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

Ilandari Devage Nimal Wijesinghe
Accused-Appellant

Vs
The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 8/2006
HC Kalutara 5/2000

Before : Sisira J De Abrew J &
PWDC Jayathilake J
Counsel : Dr.Ranjith Fernando for the accused appellant
DPJ De Livera DSG for the Respondent

Argued on : 18.7.2013, 24.7.2013 and 25.7.2013
Decided on : 12.9.2013

Sisira J De Abrew J

The accused appellant in this case was convicted of the murder of a man named Nayage Upul Nishantha and was sentenced to death. Being aggrieved by the said conviction and the sentence he has appealed to this court. Facts of this case may be briefly summarized as follows.

The accused appellant is married to the sister of the deceased person. The deceased person, who was in the trade of brewing illicit liquor, around 7.00 a.m. on the day of the incident, started brewing illicit liquor with the assistance of one Pradeep Manjula in a rubber estate which was around 180 to 190 feet away from his house. The accused appellant around 7.30 a.m. on this day came to this place

and asked for his two cans which were with the deceased person. He, in order to give two cans, asked for Rs.3000/- that the accused appellant had to give as a result of a previous transaction. At this stage the accused appellant attacked the deceased person's neck with katty which he brought. As a result of this attack the deceased person fell on the ground. The accused appellant ran away from the scene carrying the katty. This was the summary of evidence of Pradeep Manjula.

Indika Premalal who is the brother of the deceased person and the brother-in-law of the accused appellant says that in the morning of the day of the incident, the accused appellant who was armed with a 3 ½ feet long katty came and made inquiries about the deceased person. When he replied in the negative, the accused appellant went towards the place where the deceased person was brewing illicit liquor. About fifteen minutes later the accused appellant came running with the katty and addressed him in the following language: "Katty fell on Upul's body. Go and see." Upul is the name of the deceased person. He noticed blood on the blade of the katty. The accused appellant thereafter ran away carrying the katty. He started running towards the place where the deceased person was brewing illicit liquor and on the way he met Pradeep Manjula who addressed him in the following language: "Nimal attacked Upul with a katty. Go and see."

The accused appellant gave evidence under oath. His evidence may be briefly summarized as follows. On the day of the incident he went to the place where the deceased person was brewing illicit liquor and requested the deceased person to return his two cans. Pradeep Mnajula was assisting the deceased person in the brewing. The deceased person, who was having a knife stuck in his waist and a katty in his hand, pointing the two weapons, asked him whether he needed from the knife or the katty. Thinking that the deceased person was joking he went away from this place. When he was going, he came back as the deceased person called him. At this stage the deceased person tried to stab him. He grappled with

him and both fell on the ground. After the grapple he started moving away. The deceased person at this stage came to stab him. He then took a katty which he saw at this place and gave a blow in fear of death. According to him he exercised his right of private defence. This was the summary of the evidence of the accused appellant.

Pradeep Manjula says that there was no grapple between the deceased person and accused appellant. He says that the accused appellant asked for the two cans and attacked with a katty. But the accused appellant says that he did not bring a katty. I will now consider the question whether the evidence of the accused appellant can be accepted and it creates a reasonable doubt in the prosecution case. Although the accused appellant says that he grappled with the deceased person, IP Gunaratne who went to the scene of offence to investigate into the crime says that there were no marks of a struggle. This was a rubber estate.

The accused appellant says that the katty with which he attacked the deceased person was leaning against the roof of the house of the deceased person. Is this true? Did this incident take place near the house of the deceased person? Pradeep Manjula says that the brewing of illicit liquor was done at a place which was 180-190 feet away from the house of the deceased person. Then how did the accused appellant find a katty at this place. According to him the katty was leaning against the roof of the house of the accused appellant. Then the above position taken up by the accused appellant appears to be false. He himself contradicted this position later. He, at page 206 of the brief, says that he picked up the katty which was at the place of the incident. He further says that it was leaning against a rock. His own evidence demonstrates that his story of picking up the katty at the scene of offence is false and that he does not want to admit that he brought a katty to this place. What is the reason for this? If he admits that he brought a katty to the scene,

he knows that he can't maintain his story. This is the reason why he did not want to admit that he brought a katty to the scene of offence.

Indika Premalal's evidence was not challenged by the accused appellant at the trial. He says when the accused appellant made inquiries about deceased person in the morning of the fateful day, he was armed with a katty and he went towards the place where the deceased person was brewing illicit liquor. When I consider all these matters the position taken up by the accused appellant that he did not bring a katty to scene of offence and that he picked up a katty at the scene of offence appears to be false. The accused appellant told Indika Premalal that that a katty had fallen on Upul's body. Is this true? If a katty fell on his body can there be such a serious injury? The injury on the neck, according to the doctor, had extended from right side to the left side. Part of the spinal code, upper portion of the left lung and the collarbone were cut. The doctor says that the assailant had used a severe a force to inflict this injury. Eye witness Pradeep Manjula says that the accused appellant used a heavy force when he attacked the deceased person with the katty. When I consider the medical evidence I hold the view that the claim by the accused appellant to Indika Premalal that injury took place as a result the katty falling on the deceased person is false.

PC Senaratne who went to the scene of offence with IP Gunaratne says that he saw a knife in the hand of the deceased person who was lying fallen on the ground. Is this true? PC Senartane admitted that he gave evidence from his memory. IP Gunaratne who went with PC Senaratne did not see this knife. Dhammika Herath and Thilakaratne say that when they went to the scene of offence in the morning of the fateful day, they saw a knife fallen three feet away from the dead body and that the father of the deceased person Pubilis removed it saying that it belonged to his son. If Pubilis removed the knife in the morning how did PC Senaratne see it at 3.30 p.m. in the hand of dead body? Pubilis who was

called as a witness by the accused appellant says that when he went to the scene soon after the incident, he did not see anything in the hand of the deceased person who was lying fallen. When I consider all these matters, the evidence of PC Senaratne that he saw a knife in the hand of the dead body cannot be accepted and that the claim by Thilakaratne and Dhammika Herath who did not make statements to the police that there was a knife near the dead body appears to be false. When I consider all these matters, I hold the view that the position taken up by the accused appellant that he exercised his right of private defence when the deceased person tried to attack him is false and that it does not create a reasonable doubt in the prosecution case. I would now like to consider the behaviour of Pradeep who claims to have seen the incident. Soon after he saw the attack on the deceased person by the accused appellant he ran away from the place and told Indika Premalal about what he saw. This was confirmed by Indika Premalal in his evidence. Thereafter he went and told the father of the deceased person and also told his father about the attack on the deceased person by the accused appellant. He even suggested to his father to bring a van and take the deceased person to the hospital. This behaviour of Pradeep Manjulais is very much similar to that of a normal person. Thus his evidence satisfies the test of probability. Defence counsel at the trial could not mark any contradiction with his statement made to the police. Thus his evidence satisfies the test of consistency. When I consider all these matters, I am of the opinion that his evidence could be accepted beyond reasonable doubt.

According to Indika Premalal's evidence soon prior to the incident where the deceased person sustained injuries, the accused appellant armed with a katty came in search of the deceased person and went towards the place where the deceased person brewing illicit liquor. Fifteen minutes later he came back carrying the katty. The accused appellant told him that the katty fell on the body of the

deceased person. I have earlier pointed out that the above utterance made by him is false. In my view if an accused person utters falsehood soon after a crime alleged to have been committed by him, he does so in order to hide what he did at the scene of offence. Such behaviour of an accused person can be considered against him. In the present case false utterance made by the accused appellant can be considered against him in order to take a decision that he participated in the crime.

Learned trial Judge at page 301 of his judgment stated that the accused appellant made a dock statement. Learned Counsel for the accused appellant, harping on this observation, submitted that the learned trial Judge had, therefore, not considered the evidence of the accused appellant in the proper perspective. The learned trial Judge at page 316 of the brief referred to the cross examination of the accused appellant. This shows that he had considered the fact that the accused appellant had given evidence. I am therefore unable to agree with the submission of learned counsel for the accused appellant.

The learned trial Judge relying on the judgment in the case of Keerthi Bandara Vs Attorney General [2000] 2 SLR 245, had used the statement made by the accused appellant in the course of the investigation to the police and not produced at the trial. He had done this in order to discredit the evidence of the accused appellant. Is this procedure adopted by the learned trial Judge is correct or within the power of the law. I now advert to this question. In this connection I would like to consider the judgment in Keerthi Bandara Vs The Attorney General [2000] 2 SLR 245. Head note of the judgment states: "It is for the Judge to peruse the Information Book in the exercise of its overall control of the said book and to use it to aid the Court at the inquiry or trial." This should not be interpreted to say that the Judge is empowered to use the statement of the witness which was not produced at the trial when writing the judgment. It is pertinent to consider what His Lordship in the above judgment said at page 258. "We lay it down that it is for the

Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue." Where does he do it? Is it open Court or Chambers of the Judge? Is it during trial or after conclusion of trial? It is very clear that the Judge has to do the above things in open court during the trial. If it is a trial by a judge, same procedure should apply. When the defence counsel spot lights an omission or seeks to mark a contradiction, the trial judge must peruse the Information Book and decide whether the sentence in the statement which the defence counsel intends to mark as a contradiction is in fact found in the statement or the defence counsel is trying to confront the witness with an incomplete sentence in the statement or decide whether the omission is correct. This is how court uses the Information Book to aid the trial or inquiry. Thus the trial judge will have to peruse the Information Book in order to decide the above matters. This does not mean that he can use statements of witnesses made in the course of investigation to the police officer which had not been produced at the trial as evidence. This view is supported by following judicial decisions,

In King Vs Soysa 26 NLR 324 His Lordship Justice Jyawardene held:

"A Judge is not entitled to use statements, made to the police and entered in the

Information Book, for the purpose of corroborating the evidence of the prosecution."

In PAULIS APPU v. DON DAVIT. 32 NLR 335 "Where at the close of a case, the Police Magistrate reserved judgment, noting that he wished to peruse the information book,- **Held**, that the use of the information book for the purpose of arriving at a decision was irregular."

In WICKREMESINGHE *v.* FERNANDO. 29 NLR 403 "Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement by him to the Police,-**Held**, that the use of the Police Information Book was irregular."

In INSPECTOR OF POLICE, GAMPAHA v. PERERA 33 NLR 69 "Where, after examining the complainant and his witnesses, the Magistrate cited the Police to produce extracts from the information book for his perusal, before issuing process,- Held; that the use of information book was irregular."

In PEIRIS Vs ELIYATAMBY 44 NLR 207 It was held that entries in a Police Information Book cannot be used as evidence for the purpose of testing the credibility of a witness.

Having considered the above legal literature and observation, I hold that in criminal trials court is not entitled to use statements made by witnesses to the investigating police officer in the course of the investigation as evidence. A statement made by a witness to the investigating police officer can be used for the purpose of contradicting the witnesses but the portion of the statement so produced cannot be used as evidence. Such portion of the statement can be used to decide the credibility of the witness. I further hold that the trial judge, when writing the

judgment, is not entitled to use statements made by witnesses or the accused to the investigating police officer in the course of the investigation and not produced at the trial. If the trial Judge uses the statement of the accused made in the course of the investigation to the investigating officer and not produced at the trial severe prejudice is caused to the accused as he is unaware of the material that will be used against him. Who knows whether the contents found in the statement had in fact been said by accused or they were added by the police officer. If the statement of the accused person amounts to a confession can it be used by the trial Judge? The answer is clearly no as the provisions of the Evidence Ordinance completely prohibit it. The prosecutor is not even permitted to cross examination the accused using such confessionary parts of the statement.

Having considered the above matters, I hold that the learned trial judge in this case was wrong when he, after examining the statement made by the accused person in the course of the investigation to the investigating officer and not produced at the trial, decided that the credibility of the accused had been damaged. This shows that he had used the statement of the accused to discredit him. This was a misdirection committed by the learned trial Judge. What would have been the position if he did not use the statement of the accused made to the investigating officer? Could he have accepted the evidence of the accused? I have earlier pointed out that the position taken up the accused appellant in his evidence that he exercised his right of private defence when the deceased person tried to attack him was false and that his evidence did not create a reasonable doubt in the prosecution case. For the above reasons, I hold that learned trial Judge had to reject the evidence of the accused appellant and had to decide that his evidence was not capable of creating a reasonable doubt in the prosecution case. Thus the above misdirection committed by the learned trial Judge has not occasioned a miscarriage of justice. I therefore decide to act on the proviso to Section 334 of the Criminal

Procedure Code. "Provided that the 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."

From the prosecution evidence the defences of sudden fight and/or grave and sudden provocation and/or private defence do no arise. If such defences arise from the prosecution case, Court has the duty to consider them even if the accused does not raise them. I have earlier rejected the evidence of the accused appellant.

When I consider the evidence led at the trial, I hold the view that the prosecution has proved the charge of murder beyond reasonable doubt. For the above reasons I affirm the conviction and the death sentence and dismiss the appeal.

Judge of the Court of Appeal

PWDC Jayatilake J

I agree.

Judge of the Court of Appeal