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

In the matter of an Appeal in terms of Section 331 of the Criminal Procedure Act No. 15 of 1979.

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

COMPLAINANT

Vs,

Abhaya Sri Guruge (Karate Guruge)
No. 331, Akarawita Mw,
Katuwana,
Homagama.

ACCUSED

C.A No 179/11

H/C Panadura Case No.2568/2009

And,

Abhaya Sri Guruge (Karate Guruge)
No. 331, Akarawita Mw,
Katuwana,
Homagama.

.

ACCUSED-APPELLANT

Vs,

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

Respondent

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel : **Palitha Fernando PC with Viran Fernando and Viresh Nanayakara for the Accused–Appellant,**

Thusith Mudalige SSC for the Respondent.

Argued On : **13.02.2015, 18.02.2015, 19.02.2015, 20.02.2015,**

23.02.2015, 25.02.2015, 27.02.2015

Written Submission On: Appellant 01.04.2015 / Respondent 02.04.2015

Decided On : **10.07.2015**

Order

Vijith K. Malalgoda PC J

The Accused-Appellant was indicted before the High Court of Panadura for murder of one Sriyani Nanayakkara on 25th January 2007, an offence punishable under section 296 of the Penal Code.

The Accused- Appellant elected to be tried his case before a Jury and the said trial was commenced in the High Court of Panadura on 29th June 2011. The Jury has found the Accused guilty by a 5.2 verdict and sentenced to death. Being dissatisfied by the above verdict the accused had preferred this appeal before this court.

Prosecution relied on the evidence of several witnesses including one eye witness. Accused –Appellant mainly challenged the evidence of the eye witness who was not present before the High Court Trial, but his deposition was led under the provisions of section 33 of the Evidence Ordinance.

Whilst challenging the above conviction and sentence, Accused- Appellant raised six Grounds of Appeal during the Argument before us.

1. The Learned Trial Judge misdirected the jury by stating that the Medical Evidence corroborated witness Isuru
2. The Learned Trial Judge has failed to warn the jury after clearly inadmissible evidence had been led
3. The Learned Trial Judge had told the jury that witnesses had seen Guruge dressed in a white trouser leaving the scene in a bicycle when there was n o such evidence, and without drawing the jury to the infirmities in the evidence of the witnesses who say so
4. The Learned Trial Judge failed to direct the jury on the legal position regarding circumstantial evidence, when there is a strong possibility that Isuru's evidence could have been rejected and the attention of the jury would have been focused on the items belonging to the accused found at the scene
5. The Learned Trial Judge failed to place before the jury the factual positions that are in favour of the defence
6. The Learned Trial Judge failed to give proper direction to the jury on the alibi taken by the defence

In addition to the above grounds of appeal, another ground to the effect, that the Accused- Appellant was deprived of knowing the verdict of the jury when they were first ready to deliver their verdict, was raised by the Accused- Appellant in the written submissions.

In support of this additional ground, the Learned President's Counsel for the Accused- Appellant submitted that the failure to ask the jury as to how they were divided, and instead directing the jury to reconsider their verdict had deprived the accused of knowing the verdict of the jury when they were first ready to deliver their verdict.

Section 234 sub- sections (1) and (2) of the Code of Criminal Procedure Act 15 of 1979 read as follows;

234 (1).When the jury are ready to give their verdict and are all present the Registrar shall ask the foreman if they are unanimous.

(2). If the jury is not unanimous the Judge may require them to retire for further consideration.

By looking at the above provision of law we see no reason to hold that the Accused –Appellant was deprived of knowing the division among the members of the jury, since the provisions of the Code of Criminal Procedure Act are very clear on it and the Learned Trial Judge had correctly acted on the provisions of section 234 (1) and (2) of the said Act.

The deceased Sriyani Nanayakkara was married to one Prasanna Jayalath and was living in Kiriwaththuduwa with her husband and two children including Nuwanthi Malsha who was only 9 years at that time. The Accused Abhaya Sri Guruge was her immediate neighbor but was living Homagama during this period, was a frequent visitor to this area. According to the prosecution, in addition to the immediate family members, a nephew by the name of Isuru Eranga was also staying in the house of the deceased at that time.

Prosecution in this case has mainly relied on the only eye witness Isuru Eranga's Deposition at the N.S. Inquiry which was led at the High Court Trial under section 33 of the Evidence Ordinance since witness Isuru Eranga was dead at that time due to ill health.

Evidence of the following witnesses were led at the High Court Trial in addition to the deposition of witness Isuru Eranga.

Dr. Kumarasiri Mahesen Mulleriyawa

Liyana Mohottige Nuwanthi Malsha

Liyana Mohottige Vishaka Chandani

Rajawasalage Charlet Nona

Liyana Mohottige Prasanna Jayalath

Morawakage Sarath Morawaka

Inspector of Police Nansdasena Kiriella and few other Police Officers who assisted the investigation.

According to the prosecution version the deceased Sriyani was at home with her younger daughter on that day and around 5.30 pm when the daughter was in the both room, she heard an unusual sound similar to a dog howling from the front side of her house. When she came out from her house to see what it was, she saw her mother decapitated, where her head and the trunk fallen separately. Witness Malsha who was only 9 years at that time was immediately taken to her aunt's house by the neighbors who gathered there and thereafter the matter was reported to police by a neighbor.

According to the deposition of the main eye witness Isuru Eranga which was produced under section 33 of the Evidence Ordinance,

On the day of the incident around 5.30 pm while he was returning after work, he heard cries of distress and saw, the deceased running towards him chased by the Accused who was armed with a Katty. The accused had then dealt a blow with the katty and he had seen the head of the deceased sever and fallen down. He had been about 40 meters away when the attack took place. He says that, he then came to the scene and saw the headless body of the deceased.

The above evidence of Isuru Eranga was strongly challenged by the Accused-Appellant on several grounds. The time taken by Isuru to make the statement to police was one of the main grounds raised on behalf of the Accused-Appellant. Isuru has taken 18 days to make his statement to police and only explanation by him for his delay was that he was in a disturbed position after his aunt's tragic death.

However, the parties admit that when the Acting Magistrate visited the scene of crime on the following day for the inquest no one came forward as an eye witness to give evidence.

Isuru Eranga's evidence was further challenged based on the Medical Evidence in this case. Even though the Senior State Counsel submitted that according to the evidence of the Doctor, the deceased could have sustained the fatal blow from behind, the Accused-Appellant challenge the above on the ground that it is not possible to inflict such injury by the accused who chased the deceased from her behind, if Isuru Eranga to be believed.

According to the Medical Evidence three injuries were found on the body of the deceased. Injury No.1 was an abrasion behind the left shoulder, which may have caused due a fall. The second was a cut injury on the back of the chest which has not led up to the bones. This injury had been caused as a result of an attack from behind.

The third and the fatal injury is the one which decapitated the deceased. According to the doctor, the weapon has entered the neck from the front (cutting the throat first) and the Learned President's Counsel challenged the evidence of Isuru Eranga since it conflicts with his evidence.

However as pointed out by the Learned Senior State Counsel, Judicial Medical Officer under cross examination, had given an opinion that the deceased could have received the fatal blow while she is being chased by the person who dealt the blow from behind, if she had turned her face backward for some reason.

Injury No.2 the cut injury found on the back of the chest strengthens the evidence of Isuru Eranga.

The husband of the deceased Prasanna Jayalath and his sister Visaka have said in their evidence, that Isuru told them that night, that he saw Guruge attacking the deceased with the Katty. However both these witnesses in their statements to police have failed to say this and omissions had been marked with their police statements.

Whilst highlighting this material, the Learned Counsel for the Accused-Appellant challenged the evidence of the only eye witness Isuru Eranga and requested the court to reject his evidence.

Learned Senior State Counsel whilst replying the challenges made by the Accused-Appellant did not rest his case mainly on the evidence of Isuru Eranga. Learned Senior State Counsel brought to the notice of this court the evidence of 9 years old daughter of the deceased Nuwanthi Malsha and submitted the importance of her evidence in this case.

According to the evidence of Nuwanthi Malsha, on the day in question around 5.30 pm when she was inside the bath room of her house, she heard an unusual sound, similar to a dog howling, and when she went outside the house to see what it was, she saw her mother decapitated where her head and trunk fallen separately.

The above position is corroborated by the evidence of the Judicial Medical Officer; when he said that the weapon has entered the neck from the front and as a result of this injury an unusual sound could emanate, similar to one of an animal.

When the witness was questioned about her neighborhood, she said that the Accused (she referred as Guruge Uncle) was living in the house behind to her house.

When she was asked whether the Accused was there on that day she confirmed his presence and said that she saw him coming in the afternoon. (Page 199) When she was questioned as to, whether he was there during that time, she had given the following answers.

Page 200;

ප්‍ර: තමන් කිවුවා මෙම විත්තිකරු සිද්ධිය වෙච්ච දවසේ විත්තිකරයාගේ ගෙදර සිටියැයි කියලා?

උ: ඔව්.

ප්‍ර: මේ සිද්ධිය වෙනකොට විත්තිකරු, විත්තිකාරයගේ ගෙදර හිටියද නැද්ද කියන්න තමන් දන්නවද?

උ: හිටියා.

ප්‍ර: නුවන්ති කොහොමද කියන්නේ මේ සිද්ධිය වෙනකොට විත්තිකරු, විත්තිකාරයාගේ ගෙදර සිටියැයි කියලා?

උ: බැණ බැණ හිටියේ.

ප්‍ර: නුවන්ති දැක්කද මෙම විත්තිකරු , ඔය සිද්ධිය වෙනකොට විත්තිකරුගේ ගෙදර සිටි බව?

උ: ගෙදර සිටියද දන්නේ නැහැ හවස හිටියා.

ප්‍ර: හවස කියන්නේ කීයට විතරද?

උ: හතර හමාරට විතර.

ප්‍ර: කොහොමද තමන් කියන්නේ මෙම විත්තිකරු හතරහමාරට විතර විත්තිකරුගේ ගෙදර සිටියයි කියලා?

උ: වත්ත සුද්ද කර කර හිටියා.

ප්‍ර: නුවන්ති දැක්කද මෙම විත්තිකරු වත්ත සුද්ද කර කර ඉන්නවා?

උ: ඔව්.

The position taken up by the Learned Senior State Counsel was that the above evidence of Nuwanthi Malsha clearly attacks the position taken up by the accused where he took up the defence of alibi saying that he was in Ingiriya on that day. The Learned Counsel further submitted that except for two omissions marked, there were no contradictions marked in the evidence of witness Malsha.

Even with regard to the above two omissions Learned Senior State Counsel submitted that, in fact there was no omissions as such when compared to the statement given to police by Malsha and move the court to peruse the Police Extracts and Inquest proceeding and satisfy the court whether there is an omission or not.

The two omissions referred to above are appeared in the proceeding in page **230** and **231** as follows;

ප්‍ර: ඒ කට උත්තරයේ ඔයා කිව්වද මේ උසවියේ කිව්වා වගේ ගුරුගේ මාමා එයාගේ ගෙදර හරි වත්තේ හරි ඉන්නවා දැක්කා කියලා?

උ: මතක නැහැ.

ප්‍ර: මම කියන්නේ එසේ එක වචනයක් වත් කිව්වේ නැහැ කියලා ගුරුගේ මාමා ගෙදර හෝ වත්තේ සිටියා කියා වචනයක්වත් කියා නැහැ කියලා

එය අධිකරණයේ අවධානයට යොමු කරනවා

(Page 230)

ප්‍ර: ඊලඟට නුවන්ති රජයේ අධිනීතීඥ මහතාගේ ප්‍රශ්නවලට උත්තර දෙනකොට කිවුවා, උතුමනන්ගේ ප්‍රශ්නවලට උත්තර දුන්නා, ගුරුගේ අන්කල් බැන බැන හිටියා කියලා

උ: ඔව්

ප්‍ර: දැන් නුවන්ති පොලිසියට දෙන ලද කට උත්තරයේ කිව්වාද ගුරුගේ මාමා බැන බැන හිටියා කියලා?

උ: මතක නැහැ

ප්‍ර: මම යෝජනා කරනවා එසේ බැන බැන හිටියා කියලා එක වචනයක්වත් පොලිසියට කියලා නැහැ කියලා ගුරුගේ මාමා බැන බැන සිටියා යන්න පොලිසියට දෙන ලද කට උත්තරයේ පවසා නැති බව ඌණතාවයක් වශයෙන් අධිකරණයේ අවධානයට යොමු කරනවා.

(Page 231)

Section 110(4) of the Code of Criminal Procedure Act [Section 122(3) of the earlier code] deals with the power of a Criminal Court to send for the statement recorded in a case under inquiry or trial in such court and to use such statements or information "not as evidence in the case, but to aid it in such inquiry or trial"

In **Keerthi Bandara V. Attorney General 2002 (4) Sri LR at 251** the use of the above provision was discussed as followed, "thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is trial judge who should peruse the Information Book and decided on that issue. When the matter again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not...."

In the case of **Banda and Others V. Attorney General 1999 (3) Sri LR 168** the same issue was discussed as follows. "The right to mark omissions and proof of omissions is related to the rights of the Judge to use the Information Book to ensure that the interest of justice is satisfied."

We find that, it is the duty of the trial judge to go through the Information Book and to satisfy whether there is an omission or not, but the contention of the Learned Senior State Counsel was that the Learned

Trial Judge had failed to so when allowing the said omission to be marked but this court is equally empowered to satisfy whether there is an omission or not by going through the Information Book.

Nuwanthi Malsha in her police statement made during the same night had said that she saw the accused going toward his house in a Motor Cycle.

This court is not going to consider the above as substantial evidence in the case, but it will certainly assist this court to evaluate the above omission.

According to the statement made by Malsha at 19.40 hours on 25.01.2007 she had referred to the presence of the Accused in the area in two occasions as follows;

"එතකොට මට ඇහුනා අපේ ගෙට පිටු පස්සෙ ගෙදර ඉන්න ගුරුගේ මාමා එයාගේ ගෙදරට වෙලා හිනාවෙවී මොනවද ටෙලිෆෝන් එකෙන් කිය කියා සිටියා ඇහුනා"

" හවස හතරට විතර මම මිදුලේ ඉන්න කොට අපේ ගෙදර ඉස්සරහ පාරෙන් මෝටර් සයිකලයෙන් එයාගේ ගෙදරට යනවා දැක්කා. එතකොට ගුරුගේ මාමා මොනවක් කියනවා ඇහුනේ නැනැ."

The fact that witness Malsha in her statement made to the police on the same night had referred to the presence of the accused in the area in the evening hours and when this position is compared with the omissions marked at the trial, I agree with the Learned Senior State Counsel's contention that, there is no basis to conclude that there is an omission with regard to the presence of the accused in Kiriwaththuduwa in the evening of 25th January 2007.

The Learned Senior State Counsel brought to the notice of court the importance of the recovery made by the police from the scene of crime. Learned President's Counsel appeared for the Accused-Appellant challenged the above evidence as an introduction by police. According to the evidence of Inspector Nandasena Kiriella, he visited the scene of Crime around 6.50 pm on that day and made his observations. He had observed the deceased trunk and head separately, a Katty 65 feet away from the body and a broken brief case and its handle separately.

According to him he did not examined the brief case on that day but examined it after the Magistrate's Inquiry on the following day. He has recovered number of Documents from the said brief case. Among the recovered document there were six bank pass books in the names of A.S. Guruge or Abhya Sri Guruge. Three banks ATM cards, including one NSB- Visa ATM card, (P-19), one BOC Visa ATM card belonging to A. Sri Guruge (P-20) and one Sampath Set Card with a signature of Abhaya Sri Guruge (P-21).

As pointed out by me earlier, Learned President's Counsel whilst challenging the above recovery as an introduction, submitted that the same witness, under cross examination admitted that the house belonging to the accused was attacked by unknown crowd during the same night and the "so called recoveries "are result of the said attack. The fact that the recoveries were not produced until the following day was highlighted by the Learned Counsel.

In replying the said argument Learned Senior State Counsel submitted that the 3 ATM cards and 6 pass books found at the scene along with the brief case is the best evidence available to establish the presence of the Accused at the scene of crime. He further submitted that ATM cards are generally carried by its owner and specially if he is away from the house for a longer period, as accused explained in his dock statement, it can't be left at home but would have been carried by him.

Accused-Appellant in his lengthy dock statement had explained the events took place on the day in question and thereafter, but has failed to explain the presence of the said ATM Cards and Bank Pass Book at the Scene of Crime inside a brief case. In our view this aspect too had to consider by the jury.

Rather than relying solely on the eye witness's evidence, Learned Senior State Counsel's contention was to establish before us a strong primafacia case against the Accused-Appellant through circumstantial evidence. In support of his contention he submitted before us the evidence of Nuwanthi Malsha to establish that the Accused-Appellant was in his house on that evening and the recovery of personal items belonging to the accused at the scene of crime which establishes the fact that, while he was fleeing from

the area, he had a fall near the place where the body was lying, as stated by the eye witness Isuru Eranga.

Witness Rajawasalage Charlet Nona who too had come to the scene of crime few minutes after the incident, speaks of a person falling near to the place where the body was lying but failed to identify the Accused as the person who had a fall.

Whilst attacking certain decisions of the trial judge to disallow questions put to witnesses and failure by the trial judge to place Medical Evidence in its proper perspective Learned Senior State Counsel submitted that the independent material available in this case will strengthen the version given by the single eye witness Isuru Eranga and therefore submitted the court that the material available, warrants the court to act under proviso to section 334(1) of the code of Criminal Procedure Act No. 15 of 1979.

In the case of **Mannar Mannan Vs, The Republic of Sri Lanka 1990(1) Sri LR 280** G.P.S. de Silva J whilst discussing the provisions of 334(1) and 334(2) concluded that "while the general directions in the summing up on the burden of proof and the standard of the proof were adequate, as rightly submitted by Mr. Abeysuriya, there was a total failure to direct the jury on the impact of the dock statement on the evidence led on behalf of the prosecution. Nevertheless, I am of the view that a reasonable jury properly directed would inevitably and without doubt have returned the same verdict.

However when considering the fact that the failure by the trial judge to place the circumstantial evidence in its proper perspective with other misdirection's submitted by the Learned President's Counsel for the Accused –Appellant, specially 2nd, 5th and 6th grounds of appeal, I am of the view that this is not a fit case for this court to Act under proviso to section 334(1) of the Code of Criminal Procedure Act No 15 of 1979.

Section 334(2) of the said Act reads as follows:

334(2); subject to the special provisions of this Code the Court of Appeal shall, if it allows an appeal

against conviction, quash the conviction and direct a judgment of acquittal to be entered:

provided that the Court of Appeal may order a new trial if it is of opinion that there was evidenced before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed.

Trial Judge in his summing up to the jury has failed to explain the jury the importance of the circumstantial evidence, and also to place the items of circumstantial evidence in its proper perspective. The above non direction by the Learned Trial Judge in our view goes to the roots of the case. Therefore I am of the view that this is a fit and proper case to act under the proviso to section 334 (2) of the Code of Criminal Procedure Act No 15 of 1979.

However the Learned President's Counsel submitted that it is 8 years since the date of offence and sending the case for re- trial at this stage would be extremely unreasonable by the Accused –Appellant.

This court is mindful of the evidence available in this case and of the view that the said material should be placed before a fresh Jury in its proper perspective in order to meet Justice in this case. Therefore I decided to order a fresh trial in this case. Appeal is allowed, conviction and sentence set aside. Re-trial is order.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL

Re-trial ordered.