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

Sangarathnage Semapala Perera
Accused-Appellant

Vs
The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 260/2009
HC Panadura 1974/2005

Before : Sisira J de Abrew J &
PWDC JayathilakeJ
Counsel : Udara Zoysa for the accused appellant
Sarath Jayamanne DSG for the Respondent.

Argued on : 3.5.2013 and 7.5.2013
Decided on : 12.6.2013

Sisira J de Abrew J.

The accused appellant was charged for the murder of his own brother named Sagarathnage Sunil Perera. After trial the learned trial judge found him guilty of the offence of culpable homicide not amounting to murder and sentenced him to a term of eight years rigorous imprisonment (RI) and to pay a fine of Rs10,000/- carrying a default sentence of six months simple imprisonment. 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:

On the day of the incident around 7.30 p.m. to 8.00p.m Chandrani the wife of the deceased person Sunil, on hearing the shouts of her husband, went to the land of Carolis who is the uncle of Sunil. She then saw her husband and

husband's father lying fallen on the ground. When the accused appellant tried to assault Sunil with a club she prevented it by holding the club. The accused appellant then told her to bring a three wheeler and take him. It is not clear from the evidence whether he told her to take him to the hospital. Little later she came back to the scene of offence in a three wheeler.

Gamini Siri Perera who was living in the neighborhood of the deceased person around 8.30 p.m. to 8.45 p.m. on hearing from one Sampath that Sunil had been stabbed went to the scene of offence and addressed Sunil who was lying fallen with a bleeding injury in the following language: 'sunil sunil'. Then Sunil told him that Aiya stabbed him. Thereafter he took both Sunil and Sunil's father to the hospital.

It is necessary to consider whether the item of evidence that the accused appellant tried to assault Sunil with a club could be relied upon. Although the accused appellant tried to attack Sunil with a club he himself told Chandrani to bring a three wheeler and take him. If he wanted to attack Sunil with a club would he request Chndrani to bring a three wheeler and take him? I doubt about the truth of the above item of evidence that the accused appellant tried to attack the deceased with a club. In my view it is not safe to place reliance on this item of evidence.

Learned DSG submitted that no reliance could be placed on the evidence of Carolis whose evidence had been rejected by the learned trial judge although he claimed to be an eye witness. He submitted that he would rely on the following items of evidence.

1. Dying declaration made by Sunil to Gamini Siri Perera.
2. Sarong with blood stains recovered by the police officer in consequence of a statement made by the accused appellant.

3. Blood stained knife recovered by the police officer in consequence of a statement made by the accused appellant.

I now advert to the dying declaration. In order to act on a dying declaration, court must be satisfied that the deceased person in fact made the dying declaration. If there are reasonable doubts on this matter, court should not rely on the alleged dying declaration. In order to rely on a dying declaration, prosecution must prove beyond reasonable doubt that the deceased person was able to speak after he sustained the injury. In the present case when the Prosecuting State Counsel asked the doctor whether the deceased, at any stage, could have spoken after receiving injuries, he said that the deceased person could have spoken at the time of the incident. This means that the deceased person could have spoken at the time of the injury being inflicted. Learned prosecuting State Counsel did not thereafter pursue his line of examination. There is no medical evidence to say the deceased person could have spoken after receiving injury.

The other question that must be considered is even if the deceased, after receiving the injury, could have spoken, for how long he could have spoken. There is no medical evidence on this point. Doctor says that within five minutes of the receipt of the injury the brain of the deceased person would be completely inactive. Gamini Siri Perera's evidence is that he spoke to the deceased person after the injury was inflicted. But is there evidence to suggest that he spoke to the deceased person within five minutes of the receipt of the injury? He himself admits that it took five to ten minutes to come to the scene of offence. He came to this place after Sampath came and told him about the incident. How long did Sampath take to go to Gamini Siri Perera's house? There is no evidence on this point. How long after the incident did Sampath learn about the incident? There is no evidence.

Chandrani syas that she came to the scene of offence around 7.30 p.m. to 8.00 p.m. Gamini Siri Perera says that he came to the scene of offence around 8.30 p.m.-8.45 p.m. Under these circumstances how can one decide that Gamini Siri Perera came to the scene of offence within five minutes of the deceased sustained injuries? When I consider all these matters it is not possible to decide that the deceased person made a dying declaration to Gamini Siri Perera. Therefore it was wrong for the learned trial judge to rely on the dying declaration. In order to act on a dying declaration court must be satisfied beyond reasonable doubt that the deceased person made the dying declaration. The learned trial judge has not considered these matters.

The next item relied upon by the learned DSG is the recovery of the blood stained sarong in consequence of a statement made by the accused appellant. There was no evidence by the Government Analyst that there was blood on the sarong. Thus the contention that there was blood on the sarong is untenable. Then the court has to consider only the recovery of a sarong in consequence of a statement made by the accused appellant. This cannot be connected to the incident of causing injury to the deceased person by the accused appellant. This item of evidence does not strengthen the prosecution case.

The next item of evidence relied upon by the DSG is the recovery of a blood stained knife. There is no evidence by the Government Analyst that there was blood on the knife. The doctor says that the injury of the deceased person could be caused with this knife. When the above two items of evidence cannot be relied upon, recovery of the knife is not sufficient to sustain the conviction. The learned trial judge has failed to consider these matters. When I consider the evidence led at the trial, I hold the view that the prosecution has not proved the

case beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the accused appellant.

Appeal allowed.

Judge of the Court of Appeal

PWDC Jayathilake J

I agree.

Judge of the Court of Appeal