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.

Rasnegge Jayarathna,
Bogambara Prison,
Kandy.

Accused-Appellant

C. A. No. : 147/2012

H. C. Kurunegala Case No. : H. C. 207/96

V.

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

Respondent

BEFORE : H. N. J. Perera, J. &
K. K. Wickramasinghe, J.

COUNSEL	:	N. M. S. Fonseka with P. K. Perera for the Accused-Appellant. Chethiya Gunasekara, DSG for the Attorney General.
ARGUED ON	:	25th of March 2015
WRITTEN SUBMITIONS	:	29th of May 2015/ 10th Of June 2015
DECIDED ON	:	06th of October 2015

K. K. WICKRAMASINGHE, J.

The accused-appellant (herein after referred to as the 'appellant'), Rasnegge Jayarathna, who was at all relevant times, a police officer who served under the P.S.D. (Presidential Security Division), was indicted in the High Court of Kurunegala with having caused the death of Mohomed Aliyar Mohomed Munaz at Wewagedara on or about the 07th of March 1991 and that he thereby committed the offence of murder punishable under Section 296 of the Penal Code.

After service of the indictment to the appellant on 24.01.1997, the appellant had opted for a non-jury trial. On 08.10.1997 the appellant was not present in Courts. Therefore summons were issued to both appellant and the surety. The Counsel for the appellant had informed Court that he will not represent the appellant, therefore the appellant had retained another Counsel on the same day. On 17.06.1998 the indictment was read to the appellant and thereafter he had pleaded not guilty. Then again the Counsel for the appellant had informed Court that he has not been advised by the appellant to represent

him and therefore he will not represent the appellant anymore. On the same day the appellant had retained another Counsel on his behalf.

While the trial was going on, the accused had stopped appearing in Courts since 30.05.2000. The appellant was present before court only up to the date that JMO gave evidence. Thereafter the appellant had absconded. On 24.05.2001 surety of the appellant had informed Court that the appellant had gone abroad and had produced documents to prove that in fact the appellant was staying abroad. Therefore the learned Trial Judge had ordered to hear the case under sec. 241 of the Criminal Procedure Code. On the same day the Counsel appearing for the Appellant made an application seeking permission from Court to resign from the case and thereafter the application was allowed. On 21.08.2001 the evidence had been led to proceed the trial in absentia against the appellant under sec. 241 of the Criminal Procedure Code. After the inquiry, the learned Trial Judge was satisfied that the appellant had left the Island and therefore on 03.12.2001 he had made an order to proceed the trial in absentia.

At the trial the prosecution had led evidence of several witnesses (PW 1 to PW 16) to prove the prosecution case. However, there were no eye witnesses. The case was based only on circumstantial evidence.

After the conclusion of the case for the prosecution, on 28.02.2003, the learned Trial Judge had convicted the appellant for committing murder of the deceased. Thereafter on 12.06.2012 the appellant was arrested on open warrant and produced before the learned High Court Judge of Kurunegala and remanded. Then on 13.06.2012 the learned Trial Judge imposed the death penalty on the appellant.

This appeal lies against the aforesaid conviction and the sentence.

According to the learned Counsel for the appellant, the grounds for appeal are as follows;

1) The prosecution has not proved the charge beyond reasonable doubt and they have failed to prove each item of the chain beyond reasonable doubt. Furthermore according to the evidence of the case the only inference that can be drawn is that the accused is not guilty.

a) JMO Weerasinghe Rathnayake, who conducted the post-mortem of the deceased, had noted five injuries on the body of the deceased. According to him those five injuries could be caused through a firearm.
b) Mohommed Shariff Farnana (the wife of the deceased) clearly stated in her evidence that at the time her husband went out in the night just before the incident she was not aware that he was going out with the appellant. After the murder only she came to know that the person who took her husband out of the house on that night, was the appellant (Vide page 74 of the brief).
c) The wife of the deceased has failed to mention the specific year in which the incident took place. She merely stated that this incident took place "after 2 a.m. on 07th of March" (Vide page 79 of the brief).
d) According to the testimony of witness no.3 of the prosecution namely; Mohammed Nazzar (a police constable- brother of the deceased's wife), it was elicited that there is a material inconsistency regarding the date of the offence. Once he stated that he got married on 20.03.1991 and the incident happened on the following day, which was on 21.03.1991. At a later stage he had stated that the incident had taken place on 7th of March (Vide page 91 of the brief).

2) Appellant had been denied of a fair trial:- After the appellant was brought before Court, the Judge should have acted under sec. 241 (3) of the Criminal Procedure Code of No. 15 of 1979 to hold an inquiry, but in this case after the appellant was produced before court his Counsel stated that 'after having a discussion with the appellant the Counsel for the appellant does not make any pleading to make any request to reveal information from the appellant under sec. 241 (3) of the Criminal Procedure Code' (Vide page 176 of the brief).

According to the JMO Weerasinghe Rathnayake's testimony he had noted five injuries on the body of the deceased. Three of those were on the head and the face of the deceased while the other two were on the right leg. However, among all those five injuries he had clearly stated that only two injuries (on the head) were caused as a result of a gunshot. One was an entry wound caused by the bullet and the other one was the exit wound of the same bullet. Therefore, according to the findings of the JMO the deceased had been shot only once. The two injuries on the left leg were mere abrasions and the injury on the face **was only a bruise caused due to the bleeding caused by the gun shot injury above it. According to the opinion of the JMO, the death was due to only the gunshot injury had caused by a gun and not any other injury as submitted by the Council for the Appellant.** Therefore, the evidence given by the JMO does not contradict with the evidence given by

the other prosecution witnesses and thereby it does not create any doubt in the prosecution.

The second point the learned Counsel for the appellant brought was that when the deceased was going out in the night, just before the incident, his wife was not aware that he was going out with the appellant. According to the testimony of the wife of the deceased (vide page 74 of the brief) she had stated, that after the murder only she came to know that the person who took her husband was the appellant. It is not clear whether she was exactly referring to 'taking the deceased out of his house' because, it is evident on the same page that she had clearly stated to court that she had lastly seen her husband with the accused in that night just before the incident and she saw her husband going out with the accused; she had categorically stated that her"husband was driving the motor bicycle and the appellant was sitting behind the motor cycle". Furthermore, according to her (vide pages 80, 81, 82 and 83), it is so clear that the appellant had come to the house of the deceased at about 2 am on 7th of March 1991and he had taken the deceased out from his house saying that "one of our friends had met with an accident in Dambulla and now he is in Kurunegala Hospital" and the deceased had gone out with the appellant in his motor bicycle. There she had even specifically explained the cloths that the appellant was wearing at that time and also the bag he was carrying. Therefore, it is evident that it was the appellant who went out with the deceased on that particular morning.

Then the learned Counsel for the appellant had pointed out that it was elicited from the evidence given by the widow and the 3rd witness that there is a material inconsistency regarding the date of the offence. When analysing the evidence given by the wife of the deceased, it is evident that she had clearly stated the date of the incident as 07th of March 1991 (vide page 78 and 79 of the brief). According to the evidence given by the 3rd witness, who was the brother-in-law of the deceased, it is evident that his memory was not that much clear as to the date of the incident. The only thing he had remembered was that the incident took place after his marriage. The evidence given by the deceased's wife also corroborated with this evidence. According to her, the 3rd witness was not at home on that day (vide page 78 of the brief). She had further stated that the appellant had come to their home about a month before the incident and at that time period the 3rd witness was also living with them in the same house as he was not married (vide page 84 of the brief). This clearly points out that the incident had taken place after the marriage of the 3rd witness and that is why he was not living with the deceased, the deceased wife, etc... in the same house at the time of the incident. In the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 Supreme Court 753* the Court has held *"In regard to exact time of an*

incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person."

However, the evidence given by the other witnesses also stated 7th of March 1991 as the exact date of the incident. According to the testimony given by E. M. Gunaratne Ekanayaka who lived close by to the place where the deceased's body was found, had heard two gunshots while he was sleeping. As per his evidence, he had gone to bed at about 9.00 pm or 9.30 pm on 06.03.1991 and he woke up at about 6 am on the following day. Accordingly, he had heard the gunshots in the late night on 06.03.1991 or in the early morning of 07.03.1991. After he woke up in the morning he had gone to check about the sound he heard. Then he had witnessed the body of the deceased on the ground fallen with a motor bicycle (which was switched on) about 50m or 60m away from his house.

According to the above mentioned facts it is evident that the murder of the deceased had taken place on 07.03.1991 in between 2 am to 6 am.

By considering all, the inference that the learned Counsel had tried to create for the defence was that the prosecution has failed to prove each item of the chain beyond reasonable doubt and therefore the only inference that can be drawn by the evidence for the prosecution is that the accused was not guilty.

However, when analysing all the evidence before the court, it is evident that each and every item of the chain is interconnected and matches with each other.

As per the evidence given by the police officers who were serving in the President's Security Division (P.S.D.), they were on duty on 6th of March 1991 at the former Deputy Minister of Defence: Mr. Ranjan Wijeratne's funeral with the appellant who was also a police officer in the P.S.D. at that time. These officers had last seen the appellant on 6th of March 1991 at about 9.35 pm when all of them had met after duty. Thereafter the appellant had not reported for work on 07.03.1991 and therefore a message had been sent on 8th to the appellant's house asking him to report to work immediately. Then the

local police had reported that the accused had not gone home. However, on 10th of March 1991 an uncle of the accused had come to the P.S.D. and handed over a letter. Along with the letter, the appellant had sent a bag in which he had sent his official gun (recognized by the other police officers as the exact official gun issued to the appellant on 06.03.1991), 8 live bullets, his Identity card issued by the P.S.D. and his pocket note book, back to the P.S.D. It is pertinent to note that according to the evidence the appellant's official gun had been issued to him with 10 live bullets and out of which he had returned only 8 live bullets. Therefore, it shows that he had used two bullets and also in his letter the appellant had apologized for the use of two bullets. This evidence corroborates with the testimony of E. M. Gunaratne Ekanayaka(which I have mentioned above) who stated that he heard two gun shots on that night.

Specifically, one empty bullet (cartridge) had been found at the crime scene and according to the Government Analysist's report the marks around the cartridge matches with the inner surface of the weapon which was issued to the appellant by the P.S.D. Therefore it has been distinctly stated that the particular cartridge was a result of a gunshot caused by the weapon issued to the appellant on 06.03.1991. Furthermore, according to the opinion given by the JMO, the distance between the deceased and the gun at the time of the gunshot was 1 and ½ feet. This shows that the gunshot injury had been inflicted to the deceased by a person who was at a very close range.

After a clear analysis of all above, it is evident that there is no reasonable doubt on the part of the prosecution's case. The evidence led by any of the prosecution witnesses had not been contradicted by any other evidence. The deceased had been last seen with the appellant and also all the circumstantial evidence for the prosecution corroborates with each other creating a chain of circumstances that leads only to the guilt of the appellant. Furthermore, according to the evidence given by the brother-in-law of the deceased it is evident that the appellant had a grudge against the deceased and his family.

The learned Counsel for the appellant also pointed out that after the appellant was brought before Court, the Judge has not acted under sec. 241 (3) of the Criminal Procedure Code of No. 15 of 1979 to hold an inquiry. It is evident that at the commencement of the trial the appellant was present, but thereafter he had absconded. It is an obvious fact that the appellant deliberately evaded facing the trial and I see that there is no reason to interfere with the findings of the learned Trial Judge.

Even after he was produced in Court, he opted not to give reasons to Court. Therefore the learned High Court Judge was unable to act under sec. 241 (3) (b) of the Criminal Procedure Code.

Considering the above there is no reason to interfere with the findings of the learned High Court Judge.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 Supreme Court 753