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

Ratnayake Liyanage Thilakatratne alias
Soththi Mudalali

Accused appellant

Vs

CA 150/2005
HC Galle 1371

The Attorney General

Respondent

Before : Sisira J de Abrew J (Acting P/CA) &
PWDC Jayathilake J

Counsel : Rienzie Arasakularatne PC for the appellant.
DPJ De Livera DSG for the Respondent.

Argued on : 12.12.2013 and 13.12.2013
Decided on : 13.2.2014

Sisira J de Abrew J.

The accused appellant in this case was convicted of the murder of a man named Madugata Kumarage Jayatissa 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 deceased person at the time of the incident was a school boy. The deceased person's family and the accused appellant were living in the same neighbourhood. Mother of the deceased Sumanawathi says that five to six days prior to the incident in this case, there was a brawl between two families due to a land dispute. The incident where the deceased person sustained injuries took place when the deceased person around 7.00 a.m. tried to board a bus to go to school. The driver of the bus Palitha had seen the incident. Evidence of Palitha may be

briefly summarized as follows. The accused appellant who was known to Palitha boarded the bus driven by him two bus stops before the bus stop where the deceased person tried to board the bus. When Palitha stopped the bus where the incident took place three school children including the deceased person came running to board the bus. At this stage the accused appellant who was standing on the foot board attacked the deceased person who was attempting to board the bus. Palitha says that he did not see the weapon used by the accused appellant. He saw the attack on the deceased person by the accused appellant from the side mirror of the bus. After the attack the deceased person who was bleeding from the nose and the mouth came running in front of the bus and fell on the ground. Palitha shouted to the conductor of the bus and addressed him in the following language. "Nondi Mudalali (the accused appellant) attacked a child. The child is bleeding from the nose and the mouth. Take him to the hospital soon." He got down from the bus and saw the blood oozing from his mouth. He says that the child died on the spot. The accused appellant ran away from the place of the incident. This was the summary of the evidence of Palitha. Thilakarathne the brother of the deceased person, on hearing that his brother had been stabbed, started running towards Happitigala junction where the stabbing incident took place. But before reaching the said junction he met the accused appellant who stabbed him. Then he grappled with the accused appellant. At this stage one Amarajeewa, who was passing the place, tried to stop the brawl and when he was unsuccessful in his attempts, he requested the accused appellant to give him the knife. The accused appellant, who was still grappling with Thilakarathne, said that he would give the knife if it would not be given to anybody. However Amarajeewa was able to get the knife from the accused appellant. Later Amarajeewa gave the knife to the wife of the accused appellant. This knife was identified by Amarajeewa at the trial.

The evidence in this case has been led before several judges. Learned PC

for the accused appellant submitted that the proceedings have not been adopted when the succeeding Judge decided to proceed with the case. But when I go through the case record it appears that the succeeding Judge had adopted the proceedings.

Witness Palitha's position was that he saw the accused appellant attacking the deceased person through the side mirror of the bus. Palitha was the driver of the bus. He, in his statement made to the police and the evidence given at the inquest, had not mentioned the fact that he saw the said incident from the side mirror of the bus. This was marked as an omission by learned defence counsel. Learned PC therefore contended that the evidence of Palitha cannot be believed. I now advert to this contention. The omission was with regard to the witnessing of the incident through the side mirror. It is not with regard to the witnessing of the incident. The said omission does not suggest that he had not seen the incident. I therefore hold that there is no merit in this contention. Learned defence counsel marked another omission (X2) when Palitha gave evidence. This was marked as X2. What is X2? Palitha had not stated in his evidence at the inquest that he saw the accused appellant attacking the deceased. When he gave evidence at the inquest he had already made a statement to the police. No such omission was marked with his statement made to the police. Learned PC by pointing out these matters contended that Palitha was not a reliable witness and that his evidence could not be relied upon. I now advert to this contention. What was the behaviour of Palitha soon after the incident? He addressed the conductor in the following language. "Nondi Mudalali (the accused appellant) attacked a child. The child is bleeding from the nose and the mouth. Take him to the hospital soon." This was his immediate reaction. If he did not see the incident how did he immediately make this kind of reaction. This shows that he had seen the incident. He made the above observation from the driving seat itself. Thereafter what did he do? He got down

from the bus after stopping the engine. Due to the excitement he could not do anything and could not move the bus. Palitha does not know the deceased child personally. When I consider all these matters, the contention that Palitha had not seen the incident and was not a reliable witness has to be rejected. Soon after the incident the accused appellant was seen armed with a knife. The accused appellant grappled with the deceased person's brother and stabbed him. When I consider all these matters I hold that Palitha had spoken the truth and is a reliable witness. I further hold that the prosecution has established a strong prima facie case.

The accused appellant, in his dock statement, says that he is not guilty; that Palitha's evidence was false and that Palitha had taken different stand in his evidence, Police statement and the evidence at the inquest.

The investigating officer took the accused appellant into custody when he surrendered to the police on the same day. According to the police officer, there were injuries on his body and the blood in the injuries had dried up. There was no explanation to these injuries by the accused appellant. But there was some kind of explanation to these injuries by the prosecution witnesses. Thilakarathne and Amarajeewa say that the accused appellant was grappling with Thilakarthne and at this time both had fallen on the road. There was no explanation by the accused appellant to the strong evidence led against him at the trial. What is the position when the accused appellant failed to offer an explanation to the incriminating evidence? In order to answer this question, I would like to consider certain judicial decisions.

In Sumnaweera Vs The Attorney General [1999] 3 SLR 137 His Lordship Justice Jayasuriya held thus: "When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him."

In Baddewithana Vs The Attorney General [1990] 1SLR 275 His Lordship Justice PRP Perera held thus: "From the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an innocent explanation, an adverse inference may be drawn under section 114(f) of the Evidence Ordinance."

In the case of Boby Mathew Vs State of Karanatake [2004] Cr.L.J Vol iii 3003 at 3015, the body of the deceased person with injuries was found tied to a cot in the house of the accused appellant. The accused appellant failed to give explanation as to how the body of the deceased person came to his house. The Indian High Court remarked thus: "No doubt it is true that under our Indian Jurisprudence, accused has a right of silence and need not open his mouth as held in earlier pronouncements 'he can be a silent spectator watching the prosecution show to prove him guilty beyond reasonable doubt', the views of the Courts have now changed to the limited extent that once the prosecution succeeds in prima facie showing number of circumstances pointing unerringly accusing finger towards the accused, it is for the accused to come out and say or at least explain those circumstances which are shown to be against his innocence. If he still keeps his mouth shut and it is not explained or even where he tries to explain certain things which are found to be false, then the Courts are justified in drawing adverse inference against the accused as to his conduct."

Applying the principles laid down in the above judicial decisions, I hold that the failure of an accused person to offer an explanation when the prosecution has established a strong prima facie case against him can be considered against him and such failure suggests that he cannot contradict the prosecution case.

I have earlier held that the prosecution had established a strong prima facie case. What is the explanation offered by the accused appellant? He says that he is not guilty and that Palitha's evidence was false. What is his explanation to his

injuries? Police Officer who arrested the accused appellant says that blood in the injuries of the accused appellant had dried at the time of the arrest. He had offered no explanation to these injuries. But the brother of the deceased person Thilakarathne says that he and the accused appellant grappled. Amarajeewa says that both the accused appellant and Thilakartahne were grappling on the ground. It is therefore seen that there is an explanation to the injuries of the accused appellant by the prosecution witnesses. Failure of the accused appellant to offer an explanation to his injuries suggests that he could not contradict the evidence of the brother of the deceased person. Thus the fact that the accused appellant, little away from the place of offence, was armed with a knife and grappled with the brother of the deceased person has to be accepted. When I consider all these matters I hold that the dock statement cannot be believed and is not capable of creating a reasonable doubt in the prosecution case.

Learned PC submitted that the learned trial Judge had not considered the principles governing the evaluation of the dock statement. Therefore it is necessary to consider the said principles. When evaluating a dock statement following guide lines must be considered.

1. Dock statement should be considered as evidence subject to infirmities that it was not a sworn statement and not tested by cross-examination.
2. If the dock statement is believed it must be acted upon.
3. If the dock statement creates a reasonable doubt in the prosecution case, the defence of the accused must succeed.
4. Dock statement of one accused person should not be considered against the other accused.

Learned PC contended that the learned trial Judge had not considered the 3rd principle. But the learned trial Judge at page 469 of the brief had considered the above principle. Therefore I am unable to agree with the above submission of

learned PC. When I consider the evidence led at the trial I hold the view that the prosecution has proved the case beyond reasonable doubt.

The learned trial Judge referring to the dock statement made the following observation. "The accused in his dock statement stated that he was not guilty and that 6th prosecution witness Palitha had given contradictory evidence. However the dock statement does not create a doubt with regard to his innocence. Court cannot act on the dock statement because the evidence of the eye witness which has been corroborated by circumstantial evidence is more acceptable." Learned PC pointing out the above observation, contended that the learned trial Judge had decided the case on balance probability. But it is difficult to agree with this submission as the learned trial Judge had stated in the judgment that the case had been proved beyond reasonable doubt. Can it be said that the learned trial Judge was unaware of the principle that a criminal case must be proved beyond reasonable doubt? The answer is no. I therefore reject the above submission.

The learned trial Judge when considering the omissions has considered the statement of Palitha made to the police which was not produced as evidence at the trial. This appears to be a misdirection. It was not necessary for the learned trial Judge to consider the said statement when writing the judgment because the Prosecuting State Counsel had admitted the omissions. If there was no such admissions, defence counsel, by calling the investigating police officer, must prove it. If the Prosecuting State Counsel takes up the position that there is no such omission, then the trial judge for the purpose of deciding the validity of the objection can peruse the statement in order to make a ruling. But this does not mean that the trial Judge can use the said statement as evidence. 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 because he has to give a ruling whether he would permit the defence counsel to mark the omission or not. 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 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 Vs 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 Vs 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 Vs 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 to the investigating police officer in the course of the investigation as evidence.

Now the question that must be considered is whether the Court of Appeal should send the case back for retrial on the basis of the said misdirection? Why did the learned trial judge consider the statement of Palitha made to the police? It is necessary to state what the learned trial judge stated in his judgment. I will reproduce below the passage of the said judgment on this point. "It should be questioned whether the first omission marked in the 6th witness's evidence is in fact an omission. Because when his statement is considered as a whole it is clear that he had seen the incident, but the failure to mention that he saw it through the side mirror has not damaged the case." As I pointed out earlier the omission does not suggest that Palitha did not see the incident. What it suggests is that Palitha had, in his statement, failed to mention that he saw it through the side mirror. The learned trial judge, without adopting the said method, should have invited counsel for both sides to clarify this point in open court. What would have happened if the trial Judge did not consider the statement of Palitha made to the Police? Could he have rejected the evidence? The answer is obviously no because the omission marked at the trial had not shaken the credibility of the witness. I have earlier held that Palitha was a reliable witness. In my view the above misdirection has not occasioned a miscarriage of justice. For these reasons I hold that the Court of Appeal should not send the case back for retrial on the basis of above misdirection. When the Court of Appeal forms the opinion that a criminal case has been proved beyond reasonable doubt and if the Judge has made certain errors in the judgment

and if the said errors have not occasioned a miscarriage of justice or a failure of justice, the benefit of such errors cannot be given to the accused appellant and cannot be considered as a ground to allow the appeal or to secure a retrial because such a course of action will not only create dents on the administration of justice system of this country but also erode public confidence in the judicial system. The Court of Appeal, in such a situation, is empowered in terms of 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 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" to sustain the conviction. This view is fortified by the following judicial decisions. His Lordship HNG Fernando CJ in MHM Lafeer Vs The Queen 74 NLR 246 at 248 remarked thus: "there was both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of the opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

In The King Vs Musthapa Lebbe 44 NLR 505 Court of Criminal Appeal held thus: "The Court of Criminal Appeal will not interfere with the verdict of a jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand."

I have earlier held that the prosecution has established the case beyond reasonable doubt.

For the above reasons, I refuse to interfere with the judgment of the learned trial judge and affirm the conviction and the death sentence. I dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal.

PWDC Jayathilake J

I agree.

Judge of the Court of appeal.