

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

1. Sambatti Ranil Abeysekera (Deceased)
2. Agampodi Dewa Nandana

**ACCUSED**

**And now**

Agampodi Dewa Nandana

**ACCUSED-APPELLANT**

C.A 13/2008  
H.C. Galle 2187

Vs.

Hon. Attorney General  
Attorney General's Department  
Colombo 12.

**RESPONDENT**

**BEFORE:** Anil Gooneratne J. &  
P.W.D.C. Jayathilake J.

**COUNSEL:** Anuja Premaratne with Chamath Wickremasinghe  
for the Accused-Appellant

Haripriya Jayasundera D.S.G. for the Respondent

**ARGUED ON:** 18.03.2014 & 19.03.2014

**DECIDED ON:** 04.04.2014

**GOONERATNE J.**

The 2<sup>nd</sup> Accused-Appellant was convicted on a charge of murder and sentenced to death. Prior to such conviction the Hon. Attorney General indicted two persons on a charge of murder. However when the High Court set down the case for trial the 1<sup>st</sup> Accused died. As such the indictment was amended to read as the 2<sup>nd</sup> Accused committed murder along with another deceased Ranil Abeysekera. It is also noted that as submitted to this court by learned counsel for Appellant and learned Deputy Solicitor General that the trial against the 2<sup>nd</sup> Accused-Appellant was held in absentia under Section 241 of the Criminal Procedure Code since the said 2<sup>nd</sup> Accused-Appellant absconded at a certain point of the trial before the High Court.

The case against the Accused-Appellant rest mainly on a confession made by the Accused-Appellant to witness No. 2 Saumyawathie (mother of the deceased). On or about 25.1.1998, between 12.00 noon and 1.00 p.m the 2<sup>nd</sup> Accused met witness No. 2 and told her that he and Ranil killed him. Learned counsel for 2<sup>nd</sup> Accused-Appellant submitted to court, the several inconsistencies lapses and or the contradiction of witness No. 2 to

demonstrate that the evidence of witness No. 2 is highly unreliable and that the only available item of evidence against his client is a confession where several inconsistent positions were demonstrated. It was the position of learned counsel for the Appellant that it is unsafe to rely on the evidence of Saumyawathie to sustain a conviction in view of the several lapses which were highlighted as follows:

- (1) Witness met Ranil Abeysekera (deceased 1<sup>st</sup> Accused) at Ratgama junction and asked whether such an incident happened. Ranil answered stating he is unaware (Pgs. 53/54).
- (2) Attention of court drawn to the item of evidence based on confession. That Accused told the witness, your son (described as a thug) was killed. Son will not eat rice but would have to eat sand (pg. 4). Then again at pg. 49 witness more or less repeat above but when questioned as to who killed stated that Ranil and Accused-Appellant killed. At pgs. 72/73 omissions highlighted with reference to the non-summary proceedings suggesting above item of evidence not being testified by witness in the Magistrate's Court.
- (3) The Accused-Appellant came by himself and met the witness (came alone). At a subsequent point (pg. 67) witness state that Accused, Shantha and Piyadasa met her. Further the above persons gave chase behind her. Next question put to her she state that the above mentioned persons along with the Accused-Appellant came chasing behind her. At pg. 68 the witnesses further state that when the Accused said so Jinadasa, Priyantha and Shantha assaulted her. Further examination on this point witness again

state that only Accused-Appellant came. It was submitted by learned counsel that the position of being assaulted by the above named persons were not stated in the police statement or in her testimony before the learned Magistrate and at pg. 70 an omission on above suggested.

The learned Deputy Solicitor General referred to the evidence of witnesses Mallika or Ratnaseeli more or less to suggest motive for the killing. It was submitted that there had been animosity between the parties and in fact witness No. 2 Saumyawathi is a suspect or an Accused in a murder case, involving the Accused party. However learned Deputy Solicitor General did not specifically challenge the omissions and inconsistencies in the evidence of the prosecution, but invited court to items of evidence where the Accused and deceased Ranil and others had obstructed at the funeral of the deceased and attempted to prevent and cause disturbance at the funeral and also prior to the funeral even in the mortuary caused obstructions.

Having perused all the material placed before court by way of evidence, it is an undisputed fact that there was a continuous serious animosity between the deceased party and the accused party who are also very close relatives for a period of time prior to the incident. The evidence that surfaced at the High Court trial makes it very clear that either party had killed at least one

member of each other, prior to the murder in question. In fact the main witness of the prosecution Saumyawathie is a suspect or an accused in a murder case, which evidence had not been challenged, and which resulted due to the animosity between the above parties. As such evidence led at the trial need to be analysed with the above undisputed fact in mind which could also provide a motive for both the deceased party as well as the accused party. The other important matter that should be kept in mind is that merely because witness No. 2 Saumyawathie for the prosecution is an Accused or a suspect in a murder case should not be held against the said witness merely on that account unless the chain of events could be connected without a break to each other, which fortify the prosecution case. It is also undisputed that a conviction could be secured based on a confession or on reliable items of circumstantial evidence. However in the context of the case in hand court should be more cautious in view of the above background facts.

This court wish to observe that the evidence of witness No. 2 had not been so consistent. The learned counsel for the 2<sup>nd</sup> Accused-Appellant demonstrated to court the several lapses, omissions and inconsistencies, which the learned Deputy Solicitor General could not have been able to resist in the manner evidence was led before the High Court. The confession relied upon by

the prosecution is very unsatisfactory. The answer to the first and primary question based on the confession is that Accused told the witness, your son who is a thug was killed. Only on further questions being put to the witness that she implicated both the accused. In cross examination on this vital point learned counsel for the Accused Appellant demonstrate omissions and inconsistencies on the above items of evidence based on the testimony led at the non-summary inquiry. I would at this point get on to the documentary evidence to ascertain whether the confession is at least supported even to a lesser degree by the postmortem/autopsy report of professor Niriellage Chandrasiri.

The above report indicates almost 25 injuries described as corresponding to the above cut injuries the cervical spine in neck region is cut at two places. There are two cut injuries in lower lobe of right lung and four cut injuries in upper and middle lobes of left lung. It is indicative of a very serious brutal murder. On the cause of death and other relevant opinion the cause of death is described as intra thoracic bleeding caused by stab injuries. It also states injuries have been caused by a single cutting pointed knife. Report states, date, time and place of death – not known. Examination of the place where body was found:- site and position of body – not examined.

It is not necessary for the confession to be supported by the post-mortem report. But report indicates a brutal murder which would have taken some time to finish the operation of killing and the deceased party would have been heavily blood stained. Report support that the accused could not have committed the murder without some blood stained in his body being contaminated with the blood of the deceased and most probably accused clothes he wore should have some blood stains. There is no evidence of blood stains of the accused party. This would raise a doubt in the confession and testimony of witness No. 2 even though that evidence may not have been led at the trial and such a question not being posed to witness No. 2, prosecution does not give cogent reasons or give details and events that connect the confession to the background details of alleged crime. In the absence of above material as referred to in this judgment inclusive of the version of witness No. 2, it would be unsafe to convict the Accused even in absentia. Further this court observes that witness No. 2 had animosity towards the Accused, as stated above. Though the trial judge emphasis on motive I state that motive in this instance had turned into a double edged weapon.

The learned High Court Judge in his judgment base his reasoning on 9 points referred to at pgs. 174/175. I will deal with same as follows:

- (1) Confession – it is an unsatisfactory confession as observed above.
- (2) & (3) – motive for the murder is a previous killing of Accused brother by deceased – prior incident of stabbing and by causing injury, by 2<sup>nd</sup> Accused. As such it suggest motive, but this instance it could well be that due to the unsatisfactory nature of confession led through witness No. 2 animosity on either side is apparent, which casts some doubt in the prosecution version, though corroboration may not be necessary in murder cases if strong direct or circumstantial evidence could be led. However in the context of this case, this court is of the view that there is an absence of some independent evidence or material to support the confession. In the context and circumstances under which the confession was elicited independent corroboration would certainly support the confession. In the absence, it is unreliable evidence relied upon by the prosecution.
- (4) Visit to the scene of crime by 1<sup>st</sup> Accused and witness No. 2, persons gathered at the scene not prepared to look at the Accused and uttered and ignored him by saying 1<sup>st</sup> Accused not present. These are questions of fact and no reasonable man can conclude as regards the complicity of Accused No. 1.
- (5) (6) & (7) Obstructions caused by the Accused at the funeral undertakers, of bringing the body home and funeral rights held under police protection. It can suggest animosity but not motive or support the confession the only item of evidence relied upon by the prosecution.
- (8) 1<sup>st</sup> Accused accompanying the Deceased to obtain a medical report in the morning and afternoon the murder took place.
- (9) Accused absconding from the area and surrendering to court subsequently.



As regards (8) and (9) I would state that (8) could suggest a preplan but in the absence of further evidence no inferences could be drawn. On (9) above only on adverse inference could be drawn but not sufficient and safe to convict solely on same.

In our view the learned High Court Judge has erred, and it is our view that the trial judge should not have admitted or acted upon the evidence based on the confession of an unreliable witness which would have caused great prejudice to the Accused as the case against him depends on circumstantial evidence alone. In all the circumstances of this case we do not think that it is safe to allow the conviction and sentence to stand. As such we quash and set aside the conviction and sentence and acquit the accused.

Accused acquitted. Appeal allowed.

  
JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilake J.

I agree

  
JUDGE OF THE COURT OF APPEAL