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 of the Code of Criminal Procedure Act No. 15 of 1979 read together with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

CA 163/2015

HC Tangalle Case No. 26/2006

Ampagoda Liyanage Vijitha Mahindasena

ACCUSED

AND NOW BETWEEN

Ampagoda Liyanage Vijitha Mahindasena

ACCUSED – APPELLANT

Vs.

The Hon. Attorney General
Attorney Generals Department
Colombo 12.

COMPLAINANT- RESPONDENT

BEFORE: **P.R. WALGAMA J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Shymal A. Collure with A.P. Jayaweera the Accused – Appellant**

Harippriya Jasundara DSG for the Complainant – Respondent

ARGUED ON: **13.07.2016**

WRITTEN SUBMISSIONS: **Accused – Appellant – 18.10.2016**

Complainant – Respondent – 08.12.2016

DECIDED ON: **02.03.2017**

S. DEVIKA DE LIVERA TENNEKOON J

The Accused – Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Hambantota case bearing No. HC/2/12/2005 on 15.03.2006 on the charge of having caused the death of one Wickramasinghe Arachchilage Thilakaratne on or about 24.12.2001 at Netol Poruwa within the territorial jurisdiction of that Court and thereby having committed the offence of murder punishable under Section 296 of the Penal Code.

After the establishment of the High Court of Tangalle the High Court of Hambantota case bearing No. HC/2/12/2005 was transferred to the High Court of Tangalle as case bearing No. T.H.C. 26/2006 and on 28.06.2011 the contents of the indictment were read over to the Appellant and the Appellant pleaded not guilty.

Trial commenced in the High Court of Tangalle on 01.04.2013 with the evidence of PW1 Samarasekara Liyanaarachchige Kanthi who was the wife of the deceased. The brother of the deceased Wickramasinghe Arachchige Lalith Priyantha

thereafter gave evidence as PW2. Both PW1 and PW2 were the only eye witnesses to the murder of the deceased and after their evidence was led Lekamge Berty Maximus Fernando who was the Consultant Judicial Medical Officer who gave evidence as PW5, retired Inspector Police Karunamuniratne Ranjith Silva Karunaratne who served at the Weeraketiya Police Station at the time material to the murder of the deceased gave evidence as PW6, Sub-Inspector of Police attached to the Hakmana Police Station Rajapurage Premathileke gave evidence as PW7, Police Officer Abeyratne Kankanamge Wijedasa gave eviendence as PW8 and Police Constable Punchihewage Anura and interpreter Nanda Hatharasinghe gave evidence as PW9 and PW10 respectively.

The Prosecution closed its case by leading the aforesaid evidence and marked as productions P1 – the shirt worn by the deceased at the time of death, P2- the post-mortem report, P3 – a mammoty and P5 - the statutory statement.

The case for the prosecution in brief is that the on or around the 24.12.2001 PW1 (the wife of the deceased) and PW2 (the brother of the deceased) were returning from the "koratuwa" in the rain when the Appellant allegedly attacked the deceased on the head with a mammoty from behind at which point the deceased screamed "buddhu ammo" after which the Appellant fled the scene. PW1 had fainted after seen what happened to the deceased and PW2 had chased behind the Appellant but to no avail and had thereafter returned to where the deceased lay.

The defence marked 3 omissions of PW1 and marked as V1 – V5 her contradictions. The contradictions of PW2 were marked as V6 – V11.

The Defence thereafter made an application under Section 200(1) of the Code of Criminal Procedure to acquit the Appellant without calling for a defence and the

learned High Court Judge by his order dated 29.04.2015 dismissed the said application and called for the defence in the instant case.

The Defence was by means of a dock statement, made by the Appellant on 06.07.2015 by which the Appellant provided a supposed alibi, in that he stated that, he was at the residence of his mother and brother in Arauwwala in Maharagama at the time of the incident as he had gone to lodge his pregnant wife with his family.

The learned High Court Judge delivered the impugned Judgment dated 01.10.2015 and convicted the Appellant on the aforementioned charge and sentenced him to death.

Being aggrieved by the said Judgment the Counsel for the Appellant raised the following grounds of Appeal;

1) That the learned trial Judge has decided that the Appellant is guilty of the offence even before considering the defence of Alibi,

2) The learned High Court Judge has not taken into consideration the contradictions and the omissions,

3) The learned High Court Judge has failed to consider that the prosecution has failed to prove the case beyond reasonable doubt, and

4) The judgment and the sentence are contrary to law and the weight of the evidence adduced.

Before considering whether the learned High Court Judge had erred in law by not giving due weight to the evidence of the defence of Alibi as stated by the Appellant in his dock statement I shall first consider whether the omissions and the contradictions marked V1 – V11 were considered by the learned Trial Judge.

PW1 in her statement made to the Weeraketiya Police Station, around 7.00 – 7. 30 pm on the day in question, only moments after the attack on her husband, did not state that she saw the Appellant striking the deceased on the head with a mammoty, but that she saw the Appellant in flight after the assault. This has been marked as the 1st omission (vide page 77 of the Appeal brief). In the Non – summary inquiry at the Magistrate's Court in case bearing No. 73869 on 17.10.2002 PW1 re-affirms her stance that she only saw the Appellant running away from her husband. This has been marked as contradiction V2 (vide page 77 and 78 of the Appeal brief). At the inquest PW1 maintains her position that she only saw the Appellant running, and this has been marked as a contradiction V3 (vide page 78 of the Appeal brief). However when giving evidence in chief PW1 states that she saw the Appellant striking the deceased with the mammoty (vide page 61 of the Appeal brief) and confirms this during cross examination (vide page 77 of the Appeal brief). However, upon being pressed at cross examination PW1 goes on to admit that what she has stated at the inquest and at the Magistrates Court is false and that she is been honest at the trial stage.

It is pertinent to note at this stage that as per the evidence of PW5 the Consultant Judicial Medical Officer there were two (2) external injuries observed on the deceased and as per P2 the post-mortem report the death was caused due to "Cranio – Cerebral injury caused by a blunt force trauma to the head" and it was observed that "there were depressed fractures in the skull with Laceration of the brain". Therefore it may be said that the deceased was attacked twice with a blunt object.

One may therefore assume that the deceased screamed "budhu ammo" when the first blow to the head was made at which stage the PW1 quickly looked back to

supposedly, either to see the Appellant in flight after the assault or to see the Appellant assault the deceased with a mammoty for the second time before running away.

Omissions 2 and 3 were marked where PW1 omitted in her statement to the Police and at the inquest that she had seen PW2 walking ahead of her on the road at the time material to the incident. It is material at this point to note that PW1 in her evidence has stated that the road in which the incident occurred was a straight road (vide page 82 and 83 of the Appeal brief).

PW2 had clearly indicated in the Magistrate's inquiry that he did not see the deceased when he entered the road in question. At the trial PW2 consistently maintains that he joined the main road in question from a by-road at which point he saw his brother, the deceased, walking towards him and that they both continued on their way home, PW2 travelling ahead of the deceased. It must be noted that he denies seen PW1 at the time of the before the assault on the deceased. Thereafter PW2 states in evidence that he heard the deceased scream "budhu ammo" at which point he looks back and sees the Appellant striking the deceased twice before fleeing the scene (vide page 120 and 121 of the Appeal brief). He further states categorically that PW1 was not at the scene at the time of the assault and that he was the first to get to the deceased (vide page 123 of the Appeal brief) and PW1 was next to the deceased only after PW2 returned to where the deceased lay after giving chase to the Appellant.

Considering the nature of the omissions and contradictions discussed above this Court is of the view that they do in fact go to the root of this case and serious doubt is created by the omissions and contradictions of PW1 and PW2 the only eye witnesses in the instant case.

As per the version of PW1, PW2 was traveling ahead of her on a straight road when the deceased screamed "budhu ammo" at which point both PW1 and PW2 allegedly rushed to the side of the deceased. PW1 had omitted to state soon after the incident that PW2 was there at the scene. Further, PW2 maintains that PW1 was not at the scene immediately after the attack and that it was PW2 who rushed to the side of the deceased first. PW2 also maintains that he witnessed 2 blows as aforementioned. This however is highly implausible as the deceased would have screamed "budhu ammo" before being attacked and if that were the case PW1 ought to have seen the Appellant attacking the deceased and PW2 rushing towards the deceased.

Serious doubt is raised as to why PW1 omitted in her statement to the Police and at the inquest (omissions 2 and 3) that she had seen PW2 walking ahead of her on the road at the time material to the incident when it is evident that she could not have missed him and *vice versa.*

As submitted by the learned Counsel for the Appellant it is interesting to note that the murder weapon was in the possession of PW1. It was PW1 who had given the said weapon to the police on the following day. Interestingly the mammoty which was supposedly broken at the time of the incident as a result of the sheer force by which the deceased was assaulted, was given over to retired Inspector of Police Karunamuniratne Ranjith Silva Karunaratne PW6 in the complete form. This Court is seriously concerned about how the wife of the deceased PW1, who is predisposed to faint at the sight of blood, could have assembled the alleged murder weapon still stained with the blood of her husband and to have given it over to the police on the next day. Moreover, neither PW1 nor PW2 explains why or how the murder weapon was removed from the scene and tampered and why only the

banana leaf that the deceased was carrying to cover his head from the rain was found at the place of the incident.

It is now pertinent for this Court to consider the time of the incident as narrated by two eye witnesses. Both eye witnesses admit that it was raining at the time of the incident. PW1 is certain that incident occurred around 6.00 – 6.30 pm. PW2 testified that he usually leaves the field around 6.00pm but on the day in question he left around 4.00 – 4.30 pm since it was raining. (vide page 98 of the Appeal brief) Upon being cross examined PW2 confirms that he the incident occurred around 4.00pm (vide page 98 of the Appeal brief). It is therefore evident that PW1 and PW2 are at a variance when stating the time on which the incident occurred, a discrepancy which again goes to the root of the instant case. The light conditions at 4.00 – 4.30 pm and 6.00 – 6.30 pm are different. And one can assume that with the prevalent rain conditions ones vision may be impaired at close to 6.30 pm where as in such impediment would not necessarily arise closer to 4.00pm. The question then is what time could the alleged incident have occurred?

This Court finds that the prosecution has failed to establish a key element in the narrative that led to the death of the deceased by not adequately establishing the time at which the incident occurred. A prudent observer may nevertheless, point out, that if the vision of eye witnesses PW1 and PW2 were so impaired to the extent of not been able to have consistently corroborated on each others presence at the time of the incident, could either of them have effectively identified the Appellant?

Although the learned DSG on behalf of the Respondent contends the aforementioned omissions and contradictions are minor discrepancies this Court cannot agree to such and holds that these omissions and contradictions go to the

root of the instant case and have therefore created reasonable doubt as to the guilt of the Appellant.

I shall now consider whether the learned trial Judge has decided that the Appellant is guilty of the offence even before considering the defence of Alibi. On perusing the impugned judgment it seems that as submitted by the learned Counsel for the Appellant the learned High Court Judge has concluded after an evaluation of PW1's evidence that the Appellant was directly involved with the death of the deceased (vide page 173 of the Appeal brief). The learned trial Judge thereafter re-affirms her conclusion after evaluating the evidence of both PW1 and PW2 and states that it has been established that it was the Appellant who caused the death of the deceased (vide page 175 of the Appeal brief). She further concludes that it has been established by the evidence of PW1 and PW2 that the death concerned was due to the Appellant striking the deceased with a mammoty. She then finds that the injuries as referred to by PW5 were caused as a result of the Appellant striking the deceasded with a mammoty and it is specifically stated that the learned trial Judge has already decieded that the Appellant has committed the criminal act concerned and therefore that the Appellant ought to be guilty of having committed murder (vide page 178 and 179 of the Appeal brief). It is only thereafter that the learned trial judge has considered the dock statement made by the Appellant.

In the unreported case C.A. No. 225/2009 W.L.R. Silva J states thus;

> "The learned High Court Judge when he concluded that the case has been proved beyond reasonable doubt in the middle part of page 179 has prematurely decided that the chargers against the accused – appellant were proved beyond reasonable doubt. Having come to that conclusion, it is thereafter that he had proceeded to examine the evidence given by the

> accused. The learned High Court Judge should have considered the totality of the evidence before he came to a finding that the chargers against the accused – appellant were proved beyond reasonable doubt. It is repugnant to law and against all principles and norms to decide at the end of the prosecution case without considering the evidence for the defence that the chargers have been proved against the accused beyond reasonable doubt."

When considering the burden of proving a case beyond reasonable doubt it is imperative that I mention two fundamental principles in English Common Law which illustrate the opinion of this Court in that regard. In the landmark case Woolmington v DPP [1935] AC 462 the House of Lords first articulated the presumption of innocence principle and Lord Viscount Sankey stated thus;

> "Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The presumption of innocence is embedded in our Constitution in the Chapter containing fundamental rights and Article 13(5) reads;

> "Every person shall be presumed innocent until he is proved guilty"

In this context and for the reasons as morefully described above this court is of the view that the learned High Court Judge had erred in law by not giving due regard to the omissions and contradictions as discussed above and further that the learned trial Judge has misdirected herself in law by concluding on the guilt of the Appellant without first evaluating the dock statement.

For the aforesaid reasons this appeal is allowed. I set aside the conviction and sentence of the learned High Court Judge dated 01.10.2015 and acquit the Accused – Appellant.

Appeal Allowed.

Judge of the Court of Appeal

P.R. WALGAMA J

I Agree.

Judge of the Court of Appeal