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

1. Uduma Lebbe Sailathumma alias Aisha Umma
2. Adam Lebbe Mohamed Faizal alias Riswan
3. Adam Lebbe Ibrahim alias Rishan **(Presently incarcerated at the Bogambara Prison)**

ACCUSED-APPELLANTS

C.A. No. 95/2010

H.C. Kalmunai 120/2009

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Faiz Mustapha P.C., with Amarasiri Panditharatne
For the Accused Appellants

Rohantha Abeysuriya D.S.G. for the Complainant-Respondent

ARGUED ON: 29.08.2014

DECIDED ON: 25.09.2014

GOONERATNE J.

The three Accused-Appellants were indicted before the High Court of Kalmunai for the death of one Sinnathamby Mohamed Thahir on 05.04.2004. The learned High Court Judge after trial convicted all three Accused-Appellants and sentenced them on 20.7.2010 to death. The grounds of appeal are contained in para 4 of the Petition of Appeal and the learned President's Counsel who appeared for the Appellants argued this appeal, on at least three dates and took up various positions to favour the defence case, and at a certain point of his submission drew the attention of this court more particularly to the contents of para 4 of the Petition of Appeal with the

proceedings in the High Court suggesting a glaring misdirections of the learned High Court Judge. The learned Deputy Solicitor General very correctly and in the best of spirit, of an officer of the Attorney General's Department conceded on behalf of the State to the misdirection of the learned High Court Judge as stated above. Perusing the available translated brief, it is apparent that the trial Judge had compared the contradictions and omissions suggested by learned State Counsel from the police statement, when he cross-examined the 1st Accused who gave evidence on oath, with the non-summary proceedings held in the Magistrate's Court.

It appears to this court that the non-summary proceedings were never produced in court by either party at the trial. If contradictions and omissions were marked and suggested from the police statement which were marked and produced at the High Court trial, there cannot be any objection. The trial Judge cannot compare the evidence with the non-summary proceedings and arrive at a conclusion. This would amount to a misdirection since non-summary proceedings would not be evidence at the trial before the High Court. The rejection of the Accused's testimony by comparing the material contained in the non-summary inquiry is a serious misdirection.

In 1985 (1) SLR Sheela Sinharage vs. The Attorney General

Held –

(1) Section 110(4) of the Code of Criminal Procedure Act No. 15 of 1979 empowers the High Court Judge to use a statement made at a non-summary proceeding to aid him at the trial but it cannot be used as evidence in the case. Under section 33 of the Evidence Ordinance evidence given by a witness in a judicial proceeding can be proved at the later stage of the trail in accordance with the provisions of the laws of evidence and criminal procedure. But here the High Court Judge perused the evidence given at the non-summary inquiry of the deceased's statement to Dr. Waas and used material contained in it for the purpose of his judgment without having taken any steps to have such material placed before him to evidence. This procedure is illegal and cannot be justified...

At pg. 18

There is no express provision in the Code of Criminal Procedure Act No. 15 of 79 (nor was there in the earlier Code) authorizing the use of evidence given at a non-summary inquiry at a later stage of the same proceedings in the way "statements and information" referred to in the said section 110(4) could be used as set out in the said section. There is however express provision in the Evidence Ordinance (Chap 14) in section 33 making evidence given by a witness in a judicial proceeding relevant in a later stage of the same judicial proceeding. Once such evidence becomes relevant at the stage of the trial then such evidence would have also to be proved before the trial judge in the same way the other items of relevant and admissible evidence are placed before the trial judge in accordance with the express provisions of the laws of evidence or of criminal procedure. Facts which are relevant can be considered by the trial judge only if and when they are led in evidence before him at the trial in accordance with the relevant express provisions of law. A deposition made at a non-summary inquiry must, if relevant at the subsequent trial be adduced in evidence in open court at the trail in the presence of both parties just as much as the other relevant facts have to be led in

evidence and proved at the trial in open court in the presence of the parties. This is what the law requires and it has also been the inveterate practice. That that is so is also borne out by the case of Reg. v. Arthur Perera (28) . The procedure adopted in regard to this particular matter by the learned trial judge cannot, in my opinion be justified upon any basis – whether of precedent or of any express provision of law.

We find at pgs. 235/236of the translated brief that the eye-witness had viewed the incident by bending down from the fence in her premises, which is recorded as "වැටෙන් එබිලා බැලුවා". This had been suggested as an omission since in the statement to the police, it is not said so. The trial Judge states it is not an omission since the trial Judge perused the non-summary inquiry proceedings and having checked same does not consider it to be an omission. Then again at pgs. 242/243 trial Judge commenting on the evidence of the 1st Accused-Appellant, states that the 1st Accused at the trial in the High Court gave evidence in a particular way and in the non-summary inquiry her evidence was different. This suggest comparison of proceedings in both the trial and inquiry, and arrive at a conclusion by the trial Judge. Further the 1st Accused's evidence in the High Court as recorded is that the deceased had exposed his private parts and abused the 1st Accused in bad language. Trial Judge in her judgment states that there was no such reference or evidence transpired in the non-summary inquiry before the Magistrate.

We do not think that in view of the above, the Accused persons had a fair trial, and the trial Judge without testing the testimonial trustworthiness of the witness from the evidence led at the trial, before the High court, gave her mind to the material recorded in the non--summary inquiry, and arrived at a conclusion. This is an unacceptable misdirection, which has occasioned a failure of justice. The evidence in court is only the evidence led at the trial and contradictions and omissions are not evidence, and used only to diminish and or enhance the version of a particular witness or party and to test the testimonial trustworthiness. No other extraneous material could be added like the material contained in the non-summary proceedings, be considered and compared for such purpose. This is a total miscarriage of justice. In these circumstances we have to set aside the judgment and send the case for a trial afresh (re-trial).

Nevertheless the learned President's Counsel in his lengthy submissions also emphasized the following:

(1) No proper judicial evaluation of the testimony of eye-witness Sifaya.
(2) Police evidence does not support the eye-witness's version on visibility.

(3) Visibility in doubt. The sketch plan (P2) if examined would create a doubt as to whether in fact the eye-witness saw any incident from the position he was standing.

(4) Belatedness

The case of the prosecution is that the 1st Accused, mother of 2nd and 3rd Accused had held the deceased firmly and whilst holding on, the 2nd and 3rd Accused (sons of 1st Accused) attacked the deceased with clubs. In this background some positions were suggested by learned President's Counsel that from the point where the eye-witness was standing, the witness could never have seen the incident and to demonstrate same he projected the sketch plan (P2) and referred to the police evidence which create a doubt in the prosecution case. There is some substance in this argument but these are factual matters for the trial Judge to arrive at a correct conclusion. If there are circumstantial items of evidence, can it be connected in such a way that the items of evidence is more than sufficient to prove the guilt of the Accused persons? Or is that the only irresistible and inescapable inference that could be drawn from all the circumstances which tend to support guilt?

On the other hand the trial Judge is expected to analyse the evidence of the Accused persons correctly. Has it created a reasonable doubt in the

prosecution case? If so all Accused need to be acquitted. The trial Judge also need to consider the defence of grave and sudden provocation. I am unable to comment on above especially when this court is called upon to decide the appeal on a translated brief, which may not describe the incident properly and failure to project even some minute details, from which inferences could be drawn. Trial Judge need to view this case from a correct perspective having the above four points urged by learned President's Counsel in mind. It is unfortunate that a glaring misdirection has occurred. We do not propose to express our views on the merits of this case in view of such a misdirection. In all the above facts and circumstances we set aside the conviction and sentence and send the case back to the High Court for a fresh trial. Trial de nova ordered.

Case sent back for a fresh trial.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL