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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/54/2007
H/C Kandy case No. 131/2000

Ponnambalam Sathees

ACCUSED

And,

Ponnambalam Sathees

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**
S. Devika de. L Tennakoon J

Counsel: Srinath Perera PC with Neville Ananda for the Accused –Appellant
Chethiya Gunasekara DSG for the AG

Argued on: **24.11.2015, 27.11.2015**

Written Submissions on: **07.12.2015**

Judgment on: 11.03.2016

Order

Vijith K. Malalgoda PC J

The Accused-Appellant Ponnambalam Sathees was indicted before the High Court of Kandy for committing the offences of,

1. Murder of one Rakan Balendran on 01.10.1998 an offence punishable under section 296 of the Penal Code.
2. Robbery of a Van carrying the distinct number 62-2014 an offence punishable under section 380 of the Penal Code.

When the Indictment was served on the accused-appellant, he elected to be tried before a Judge without a jury. At the Concision of the trial, the Learned High Court Judge had convicted the accused-appellant on both counts and imposed a sentence as follows.

Count 1 – Death sentence

Count 2 – 5 years Rigorous Imprisonments with fine of Rs. 2000/-, in default one month imprisonment

Being dissatisfied with the said conviction and sentence the accused-appellant had preferred this appeal.

This refers to a case of Robbery of van after killing the driver of the said van. The van carrying the distinct number 62-2014 which was hired from Colombo was stopped by the officers attached to Lindula Police Station on a tip off in the early hours of 01.10.1998. At the time the vehicle was searched, it was driven by the accused-appellant. Since the police had information to the effect that it was a stolen vehicle and was trying to dispose at a lower price, the accused appellant was arrested along with the vehicle by the Officer in Charge of Police Station Lindula Inspector of Police H.M. Srinath Nanda and produced at the Lindula Police Station.

Based on the material revealed during the investigation the accused-appellant was subsequently produced before the Magistrate of Nuwara Eliya for the murder of Rakan Balendran the driver of the said van and robbery of the van carrying distinct No. 62-2014.

In the absence of any eye witnesses to the murder, the entire case was based on circumstantial evidence. During the trial, the prosecution led the evidence of several witness including 3 lay witnesses and 7 official witnesses.

According to the evidence of witness Sinnaiah Muththu who was also a van driver from sea street (Hetti Veediya) Colombo, the deceased too was hiring a van in the same area with him on 30th September 1998. When he was at sea street around 5.00 -5.30 pm, the accused came to him and discussed a hire to go to Hatton informing that he was sick. As the witness didn't know the accused, he had refused the hire, but the deceased had taken over the hire since the deceased too was from Hatton area. Witness had seen the deceased leaving with the accused thereafter. The following day he heard the death of the Deceased and his statement was recorded by the police. The witness had identified the accused at an identification parade which was held at the Magistrate Court of Nuwara Eliya, as the person who discussed the hire with him on 30th September and left with the deceased on a hire.

The next witness the prosecution had relied upon during the High Court trial was Dehiwala Gedara Vipula Ananda Thilak Kumara a Police Constable attached to Dimbula- Pathana Police Station on 30th September 1998.

According to his evidence he was on duty on 30th night, attached to a road block opposite Kotagala Petrol Filling Station. Along with him there were 4 other officers detailed for this road block and he was the most senior officer among them.

At 1.30 am they searched a van with the distinct No. 62-2014 which was going towards Thalawakele from Hatton area. Two people were travelling in that van including the driver and their identity was recorded in the register maintained at the road block as R. Balan the driver and Sathees Ponnambalam as the passenger. Witness had identified the accused-appellant as the person who travelled in the said van, at the parade as well as in court.

The prosecution had mainly relied on the evidence of two more police officers during the High Court Trial. According to the evidence of Chief Inspector of Police Herath Mudiyanselage Srinath Nanda, he was attached to Lindula Police Station as the Officer in Charge during the period relevant to this case. Since 25th September he received an information of an attempt to dispose a stolen vehicle but until 1st October, he could not obtain substantial details with regard to the said transaction. However early

hours of the 1st October he received information from his private informant about an attempt to dispose a van but it is being driven away due to the non availability of cash with the buyers.

On this information he immediately arranged a road block on the main road opposite Lindula Police Station. He received the information at 3.15 am and by 3.20 am the road block was arranged and the witness had personally engaged in the road block duty along with PS 7886, PS 22498 and Police Assistant 21068.

Around 4.30 am they stopped a van, at the road block on suspicion. The van was driven by the suspect in the present case and he could neither prove his identify at that time nor he could submit any documents to establish the ownership of the van.

The suspect was arrested immediately thereafter and after questioning him, his statement was recorded at the Police Station.

Since the suspect had disclosed certain information with regard to the driver of the said van, the witness had gone to a place called "Despord on the Nuwara Eliya- Nanu Oya road, in order to recover the body of the Driver of the van.

The said statement to the effect, "කන්ද අයිනෙන් පහලට බැස රියදුරුව ඇද රියදුරුව ඩෙස්පෝඩ් කුඩා පාලම යටට දැම්මා එම ස්ථානය මට පෙන්වාදිය හැක." which helped the police to recover the body of the driver was produced marked P-1 at the High Court Trial.

According to the witness the place was pointed out to him by the accused-appellant and the observations made with regard to the place where the body was found by him at that time is important to be considered by this court.

Page 71 of the brief,

ප්‍ර: විත්තිකරුගේ ප්‍රකාශයට අනුව එම ස්ථානයට ගියාටපසු යම් දෙයක් සොයා ගත්තාද?

උ: ඔව් ඉතා දුෂ්කර ස්ථානයක් මෙම සැකකරු පෙන්වා නොසිටියානම් එම ස්ථානය තවත් කෙනෙකුට සොයා ගන්නට නොහැකි ස්ථානයක්. වටේ ලොකු කරීපන්ටයින් ගස් වැවී තිබෙන කැලැව වගේ ප්‍රදේශයක් එම ස්ථානයට කිසි කෙනෙක් යන්නේනැති ස්ථානයක් සැකකරුගේ ප්‍රකාශය හැර වෙනත් සොයා ගන්නට ක්‍රමයක් නැහැ

With regard to the recovery of the body the witness had given evidence as follows;

ප්‍ර: කොයි විදිහටද ඒ අනුව නිරීක්ෂණය කලේ ? මේ ස්ථානය කොයි විදිහටද තිබුනේ

උ: මෙම ස්ථානය නානුඔය ඩෙස්පෝඩ් තලවකැලේ මාර්ගයේ අංක 107/3 දරණ බෝක්කුව යට බෝක්කුවේ නුවරඑලිය පැත්තට යද්දී පාරේ දකුණුපස තිබෙන තැනිතලා ප්‍රදේශයක ඇළක් ගලාගෙන යනවා පොඩි වතුර පාරක් ගියා එම පාරේ ඇදගෙන ගිය ලකුණු තිබුනා ඒක අවත් පාරක් ඇදගෙන ගිය පාර. එම අවස්ථාවේදී වගේ හමුවෙලා තිබුනේ එතනින් පහලට ගියවිට තැනිතලා ගලක් තියෙනවා එම ගලඋඩ උඩුබැලි අතට නිල්පාට කොටු වර්ණයෙන් පහලකොටස පමණක් වැසෙන සේ සරම පහලට ගැලවී තිබුනා යට ඇදුම් තිබුනා සුදු අත්කොට ෂර්ට් එකක් තිබුනා ඔහුගේ කිසිම ලියවිල්ලක් සාක්කුවේ තිබුනේ නැහැ

Since the place where the body was recovered comes within Nanu Oya Police Division, witness had taken steps to inform Nanu Oya Police and thereafter the investigation was carried out by the Nanu Oya Police Station. IP Keerthiratne of the Nanu Oya Police Station had given evidence with regard to the investigation carried out by Nanu Oya Police Station, but it was revealed from his evidence that the major part of the investigation was not carried out by Nanu Oya Police but by the officers attached to District Crime Detection Bureau Kandy. The investigation carried out by the said unit was revealed from the evidence of Chief Inspector Senarath Bandara Senevirathne. This witness had visited the scene of crime on the same morning on the instruction of his superiors and thereafter taken charge of the suspect who was in the custody of Lindula Police Station.

During the investigations carried out by the District Crime Detection Bureau Kandy, the officers have visited the house of the accused's father in Meraya Estate Lindula. During the said investigation police had recovered a leather bag containing some cloths, a cassette player removed from a vehicle, Driving license belong to the deceased License and the Insurance of the van and some other documents belong to G.G.T. Fernando, Perumal Seruwan and J.D.D. Fernando.

Subsequent investigations carried out by the said unit revealed that the vehicle in question was belonging to the said G.G.T. Fernando and J.D.D. Fernando.

In addition to the above evidence the next important evidence relied upon by the prosecution was the evidence of the Dr. Indrasiri Perera who performed the Post Mortem Inquiry of the deceased at Nuwara Eliya Hospital.

Considering the injuries he observed on the body of the deceased he has come to the conclusion that the cause of death was due to manual strangulation, most probably by one person, either from his side or from his behind. When the doctor was confronted with fact whether it was possible for more than one person to commit the said act, his position was that it was not possible, considering the injuries found on the neck area. He expected more injuries on the neck if the act was committed by more than one person.

When the doctor was questioned about the stomach contents, the position taken up by the doctor was that other than partly digested food he could not observe anything else in the stomach contents.

The accused-appellant whilst making a dock statement admitted hiring the van to go home, checking the van at Kotagala by police but said that, at Thalawakele three men, known to the deceased had got in to the van and at Despord the vehicle was stopped in order for them to take some drinks. Two of them went down near the bridge with the deceased and one person stayed in the van with him. Few minutes later only those two returned without the driver and when he questioned as to what happened to the driver, they pointed out a knife at him and threatened to kill him. They asked the details of him and thereafter asked him to throw all the belongings of the deceased which was in the van and thereafter bring the van to Thalawakele and all three left. However he had gone home dropped the belongings of the deceased at his father's house and decided to go to the police station but on his way to the police he was arrested by police.

During the arguments before this court, Learned President's Counsel appearing for the accused-appellant raised the following grounds of appeal.

a) Learned Trial Judge had permitted a large volume of inadmissible evidence to get into the record which was influenced the mind of the Trial Judge.
b) Learned Trial Judge had permitted hearsay evidence to be led at the trial and relied upon the said evidence arriving at his final decision.
c) Learned Trial Judge had failed to set out the legal principles that he applied in arriving at the verdict
d) Learned Trial Judge had failed to set out the extent to which he relied upon in the section 27 statement
e) Learned Trial Judge had failed to consider matters which are favourable to the accused-appellant

Whilst raising the said arguments the Learned Counsel for the accused-appellant had referred to several portions of evidence from the evidence of the arresting officer Inspector of Police Srinath Nanda.

Page 69,

ප්‍ර: වෙනත් මොනවද තොරතුරු?

උ: ට්ට පසු විශේෂයෙන්ම වාහනය ගෙනආපු එක්කෙනා ඔහු සමග ආවා ඔහු අතරමග මරලා බෝක්කුව යටට දාලා ට්ට පසු වාහනය අරගෙන ආවා කීවා

Page 69,

ප්‍ර: අත් අඩංගුවට ගෙන ප්‍රකාශයක් සටහන් කර ගත්තා එම ප්‍රකාශය මත යම් තොරතුරක් අනාවරණය වුනාද?

උ: ඔහුගේ ප්‍රකාශය ම එම වාහනය පදවාගෙන ආපු රියදුරු මරා නුවරඑලිය නානුඔය ඩෙස්පෝඩී මාර්ගයේ ලිදුල ප්‍රදේශයට එන දීර්ඝ මාර්ගයේ එම රියදුරුගේ මෘත ශරීරය ගෙල මිරිකා මරා බෝක්කුව යටට ඇද දමා පැමිණි බව පැවසුවා

Page 70,

ප්‍ර: විත්තිකරු සමග එම ස්ථානයට ගියාට පසු විත්තිකරු යම් දෙයක් පෙන්වා සිටියාද?

උ: ඔව් මෙතනින් පහලට තමයි රියදුරුගේ මෘත ශරීරය හෙලුවේ කිව්වා

When considering the above evidence led at the High Court Trial before the Judge (without a jury) this court is reminded of the provisions in section 25 of the Evidence Ordinance to the effect.

25 (1) No confession made to a police officer shall be proved as against a person accused of any offence.

In the case of ***The Queen V. Murugan Ramasamy (1964) 66 NLR 265*** Viscount Radcliffe made the following observation, with regard reception in evidence of confessions made to police officers' as follows;

> "There can be no doubt as to what is the general purpose of section 25 and 26. It is to recognize the danger of giving credence to self-incriminating statements made to policemen or made whilst in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and these

> two sections recognize and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying"

As this court observes, majority of the reported decisions on the above provisions were decided at a time the trial were taken up before a jury and the argument at that time was that, the jury was prejudiced when such confessionary evidence was led in evidence before the jury.

In the present day context, when majority of the cases are tried before the Judge without a jury, it is frequently argued that, the Trial Judge with a trained legal mind was alive and mindful of the relevant principles of law and has applied them in arriving at his conclusion.

This position was discussed in the case of ***Dayananda Loku Golappaththi and Eight Others V. The State 2003 (3) SLR 362*** as follows;

> "In a Jury trial an accused is tried by his own peers. Jurors are ordinary laymen. In order to perform their duties specified in section 232 of the Code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to section 229 that the Trial Judge should lay down the law which he is to be guided. In appeal the Appellate Judges will consider whether in fact the Trial Judge was alive and mindful of the relevant principle of law and has applied them in arriving at his conclusion. The law takes for granted that a Judge with a trained Legal mind is well possessed of the principles of law, he would apply."

When considering the argument raised by the learned President's Counsel for the accused-appellant, what is important to consider at this stage is whether the Learned Trial Judge was influenced by permitting the said inadmissible material being led at the High Court Trial.

When considering the Judgment of the Learned Trial Judge, it is observed by this court that the Learned Trial Judge had not made any specific remarks to the items of evidence referred to above, but however it is not clear from the above judgment, the exact evidence he had relied upon to conclude that the prosecution has established the case beyond reasonable doubt.

As observed by me earlier in this Judgment the present case is based solely on circumstantial evidence. In a case the prosecution is solely relied on circumstantial evidence, it is imperative for the Trial Judge to place on record the items of evidence he relied upon to conclude that the prosecution has establish its case beyond reasonable doubt. The said material the prosecution has relied upon should be

consistent only with the hypothesis of the guilt of the accused that is to say; they should not be explainable on any other hypothesis except that the accused is guilty.

In the case ***of Don Sunny V. Attorney General 1998 (2) Sri LR 1*** the requirements in establishing a case based on circumstantial Evidence was considered as follows;

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.
   On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.
2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drown is that the accused committed the offence then they can be found guilty.
4. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

In this regard the Learned President's Counsel has argued that the failure by the Learned Trial Judge to set out the legal principles that he applied in arriving at the verdict, that is to say the principles applicable in establishing a case on circumstantial evidence amounts to a non direction by the Learned Trial Judge. As observed by this court even though the Learned Trial Judge had discussed some of the items which can be considered as items of circumstantial evidence, he has failed to give his mind to the requirements needed in establishing a case solely on circumstantial evidence.

Prosecution in the present case has further relied upon the statement made by the accused-appellant which helped to recover the body of the deceased Rakan Balendran. In this regard prosecution has led the evidence of Chief Inspector Srinath Nanda and led the said statement in Evidence and marked the relevant portion as P-1.

Even though the present trial is a trial before Judge without a Jury, there is no material before us to conclude that the said portion was considered by court to ascertain whether it is admissible under section 27 (1) of the Evidence Ordinance. As complained by the Learned President's Counsel, the Learned Trial Judge has failed in his judgment to specify the extent to which he relied upon the section

27 statement. When he permitted P-1 to be led at the trial I have a doubt in my mind, whether he was prejudiced by permitting the words "රියදුරුට ඇද රියදුරුට" being marked in the section 27 statement.

The Learned President's Counsel had further alleged that the Learned Trial Judge had taken into consideration the evidence given by Chief Inspector Senarath Bandara Senevirathne with regard to the questioning a person from a business establishment by the name Ranjanas at 127, Main Street, Colombo on 14.10. 1994 and taken into custody a leave application dated 20.09.1994.

In the absence of calling a single witness to establish the fact that the accused-appellant after applying for leave for 3days since 20.09.1998, had continued to refrain from reporting to work until 30.09.1998 the day on which he hired the van from Sea Street Pettah, it was argued that the said evidence is hearsay and therefore the Learned High Court Judge had misdirected himself when taking into considerable the hearsay evidence in his judgment as follows;

> "එසේම විත්තිකරු සේවය කල රංජනාස් නම් ආයතනයේ ලබාගත් නිවාඩු ඉල්ලුම් පත්‍රය පරීදි විත්තිකරු 1998.10.20 වෙනි දින සිට නිවාඩු දවස් 3ක් සඳහා ලබාගෙන ඇති නමුදු සැප්තැම්බර් මස 30 වෙනි දිනතෙක් සේවයට වාර්තා කොටද නැත ඒ අනුව ඔහු සේවයට වාර්තා නොකොට සැරිසරා ඇතිබව පෙනේ"

However during the argument before us the Learned Deputy Solicitor General who represented the Hon. Attorney General submitted that there is a strong circumstantial evidence case against the suspect in this case.

As submitted by him, the accused-appellant was arrested few hours after the alleged act of murder with the vehicle robbed by him. The body of the driver was recovered from a statement made by the accused-appellant admissible under section 27 (1) of the Evidence Ordinance and several other items were recovered from the house of the accused-appellant's father. Accused-Appellant was identified by a police officer as the person who travelled in the van carrying the distinct no 62-2014 during the same night few hours prior to the incident and he was identified by another driver as the person who discussed a hire and travelled with the deceased on the previous day evening.

Based on the very strong evidence as referred to above the Leaned Deputy Solicitor General argued that this is a fit case to act under the principle laid by down by the Supreme Court in the case of ***Mannar Mannan V. The Republic 1990 (1) Sri LR 280.***

However when considering the non directions and misdirection I have discussed above in this Judgment, specially permitting inadmissible evidence to get in to the record and failure by the Learned Trial Judge to evaluate the items of circumstantial evidence he relied upon and his failure to set out the legal principle he relied upon in finding the accused-appellant guilty of the charges against him without a single eye witness evidence, this court is of the view that there was a miscarriage of justice caused to the accused-appellant by the said conduct of the Learned Trial Judge.

It is the duty of this court to comment the conduct of the prosecutor and the role of the Learned Trial Judge when permitting inadmissible evidence to get in to the case record, as observed in this case. Even though this case is a trial before Judge without a Jury the Trial Judge has a duty to control the proceedings in court without allowing the prosecutor to lead any evidence before him. In the present case as observed by me, provision of section 25 and 26 of the Evidence Ordinance had been ignored by the prosecutor either in ignorance or due to enthusiasm, but by doing so caused an injustice not only to the accused-appellant but also to the prosecution. This court is not infavour of acting under the principles laid down in the case of ***Mannar Mannan V. The Republic*** due to the reasons discussed above. However considering the strong evidence available in this case, I decide to act under section 335 (2) (a) of the Code of Criminal Procedure Act No. 15 of 1978.

I therefore make order setting aside the conviction and sentences imposed by the Trial Judge and direct a retrial before the High Court of Nuwara Eliya Since the place where incident had taken place now comes within the Jurisdiction of the High Court of Nuwara Eliya.

Appeal party allowed.

PRESIDENT OF THE COURT OF APPEAL

S. Devika de. L Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEAL