

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

BA Premarathne

**Accused-Appellant**

Vs

The Democratic Socialist Republic of Sri Lanka  
**Complainant Respondent**

CA 168/2009  
HC Rathnapura 54/99

Before : Sisira J De Abrew J &  
PWDC Jayathilake J  
Counsel : Indika Mallawaarchchi for the accused appellant.  
Diliepa Peiris for the Respondent

Argued on : 13.1.2014, 16.1.2014 and 17.1.2014  
Decided on : 20.2.2014

**Sisira J De Abrew J**

The accused appellant in this case was convicted of the murder of a man named Nandasena and was sentenced to death. Being aggrieved by the said conviction and the sentence he has appealed to this court. The 2<sup>nd</sup> and the 3<sup>rd</sup> accused were convicted for assisting the accused appellant to conceal the dead body which is an offence punishable under Section 198 of the Penal Code and were sentenced to a term of five years rigorous imprisonment (RI) and to pay a fine of Rs.10,000/- carrying a default sentence of one year RI. They did not appeal. Facts of this case may be briefly summarized as follows.

Hemalatha who is the wife of the deceased person Nandasena is the sister of the wife of the accused appellant. Ten days prior to the incident in this case Nandasena's family from Horana came to live with the accused appellant. On the 1<sup>st</sup> of May 1988 Nandasena got ready to go to Horana in order to get the school leaving certificate of his son. But there is no evidence to suggest that he went to Horana. Evidence led at the trial suggests that he had not gone to Horana. Hemalatha, after preparing his sarong and shirt for the journey, went to a nearby stream with his sister and children for the purpose of bathing. At the time they left, the accused appellant and Nandasena were at home. When she came back the accused appellant who was repairing a radio told her that Nandasena left for Horana.

The accused appellant in the evening of 1.5.1988 went and sought assistance of Kularathne who lives in the same neighbourhood to clear a block of land. When Kularathne went to the house of the accused appellant, the dead body of Nandasena, which was covered with a mat and kept in the back garden, was shown to him and requested his assistance to remove it. The accused appellant told him (Kularathne) that he killed Nandasena. When Kularathne refused the request, he addressed him in the following language: "I will kill you too in the same manner in which Nandasena was killed." He thereafter assisted the accused appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> accused to remove the body. He saw a blood patch on the face of the deceased person. He was shown only the face of the dead body. The four persons carried the dead body to a place which was about six hundred (600) feet from the house of the accused appellant. The accused appellant requested to dig a pit but Kularathne refused. At this stage the accused appellant again threatened him with death. All four of them thereafter dug a pit and buried the dead body of Nandasena. The accused appellant requested Kularathne not to tell the story to anybody. Two years and nine months later, when the investigation started

the grave was discovered on a statement made by the accused appellant who pointed out it. The investigating police officer found a skeleton and a piece of a sarong in the pit. Hemalatha the wife of the deceased person identified this piece of sarong as a piece of a sarong which was similar to the sarong of her husband. Dr. Sydney Premathirathne who examined the skeleton expressed the view that grievous injuries had been caused to the skull. He further expressed the view that injuries had been caused on any day prior to three months of his examination. Dr. Sydney Premathirathne was not available to give evidence as his demise had taken place long prior to the commencement of the trial. Dr. Lalantha who produced the report prepared by Dr. Sydney Premathirathne expressed the opinion that the injuries had been caused within two years of the examination. However Dr. Sydney Premathirathne in the Post Mortem Report had not expressed this opinion. Therefore it is prudent to accept the opinion expressed by Dr. Sydney Premathirathne who had said that the injuries had been caused on any day prior to three months from his examination.

Learned counsel for the accused appellant submitted that evidence given by Dr. Lalantha cannot be accepted as he had given evidence on a report which was not signed by Dr. Sydney Premathirathne. It is true that Dr. Sydney Premathirathne did not sign the report. But it has to be noted here that the day stamp of the JMO's office had been placed on the report. Further Dr. Lalantha says that he discovered this report from PMR file maintained in the JMO's office. Further there is a presumption that judicial and official acts have been regularly performed. When I consider all these matters, there is no doubt that P1 report had been prepared by Dr. Sydney Premathirathne. For the above reasons I am unable to agree with the submissions of learned counsel for the accused appellant.

Learned counsel for the accused appellant next contended that the dead body had not been identified anybody. I now advert to this contention. Kularathne

says when he went to the house of the accused appellant the dead body of Nandasena which had been kept in the back garden of the accused appellant was covered with a mat and the accused appellant removed the part of the mat and showed him the face of the dead body. Then he identified that it was Nadasena's body. There was a patch of blood on the face of the dead body. The accused appellant admitted to Kularathne that he killed Nandasena. When I consider all these matters, I hold that the dead body of Nandasena had been identified by Kularathne. I therefore reject the said contention.

Learned counsel submitted that it was unsafe to allow the conviction to stand as it was based on the accomplice's evidence which was uncorroborated. I now advert to this contention. How was the grave of Nandasena discovered? It was on a statement made by the accused appellant. Further the accused appellant pointed out the grave and the Police discovered a skeleton and a piece of a sarong from the said grave. This piece of sarong which was similar to Nadasena's sarong was identified by Hemalatha. Kulartahne says that this was the place where the dead body of Nandasena was buried. He too was present at this place when the police officer discovered the skeleton. When I consider all these matters, I hold that Kularathne's evidence was corroborated by the above evidence. Therefore I am unable to agree with the above contention of learned counsel.

Learned counsel for the accused appellant contended that the evidence of Kularathne did not satisfy the test of promptness as he made a statement two years and nine months later. I now advert to this contention. It is true that Kularathne made a belated statement. He assisted the accused appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> accused to bury the dead body of Nandasena. Under these circumstances can one expect him to make a prompt complaint to the police? The answer is no. Therefore the fact that his evidence did not satisfy the test of promptness does not weaken his evidence. If the delay in making a statement to the police has been explained by a

witness or can be understood by court, evidence of such witness should not be rejected by court. I have earlier pointed out that evidence Kularathne had been corroborated. For the above reasons I hold that the learned trial Judge was right when he decided to accept the evidence of Kularathne. Therefore I am unable to agree with the above submission of learned counsel for the accused appellant.

One year after the disappearance of Nandasena, the accused appellant after an exchange of words with Hemalatha over a monetary transaction, told her (Hemalatha) to bring a mamoty to show the dead body of Nandasena. Hemalatha says that she, thereafter, lodged a complaint in the police station. But the investigating police officer does not confirm such a statement being made Hemalatha. Therefore it is difficult to rely on the said item of evidence.

The accused appellant, in his dock statement, denied the incident.

The learned trial judge when analyzing the dock statement stated that the dock statement was not tested by cross-examination and that a statement could be considered as evidence only if it was considered by cross-examination. This is a misdirection committed by the learned trial judge. Judges when evaluating a dock statement should bear in mind the following principles.

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

The above view was expressed in the case of Kularathne Vs Queen 71 NLR 529. Similar view was expressed in Buddarakkitha Vs Queen 63 NLR 433

When I consider the evidence led at the trial, I hold that the prosecution has proved its case beyond reasonable doubt and that above misdirection has not

caused any miscarriage of justice to the accused. When I consider all these matters, I intend to apply 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 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."

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

Appeal dismissed.

Judge of the Court of Appeal.

PWDC Jayathilake J

I agree.

Judge of the Court of Appeal.