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/03-06/2005

H/C Colombo case No. 8999/1997

1. Monika Fenando
2. Ajith Priyankara Perera
3. Neville Roshana Peiris
4. Sugath Krishantha Appu

ACCUSED

And,

1. Monika Fenando
2. Ajith Priyankara Perera
3. Neville Roshana Peiris
4. Sugath Krishantha Appu

ACCUSED-APPELLANTS

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

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

H.C.J. Madawala J

Counsel: Dr. Ranjith Fenando for the Accused-Appellants

Sarath Jayamanna P.C. ASG for the Attorney General

Argued on: 24.03.2015, 25.05.2015, 07.07.2015, 03.08.2015, 05.08.2015, 21.09.2015

Written submissions on : 26.04.2016, 01.12.2016

Decided on: 17.02.2016

Order

Vijith K. Malalgoda PC J

The three accused–appellants namely Ajith Priyankara Perera , Neville Roshana Peiris and Sugath Krishantha Appu were indicted before the High Court of Chilaw along with Naththandiyage Mary Juliet Monica Fernando for conspiracy to commit the abduction and murder of Kalugamage Charlot Theres Fernando and the said three accused-appellants were further charged in the indictment for the abduction and murder of Kalugamage Charlot Theres Fernando and Susahewage Tecline alias Seelawathy, offences punishable under sections 113 (b), 355 and 296 read with section 102 and section 355 and 296 read with section 32 respectively.

At the conclusion of the said trial which proceeded in the High Court of Chilaw before the High Court Judge without a jury, all four accused were found guilty of the said indictment and sentenced accordingly.

When the appeal preferred by the said accused were taken up before the Court of Appeal, this court after considering the appeal, had made order setting aside the conviction and sentence imposed on the

accused, directing a retrial and the case was to be heard in the High Court of Colombo in the same indictment.

However as revealed before us, out of the 4 accused who were present in the 1st trial, only the 1- 3 accused were present before High Court of Colombo for the re-trial. The trial against the 4th accused proceeded in his absence after satisfying and following the provisions of section 241 of the Code of Criminal Procedure Act. Even though the 4th accused was absent and unrepresented on few calling dates he was later represented by counsel from the commencement of the 2nd trial.

The re-trial proceeded before the High Court Judge of Colombo with a jury and the steps taken in this regard will be looked into and discussed by me at a later stage of this Judgment since that has been one of the grounds of appeal before this court.

At the conclusion of the High Court Trial before the High Court Judge with a Jury, the jury by a majority decision of 6.1 found all 4 accused guilty on all the charges in the indictment against them. The Learned High Court Judge, after the said verdict of the Jury had sentenced the 4 accused as follows;

1st accused	1st count - 20 years Rigorous Imprisonment with a fine of Rs. 10,000 in default 2 years Rigorous Imprisonment 2nd count -Death Penalty
2nd to 4th accused	count 1 and count 4 - 20 years Rigorous Imprisonment with a fine of Rs. 10,000 in default 2 years Rigorous Imprisonment Count 3- 20 years Rigorous Imprisonment with a fine of Rs. 10,000 in default 1 year Rigorous Imprisonment Counts 2, 5 and 6- Death Penalty

Being dissatisfied with the said conviction and sentence, 4 accused preferred an appeal before the Court of Appeal. However, when this appeal was pending for argument, the 1st accused-appellant had moved to withdraw her appeal unconditionally and this court on 29.02.2008 permitted the application for withdrawal of the appeal by the 1st accused-appellant and accordingly dismissed her appeal.

Therefore, the present appeal taken up before us is limited for the appeals preferred by 2nd to 4th accused-appellants.

The Learned Counsel for the accused-appellants had restricted his appeal to four grounds of appeal before this court. The said grounds can be summarized as follows,

1. Procedure adopted with regard to the change of jury option was irregular and illegal, because the accused did not communicate through their mouth but through their counsel.
2. The prosecution failed to produce the conditional pardon papers to prove that such pardon was given-conviction based on the evidence of co-accused treated/considered as independent prosecution witness.... with no corroboration addressed.
3. Noncompliance of section 227 of the Code of Criminal Procedure Act when the jury had been dispensed for a continuous period for four days without swearing.
4. The approach of the Learned Trial Judge in his charge to the jury was erroneous as there was no application of law to the facts of the case.

Change of Jury option,

As observed in this Judgment, the first trial before the High Court of Chilaw was a trial before the High Court Judge without a jury. As directed by this court the second trial (re-trial) was taken up before the High Court of Colombo and the said trial had proceeded before the High Court Judge with a Jury.

The Learned Counsel for the 2nd to 4th accused-appellants took up the position that the said change of the jury option was against the provisions of section 195 (ee) since the said change of the original choice was effected only on the application of counsel but has not come from the mouth of the accused.

As observed by this court, the situation in this case is different to any other case where the parties alleged that section 195 (ee) is not followed for the reason that a Jury option has not been given.

In this regard the court is mindful of the decision in ***The Attorney General V. Segulebbe Latheef and Another (2008) 1 Sri LR 255*** where J.A.N. de Silva J (as he was then) observed,

> This amendment necessitated an introduction of a further amendment i.e. section 195 (ee) imposing 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 tried by a jury. This is in recognition of the basic right of an accused to be tried by his peers.** It is left to the discretion of the accused to decide as to who should try him.
>
> "As pointed out earlier for nearly two hundred long years the jury system has been in existence in Sri Lanka with whether the faults it had. I do not make an endeavour to discuss the merits and the demerits of the jury system. As long as it is in the statute book that the accused can elect to be tried by a jury, the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non-observance of this procedure is an illegality and not a mere irregularity."
>
> (emphasis added)

In the present case, there was no allegation of not granting jury option when the indictment was served on the accused but the complainant is that, the change of the jury option has not come from the mouth of the accused.

As observed by this court the decision of the above case was mainly based on the right of an accused person to know his legal rights with regard to his trial, since the amendment brought under section 195 (ee) made provisions to take up all trial in the High Court before the Judge without a jury subject to an exception for certain trials to be taken up by the High Court Judge before a Jury if the accused so desires. It is this right which was to be explained to the accused by court which was highlighted in the said case.

Even though the importance of the said requirement was highlighted in the said case, there was no reference made in the said judgment that the said option has to come from the mouth of the accused.

The position in the present case is quite different to the above situation. The accused had given their option to a trial by a Judge without a jury when the indictments were served on them and the trial proceeded.

When the re-trial was to be taken up, the accused have charged their option for a trial by a Judge before a jury and from the proceeding placed before this court it is clear that the accused were well aware of their rights to have the trial before the jury or not before the jury since they have once experienced a trial without a jury.

In this regard, I would like to record the sequence of events took place before the High Court of Colombo as revealed during the argument before this court.

When the case was called before the High Court of Colombo in the later part of 1997 only the 1st -3rd accused were present and it was reported that the 4th accused had gone abroad.

After leading evidence the trial was fixed in absentia against the 4th accused and there was no legal representation for the 4th accused during that period. When the case was called before the High court on 24.05.1999, 1st to 3rd accused were represented by counsel and 4th accused was still absent and

unrepresented. When the court, inquired the 3 accused present in the court they had informed that they wished to try the case before the High Court Judge without a jury.

However, when this case was called again on 13.05.2004 the counsel who appeared for the 1st and 3rd accused had informed the court that the counsel for the 2nd accused had informed him that the 2nd accused wanted the case to be taken up by the High Court Judge before Jury and his clients, i.e. 1st and 3rd accused also agreeable for the case to be taken up before a Jury.

Thereafter when this matter was called before the High Court on 25.06.2004 the Learned High Court Judge had made the following order.

..... ඒ දින ජූරිසභාවක් ඉදිරියේ මෙම නඩුව විභාගයට ගන්නා ලෙස කරන ලද ඉල්ලීම අනුව නඩු වාර්තාව අංක 1 මහාධිකරණයට යොමු කර ඒ අනුව මෙම අධිකරණයට එවා ඇත. මේ අනුව විත්තිකරුවන් තුන්දෙනා පෙනී සිටී

ඔවුන් මෙම නඩුව ජූරි සභාවක් ඉදිරියේ ගත යුතු බවට සඳහන් කරන බැවින් ජූරිසභාවක් ඉදිරියේ කැඳවීම සඳහා පියවර ගැනීමට අධිකරණ රෙජිස්ට්‍රාර්ට නියම කරමි.....

When the matter was ready to be taken before a jury against all 4 accused on 17.01.2005 an application was made by an Attorney at Law for the 4th accused for a postponement since the 4th accused wanted to represent by counsel at the trial.

The matter was called again on the 20.01.2005 and the counsel who appeared for the 4th accused had moved further time to get ready for trial and when inquired by court had replied,

මේ අවස්ථාවෙදි 4 වෙනි විත්තිකරු වෙනුවෙන් පෙනී සිටින නීතීඥ මහතා 4 වෙනි විත්තිකරුගේ නඩු විභාගය ජූරිසභාවක් ඉදිරිපිට විභාගයට ගැනීමට 4 වෙනි විත්තිකරු වෙනුවෙන් ලැබී ඇති බලය අනුව කැමැත්ත පලකර සිටී."

When this matter was once again called to fix a date for trial the counsel informed as follows,

වැඩිදුරටත් එසේ ලැබුනු උපදෙස් පරිදි නිහාල් ගුණසිංහ මහතා දන්වා සිටින්නේ තම නඩුව ජූරිසභාවක් ඉදිරිපිට විභාග කිරීමට 4 වෙනි විත්තිකරු කැමැත්ත ප්‍රකාශකල බවත් ඒ බව අධිකරණයට දැනුම් දීමට ඔහුවෙනුවෙන් පෙනී සිටින නීතීඥ මහතා දැනුම් දුන් බවත්ය.

From the above proceedings, it is clear that the court had given all the opportunities to the 1st to 4th accused to decide as to how their trial should be proceeded and they were well aware of the right given to them in selecting the trial whether it should be taken up before the High Court Judge without a jury or before the High Court Judge with a Jury. Therefore, we see no merit in the said argument raised by the Learned Counsel for the 2nd to 4th accused-appellants.

Failure to produce Conditional Pardon

Even though the counsel who represented the 2nd to 4th accused-appellants did not make any reference to the evidence in this case, the Learned Additional Solicitor General, placed before us the entire case for the prosecution.

As revealed before this court the 1st deceased had an illicit affair with the husband of the 1st accused. The 2nd deceased was the 1st deceased's servant. The 2nd accused-appellant is the Mill Manager of the 1st accused-appellant and 3rd and 4th accused-appellants were people who helped the 2nd accused-appellant to commit the said offence. Witness no.3 who was the driver of the 1st accused's husband was used in the commission of this offence. According to the 3rd witness he was physically present during the entire episode, witnessed the entire incident but could not leave the place. When he was produced before Marawila Police by the husband of the 1st accused, he made a statement to police and subsequently made a statement giving full details before the Magistrate. Later he was granted a pardon by the Honourable Attorney General and made him a witness for the prosecution.

As submitted by the Learned Additional Solicitor General the submissions made by the Learned Counsel for the accused-appellant is an unheard objection by this court earlier.

Granting a conditional pardon to a person and making him a witness is provided subject to certain restrictions by our courts. It is an accepted legal principle that it is unsafe to act on the uncorroborated testimony of a witness who was given a conditional pardon.

In the case of ***Ram Prasad V. State of Maharashtra 1999 Cr. LJ 2889 (SC)*** it was decided that, the evidence of an accomplice has to pass the test of reliability and must leave adequate corroboration before the same can be acted upon.

The next important aspect of having a witness who was given a conditional pardon in a jury trial is the duty on the prosecution and the court to inform the jury of this fact and cautioned the jury with regard to the admissibility of the said evidence.

In this regard, we observe that while the 3rd witness Sunil Shantha was giving evidence, he had told court, that he made a statement to CID on 7th of January 1992, and was remanded. On 16th he made a voluntary statement before the Magistrate and later signed certain documents before the Magistrate expressing his willingness to become a prosecution witness. Even the defence counsel cross examined the witness on the basis that he was granted a conditional pardon by the Attorney General.

Registrar of the High Court whilst giving evidence before the jury once again revealed the High Court the background behind granting a conditional pardon to the 3rd witness Sunil Shantha.

The Learned High Court Judge had explained the Jury the principles, fundamentals and procedure with regard to granting conditional pardon to Sunil Shantha and cautioned the jury as to how such evidence should be evaluated. Whilst referring to the requirement of corroboration, the court has specially warned the jury that such corroborative evidence should emanate from independent sources.

In the absence of any specific legal requirement for the pardon papers to be marked before the trial, this court is of the view that the Learned Trial Judge has sufficiently cautioned the Jury with regard to

the admissibly of the evidence of the 3rd witness Sunil Shantha on whom the Attorney General has granted a pardon.

In this objection, the Learned Counsel for the 2nd to 4th accused-appellants have further submitted that there was no independent corroboration to the evidence of the 3rd witness.

However, the extent to which the evidence of 3rd witness Sunil Shantha was corroborated by independent witnesses were placed before the Jury by the trial judge and as observed by us, this corroboration commences at the time the two deceased were taken out from the house of Rani Beatrice (sister in law of the 1st deceased) with the dying deposition made to her by the 2nd deceased that one of the persons who came up to the gate was Sunil Shantha.

In his evidence, Sunil Shantha has taken up the position that he had no alternative but to follow the order given to him by the 2nd accused-appellant and had explained the events took place on the fateful day. In his evidence, he had stated going to a petrol station and buying some petrol to a can prior to their visit to the house of witness Beatrice. This too was corroborated by witness Dharmakeerithi a pump attendant who identified, Sunil Shantha and all three accused-appellants coming to collect petrol.

After the killing and setting fire to the dead bodies, when the three-accused left the scene of crime in the Jeep driven by the 3rd witness, the witness could not control the vehicle due to fear, and it had gone out of the road and collided with a tree.

Witness Premathilake who lived close to the place where the Jeep met with an accident, helped in pulling the Jeep and the putting it back to the road. Though witness could not identify the persons, he was categorical that apart from the driver, there were three others in the Jeep.

Prosecution witness M.A.J. Mendis the Additional Government Analyst confirmed that the parts of the broken tail light found at the scene of the accident tallied with the Jeep. In addition, the Additional

Government Analyst corroborated that the two hair strands found inside the Jeep belonging to the two deceased Theresa and Taclin and Scientifically it was conclusively established that the Jeep belonging to the husband of the 1st accused to the Indictment which were driven by witness Sunil Shantha was instrumental in committing the two murder on 03.01.1992.

When considering the above evidence, which was carefully placed before the Jury by the Leaned Trial Judge, we see no reason to hold that the evidence given by prosecution witness No. 3 Sunil Shantha was not corroborated by the independent witnesses' testimony.

Under these circumstances, we reject the second ground of appeal raised by the 2nd to 4th accused-appellants.

Non compliance of section 227 of the Code of Criminal Procedure Act

Section 227 of the Code of Criminal Procedure Act No. 15 of 1979 reads thus;

227 (1) It **shall** be necessary in any case to keep the jury together during any adjournment previous to the close of the Judge's summing up, but it shall be lawful for the Judge if it should appear to him to be advisable in the interests of justice in any trial to require the jury to be kept together during any adjournment.

(2) Where the jury is allowed to separate during the course of any trial the jurors **may** be first sworn or affirmed not to hold communication with any person other than a fellow juror upon the subject of the trial during such separation. (emphasis added)

(3) If any such juror shall hold any such communication with any person other than a fellow juror or if any person other than a communication with any such juror, such juror or person as the case may be shall be deemed to be guilty of a contempt of court and shall be punishable accordingly.

As referred above, there is no requirement under law to keep the jurors together during an adjournment prior to the judges summing up, unless the learned High Court Judge decides so in the interest of justice,

When the jurors are allowed to separate, it is the general practice to sworn or affirm the jurors not to hold communication with other than the fellow jurors but the term used in the section is 'jurors may' and not 'jurors shall' as against the term 'shall' used in subsection (1).

However when going through the proceedings of the present jury trial, it is observed by this court that except for the adjournment on 3rd February, on all the other days the jurors had been properly affirmed prior to the adjournment and this practice had continued nearly for 3 weeks since the trial proceeded for nearly 3 weeks. Therefore, it is our considered view that the jurors were well aware of their responsibilities and the mere failure on one single day has not caused any prejudice to the accused-appellants. It is further observed that in the absence any information and/or complaint against a juror of their conduct during the trial, it is safe to conclude that no prejudice had caused to any one of the accused-appellants for the failure as complained by the Learned Counsel for the 2nd to 4th accused-appellants.

Approach by the Learned Trial Judge

The role played by the Trial Judge at the conclusion of a jury trial is provided under section 229-231 of the Code of Criminal Procedure Act as follows,

Section 229 When the case for the defence and the prosecuting counsel's reply (if any) are concluded the Judge shall charge the jury summing up the evidence and laying down the law by which the jury are to be guided.

Section 230 It is the duty of the Judge-

a) To decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;

b) To decide upon the meaning and construction of all documents given in evidence at the trial;

c) To decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

d) To decide whether any question which arises for himself or for the jury.

Section 231 The Judge may if he thinks proper in the course of his summing up express to the jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding.

When making his summing up before the jury, the trial judge is free to make his summing up according to his wish but what is required is to follow the above guidelines. Therefore, one cannot argue that the approach of the judge is erroneous, if he has properly guided by the requirements referred to above.

One of the main argument raised by the Learned Counsel for the 2nd to 4th accused-appellants was that the Learned Trial Judge when making the charge before the jury does not indicate any application of the facts to the law. However, when going through the charge by the Learned Trial Judge we observe that the Learned Trial Judge had properly explained the each and every legal provision applicable to the present case and thereafter evaluated the prosecution as well as the defence version at length before the jury. As observed from the relevant provision of law in the Code of Criminal Procedure Act No 15 of 1979, i.e. section 229, the law requires the trial judge to, "charge the jury summing up the

evidence and laying down the law by which the jury are to be guided" and there is no requirement of application of law to the facts of the case as submitted by the Learned Counsel for the accused-appellants. We further observe that the above allegation made by the Learned Counsel is not specific but mainly in general nature and in the said circumstances we see no merit in this argument.

In addition to the main grounds of appeal raised before us by the Learned Counsel for the 2nd to 4th accused-appellants, when filing the written submissions before this court, had drew our attention to several portions of the summing up by the trial judge and submitted that the errors, misdirection and non-directions found in the summing up had caused prejudice to the 2nd to 4th accused-appellants.

However, when considering the said portions placed before us, we cannot consider them as errors, misdirection or non-directions, since the Learned Counsel had relied only on a specific sentence of the summing but not considered the summing up as a whole when placing those arguments. In one instance the Learned Counsel whilst referring to page 1759 of the summing up, submitted that the Learned Trial Judge had erred in law when he said to the jury that, "they can convict even on uncorroborated evidence of an accomplice" but, as observed by us the said position taken by the Learned Counsel is untrue and the trial judge had discussed the value of the evidence of an accomplice in detail from pages 1759-1764.

Whilst referring to page 1781 of the summing up the Learned Counsel has submitted that Learned Trial Judge's directions on dock statement dilutes the value of it but we see no merit in the said argument. In this regard we observe that the Learned Trial Judge after discussing the nature and value of a dock statement at length, had finally said, "ඒ අනුව විත්තිකරුවන්ගේ එම සාක්ෂිවලට අඩු වටිනාකමක්, අඩු තක්සේරුවක් ලබා නොදී ඒවා සාක්ෂි ලෙසට සලකාබලා ඉන් පැමිණිල්ලේ සාක්ෂිමත සාධාරණ සැකයක් ඇතිකරනවාද යන්න ඔබලා සලකාබැලිය යුතු වෙනවා. එසේ සාධාරණ සැකයක් මතුවන්නේනම් එම සැකයේ වාසිය විත්තිකරුවන්ට ලබා දී ඔවුන් නිදහස් කලයුතු වෙනවා."

In the said circumstances, we see no merit in the argument raised by the Learned Counsel when he submitted that the portions referred to in the written submissions have caused prejudice to the 2nd to 4th accused-appellants.

For the forgoing reasons this court is not inclined to interfere with the conviction and the sentence imposed on the 2nd, 3rd and 4th accused-appellants by the High Court of Colombo. The appeal submitted by the 2nd, 3rd and 4th accused appellants is hereby dismissed.

Appeal dismissed. Conviction and sentence is affirmed.

President of the Court of Appeal

H.C.J. Madawala J

I agree,

Judge of the Court of Appeal