

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

1. Herath Mudiyansele Sisira Kumara alias Rala
2. Dissanayake Herath Mudiyansele Upalie
Herath Dissanayake

Accused-Appellants

Vs

The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 3-4/2004
HC Kurunegala 63/99

Before : Sisira J de Abrew J &
PWDC Jayathilake J
Counsel : Anil Silva President's Counsel for the accused appellant
Thusith Mudalige SSC for the Respondent.
Argued on : 27.3.2013
Decided on : 16.5.2013

Sisira J de Abrew J.

The above named two accused appellants were convicted of the murder of a man named Rajapakshe Mudiyansele Rambanda alias Mudiyanse and were sentenced to death. Being aggrieved by the said conviction and the sentence they have appealed to this court. Facts of this case may be briefly summarized as follows:

Herath Mudiyansele Dissanayake alias Dasa, Mudiyanse (the deceased person in this case), Muthubanda and Rathnapala cultivated a chena and

Mudiyanse was in the habit of looking after it in the night. They cultivated vegetable in the chena. On 15.8.1997 two appellants had asked Mudiyanse's coffin from him. This was told to Dasa by Mudiyanse in the afternoon of 15.8.1997. In the evening of 15.8.1997 the 1st appellant came and addressed Dasa in the following language: "Today I will give work to Lokka. Don't come to see if Lokka shouts." This incident took place little before 8.00p.m. According to Dasa, Mudiyanse was referred to as Lokka. At this time the 1st appellant had a club in his hand. Little later around 8.00 p.m. he (Dasa) heard the sound of Mudiyanse's bicycle and then he learnt that Mudiyanse had come to the chena which was very close to his house. Thereafter he heard Mudiyanse shouting: 'Dasa putha (son), I am being killed.' This was a kind of appeal to Dasa by Mudiyanse. On hearing the said cries, Dasa came out of his house. He then saw the 1st and the 2nd appellants attacking Mudiyanse with clubs. Then he saw Mudiyanse and the 1st and the 2nd appellants running away from this place. He thereafter climbed a Kohomba tree and then saw the 1st and 2nd appellants again attacking Mudiyanse with clubs. The distance between the 1st place of attack and the 2nd place was about eight fathoms. The 1st appellant while attacking Mudiyanse, addressed him (Mudiyanse) in the following language: 'You have given information regarding my uncle's arrack. I will kill you. I am Kumbuke Rala.' Thereafter the 1st and the 2nd appellants carried Mudiyanse with the aid of a pole. At this time Herath Banda and another person were with the 1st and the 2nd appellants. Dasa describing this incident says that they carried Mudiyanse as if a dead pig being carried in the village. He saw this incident with the aid of moon light. Thereafter he came home but could not sleep. He told his wife what happened to Mudiyanse but did not divulge the names of the assailants due to fear. Dasa says he did not go out as the 1st appellant had threatened to kill him if he came out of the house. Following morning when Muthubanda came to meet him, both of them went to the police station and

Muthubanda lodged a complaint. Dasa divulged the incident to the police only when he was coming in the police jeep to the place of incident.

According to medical evidence Mudiyanse, the deceased person, had sustained cut injuries, stab injuries and contusions. His ribs were also broken. Altogether there were nineteen injuries. According to the doctor as a result of injury No.17 brain of the deceased person had been damaged and he had died due to the said injury.

IP Jaysundara, the investigating officer, discovered the dead body of Mudiyanse in consequence of a statement made by the 1st appellant. He found a blood stained knife near the dead body.

Both appellants in their dock statements denied the incident. Learned President's Counsel (PC) for the appellants contended that the case for the prosecution depended on the question whether Dasa climbed the Kohomba tree or not. He contended that according to Dasa's evidence he had seen the attack on Mudiyanse only after he climbed the Kohomba tree and that if he did not climb the tree he could not have seen the attack on Mudiyanse. Learned defence counsel at the trial cross-examined Dasa on the basis that he failed, in his statement made to the police, to mention the fact that he climbed the Kohomba tree. Although learned defence counsel did not mark this omission, the learned trial judge after examining his statement made to the police had accepted it as an omission. I now advert to the contention of learned PC. Learned Senior State Counsel (SSC) did not support the conviction on the basis that Dasa was not a credible witness. He also submitted that if Dasa did not climb the tree he could not have seen the attack on Mudiyanse. Did Dasa see the attack on Mudiyanse before he climbed the tree? At the hearing when this Court presented this question to both counsel, they, from the evidence, could not find an answer to this question. Dasa, at page 102 of the brief, (during the re-examination) clearly states that he saw the attack on Mudiyanse before he climbed

the tree. When the evidence of Dasa fully examined, he, even before the re-examination, stated that he saw the 1st and the 2nd appellants attacking the deceased and that he saw it when he came out of the house on hearing the shouts of Mudiyanse. Dasa at one stage says that he saw Mudiyanse being attacked when he was near the Kohomba tree and saw the 2nd attack after he climbed the tree. The investigating officer says that he saw two large patches of blood and that one patch of blood (the place of one patch of blood) could be clearly seen from the ground level of the Kohomba tree. This demonstrates that the evidence of Dasa is consistent with police observation. When I consider the above matters, contentions of both President's Counsel and the Senior State Counsel cannot be accepted. Dasa, in his statement made to the police, had not mentioned that he climbed the Kohomba tree. Learned defence counsel at the trial cross examined him on this basis. Learned trial judge accepted it as an omission. Can the evidence of Dasa be rejected on this basis? Dasa says that after he saw the attack on Mudiyanse, he could not sleep. The 1st appellant had threatened to kill him. He says after the attack, Mudiyanse was taken away by the appellants with the aid of a pole as if a dead pig was being taken. Thus one can understand the trauma that he underwent. When I consider all these matters, failure to mention, in his statement made to the police statement, that he climbed the Kohomba tree can be understood. In my view his evidence cannot and should not be rejected on the basis of this omission. Dasa made a prompt statement. Thus his evidence satisfies the test of promptness. There are no vital contradictions and omissions marked between his evidence and his statement made to the police. Thus his evidence satisfies the test of consistency. I have earlier pointed out that his evidence was consistent with police observation. He worked with Mudiyanse in the chena. When he heard the cries of Mudiyanse he came out to see what it was despite the death threats by the 1st appellant. After he saw the first attack from the ground he climbed the Kohomba tree. One must not

forget that thereafter all three ran away from the place of first attack. The distance between the first place of attack and the 2nd place of attack, according to him, was eight fathoms. It appears from his evidence that he climbed the Kohomba tree as he could not get a better view of the second place of attack from the ground level. It is not reasonable for anybody to expect him to approach the second place of attack from the ground as he had been threatened by the 1st appellant soon prior to the attack. When I consider all these matters, I hold the view that his evidence satisfies the test of probability. I have examined the evidence led at the trial and I am satisfied beyond reasonable doubt that Dasa had seen the attack on Mudiyanse from the ground and from the tree and that his evidence could be accepted beyond reasonable doubt.

Prosecution has produced following items of evidence.

1. On the day of the incident the 1st and the 2nd appellants requested Mudiyanse to give his coffin to them.
2. Little before 8.00 p.m. on the day of the incident the 1st appellant came and addressed Dasa in the following language: "Today I will give work to Lokka. Do not come to see if Lokka shouts." Mudiyanse was known as Lokka.
3. Little after 8.00 p.m. on the day of the incident Dasa heard Mudiyanse shouting in the following language: "Dasa putha (son) I am being killed." This was a kind of appeal to Dasa by Mudiyanse.
4. When Dasa came out he saw the 1st and the 2nd appellants attacking the deceased with clubs.
5. Thereafter the 1st, 2nd appellants and Mudiyanse were seen running away from the first place of attack.
6. When Dasa climbed the Kohomba tree he saw both appellants attacking Mudiyanse.

7. After the attack the 1st and the 2nd appellants were seen carrying Mudiyanse with the aid of a pole. According to Dasa Mudiyanse was being carried as if a dead pig being carried in the village.
8. The investigating officer found large patches of blood at the scene.
9. The 1st appellant whilst attacking Mudiyanse addressed him in the following language: You have given information regarding my uncle's arrack. I will kill you. I am Kumbuke Rala.
10. The dead body of Mudiyanse was recovered in consequence of a statement made by the 1st appellant.

Learned trial judge considered the statement made by Dasa to the Police in the course of the investigation and decided that his evidence was consistent with the said statement except for the fact that he had failed to mention the climbing of the Kohomba tree. Thus the learned trial judge used a document which had not been produced as evidence at the trial. This was a misdirection committed by the learned trial judge. I must mention here that the learned trial judge was not entitled to use a document which was not produced at the trial. Learned PC harping on this misdirection contended that appellants had not had a fair trial. I have earlier held that the evidence of Dasa could be accepted beyond reasonable doubt. When I consider the evidence led at the trial, I hold the view that the prosecution had proved the case against both appellants beyond reasonable doubt. I therefore hold that the above misdirection committed by the trial judge is not sufficient to vitiate the conviction. In my view the learned trial judge was right when he decided to accept the evidence of Dasa. At this stage it is relevant to consider the proviso to section 334 of the Criminal Procedure Code which reads as follows: "Provided that the court may, notwithstanding that it is of opinion that the point raised in appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred". I apply the proviso and

hold that the above misdirection has not occasioned a miscarriage of justice.

For the above reasons, I affirm the convictions and death sentence and dismiss this appeal.

Appeal dismissed.

Judge of the court of Appeal

PWDC Jayathilake

I agree.

Judge of the Court of Appeal