

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

Nandasiri Kumaranayake

ACCUSED-APPELLANT

C.A. 215/2010

H.C. Galle 2701/2006

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Jagath Abeynayake for the Accused-Appellant
Shanaka Wijesinghe D.S.G for the Complainant-Respondent

ARGUED ON: 25.06.2014

DECIDED ON: 30.09.2014

GOONERATNE J.

The Accused-Appellant was indicted for the murder of Samarasinghe K. Sena on or about 19.10.2002. He was convicted and sentenced to death. Two witnesses for the prosecution being sister and mother of the deceased gave evidence. Sister testifies that the deceased brother was at home and when they were having tea her mother having notice that the deceased nose and face was swollen, had questioned the deceased as to what happened and he replied that he was assaulted by the Accused. Deceased had been at home the entire day of the incident and the Accused had come home at about 8.30 p.m when the deceased was watching television. Accused was near the door step and had with him an iron pole. Accused was told by deceased's mother, to come some other time since he was not in his proper senses. Accused had reacted and started to abuse them in bad language and had struck the door posts with the iron pole. The other witness the mother of the deceased saw to it that that the Accused left the premises and followed him. Thereafter the sister also went behind the mother after about 5 minutes.

The testimony of the 1st witness reveal that the Accused even attacked the deceased mother with the iron pole near the Buddha statute in the vicinity, when the mother followed the Accused. Sister of the deceased also came to the scene of the crime and the Accused had also attempted to attack the sister. The deceased also arrived at the scene and the Accused attacked the deceased with the iron pole which properly is described as 'යකඩ පටිය' (P1). The witnesses answer about the attack could be described in the manner it is recorded, in the brief as follows (folio 423).

උ: එත්තිකරු යකඩ පටියක් අතේ තියා ගෙන එතන තිබෙනවා පොල් ගහක්. එයා පහත් වුනා. යකඩ පටිය කියා ගෙන ඉන්න මගේ මගේ අයිතා ආවා. ඇවිත් මගේ අයිතා ඇහුවා මාවගේ මවට ගහන්න හේතුව මොකද්ද කියල. ඒ කියන කොට මෙයා යකඩ පටිය අරගෙන මෙහෙම ගහන කොට අයිතා උඩු පැල්ලෙන් වැටුනා. (දැන උස් කර පෙන්වා සිටී).

The learned defence counsel in his submissions to court submitted that weapon used in the commission of the offence was not properly identified. He also submitted that it is not safe to act upon the evidence of the prosecution witnesses due to several contradictions, and contradictions inter

se between witnesses. Both the 1st and 2nd witnesses are unreliable witnesses according to learned defence counsel. As regards the weapon, contradiction V5, V11 & V12 concerning assault with weapon on witness and witness's mother were emphasized by the defence counsel. It was also suggested that the Accused was in hospital when the Section 27 Evidence Ordinance Recovery was made and in reality no such weapon could have been recovered based on a Section 27 Evidence Ordinance Recovery. It was the learned counsel's reasoning that police evidence reveal that the Accused was hospitalized.

Learned Deputy Solicitor General submitted to this court that although there were about 12 contradictions marked during the course of the proceedings, none of the contradictions would be material to the prosecution case and are not relevant in the context and circumstances of the case. It was also pointed out that there is no record or evidence to support the contention that the Accused continued to be hospitalized. It was the position that material does not suggests that Accused had been warded and continued to be in hospital for a period, and as such learned defence counsel's submissions as regards the Section 27 recovery does not cause any doubt in the prosecution

case. Learned Deputy Solicitor General referred to the evidence at folio 401 & 400 which suggests motive. Previous conduct and subsequent conduct of Accused. It was also suggested that the medical evidence in all respects support the prosecution case.

The medical evidence reveal that almost all the injuries had been inflicted above the shoulders, concentrated on upper areas of the body inclusive of the head, nose, forehead, eyebrows etc. Blows from the weapon had an impact on the brain, caused with certain amount of force. The medical officer has expressed an opinion that the injuries could have been caused as above by the iron pole or iron strip marked P1. Medical evidence no doubt support the prosecution version. Accused had, according to the prosecution version, assaulted the deceased prior to attacking with the iron weapon, which caused the death subsequently. Deceased's mother had inquired about swollen face of deceased and the reply to such a question was that the deceased had been assaulted earlier, by the Accused-Appellant. On the day of the incident the Accused-Appellant had visited the house of the deceased party and had threatened all of them. He was also under the influence of liquor. The scene of crime of attack with the iron strip (P1) by accused was in close proximity to the house of the deceased and near the Buddha statue. All

these items of evidence described above and threats of the Accused party aimed towards the deceased remain as uncontradicted evidence.

Accused had given a dock statements. I agree with the views of the trial Judge that the evidence of the Accused-Appellant does not really touch upon the incident and as such, and no explanation of the incident had been really divulged by the Accused. Accused attempt to impress that the deceased had demanded some money in the morning on the day of the main incident and on his refusal, the Accused had to suffer some loss to his house as a result of an attack by the deceased followed with certain injuries caused to himself. Further the Accused had stated that the two prosecution witnesses had lied to court. Therefore I have no reason to fault the learned High Court Judge's views that the Accused version had not been capable enough to cause a reasonable doubt in the prosecution case.

There were about 12 contradictions marked and the defence made specific reference to same. However the question is whether these contradictions are material or immaterial to the case in hand. Such contradiction should be capable of going to the root of the case. I agree with

the learned Deputy Solicitor General that none of these contradictions are capable of damaging the prosecution case. In this case it is unnecessary for the Appellate Court to divert its attention to all of them. I would endorse the views of the trial Judge on same as reflected in his judgment at folios 295 -299 of the brief/record. In any event contradiction marked V6, has been considered with cogent reason by the trial Judge, which connects the weapon used, whether it was a manna knife or an iron pole or belt (කැබලි පොල). Trial Judge has approached this point, with the available light at the time of the incident to be around 8.30 p.m. Trial Judge's views of the specific weapon used for committing the offence in the above background with sufficient light need not be faulted.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be attached with undue importance. More so when the all important "probabilities – factor" echoes in favour of the version narrated by the witnesses Bhoginbhais case (AIR 1983 Supreme Court 753-1983 Cri LJ 1096) .

In all the above facts and circumstances of this case, it is our view that the prosecution has proved the case beyond reasonable doubt. There is

no way in which this court need to interfere with the verdict of the trial Judge.

We affirm the conviction and sentence, and dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL