

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

Hatangalage Ariyasena
Accused-Appellant

Vs

CA 68/2011
HC Ratnapura 5/97

The Attorney General.

Respondent

Before : Sisira de Abrew J &
Sunil Rajapakshe J

Counsel : Tenny Fernando for the Accused Appellant.
V K Malalgoda DSG for the Respondent.

Argued on : 12.12.2012, 17.12.2012 and 18.12.2012
Decided on : 21.2.2013

Sisira de Abrew J.

The accused appellant in this case was convicted of the murder of a man named DK Publis and for committing the offence of mischief to the house occupied by MM Jane which is an offence punishable under section 419 of the Penal Code. On the 1st count (the charge of murder) he was sentenced to death and on the 2nd count (the charge of mischief) to a term of five years rigorous imprisonment (RI) and to pay a fine of Rs.5000/- carrying a default sentence of one year RI. Being aggrieved by the said conviction and the sentence the accused

appellant has appealed to this court. The facts of this case may be briefly summarized as follows.

The accused appellant is the son-in-law of Publis, the deceased person. The accused appellant who is married to Nalani, the daughter of the deceased person was, at the time of the incident, living in separation from her husband. The maintenance case filed by Nalani against her husband, the accused appellant was pending. Prior to the separation, Nalni was living with her husband in a house which is about 170 feet away from the ancestral house. After the separation, Nalani came and stayed with her parents in the ancestral house but her father, the deceased person went and slept in her house in the night. Both houses were on one land. On 29th of June 1994 around 2.00 a.m. Jane, the wife of the deceased person and Kalyani, the daughter of the deceased person heard the deceased person shouting in pain. Jane and daughter first thought that it was due to the elephant attack but later Jane heard the voice of three people and a sound of a motor cycle. Kalyani later heard her brother-in-law, the accused appellant shouting in the following language: "Your family destroyed me. One was killed. I will kill all of you. Open the door." According to Kalyani he uttered these words near the ancestral house. Kalyani identified this voice as that of the accused appellant.

Jane says she heard similar words. She says that she thought it was the voice of the accused appellant. What she thought cannot be considered as evidence as evidence as it is not something that was perceived by her senses. Thus in order to consider whether the identity of the accused appellant has been proved or not the court can only consider the evidence of Kalyani. Thereafter Kalyani and her younger brother went to Mahathung alias Dayawanshe's house which was in the neighborhood. Jane and Kalyani's younger sister went to the jungle. Following morning they noticed that their two houses had been set on fire. Jane says that her husband's body was inside Nalani's house where he slept. According to

Dr.Mataraarchchi who conducted the post mortem, the deceased person had five cut injuries and the neck had almost been severed from the body.

Karunawahi who runs a shop which sells aluminium items, plastic items, knives and kathies says that he sold a kathy to a person. According to her, this person was later brought to her shop by the police with a kathy and she identified this person as the person to whom she sold the kathy. She also identified the kathy.

Ariyaratne a bus driver who runs a bus from Balangoda to Diyawinna says that on a day in the month of June 1994 he could remember a person travelling in his bus seated on the seat reserved for clergies. This person kept a kathy which was wrapped with a cement bag paper on the battery box of the bus and later got down taking the kathy. He says that he saw this person in the police station on 30.6.94. He identified this person in the dock. It is seen that identification of the accused by both witnesses Karunawathi and Ariyaratne is a dock identification. But the defence had not challenged it at the trial. Even learned counsel for the accused appellant did not challenge this identification of the accused appellant before us.

The accused appellant in his dock statement says that Nalani who is his wife had filed a maintenance case against him. He was arrested when he was coming from court after paying maintenance. He further says that the police officer, after taking his kathy from his house, took him to the shop where he purchased the kathy. At the police station he was asked to sign a document. He refused to sign as he did not know anything. Thereafter police officers assaulted him and he signed the document due to fear. This was the summary of his dock statement. The accused appellant in his dock statement did not deny the charge.

Piyadasa the brother of the accused appellant says that on 29.6.94 the accused appellant slept in his house and on the following day he (the accused appellant) went to court to attend his maintenance case. According to him the accused appellant was living with him. But he does not know as to how his

brother's father-in-law died. The learned trial judge made certain observation to the effect that this witness did not answer the questions and was evasive. According to this witness the accused appellant was with him on 29.6.94. This is a defence of alibi. But the accused appellant in his evidence did not plead an alibi. Thus it appears that the defence of alibi is an afterthought by the brother of the accused appellant. When I consider all these matters I hold the view that no reliance could be placed on the evidence of Piyadasa. Thus the learned trial judge was right when he rejected Piyadasa's evidence.

Priyangani, a clerk attached to the Magistrate's court Balangoda called by the accused appellant as a witness, says that according to the maintenance case record, the accused appellant who had been present in court on 30.6.94 had paid Rs.600/- as maintenance to Nalani. The accused appellant claims that he was arrested in Court premises. Ariyaratne, the bus driver says that he saw the accused appellant in the Police Station on 30.06.1994. But IP Wanigasekera, the investigating officer says that he arrested the accused appellant on 02.07.1994 and a kathy was recovered in consequence of a statement made by the accused appellant. He had noticed a blood stain on the blade of the kathy. If Ariyaratne saw the accused appellant at the Police Station on 30.06.94, how does Wanigasekera claim that he arrested the accused appellant on 02.07.94? Further the accused appellant and Nalani were present in Court on 30.06.1994 and the accused appellant says that he was arrested in Court premises when he went to pay maintenance. The investigation into the case commenced on 26.09.94. Under these circumstances it is difficult to think that the accused appellant escaped from the eyes of the Police on 30.06.1994 when he went to Court on this day. When I consider all these matters it is not possible to accept IP Wanigasekera's position that he arrested the accused appellant on 02.07.94. But the evidence of Kalyani who identified the voice of the accused appellant remains unchallenged. No

contradiction or omission was marked in her evidence. She made a statement to the Police on 30.06.94. Thus her evidence satisfies the test of consistency and the test of promptness. Although she says that she identified the voice of the accused appellant, she does not claim that she saw the accused appellant. When I consider all these matters, I hold the view that she is a truthful witness and her evidence can be accepted beyond reasonable doubt. Therefore the learned trial judge was right when he acted on her evidence.

Next question that arises for consideration is whether the accused appellant could be convicted on voice identification. I now advert to this question. The accused appellant, prior to the separation from his wife, was living in his wife's house which was in the same land where the ancestral house was located. Kalyani was living in the ancestral house. She says that the accused appellant and Nalani were living together for several months. The accused appellant made utterances which I have referred to earlier. When I consider all these matters I hold the view that there was no difficulty for her to identify the voice of the accused appellant. In considering the question whether a person could be identified by his voice, I would like to consider the judgment in the case of Kirpal Singh Vs. The State Uttar Pradesh AIR 1965 712 wherein the Indian Supreme Court held thus : "It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognizing is not familiar with the person recognized may be somewhat risky in a criminal trial. But where the accused is intimately known to the witness and for more than a fortnight before the date of the offence he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable that the Supreme Court would be justified in disagreeing with the opinion of the Court

which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony.”

Learned Addl. SG submitted that a man could be identified by his voice. Applying the principles in the above judicial decision and the above observations, I hold that Kalyani had identified the accused appellant by his voice. What did the accused appellant say when he came near the ancestral house of Kalyani. “Your family destroyed me. One was killed. I will kill all of you. Open the door.” These were the words used by him. Little before she heard these words the deceased was shouting in pain and later she heard the groaning sound of the deceased person. The above items of evidence clearly show that the accused appellant had killed the deceased person. Therefore I hold that the learned trial judge was right when he convicted the accused appellant for the offence of murder. But there is no evidence that he set fire to the house occupied by Jane. I therefore hold that the 2nd charge has not been proved beyond reasonable doubt. I therefore set aside the conviction of the 2nd count and acquit him of the 2nd count. For the above reasons, I affirm the conviction of murder and the death sentence and dismiss the appeal.

Conviction of murder and the death sentence affirmed.

Conviction and the sentence of the 2nd count set aside.

Judge of the Court of Appeal

Sunil Rajapakshe J

I agree.

Judge of the Court of Appeal