

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

In the matter of an Appeal against
an order of the High Court under
Sec. 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

Sudu Hakuruge Upali Premathilaka,
Bogambara Prison.

Accused-Appellant

C. A. No : 71/2012

H. C. Kegalle No : 3075/11

V.

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

Respondent

BEFORE : **H. N. J. Perera, J. &**
K. K. Wickremasinghe, J.

COUNSEL : Dharmasiri Karunaratne for the Accused-Appellant.
Kapila Waidyaratne A.S.G for the Attorney General.

ARGUED ON : 19th June 2015

DECIDED ON : 04th September 2015

K. K. WICKREMASINGHE, J.

The Accused-Appellant, in this case was indicted in the High Court of Kegalle for committing the murder of one Sisira Kumara Seneviratne on or about 28.02.2010, which is an offence punishable under the s.296 of the Penal Code.

On 07.06.2012 the indictment was read to the appellant and there he had pleaded not guilty.

After the conclusion of the case of the prosecution, on 19.06.2012 the learned Trial Judge had convicted the Accused-Appellant for committing murder of the deceased and imposed the death sentence.

This appeal lies against the aforesaid conviction and the sentence.

Grounds of Appeal:

The evidence of the main witness for the prosecution is not credible. Therefore, the prosecution had not established the case beyond reasonable doubt.

The prosecution had not produced the mobile phone of the accused appellant referred to in the evidence. Therefore, it creates reasonable doubt in the prosecution case.

According to the prosecution, the incident had taken place as follows:

Sisira Kumara Seneviratne (the deceased) was employed as a private bus driver in Harigala. Dammika Priyangani Thilakaratne had testified that the deceased had gone to her house (Witness No.1) about two weeks prior to his death around 9pm. (pg. 17 of the brief) Dammika Priyangani's husband was employed abroad at that time. (pg. 16 of the brief) The deceased stayed in Dammika Priyangani's house for about half an hour on this occasion. While the deceased was there, Upali Premathilaka (the Accused-Appellant herein after referred to as the 'Appellant') who was Dammika Priyangani's husband's uncle, came to her house and scolded them. Shortly after this, the deceased left her house. Then the Appellant advised the witness not to bring the deceased into her home. The deceased had come to Dammika Priyangani's house again on the 27.09.2010 around 9pm and she had thereafter engaged in a conversation with him which had lasted for about 10 to 15 minutes. Whilst she was engaged in the conversation she heard a sound of the buttons of a mobile phone being pressed. Then she had peeped outside of the window and she had seen the appellant seated outside wearing a black cap. However in her statement to the police, she had not mentioned that she recognised the appellant. (pg. 28 of the brief) Dammika Priyangani testified that when she saw someone outside wearing a black cap, she rang the appellant's phone and that his phone rang and thereby she recognised him. (Pg. 30 of the brief) The appellant had threatened the witness to open the door and there after continued to remain there till around 4am. (pg. 20 of the brief) During that time the deceased was in Dammika Priyangani's house. There after the appellant had demanded her to open the door, continuously over a period of 5 to 10 minutes. She had identified the appellant from his voice as well. The tone of the appellant made her to feel that he would do some

harm. Therefore she had advised the deceased to make his exit from the kitchen door. Shortly after the deceased left the house through the back door while Dammika Priyangani opened the front door for the Appellant. Once the Appellant came in, he searched for the deceased in the whole house to check whether the deceased was still there. After doing so, the appellant left after about 10 to 15 minutes. This was at around 4am. Thereafter the appellant had found his way out from the rear door.

After the Appellant left, Dammika Priyangani had gone to sleep with her two children having closed both doors. She had managed to sleep only for about half an hour until she had woken up upon hearing the sound of a thud which had come from the direction of the kitchen door. (pg. 23 of the brief) She had reckoned the said sound heard to have been that of the sound of something being released to the ground. The kitchen door was remained closed at that point of time. She had stepped outside to check what it was and she had seen the deceased lying on the floor and a large amount of blood near grinding stone. She had also seen the appellant standing near the deceased. After seeing her, the appellant had threatened her to remain inside the house, keeping her mouth shut about what she had seen. He had further threatened her that he would do the same thing which he had done to the deceased to her as well if she narrates what she had seen to anyone else.

There after she had seen the appellant walking away carrying the body of the deceased with him towards the cemetery. (pg. 24 of the brief) She had remained inside the house and had refrained from informing anyone out of fear. Nevertheless, she had later proceeded to the Pindeniya police to make statement of what she had seen.

Investigating Officer IP Athawuda in his evidence had stated that the Pindeniya Police station had received the first information around 8.30 am on the 28th of February 2010.

The police had conducted investigations .Investigating officers had visited the scene of crime and discovered blood stains on the rear side of the wall outside the house and also, on the road leading towards the cemetery. (pg. 25 of the brief)

Upon visiting the scene and discovering the body in a rubber estate, the police officers also identified blood stains along both sides of the road where the body was discovered. (pg. 74 of the brief) When the officers continued further along the road, they arrived at a junction where they discovered blood stains. They also discovered blood stains on the road to the left and right of the junction. Further along the road, they discovered house where they discovered bloodstains on two Mahogany trees, on the walls of the house and on the grinding stone in the kitchen. Sand was discovered behind the house, and blood stains were discovered under the sand. Observations of the investigating officer clearly establishes that the body of the deceased had been moved from the place where the witness Dammika Priyangani had first seen the deceased lying and the appellant standing nearby outside the kitchen door next to the grinding stone.

Dammika Priyangani identified the appellant as the one who carried the body of the deceased. The name of the appellant and his involvement had been revealed subsequently to the recording of the statement of the witness Dammika Priyangani IP Athawuuda had accordingly gone in search of the appellant to his house on the 28th night and the appellant was not to be found at home.

Amali Udayangani Jayasinghe (Witness No. 7) who was the niece of Dammika Priyangani testified that Dammika Priyangani had asked her to keep two phones about a week prior to the day the witness (Amali Jayasinghe) gave her statement to the police. She handed over these phones to the police.

In the testimony of Samaweeraarachchilage Deepika Priyadarshani (the deceased's wife: Witness No.2), she identified the clothes of the deceased as those he was wearing the last time she saw him. She also identified a blood stain on those clothes and stated that it was not present on his clothes at the time that the deceased left the house. The witness also identified a 'Nokia' phone as the phone that was owned by the deceased.

The medical evidence of the judicial Medical Officer, Dr. Sunil Piyasena Angappulihewage (Witness No.11) revealed that there had been nine injuries on the deceased. Out of these nine injuries most of the injuries were caused by a blunt

weapon, a large stone. (pg.'s 61 and 62 of the brief) The second injury was identified as a necessary fatal. (pg. 63 of the brief)

The Appellant in his gave a dock statement had completely denied the allegation levelled against him, and stated that he did not know anything and that he was residing in his wife's house.

The fact that the prosecution has failed to lead evidence pertaining to the mobile phone and its used which prove any connection to the appellant, in no way cast a doubt in the prosecution case, since there is ample evidence of the eye witness and the strong circumstantial cogent evidence which I have already mentioned above.

Though the counsel for the appellant mentioned that the evidence of the main witness was not credible, her evidence corroborate with the findings of the investigators and the medical evidence. The available unchallenged direct and circumstantial evidence of the prosecution amply demonstrate the culpability of the appellant for committing the alleged offence of murder.

In the case of ***Sumanasena Vs. Attorney General 1999 (3) SLR 137*** it was held that:

- 1. Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law.*
- 2. Just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness.*
- 3. Though the prosecution is not required to establish a motive once a cogent and intelligible motive has been established that fact considerably advances and strengthens the prosecution case.*
- 4. When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to*

offer an explanation of the highly incriminating circumstances established against him.

Sumanasena's case, it was discussed that "In our law of evidence the salutary principle is enunciated that evidence must not be counted, but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law. Section 134 of the Evidence Ordinance sets out that 'no particular number of witnesses shall in any case be required for the proof of any fact'. In an Indian case the conviction for murder was affirmed on the mere circumstantial evidence given by a solitary witness and a pointed reference was made to the principle which we have adumbrated above vide **Mulluwa v. The State of Madhya Pradesh**. Testimony must always be weighed and not counted and these principles have been followed by Justice G. P. A. De Silva in **Walimunige John v. State; King v. N. A, Fernando**."

Therefore in the present case the learned Trial Judge could have acted on the evidence of Witness No.1, since the learned Trial Judge had the benefit of observing the demeanour and deportment of Witness No.1, Dammika Priyangani Nilakaratne and her testimonial trustworthiness and credibility. It seems that the Defence Counsel was unable to make a dent on the credibility of Witness No.1 and establish to court that the witness ought not to be believed. Therefore strong circumstantial, cogent evidence has been established against the accused. In such a situation the accused was required in law to offer an explanation when highly incriminating circumstances were established against him.

In this present case the accused had merely given a dock statement denying the offence and claimed that he did not know anything. The evidence given by Witness No.1 was subject to severe cross examination and it was given under oath, whereas, the statement of the accused-appellant, denying the offence was given without an oath. In the case of **The Queen Vs. Kularatne and two others 1967 (71) SLR 529**, it was held that "when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony."

Although the Appellant's counsel tries to discredit the testimony of the prosecution witness, the evidence in this case has been carefully scrutinised by the Trial Judge herself who had the full advantage of observing all the witnesses in this case before her. In the Supreme Court case of ***Alwis Vs. Piyasena Fernando 1993 (1) SLLR 119 at 122***, Hon. G.P.S De Silva CJ stated as follows: *"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal."* Thus the acceptance of evidence by the Trial Judge cannot be easily faulted.

When considering the judgement of the learned High Court Judge it is very clear that the learned High Court Judge had very correctly evaluated the evidence and arrived at the decision.

Therefore I see no reason to interfere with the findings of the learned High Court Judge. In these circumstances I affirm the conviction and the sentence imposed by the learned High Court Judge of the High Court of Kegalle.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA J.

I agree

JUDGE OF THE COURT OF APPEAL

CASES REFERED TO:

- 1. Sumanasena Vs. Attorney General 1999 (3) SLR 137**
- 2. The Queen Vs. Kularatne and Two Others 1967 (71) NLR 529**
- 3. Alwis Vs. Piyasena Fernando 1993 (1) SLLR 119**
- 4. Mulluwa v. The State of Madhya Pradesh 1976 AIR SC 989**
- 5. Walimunige John v. State (76) NLR 488**
- 6. King v. N. A, Fernando (46) NLR 254**