

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

M. Don Hemantha Kumara Perera

ACCUSED-APPELLANT

C.A 98/2010
H.C. Anuradhapura 88/2001

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 01.

RESPONDENT

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Wijedasa Rajapaksa P.C., with N. K. Tissa Yapa
For the Accused-Appellant

Shanil Kularathne S.S.C. for Respondent

ARGUED ON: 03.04.2014

DECIDED ON: 13.05.2014

GOONERATNE J.

The Accused-Appellant in this appeal was convicted of murder and sentenced to death. The date of incident of murder as stated in the indictment was on 29th November 1990. The facts of this case could be briefly stated as follows.

One of the witnesses called by the prosecution states (Sumith Anura Kumara) he was a soldier attached to the Palaly Camp and served in a unit of the camp at Wasavilan school as described by him in his evidence. In that place there had been a platoon of about 35 soldiers, and he and others in the platoon occupied an abandoned houses, in the vicinity. The witness gives the details of persons who were occupying these house, i.e Lt. Atapattu, deceased Soldier Dushantha Perera the Accused who was a corporal in the Army. The incident took place at about 1.25 p.m in the afternoon and the witnesses had been cooking at that time. It is also in evidence that there were others attending to various other functions. Then he heard a noise of a gun-shot from behind, from the place he was seated and cooking. The kitchen was about 10/15 feet outside the house. Thereafter the witness stood up and looked through the window towards the

direction where there were others. He saw the deceased fallen. The evidence on that was followed by another question:

උ: පෙරේරා ඇඳේ වැටී සිටියා

ඉ: චෙන කවුරුන් සිටියා ද?

උ: හැකැ (pg. 155)

Further examination on this point by State Counsel reminding the witness about the evidence he gave in the Magistrate's Court, the witness states he saw the Accused going from behind එම ස්ථානයේ කෝපුල් පෙරේරා, පිටුපසයානවා දැක්කා. This witness also states he saw a gun near the place the deceased was fallen. He also saw the Accused running. The prosecution also relies on a confession.

The learned President's counsel Mr. Wijedasa Rajapaksa in his submissions referred to several inconsistencies, lapses and contradictions in the prosecution case and also demonstrated to court the alleged confessions to be contrary to the provisions of the Evidence Ordinance and other legal provisions and also emphasized about the misdirection of learned High Court Judge in the judgment delivered in the trial court. Learned Senior State Counsel Shanil Kularatne very correctly, having considered the prosecution version submitted to court that he is unable to support the conviction.

The 1st witness called by the prosecution is an officer in charge of discipline in the Army. He had received information initially of suicide and thereafter on his own inquiries he states it was not a suicidal attempt but the deceased had been shot, also having regard to information provided by the Medical Officer. This witness had recorded a statement of the Accused person and stated the Accused was not threatened and no complaint by Accused against him. Defence counsel had objected to recording of a confession and placing it as evidence but the High Court Judge has not made a proper ruling on same but state that after considering all the evidence in the case the trial Judge will decide on the admissibility of evidence.

When an objection is taken that the purported confession was not voluntary or even no objection is taken, court must decide whether the confession was voluntary or not. On Voir/Dire and admissibility of confession. Accused need not prove inducement, threat etc. burden is on the prosecution to establish voluntariness and establish relevancy. King Vs. Weerasamy 43 NLR 152 1 NLR 209; 57 NLR 132; 73 BLR 154 at 177 – 178. Court need to be extra cautious. In the case in hand the prosecution does not seem to have shown the absence of invalidating circumstances set out in Section 24 and must prove beyond reasonable doubt. It is not proved in this case.

The principle to be applied is to avoid the risk of admitting false confession or confessions made under duress in the existing state of affairs, may be in the police or even Army. The trial Judge should have held the voir-dire inquiry and satisfied on the voluntariness as and when the objection was raised, since the witness is a superior officer in the Army who has authority over the Accused. Abuses and unfair advantages, 60 NLR 313 at 319-320, need to be checked and tried by the trial judge. A mere answer of an admission and that the Accused failed to challenge the confession should not be the only deciding factor. Trial Judge has not attempted to rule out abuses of unfair advantages, since witness' evidence thereafter suggest very many lapses deliberate or otherwise within the Army, to conceal evidence. Trial Judge need to be extra cautious if a need arises to rule on a confessions. Somarathna Rajapakshe Vs. Attorney-General 2010 (2) SLR 113 held:

“Considering the powers and the authority the Military Police Officers have over the persons in their custody, combined with the gravity of the charges, the detention incommunicado, and the inaccessibility to lawyers to practice the rights of such persons in their custody would be paramount necessity to include a Military Police Officer also into the definition of “Police Officer” in terms of Section 25 of the Evidence Ordinance.

Accordingly the confessions made to Military Police Officers by the Appellants are inadmissible and therefore cannot be used against the Appellants.”

The evidence of the official witness from the Sri Lanka Army appears to be highly unreliable. The witness in charge of the armory was compelled to adjust details of weapons, Nos., etc in the register maintained for the purpose. There is material to suggest that alterations were done to enable the heirs of the deceased to get same benefit. If it was a suicide the Army Regulation do not permit payment of compensation or damages.

We also find that the learned High Court Judge relied on the dictum of Lord Ellen borough as in Rex Vs. Cocharane and held defendant has failed to adduce evidence to exonerate him.

The above dictum could be applied when there is strong prima facie case established against the Accused. In M.A. Sammy and other Vs. Attorney General 2005 BLR Vol. Xi pg. 68, Ellen borough dictum was analysed.

“This dictum has been applied in Sri Lanka both in cases of circumstantial and direct evidence. It must be noted that in the following case this dictum was applied where a strong prima facie case had been made out against the accused.

On a careful survey of these cases it is manifest that a condition precedent to the application of this dictum is that there must exist a strong prima facie case made out against the accused.”

When we consider the evidence led before the High Court and the material suggested to this court by the learned President's Counsel, it is very unsafe to act upon the prosecution version. In view of the several matters stated above we have to intervene and interfere with the judgment of the learned High Court Judge. We cannot allow the conviction to stand. As such, we set aside the conviction and sentence, and allow the appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL