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

In the matter of an Appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

01. Korale Hewage Maithripala.

02. Korale Hewage Devapriya

Accused-Appellants

C.A. No.129-130/2016

H.C. Matara No. 88/2003

Vs.

Hon Attrorney General

Attorney Geeral's Department

Colombo 12.

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**
ACHALA WENGAPPULI, J.

COUNSEL : Dr. Ranjit Fernando for the Accused-Appellants.

Dilan Ratnayake DSG for the Attorney General

ARGUED ON : 24th May, 2018

DECIDED ON : 06th July,2018

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ACHALA WENGAPPULI, J.

The 1st and 2nd accused-appellants were indicted before the High Court of Matara for causing death of *Korale Hewage Nimal,* under Sections 140, 296 read with 146 and 296, read with 32 of the Penal Code, with three other accused. After trial without a jury, only the 1st and 2nd accused-appellants were convicted. They were sentenced to death.

Being aggrieved by the said conviction and sentence, the accused-appellants sought to have the said conviction and sentence of death set aside upon the following grounds of appeal;

i. the trial Court has erroneously accepted the evidence of the sole eye witness, notwithstanding its infirmities,

ii. the learned High Court Judge who convicted them had no power since there was no nomination made in his name.

However, at the hearing, learned Counsel for the accused-appellants moved this Court to have this case remitted back to High Court for a trial *de novo* in view of the two grounds of appeal.

The prosecution relied on the sole eye witness to the incident *Nilanthi* to prove the several charges levelled against the five accused. According to witness *Nilanthi* the deceased was her elder brother. He was not married at that time and lived in their ancestral house. On the day of the incident, she has gone to her ancestral house to pick her children. On

her way, she saw her brother also walking towards their house about 50 meters ahead of her. Then she saw the 1st accused-appellant suddenly emerging behind a fence of *Makulatha* trees. He had a sword in his hand and has then attacked the deceased's neck area with it. With the sword attack the deceased fell into the side drain. The 2nd accused-appellant too has come armed with a *"Malu Pihiya"* and attacked the already fallen deceased with it. Seeing this attack on her brother, the witness raised cries. When her sister and a nephew came to see what was happening, the two accused-appellants have chased after them.

The witness went near the deceased who seemed to be alive at that time. Then the two accused-appellants have returned to the scene and has thereafter chased the witness away. The other accused who came to the scene after the attack on the deceased, encouraged the accused-appellants to inflict more injuries on him.

By then many others have gathered around the place and the accused-appellants decided to withdraw. Since the deceased has died by that time, the witness had taken a detour to avoid the accused-appellant's house, to reach the Police Station and lodged a complaint.

During her lengthy cross examination, several contradictions and omissions were marked. It is based on these infirmities that the accused-appellants complain that the sole eye witness's evidence is of diminished

evidentiary value. They complain that the infirmities in relation to identity of the accused, the improbability of her narration of sequence of events, taken together with the strong motive to implicate them to the incident should have been considered by the trial Court to decide that she is not a truthful and reliable witness.

Learned Counsel for the accused-appellant, during his submissions introduced another aspect in relation to the first ground of appeal, in addition to the already stated ground that the trial Court has erroneously accepted the evidence of the sole eye witness, notwithstanding its infirmities. The new aspect, relied on by the accused-appellant in support of their first ground of appeal, is that the learned High Court Judge who delivered the judgment has adopted the evidence already led before his predecessors and thereby failed to recall the witnesses as provided for by Section 48 of the Judicature Act No. 2 of 1978 as amended.

Learned High Court Judge, in his judgment, has taken extra care to evaluate *Nilanthi's* credibility as he was very much alive to the fact that he had no opportunity of observing her demeanour and deportment when giving evidence. In the judgment itself there were references that no opportunity to observe her demeanour. Learned High Court Judge has devoted a separate section for evaluation of credibility of the sole eye witness and dealt with each contradiction and omission. He has applied the tests of spontaneity, consistency and probability on her evidence before accepting her testimony as truthful and reliable. There was criticism by the

accused-appellant upon the learned High Court Judge's comment that the witness was tired after lengthy and often repeated questioning during cross examination. The contention of the accused-appellant is that the trial Judge was not able to make that observation as he did not observe the demeanour of the witness.

This observation was made by the trial Judge not on the demeanour of the witness but on the material available on the record itself. Her evidence commenced on 2nd October 2012 after 16 years since the incident and continued for several hours on that day. After an adjournment for a date after 7 months, her evidence continued on 2nd May 2013 and that also for several hours. There was cross examination of the witness even on minute details by the accused. It is under these circumstances the trial Judge rightly considered the stress of the witness and its effect on her evidence in the evaluation.

There cannot be a difficulty in relation to identifying the accused-appellants in this day time incident, where the witness has seen two well-known persons attacking her brother within a distance of 50 meters. Her reference to describe the initial identity in vague terms led to this submission. Thereafter, the witness has clearly identified the two accused-appellants, when they chased after her sister and threatened her.

Learned Counsel for the accused-appellants relied on the admission of the witness *Nilanthi* that there was previous enmity existed between the accused-appellants and the deceased, which made her to implicate them falsely for the murder of her brother. The learned trial Judge has devoted considerable space in his judgment in consideration of this factor, before he decided to accept her evidence.

The determination on credibility of a witness is a determination of a question of fact and we see no reason to interfere with this finding of fact by the learned trial Judge.

The other complaint by the accused-appellants, is that the trial Judge should have exercised his discretion under Section 48 of the Judicature Act No. 2 of 1978 as amended, should be considered next.

Section 48 provided for a situation where continuation of proceedings before a succeeding Judge who was empowered to act on the already recorded evidence. In addition, the succeeding Judge was also empowered to "re summon the witnesses and commence proceedings afresh."

The amendment brought in to the proviso to Section 48 of the Judicature Act by the Judicature (Amendment) Act No. 27 of 1999, read as follows;

> "Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to the committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re summoned and reheard."

Before this amendment, the proviso stated that "either party may demand that the witnesses be re-summoned and re-heard, in which case the trial shall commence afresh."

In view of these provisions, it appears that the accused-appellant's submission that the trial Judge has failed to exercise his discretion to re summon *Nilanthi* is based on the power conferred upon a succeeding trial Judge to "re summon the witnesses and commence proceedings afresh."

Learned Deputy Solicitor General, in his submissions in reply, contended that with the amendment brought in by the Act No. 27 of 1999, only the accused could demand that a witness be recalled and the prosecution was deprived of that opportunity. He further submitted that if the accused-appellants were of the view that the trial Judge should have observed the demeanour and deportment of the witness, then they had ample opportunity to make an application to the succeeding trial Judge to recall her. Having failed to make an application at the proper stage,

learned Deputy Solicitor General strongly contended that it is too late in the day to make this complaint only in the appeal.

In ***Dissanayake and Others v Dharmaratne***(2008) 2 Sri L.R. 184, the Supreme Court observed thus;

> *"It is necessary for a succeeding Judge to continue proceedings since there are changes of Judges holding office in a particular Court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving a discretion to a Judge to continue with the proceedings. Hence the exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case."*

As correctly submitted by the learned Deputy Solicitor General, the accused-appellants did not make any application to the succeeding trial Judge to recall *Nilanthi.* If they were under the impression that she has fared poorly at the witness box during the predecessor trial Judge and it is advantageous for them to have the witness recalled, then they had all the opportunity to do so as there was no change of their Counsel.

When the succeeding trial Judge decided to adopt proceedings under Section 48 on 27th August 2014, all parties consented. Then the question to

be decided in respect of this submission would be whether the succeeding trial Judge has exercised his discretion under Section 48 reasonably.

The apex Court, in its observation took a pragmatic view by narrowing down the scope of the challenges that could be made to instances of such exercise of discretion as it held that *"the exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case."*

If there is a serious issue, then the best party to raise it is the accused-appellants themselves. If the succeeding trial Judge, having considered the evidence already led, decided to proceed with the case with the consent of the parties then that clearly is a reasonable exercise of discretion.

In ***Dharmaratne v Dassenaike and Others*** (2006) 3 Sri L.R. 130, this Court reproduced the judgment of ***Wijewardena v Lenora*** 60 NLR 457 where the considerations that should be applied by an appellate Court in determining the issue whether a Judge of a Court of first instance has exercised the discretion vested in him reasonably;

> *"The mode of approach of an Appellate Court to an appeal against an exercise of discretion is regulated by well-established principles. It is not enough that the judges composing the appellate Court consider that, if they had been in the position of*

the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the judge has acted illegally, arbitrarily or upon a wrong principle of law or allow extraneous or irrelevant consideration to guide or affect him, or that he has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court."

In view of the above reasoning, we are of the firm view that the first ground of appeal raised by the accused-appellants is without any merit.

The second ground of appeal concerns the issue whether the succeeding trial Judge had the authority to try and determine the case against the accused-appellants.

The submission made by the learned Counsel for the accused-appellants are based on a nomination made by His Lordship the Chief Justice on 4th July 2006 nominating a particular Judge of the High Court of Hambantota to hear and conclude the case at Hambantota whose name appears on the nomination and therefore the judgment pronounced by a different High Court Judge at Matara is made clearly without authority.

However, the examination of the original case record revealed that there is a subsequent nomination dated 24th November 2011, by which the "Present Judge of the High Court of Matara is directed to hear and conclude" this case. It is clear that the learned High Court Judge who finally delivered the judgment was empowered by this nomination as he was the incumbent High Court Judge of Matara at that time. Therefore, the submission made by Counsel for the accused-appellants in relation to the 2nd ground of appeal is based clearly on a misconceived notion.

Upon consideration of the two grounds of appeal, we hold that they are without any merit. Accordingly, the judgment and the sentence imposed on the accused-appellants by the High Court of Matara on 11th July 2016 is affirmed.

The appeal of the accused-appellants is therefore stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL