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.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/70/2011

H/C Batticaloa case No. 2301/04

1. Deniya Kumbura Saliya Kumara Deshapriya Bandara Dissanayake

ACCUSED

And,

1. Deniya Kumbura Saliya Kumara Deshapriya Bandara Dissanayake

ACCUSED-APPELLANTS

Vs,

Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

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

S Devika de. Thennakoon J

Counsel: Darmasiri Karunaratne for the Accused-Appellants

S Thurairajah SDSG for the Attorney General

Argued on: 01.12.2015

Written Submissions on: 05.03.2016, 24.06.2016

Decided on: 14.10.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant was indicted before the High Court of Batticaloa on a charge of murder for committing the murder of Rambadalage Gedara Ariyasena on or about 14th April 1991.

When the indictment was served on the accused-appellant, the accused-appellant who pleaded not guilty had opted for a trial before a judge without a jury.

At the conclusion of the said trial the Learned High Court Judge convicted the accused-appellant on the indictment and imposed a sentence of 20 years Rigorous Imprisonment with a fine of Rs. 5000/- in default 6 months Imprisonment.

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

Before analyzing the said appeal preferred by the accused-appellant, it is important to place on record that the said sentence imposed by the Learned High Court Judge after convicting the

accused-appellant for murder was illegal, but the Attorney General who was represented at the High Court had not taken any steps to appeal against the said illegal order. As revealed during the argument before this court, the Learned High Court Judge after imposing the said illegal sentence of 20 years Rigorous Imprisonment with a fine of Rs. 5000/- to the accused who was convicted for murder after trial before the said Judge had again made an illegal order enlarging the accused on bail after staying the said sentence when the accused-appellant preferred an appeal.

In this regard this court is mindful of the following provisions of the Penal Code,

Section 296 of the Penal Code; who ever commits murder shall be punished with death.

I will now turn to the evidence led at the trial since that will help to decide the case before us. The deceased to the present case was a Sergeant Major attached to the army and the accused was a soldier in the same unit.

As revealed during the trial, the incident had taken place inside the Panichchankerni Camp on 14th of April 1991.

Even though there were no eye witnesses to the incident, prosecution had mainly relied on the evidence of two Military Personnel, one is an officer and the other a Sergeant attached to the same camp.

According to the evidence of Colonel Arun Wanniarachchi, he was serving as the commanding officer of the Panichchankerni Army Camp and the said camp was a temporary camp situated on the Batticaloa- Vakarai Road covering the main road. There were 4 temporary sheds inside the camp, used as accommodation for nearly seventy personal attached to the said camp. The witness was occupying one such shed during this time and on the day in question between 10.00 and 11.00 pm, when he was getting ready to sleep, he heard a gun fire from very close range. The camp did not have electricity, and was lit using Kerosene lamps and Torches.

Witness had come out from his shed with his weapon and saw a person fallen down in the shrubs by the side of the road. He immediately rushed to the place calling others to bring a torch and observed a person fallen with bleeding injuries and with the help of Sergeant Premadasa carried the injured to a secured place and called the medical officer to attend the injured. In the absence of any evidence of a terrorist attack, he decided to commence an internal investigation immediately thereafter. He explained the steps he had taken during the said investigation as follows;

"Q: how did you take action?

A: I ordered all the soldiers to bring their weapons and asked them to lay them down and to stand closer to their respective weapons. They stood in three separate lines. Then I called the senior officers to examine the weapons. I ordered them to smell the weapons in order to find the odour of the gun powder. By doing this one could ascertain that the particular weapon would smell the gun powder if it had been fired. So all weapons were examined in this similar way.

Q: Were all weapons examined in this way?

A: All weapons including mine were examined."

.....

"Q: Were the weapons of all the officers who were serving then examined?

A: Except those who were on leave on that day and of them who died before nine days, all the weapons of the others were examined."

During the said investigations they have recovered a weapon used for the firing and the person used the said weapon and his evidence with regard to the said recovery is referred as follows;

"Q: Did you examine all the weapons of the officers who were there

A: Yes, after the weapons of all the soldiers were examined, Premadasa said that when he was examining the weapons a particular weapon smelt the gun powder."

.....

"Q: What were you able to learn when you examined?

A: When I brought the tip of the gun barrel I could get the odour of the gun powder?"

The above evidence of witness Wanniarachchi was corroborated by witness Premadasa as follows;

"Q: What did you do by keeping them in a line?

A: All were standing in a row with their respective weapon and I examined them."

.....

"Q: Did you come to know anything when you examined the weapons of your division?

A: At that moment there was an odour of new gun powder emanating from Dissanayake's weapon.

Q: Is Dissanayake here in this court?

A: Yes he is in the dock.

Q; What did you do there?

A: I examined the weapon and took that to the commanding officer who was in charge of the camp and told him that there was the odour of the gun powder.

Q: Did your commanding officer examine it?

A: Yes."

According to the evidence of the above witness the suspect Dissanyake and the weapon with 29 live cartridges, 2 spent cartridges and a magazine was handed over to the Valachchenai police on the following day and the witness had made a statement to police on that day.

Prosecution had led the evidence of one Udugama Koralage Pushpakumara as the 3rd witness and according to him, when he was talking to the deceased Ariyasena after returning from Petrol duty, he heard the sound of somebody coming towards them in the dark. When questioned, the person who came in the dark had identified himself as Dissanayake. Dissanayake wanted to check the roster the witness was having and at that time the deceased wanted him to go and sleep. When Dissanayake left the place he too had left but before he could move 30 meters, he heard a gunshot at a close range and later found Ariyasena dead with gunshot injuries.

According to the evidence of Vijayantha de Silva who was the officer in charge of Valachchenai Police Station, the death was reported to the police on 15.04.1991 at 8.30 am. After the post mortem, a T-56 gun bearing 5066802 and its 29 bullets and 2 spent bullet caps were handed over to him along with the accused D.S.K Dissanayake by an officer named Wanniarachchi.

As revealed at the trial, the said weapons and the bullets were sent to the Government Analyst for examination, and according to the evidence of witness Gamini Madawala, Government Analyst, it was revealed that, when comparing the empty bullet caps, with that of the test fired bullets, and its marking both matched with each other, and the Government Analyst concluded that the two empty bullet caps marked as P-4 had been fired by the gun which was produced marked as P-1.

Even though there was no eye witness testimony to establish the present case, as discussed above the prosecution had placed before the High Court a strong circumstantial evidence case. However during the arguments before us the Learned Counsel who represented the accused-appellant had challenged the said evidence on several grounds. The said grounds can be summarized as follows,

a) There is no eye –witness to the shooting

b) No Documentary evidence before court to establish the gun P-1 was officially allocated to the accused

c) All the guns in the army camp were not checked

d) Learned High Court Judge had failed to consider material inter-say contradiction between the four army officers evidence

e) P-1 gun was not properly identified at the trial

f) Illegal/irregular nature of the Government Analyst's Report

g) There was no fair trial to the accused

h) The Learned Trial Judge had failed to consider the fatal weaknesses of the prosecution case

As observed, there were no eye-witnesses to the present case but it is based on circumstantial evidence and there is no requirement to establish criminal cases only on the testimony of eye-witnesses, if the court is satisfied with the evidence placed before court.

In this regard this court is mindful of the decision in the case of ***Don Sunny V. Attorney General 1998 2 Sri LR 1*** where the principles that should be applied by court in analyzing circumstantial evidence was identified and will be discussing the applicability of this decision at a later stage of this judgment.

This court has already analyzed the evidence led by the prosecution in the High Court including the evidence of several military personal but did not observe any major contradictions inter se in their evidence, even though the accused–appellant referred to the fact there are inter se contradictions without pointing out them before us.

The evidence of Colonel Arun Wanniarachchi and Sergeant Premadasa clearly explained the steps they have taken to inspect the weapons immediately after the firing and every weapon issued to

personal who stayed in the army camp on that day including the weapon issued to the commanding officer were inspected in the presence of the person to whom the said weapon was issued. The said witnesses were subjected for cross examination but nothing significant had been elicited in favour of the accused-appellant at the trial.

Under these circumstances we see no reason to disbelieve or reject the evidence given by the said witnesses.

One cannot expect a witness to keep in mind the number of a weapon for a period of 20 years. Witness Wanniarachchi who handed over the weapon to Valachchenai police had clearly said that he made a statement to the said police station when handing over the weapon, along with unused and used cartridges and the suspect. This position was confirmed by the officer in charge of Valachchenai Police Station and produced before court, the number of the said weapon based on the notes made at the police station, which corroborates with the documentation maintained at the Government Analyst.

When considering the evidence given by the said Military personal, officer in charge of Valachchenai Police Station and Government Analyst, we see no reason to conclude that there was any doubt with regard to the identity of the weapon which was produced before the High Court marked P-1.

With regard to the Analyst Report marked through witness Madawala, several objections were raised by the accused-appellant to show that the said report was an irregular and/or illegal document. In this regard the accused-appellant had submitted, that the said report had been prepared after 15 years and by that time the weapon was rusted and the report before court was issued without proper analysis by the Government Analyst.

However we had the opportunity of going through the evidence given by Government Analyst Gamini Madawala, which was subject to the cross examination by the counsel who represented the accused in the said case (accused-appellant in the present case) and observe that the said witness had given clear evidence with regard to his finding as follows;

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"Q: You mentioned that when you opened the parcel P-1 you found a fire area

A: Yes"

.....

"Q: Did you write-down the number of the particular T56 gun?

A: The number was mentioned as 5066802.

(Page 199-under cross examination)

Q: Where did you keep the particular productions in your office, when you made the examination?

A: It was kept in a special room where rifle, pistol and revolvers are kept.

Q: Do you keep all types of productions sent from all part other courts in Sri Lanka in that room?

A: We keep the special weapons and fire arms there."

.....

"Q: When live bullets are fired would such live bullets be torn and dented?

A: After the firing the exterior shape of it would change."

(Page 200- under cross examination)

"Q: Can you say for certain that the bullets marked as P-4 had been fired from P-1?

A: Yes"

.....

"Q: Is there a possibility that its particular P-4 could have exited from another T56 type gun?

A: It cannot be.

Q: Do you in this case say that particular P-4 had exited from the gun P-1?

A: Yes

Q: Do you say that those did not exit out of any other T56 type gun?

A: Yes

Q: What is the reason for you to say certainly?

A: It is because the exterior appearance of the empty caps P-4 and the exterior appearance of the bullets that exited from P-1 were matching when they were examined."

The witnesses above evidence on his findings were unchallenged before the High Court, and therefore we see no reason to reject the above findings of the Government Analyst. The learned defence counsel at the High Court trial and the counsel for the accused-appellant before us challenged the above evidence by making reference to the delay in conducting the examination but the Government Analyst had denied the position submitted by the defence and stick to his position that he reached the above conclusion by testing the gun with a sample cartridge used by him, and at the time he used the gun it was in good working condition.

In the above circumstance we see no reason to disbelieve the evidence given by the Government Analyst and reject his report produced marked P-7.

The next ground of appeal raised by the counsel for the Accused-appellant was mainly based on the failure by the trial judge to afford a fair trial to the accused-appellant by

a) Failing to act under section 195 (ee) and 196 of the Code of Criminal Procedure Act No 15 of 1978
b) Failing to act under 4 (1) (ee) of the ICCPR Act No 56 of 2007

The amendment introduced to section 195 by bringing new section (ee) imposed a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be trial by jury.

Section 196 of the Code of Criminal Procedure Act requires when the court is ready to commence the trial and the accused is present before court, the indictment to be read and explained to the accused and asked whether he is guilty or not guilty of the offence charged.

As observed by us the proceedings in the present case had been recorded in the Tamil language except for the journal entries which are in English language.

The journal entry dated 14.03.2005 which refers to the proceedings took place on the date the indictment was served on the accused, reads thus,

Mr. Ameen A/L, appears for the accused

1. Indictment and Magistrate's Court brief served on the accused
2. Trial on 31.05.2005
3. Accused elect to be tried by court without a Jury
4. Witness summoned 1-5

5. Call production if any

According to the proceeding before us, the trial had commenced on 05.03.2008. The journal entries between 14.03.2005 and 05.03.2008 including the journal entries referred to above does not refer to the arraignment of the accused under section 196 of the Code of Criminal Procedure Act.

The journal entry dated 05.03.2008 only referred to,

"Vide proceedings F/Trial 18/03/2008" and the proceedings only referred to the evidence recorded by 1st witness Arun Wanniarachchi.

In this regard this court is mindful of the decision of the Supreme Court in the case of ***Attorney General V. Segulebbe Latheef and Another [2008] 1 Sri LR 225*** where J.A.N. de Silva (J) (as he was then) discussed some of the important aspects of a fair trial and the duty on the trial judge under section 195 (ee) of the Code of Criminal Procedure Act.

In the said case J.A.N. de Silva (J) has observed the right of an accused person as follows;

> "The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied."

As observed above the journal entry dated 14.03.2005 refers to the steps followed by the Learned Trial Judge when the indictment was served on the accused. In the said journal entry the judge has specifically recorded that "accused elect to be tried by court without Jury"

From the said entry made by the Judge himself in the journal, it is clear,

a) That the Judge was mindful of the provisions in section 195 (ee) of the Code of Criminal Procedure Act
b) That he had explained the rights to the accused and
c) The accused elect to be tried by court without Jury

In the said circumstance we see no merit in the argument by the Learned Counsel that the Learned Trial Judge had failed to follow section 195 (ee) of the Code of Criminal Procedure Act.

However as observed above the journal entry dated 05.03.2008 only referred to "vide proceedings" and the proceeding of 05.03.2008 only carried the evidence of witness Arun Wanniarachchi. As observed by this court, this witness was one of the main witnesses summoned by the prosecution and his evidence was concluded on that day and further trial was postponed for 18.03.2008.

According to the journal entry dated 18.03.2008 the State Counsel had moved to amend the Indictment on that day and after the indictment was amended the indictment was read and explained to the accused by the court and thereafter the other witnesses for the prosecution was called to give evidence.

Even though the journal entry dated 18.03.2008 refers to reading out indictment when the indictment was amended, there is no entry found on the case record between 14.03.2005 and 05.03.2008 that the court had followed the provisions of section 196 of the Code of Criminal Procedure Act to the effect,

> "When the court is reading to commence to trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged."

In these circumstances, the question whether the accused was arraign prior to the commencement of the trial is uncertain, in the absence of any indication in the journal entries or in the proceedings.

However we are not inclined to hold that the Learned Trial Judge had failed to follow section 195 (ee) of the Code of Criminal Procedure Act since the Trial Judge had recorded that the accused had elected to be tried by the court without a jury.

With regard to the objection raised under section 4 (1) e of the ICCPR Act No 56 of 2007 this court is not inclined to make any order, as it was revealed during the argument before us, that the entire proceedings were conducted in Sinhalese with the assistance of a interpreter to translate the proceedings in to Tamil language only for the purpose of recording them in Tamil language which is the working language of the court.

However when considering the objections raised by the Learned Counsel for the accused-appellant with regard to the failure by the trial judge to afford a fair trial under section 196 of the Code of Criminal Procedure Act, we are of the view that the accused had a legal right to be informed of his right to know the charge under which he is tried before the High Court.

The Learned Counsel for the accused-appellant had brought to the notice of this court the fact that the incident referred to this case had taken place as far back as in 1991 but considering the material available against the accused-appellant, specially the fact that there is a strong circumstantial evidence case against him, this court is not inclined to decide otherwise but, considering the failure by the trial judge to afford a fair trial, we decide to quash the conviction and sentence imposed by the High Court Judge of Batticaloa and order a retrial by the High Court. We further make order directing the Learned High Court Judge Batticaloa to conclude the retrial early.

President of the court of Appeal

S Devika de. Thennakoon J

I agree,

Judge of the Court of Appeal