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

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Mirissa Galappaththige Thushan Kumara

C.A.Case No:-122/2014

H.C.Monargala Case No:- 199/2008

V.

Hon Attorney General

Attorney General's Department,

Colombo 12.

Before:- H.N.J.Perera, J &

K.K.Wickremasinghe, J.

Counsel:-Neranjan Jayasinghe for the Accused-Appellant

H.I.Peiris S.S.C for the Respondent

Argued On:-04.06.2015/02.07.2015

Written Submissions:-15.07.2015

Decided On:-10.09.2015

H.N.J.Perera, J.

The accused-appellant with three others were indicted in the High Court of Monaragala for committing the murder of one Edirimannage Chandramali on 27 06.2000 punishable under section 296 read with section 32 of the Penal Code. The third accused was dead at the time of the trial. After trial without Jury the Learned High Court Judge acquitted the 1st and the 3rd accused and convicted the accused-appellant and imposed the death sentence on 02.09.2014. Being aggrieved of the conviction and sentence, the accused-appellant had preferred this appeal to this court.

The prosecution case rests on the evidence of D.Hemapala, the husband of the deceased and D. Mahendra Maduranga the son of the deceased and section 27 recovery.

According to prosecution witnesses the incident had taken place on 27.06.2000at around 11p.m.According to witness Hemapala a bottle lamp was burning inside the house. He had stated that he heard some sounds around his house and he was asked to open the door saying that they are from police. Thereafter they broke open the door and came inside the house. According to witness Hemapala three people came inside the house wearing camouflage uniforms similar to Army uniforms. According to him one person came in and kicked him and he fell down and further states that he saw something about 1 ½ feet long like a pistol in the hand of one person and it was aimed at him. He states that the deceased came near him and they held her from her hair and pushed her towards the door. Then he says that the deceased fell near the door step

and he heard the deceased uttering "Kumara don't kill us" and at that time he heard a sound of a gun and the people who came an away.

Mahendra Maduranga the son of the deceased was not listed as a witness in the indictment initially but was added as a witness after the conclusion of the evidence of the doctor.

According to Maduranga the son of the deceased he was only 14 years at the time of the incident and says that he did not see any weapon in the hands of anyone who came into the house on that day. He too testified that the deceased told "don't kill Kumara".

In King V.Asrivadam Nadar 51 N.L.R 322 it was held that:-

When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge or the Jury as the case may be must bear in mind following weaknesses.

(a)The statement of the deceased person was not made under oath.

(2)The statement of the deceased person has not been tested by cross examination.

In the case of Queen V. Anthonypillai 68 C.L.W 57 it was held that the failure on the part of the learned trial Judge to caution the Jury as to the risk of acting upon a dying declaration, being the statement of a person who is not a witness at the trial and as to the need to consider with special care the question whether the statement could be accepted as true and accurate had resulted in a miscarriage of justice.

It is important to note that among the four accused three accused get the name of Kumara in their names. Both witnesses, the husband and the son of the deceased had clearly stated that they were not able to identify the persons who came into their house on that day as they were covering their faces with caps. Bur but the witness Maduranga had

proceeded to identify the second accused as a person who had come into house that night from the shape of his body and by the name Kumara. According to him his mother only referred to the 2nd accused as Kumara. According to his evidence it is clear that he knew at the time of the incident one of the persons came on that day was Kumara and that is the 2nd accused. But the witness had clearly admitted in cross examination that he had not mentioned about the 2nd accused to the police. It was the contention of the Counsel for the accused-appellant that this clearly indicates that the witness Maduranga did not know at the time he made the statement to the police that it was the 2nd accused-appellant who came in to their residence that night.

The witness Hemapala had stated that there are two persons in the name of Kumara-Sumith Kumara and Thushan Kumara. Therefore he cannot say to whom the deceased referred to as Kumara. He had categorically stated that he was not able to identify any of the persons who came in to their house that night as they had covered their faces with caps. Therefore he was not aware that any person by the name of Kumara had come into their house that night. But the deceased had mentioned the name Kumara. In my opinion the learned trial Judge has failed to consider the weaknesses of the dying declaration made by the deceased.

Further according to the evidence led in this case the deceased prior to the incident had made a complaint to police regarding a theft of a cow. According to witness Hemapala the said complaint had been made against the 2nd accused-appellant Thushara Kumara. But according to the police evidence on the day of the incident in the morning the deceased had made a complaint against the 3rd accused–Sumith Kumara. This clearly shows that there was in fact a doubt as to which Kumara the deceased had referred to in her dying declaration.

The police evidence also confirms the fact that the witness Hemapala had made two statement s to the police on the same day.

It is not clear whether the learned trial Judge had directed his mind to the inherent weaknesses in the dying declaration and the risk of acting upon the said dying declaration. The prosecution must prove beyond reasonable doubt that the deceased referred to the 2nd accused appellant when she said 'Kumara'.

The witness Hemapala's evidence is that at the time he went to the police station on 09.07.200 all the accused were at the police station and he in fact stated that the 3rd and the 4th accused made a confessionary statement to him to the effect that they killed the deceased. He had not stated that the 2nd accused-appellant had made such a statement to him. Therefore as submitted by the Counsel for the accused-appellant there is always the possibility of the deceased referring to any other Kumara other than the 2nd accused-appellant in this case. Further the fact that the witness had seen all three accused at the police station on 09.07.2000 is contradicted by the police evidence that the 2nd accused-appellant was taken into custody on 10.07.2000 at 15.30.

Therefore it was contended by the Counsel for the accused-appellant that it is unsafe to rely and act on the I.B notes and the evidence of police.

The gun which had been recovered was 3 ½ feet. The gun was not shown to the witnesses. Only witness Hemapala states that he saw a weapon like a pistol about 1 ½ feet long. The said weapon had also not shown to the doctor and the doctor had said without seeing the weapon he cannot express any opinion on that matter. According to the evidence there had been two T shirts. It is not clear as to which T shirt was recovered on the statement made by the accused-appellant. It was further submitted that there was a serious doubt as to the T shirt which was recovered as a result of section 27 recovery.

It is well settled law that when the conviction is solely based on circumstantial evidence prosecution must prove that no one else but the accused committed the offence.

In Don Sunny V. Attorney General 1998 (2) S.L.R 1, it was held that the charges sought to be proved by circumstantial evidence the items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

In the case of The Queen V.Kularatne 71 N.L.R 534, the Court of Criminal Appeal quoted with approval the dictum of Whitemeyer J. in Rex V. Blom as follows:-

Two cardinal rules of logic governs the use of circumstantial evidence in the criminal trial:-

(1)The inference sought to be drawn must be consistent with all the approved facts. If it does not, then the inference cannot be drawn.

(2)The proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inferences sought to be drawn is correct."

There is no direct evidence as to the identity of the accused in this case. The item of evidence relied by the prosecution is purely circumstantial. On a perusal of the judgment of the learned trial Judge it is very clear that the trial judge had not considered all the material evidence that had been led before him at the trial by both parties.

Consideration of circumstantial evidence has been vividly described by Pollock C.B in Regina V.Exall [1866] 4 F&F 922 at page , cited in King V. Guneratne [1946] 47 N.L.R 145 at page 149 in the following words:-

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight; but three strands together may be quire of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."

The items of circumstantial evidence referred to earlier in this case in my opinion is insufficient to sustain the weight of the rope. Further totality of the evidence led in this case does not lead to an inescapable

And irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased. The prosecution has failed to prove the case beyond reasonable doubt and rebut the presumption of innocence.

For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this judgment, I set aside the conviction and sentence of the Learned High Court Judge of Monaragala dated 02.09.2014 and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe ,J.

I agree.

JUDGE OF THE COURT OF APPEAL