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

Wijeratne Mudiyansela jayantha Wijerantne

Accused-Appellant

C.A. Appeal No. 218/2008
H.C. Trincomalee No.HCEP/1871/2001

Vs.

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

Respondent

Before : **SISIRA DE ABREW, J &**
P.W.D.C. JAYATHILAKA, J

Counsel : Amila Palliyage for the Accused-Appellant

Heranjan Peries S.S.C. for the State.

Argued & Decided on : 06.03.2013.

Sisira de Abrew, J,

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted of the murder of a girl named Wijerathne Mudiyanselage Dinusha Shyamalie and

was sentenced to death. Being aggrieved by said conviction and the sentence the accused-appellant has appealed to this court.

Facts of this case may be briefly summarized as follows:

The deceased girl who was 14 years old at the time of the incident, her step mother, the accused-appellant and his father were living in one house. On the day of incident around 3.00 p.m. Udulawathie on hearing some sound of a small girl went near the house of the accused-appellant. She then saw the accused-appellant, standing near his house. The accused-appellant, at this stage, addressed Udulawathie in the following language. "I killed Sudu." According to Udulawathie, Sudu is the deceased girl in this case. She thereafter ran away from the place and met several neighbours on the road. While they were on the road, the accused-appellant came to the road and again addressed them in the following language. "I killed Sudu". This was the summary of the evidence of ~~witness of~~ Udulawathie, Witness Wanaraji and Premasiri. Premasiri further said that the accused-appellant was, at this time, wearing a blood stained shirt. Later the said witnesses went inside the house of the accused-appellant and saw the deceased girl lying fallen on the ground with bleeding injuries. According to the postmortem report

there were several multiple cut injuries on the head of the deceased . She had died due to said injuries.

The accused-appellant made a dock statement. The dock statement may be briefly set out as follows: When the accused-appellant, on the day of the incident, came to his house he saw the deceased girl lying fallen on the ground. Then he went out and shouted and told the people in the neighbourhood that somebody had killed his sister (the deceased girl.) He specifically mentioned Premasiri's name and Udulawathie's name. According to him, he told Premasiri that someone had hit the deceased girl.

Learned trial Judge did not consider the dock statement. This is the only the ground urged by the learned counsel for accused-appellant. It is necessary to consider, at this stage, whether position taken up by the accused-appellant in his dock statement is true or whether it creates a reasonable doubt in the prosecution case. When Premasiri was giving evidence learned counsel who appeared for the accused-appellant at the trial did not suggest his defence to witness Premasiri. He did not suggest his defence to any of the witnesses who gave evidence on behalf of the prosecution.

We note that witness Premasiri was not cross examined at all. This shows that the evidence given by witness Premasiri had not been challenged by the accused-appellant at the trial. When we examine the evidence given by the prosecution witnesses, we see no reason to doubt their evidence. In our view the evidence given by the prosecution witnesses can be accepted beyond reasonable doubt. They had spoken the truth. What happens when evidence given by a reliable witness on a material point is not challenged in cross-examination? What is the effect of such silence on the part of the counsel? In this regard I would like to consider certain judicial decisions. In the case of ***Sarwan Singh vs. State of Punjab R (2002) AIR Supreme Court (III) 3652 at 3655 and 3656*** also reported in ***2003 Criminal Law Journal 21.*** Indian Supreme Court held *" It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted".* This judgment was cited with the approval in the case of ***Bobby Mathew Vs State of Karanataka (2004) Criminal Law Journal. Pg. 3003.*** In the case of ***State of Himachal Pradesh Vs. Thakur Dass (1983), 2 Criminal Law Journal 1694 at 1701 V.D. Misra CJ*** held : *Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not*

disputed." "Absence of cross examination of prosecution witness of certain facts leads to inference of admission of that fact." ***Vide Mothilal Vs State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP.***

In the light of the above judicial literature I hold that whenever the evidence given by witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness. I have earlier held the prosecution witnesses had spoken the truth. I therefore hold that this story narrated by the prosecution is a true story. I have earlier pointed out that the defence taken up by the accused-appellant had not been suggested to the prosecution witnesses. The accused had spoken the names of Udulawathi and Premasiri in his dock statement. But he failed to suggest his defence to these witnesses. When I consider all these matters I hold the view that the story narrated in the dock statement by the accused-appellant is false and is not capable of creating reasonable doubt in the truth of the prosecution case. I therefore reject the dock statement as a false statement. Under these circumstances question has to be asked: would there be any change in the verdict of the trial judge even if the dock statement is considered by the learned trial Judge. The

answer is obviously no. In such a situation should the Court of Appeal on the basis of non- consideration of the dock statement send the case back for retrial especially, when there is overwhelming evidence against the accused-appellant. In this connection it is relevant to consider proviso the section 334 of the Criminal Procedure Code which read as follows: *"provided that court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred ".* When I consider the evidence of the prosecution witnesses, the dock statement and the above observation made by me, I hold the view that non-consideration of dock statement has not occasioned a failure of justice or miscarriage of justice. I therefore decide to apply the said proviso and dismiss the appeal. But I would like to state here that this judgment should not be considered as a license to trial Judges not to consider the dock statement of the accused-appellant when deciding the case. We have arrived at this decision purely on evidence given at the trial. For the benefit of the trial Judges and legal practitioners of this country I would like to state the following guide lines with regard to the evaluation of the dock statement.

1. If the dock statement is believed, it must be acted upon.

2. If the dock statement raises a reasonable doubt in the prosecution case, the defence taken up in the dock statement must succeed.

3. The dock statement of one accused person should not be used against the other accused person.

Similar view was expressed by the Court of Criminal Appeal in ***Kularatne vs Queen in 71 NLR page 529.***

For the above reasons I affirm the conviction and death sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka, J.

I agree.

JUDGE OF THE COURT OF APPEAL

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