the police station should assist him. Should SI Renuka confirm this position in evidence? What would happen if Ranjith Perera could not identify the police officers who assisted Gerad Perera? Can it create a reasonable doubt in the prosecution case? I say no. In my view failure to call SI Renuka cannot create a reasonable doubt in the prosecution case. Can it be argued that Renuka is the person who assaulted Gerad Perera? If that is so would he have assisted the victim to walk? I think not. Ranjith Perera further says that after about one hour Gerad Perera was taken back from the OIC's room by SI Renuka and the other police officer. This time he was taken to a room in upstairs. Ranjith Perera does not speak about anybody being present in the OIC's room. It appears from this evidence, SI Renuka and the other police officer had only assisted Gerad Perera to walk. Thus how can failure to call SI Renuka create a reasonable doubt in the prosecution case? In my view the learned trial judge's observation on this point is wrong.

When Ranjith Perera went back to the police station around 9.00 p.m. on the sane day, he noticed that some police officers applying balm called Siddalepha on Gerad Perera. It appears from the judgment of the learned trial judge that a reasonable doubt had been created in the mind of the trial judge that these officers who applied balm would have caused affliction to Gerad Perera. Applying balm (siddalepha) can be considered as a kind gesture on the part of the officers who were doing it. Thus it is not correct to think that the police officers who were applying balm had attacked the victim. The learned trial judge was wrong on this point.

It is admitted that Gerad Perera was arrested around 12 noon on 3.6.2002 by the 1st to 6th accused. When he was arrested he was quite hale and hearty. This was the evidence of Padma Wickramaratne and Lalith Wickramaratne. According to the affidavits filed by the 1st, 2nd and 3rd accused in the Supreme Court in connection with the Fundamental Rights Case, Gerad Perera was in their custody till 2.00 a.m. on 4.6.2002. Ranjith Perera says that when he came to the police station around 5.00 p.m. on 3.6.2002, he noticed Gerad Perera's inability to walk properly and him being assisted by two police officers. At this time Gerad Perera's appearance (colour of the skin) had turned black even beyond recognition. When he came back around 9.00 p.m. on the same day, police officers were applying balm (siddalepha). This evidence clearly indicates that Gerad Perera had sustained injuries whilst he was inside the police station. Gerad Perera was brought to the police station around 1.10 p.m. on 3.6.2002. During 1.10 p.m. to 9.00 p.m. in whose custody was Gerad Perera? The 1st, 2nd, and 3rd accused in their affidavits filed in the Supreme Court marked as X1 to X3 admit that after the arrest of Gerad Perera, they questioned him till 2.00a.m. on 4.6.2002. Thus it is very clear that Gerad Perera had sustained injuries when he was in the custody of 1st,2nd, and 3rd accused. On this evidence alone 1st, 2nd, and 3rd accused could be held responsible for the assault on Gerad Perera. What is the role played by the 4th accused? It is the 4th accused who recorded the statement of Gerad Perera. This is evident by P5. According to P5 he commenced recording the statement of Gerad Perera at 22.30 hours on 3.6.2002. According to the affidavits of 1st,2nd, and 3rd accused, they questioned Gerad Perera till 2.00 a.m. on the following day. Thus the recording of the statement has taken place for 3 ½ hours. The length of the statement is 1 ½ pages. Then the question arises as to why he

took 3 ½ hours to record such a short statement. This indicates that he was subjected to harassment whilst his statement was being recorded. This evidence shows that he shared common intention with 1st, 2nd, and 3rd accused in causing affliction to Gerad Perera.

Prof Ravindra Fernando who examined Gerad Perera (victim) says that the victim was subjected to cruel treatment. Dr. Wijesundara Assistant JMO Colombo who examined Gerad Perera on 16.7.2002 at National Hospital has described the injuries as follows:

1 &2 : Two blackish scars, measuring 1cm x 1 cm and 5 mm x 5 mm, placed on the back of the right hand on both sides of the root of the middle finger.

3. White scar, 5 cm x 2.5 cm, obliquely placed on the back of the right forearm, just above the wrist joint.

4. White scar, 2 cm x 1 cm, placed on the medial side of the left wrist joint.

5.Blackish brown discolouration of skin, 3 cm x 1 cm, placed on the lower part of the left shin.

6. Weakness of both upper limbs.

Dr. Wijewardene, in his report, has expressed the following opinion. The features of the scars (Nos. 1 & 2) are consistent with healed burns. White scars could be caused by healing of abrasions. Tying the wrist with a coir rope and hanging could cause abrasions. The scars of the right forearm and left wrist joint could have been caused by tying and hanging with a coir rope. Blackish brown colour of the skin could appear in the healing process of a contusion. A contusion could be caused by hitting with a blunt weapon such as an iron bar. The injury described under No.5 could have been caused by hitting with an iron bar. Dr Wijewardene says that the above injuries could have been sustained on 3.6.2002.

The 1st, 2nd, and 3rd accused, in their affidavits filed in the Supreme Court admitted that the victim was in their custody till 2.15.a.m. on 4.6.2002 from the time of arrest. Around 5.00 p.m. on 3.6.2002 Gerad Perera was seen walking with difficulty in the police station assisted by two police officers. He had to be assisted when he was being taken back from the OIC's room. This clearly shows that Gerad Perera could not walk on his own. There is no evidence to suggest that OIC Suraweera was present in his office during the period that Gerad Perera was in the said office. According to medical evidence Gerad Perera had sustained injuries and these injuries could have been caused on 3.6.2002. On this evidence 1st, 2nd, and 3rd accused could be held responsible for the injuries caused to Gerad Perera. I have earlier stated that 4th accused shared common intention with 1st, 2nd, and 3rd accused in causing injuries to Gerad Perera. Learned counsel for the accused respondents cited judgments relating to circumstantial evidence.

In the case of King Vs Abeywickrama 44 NLR 254 Soertsz J remarked as follows. "In order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence".

In King Vs Appuhamy 46 NLR 128 Keuneman J held that "in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

In Podisingho Vs King 53 NLR 49 Dias J held that "in a case of circumstantial evidence it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt"

In Emperor Vs Browning (1917) 18 Cr. L.J. 482 court held "the jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts, the prisoner must have the benefits of those doubts."

In Don Sunny Vs A G [1998] 2 SLR page 1, "the accused-appellant and two others were indicted on the first Count with having between 1.9.86 and 27.2.87 committed conspiracy to commit murder by causing the death of Amarapala with one G. and others under s. 113(8) and s. 102 Penal Code and on the second count having committed murder by causing the death of the said Amarapala on 27.2.87 under s. 296 Penal Code. After trial the accused-appellant and the absent-accused were convicted and sentenced to death.

Held:

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable
doubt.

3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence then they can be found guilty.

The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence."

When I consider the facts of this case, I hold the view that the facts of this case do not justify the application of the principles laid down in the above judicial decisions.

After the arrest of Gerad Perera, the 5th and 6th accused had signed off duty. There is no evidence to contradict this position. In my view there is no evidence against 5th and 6th accused. Learned counsel for the appellant and learned DSG admitted this position. When I consider all the above matters I hold that the learned trial Judge was wrong when he acquitted the 1st, 2nd, 3rd, and 4th accused. I therefore set aside the judgment of the learned trial Judge acquitting the 1st,2nd, 3rd, and 4th accused. The next question that must be considered is whether this court should convict or order a retrial in respect of the 1st to 4th accused. Various Indian authorities were cited by the

learned DSG to support the view that this court should convict the accused. In considering this question I have to observe the failure on the part of the learned trial judge to arrive at a decision whether she accepts or rejects the evidence of witnesses. The learned trial Judge neither accepted nor rejected the evidence of the witnesses. Without such a decision of the learned trial judge who had the opportunity of observing demeanour of some witnesses, it is not proper to convict 1st to the 4th accused. I therefore order a retrial in respect of 1st, 2nd, 3rd, and 4th accused. I have earlier held that there is no evidence against the 5th and 6th accused. I therefore affirm the judgment of the learned trial judge acquitting the 5th and 6th accused.

Acquittal of the 1st, 2nd, 3rd, and 4th accused set aside and a retrial ordered.

Acquittal of the 5th and 6th accused affirmed.

Judge of the Court of Appeal.

KT Chitrasiri J

I agree.

Judge of the Court of Appeal.