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

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

C.A.No.177-178/2007
H.C. Panadura No.HC 1602/2002

01. Somasiri Fernando
02. Dombagahawatte Ranjith Ananda

Accused-Appellants

Vs.

Hon. Attorney General
Attorney General's Department

Colombo 12.

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Tirantha Walaliyadde PC with Roshanara Abeywardena for the 1st Accused-Appellant.
Amila Palliyage with Nihara Randeniya, Sandeepani Wijesuriya and Daminda de Alwis for the 2nd Accused-Appellant
Madhawa Tennakoon S.S.C. for the respondent

ARGUED ON : 05.09. 2018 and 11.09.2018

DECIDED ON : 26th October, 2018

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ACHALA WENGAPPULI J.

The 1st and 2nd Accused-Appellants (hereinafter referred to as the "1st and 2nd Appellants") were indicted before the High Court of Panadura for committing murder of *Chamudi Kaushalya Fernando* on 13th December 1992. After a jury trial, both Appellants were convicted for murder upon unanimous verdict and were sentenced to death.

Being aggrieved by their conviction and sentence, the Appellants sought to challenge its legality on several grounds of appeal.

The 1st Appellant raised following grounds of appeal in his written submissions;

a. the trial Court misdirected the Jury on the presumption of innocence and burden of proof
b. the trial Court misdirected regarding the defence of *alibi*
c. the trial Court misdirected the Jury on the principle of common intention
d. the trial Court failed to direct the Jury on Section 114(f) of the Evidence Ordinance
e. the trial Court failed to direct the Jury on Section 134 of the Evidence Ordinance
f. the trial Court failed to direct the Jury regarding the necessity of proof of omissions and contradictions
g. the trial Court misdirected the Jury on assessing credibility of the defence witnesses

h. the trial Court misdirected the Jury on identification of the accused
i. the trial Court misdirected the Jury on evaluation and assessing credibility of the witnesses

The 2nd Appellant raised following grounds of appeal in his written submissions;

a. the trial Court misdirected the Jury on the presumption of innocence and burden of proof
b. the trial Court misdirected regarding the defence of *alibi*
c. the trial Court failed to direct the Jury on Section 114(f) of the Evidence Ordinance
d. the trial Court failed to direct the Jury on Section 134 of the Evidence Ordinance
e. the trial Court misdirected the Jury on assessing credibility of the witnesses called by him
f. there are highly prejudicial comments made by the learned High Court Judge in that they have effectively and incorrectly narrowed down the scope of the Jury assessing the credibility of the witnesses.

In view of the above quoted grounds of appeal as urged by the Appellants, it is appropriate at the outset of this judgment to consider the case for the prosecution that had been presented before the Jury.

The prosecution primarily relied on the eye witness testimony of PW1 *Wasantha Sriyani* to establish the charge against the Appellants.

It is stated by the witness that she had come to live in *Kaikawala* about three months prior to the incident. The deceased is her 20 months old daughter. On the day of the incident, at about 7.15 in the evening she heard a knock on her kitchen door. She opened it with the impression that it was her husband who usually arrives home at that time. She saw the two Appellants just outside her door. They came into the house uninvited. Her house was lit by oil lamps. She identified both Appellants. The 2nd Appellant had a large wooden club and a *manna* knife in his hands. The 1st Appellant was unarmed.

As they entered her house through the kitchen door, the 2nd Appellant said that they came for a particular "business" and wanted her child. She retorted back saying that she had not raised children to be given away to them. The 2nd Appellant then went to the bed on which the deceased infant was sleeping and had inflicted three cut injuries on her neck area. The 1st Appellant had threatened the witness not to shout and had then attempted to prevent her leaving the house. She however, succeeded in her attempt to leave the house and ran directly to her neighbour *Karunawathie* claiming her "*child is finished*" Thereafter, the witness returned to her house with *Karunawathie* and *Kamal,* another neighbour of hers. She had picked up her child from the bed and saw the pillow was soaked in blood. Her husband too had arrived at this juncture and he immediately took away their child to *Horana* hospital in a motor cycle.

The witness too had gone to the hospital with the pillow of the child in another motor cycle with one *Nishantha.* At the hospital, they learnt that the child was dead. The witness had narrated what she witnessed to the medical officer, implicating the Appellants. Thereafter, the witness and her husband went to *Horana* police to make a complaint but were redirected to *Moragahahena* Police where they finally made a complaint at about 10.00 p.m. about the death of their daughter.

The evidence of Dr. *Ariyasinghe,* who performed the post mortem examination on the body of the deceased, is that she has suffered 3 deep cut injuries located on the right side of her neck parallel to each other. Particularly the injury No. 1 had penetrated cranial cavity by cutting through her skull bone and had thereby caused damage to outer membrane to the brain. There were no injuries caused to her brain, but her death was due to haemorrhagic shock. He believed her death could have occurred within 15 minutes of receiving such injuries due to heavy loss of blood as some of the blood vessels were also cut.

The Police evidence revealed that *Moragahahena* Police received 1st information on the same night at 10.00 p.m. from PW1 and, having visited the scene at 11.15 p.m., the 1st Appellant was arrested from his home on the same night at 3.30 a.m. The 2nd Appellant surrendered to Court on 15.12.1992.

On inspection of the crime scene, IP *Rajapakse* observed a chimney lamp still burning and there was a polythene sheet with stains like blood on a bed. He also noted a mosquito net by the bed and some cooked food in the kitchen.

At the close of the prosecution case, the trial Court called for defence from the Appellants. They gave evidence under oath and called witnesses in support of their *alibi.*

In this backdrop of evidence, we now turn to consider the several grounds of appeal of the Appellants.

At the hearing of this appeal, learned President's Counsel for the 1st Appellant modified his grounds of appeal and amalgamated some. He had then made extensive submissions on the alleged failure of the trial Court to follow the "mandatory" statutory provisions contained in Section 227(2) of the Code of Criminal Procedure Act No. 15 of 1979 as it failed to administer the oath of separation on the Jury on each day at the end of the day's proceedings. He relied on the judgments of ***K v Appuhamy*** 46 N.L.R. 304, ***The Queen v Aladdin*** 61 N.L.R. 7, ***Fernando v The Queen*** 76 N.L.R. 160 and ***In re Lilian Rajapakse*** 72 N.L.R. 352 and requests this Court to "pronounce whether the provision is mandatory or not". The 2nd Appellant also associated himself with this submission.

The learned Senior State Counsel in his reply on this ground of appeal contended that there is no such "mandatory" requirement to administer an oath of separation at adjournment and in this instance the learned High Court Judge has adopted a more effective method of ensuring that there is no external communication by the Jurors by directing them of the importance of observing the restriction to communicate.

Section 227(2) of the Code of Criminal Procedure Act, states that *"where the jury is allowed to separate during the course of any trial the jurors may be first sworn or affirmed not to hold communications with any person other than a fellow juror upon the subject of the trial during such separation."*

In ***Regina v Pinhamy*** 57 N.L.R. 169, Basnayake ACJ (as he was then) observed thus;

> *"Jurors are administered an oath of separation whenever the Court adjourns. By that oath Jurors undertake not to hold communication with any person other than a fellow juror upon the subject of the trial during their separation.*
>
> *In view of that oath the need for the Judge satisfying himself that there has been in fact an improper conversation between Juror and witness is greater. For a discharge without inquiry may cast on the Juror an undeserved reflection that he had acted contrary to the terms of his oath. A Juror should be free to talk to anyone on matters unconnected with the subject to the trial. it would be an interference with the rights of the Jurors if they were to totally debarred from conversing with a witness under any circumstances. Nevertheless, prudence demands that a Juror*

should avoid conversing in public with a witness during a trial. similarly, a witness should avoid conversation with a Juror in public however familiar and friendly he may be with him in private life. The importance attached to keeping the jury beyond any kind of influence can be realised from the fact that in the early days in England Jurors are kept together from the commencement of the trial till its conclusion. But today we are satisfied with the safeguard of an oath of separation. The greater is the need therefore not only to ensure that the oath is observed strictly but also make it appear that it is so observed."

It is evident from the above quotation that the emphasis should be on *"keeping the jury beyond any kind of influence"* during their tenure of office as Jurors. The Legislature in its wisdom thought it fit to achieve this objective by administering an oath of separation at adjournments. But it did not think fit to impose such a condition as a mandatory obligation on the trial Court as it used the word "may" and did not lay down any consequence, in the event of failure to administer such an oath. Section 9 of the Oaths and Affirmations Ordinance provided that *"no omission to take any oath or make any affirmation ... shall invalidate any proceedings or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."*

In the instant appeal, instead of administering an oath of separation, the trial Court took the responsibility to itself to warn the Jurors not to

have any communication about the trial with outsiders. This warning, as admitted by the 1st Appellant, was repeated faithfully by the trial Court on every adjournment.

We do not propose to impose a mandatory duty on a trial Court in complying with Section 227(2) when the Legislature opted not to. None of the authorities relied upon by the 1st Appellant held such a view. In the circumstances, we are of the considered opinion that, in this particular instance, the failure to administer an oath of separation had not caused any prejudice to the Appellants denying their right to a fair trial, in view of the trial Court's repeated warnings reminding the Jurors not to indulge in any communications other than with the fellow Jurors in relation to the trial before them and in the absence of any allegation that the verdict of the Jury was corrupt due to outside influence.

However, we take this opportunity to re-emphasisc the importance of strict adherence to the statutorily laid down procedure in which a Jury trial is conducted since the Jurors are not persons who are learned in law and Court procedures. All Courts must ensure that those provisions are faithfully given effect to as it is vital for the prosecution as well as to the accused to have a fair trial.

Connected to this ground of appeal, the 1st Appellant also claimed that the trial Court had failed to comply with the provisions of Section 223(2) of the Code of Criminal Procedure Act, at the end of the summing up. Learned President's Counsel invited our attention to p.1097 of the

appeal brief where it is recorded that the Jurors are only handed over to the Registrar of the Court.

Section 223(2) lays down the procedure to be followed once the summing up is concluded by the trial Court. When the Jury retires *"they shall be committed to the charge of the Court"* and the Court had complied with that requirement. The Court officer in whose responsibility that the Jury was placed must then administer an oath on them in the prescribed form. There is no reference in the record of such compliance.

It is also observed that throughout the proceedings it is evident that at the commencement of further trial for each day the oath was administered, and that fact had been recorded. This indicates the Court officers were aware of the importance of administering such an oath on Jurors. In this particular instance, it had not been recorded that the Registrar had administered the oath when the summing up was concluded.

In ***Attorney General v Theresa*** (2011) 2 Sri L.R. 292, the Supreme Court held that;

> *"Section 114 of the Evidence Ordinance contains the presumption that judicial and official acts have been regularly performed or done with due regard to form and procedure... While the presumption is used sparingly in criminal cases, it will be presumed even in a murder case that a man acting in public*

capacity has properly discharged his official duties, until the contrary is proven (vide ***R v Gordon*** *(1989) Leach 515)."*

As noted above, the administering of the oath on Jurors had been done regularly throughout the trial by the relevant Court official. It appears that the Jury retired for deliberations late in the evening and it is therefore reasonable to infer that the oath had been administered as usually done by the Court official but due to an oversight that fact had not been recorded. As such the presumption under Section 114 of the Evidence Ordinance applies, as decided by the apex Court.

Learned President's Counsel, in support of the ground of appeal in relation to *alibi* contended that the trial Court directed the Jury to compare the cases of prosecution and defence side by side and thereby violated fundamental principle of criminal law as laid down in ***James Silva v The Republic of Sri Lanka*** (1980) 2 Sri L.R. 167 where it was held *"... to examine the evidence of the accused in the light of the prosecution is to reverse the presumption of innocence"*. He referred to pages 1071 and 1072 of the brief where these references are made in the summing up.

Examination of the summing up of the trial Court, we find that the references to comparison of evidence is made in relation to *alibi* has no such objectionable feature. The trial Court, having dealt with the prosecution evidence invited the Jury to consider whether it is acceptable or not. If it is not acceptable, then the Jury was told to give that benefit to the Appellants.

Then the trial Court referred to the evidence of the Appellants. The trial Court directed the Jury that if they accept that evidence then the defence is successful. If that evidence could not have accepted, then the defence has failed. The reference of comparison of evidence is in relation to the evidence of each appellant and the witnesses called by them and not in relation to the evidence of sole eye witness to the prosecution (p.1072).

The 1st Appellant then addressed us that the trial Court failed to distinguish between common and similar intentions and left this question of fact to be inferred from the illustration given by the Court in its summing up and thereby acted in violation of Section 229 of the Code of Criminal Procedure Act.

It is clear from the perusal of the summing up that the trial Court invited the attention of the Jury to the submissions made by the Appellants in relation to the concepts of similar and common intention before it ventured to offer directions on the point. Having reminded them on the submissions of the Appellants, the trial Court directed the Jury to an illustration and had dealt extensively on this aspect particularly at page 979, where it clearly directed them that common intention and similar intentions are two distinct concepts. The trial Court also directed them of the instances where there is common intention and where there is similar intention. It further directed them when a similar intention transforms itself and thereby becomes common intention.

The 1st Appellant relied on the evidence of the PW1 to impress upon us that there was no common intention by referring to the evidence of the prosecution where PW1 clearly admitted that he did nothing and had no arms with him at the time of intrusion.

In countering this submission, learned Senior State Counsel submitted that there is ample evidence to infer the common murderous intention of the 1st Appellant he shared with the 2nd Appellant. He relied on the evidence of PW1 that it was the 1st Accused who prevented her from seeking help by restricting her movements and thereby ensured that none of them seen and apprehended at the scene itself by her neighbours.

The evidence of PW1 clearly implicated the 1st Appellant having a common murderous intention shared with the other Appellant. The two of them entered the house uninvited and demanded her daughter. PW 1 retorted back marking her protest. Then the 2nd Appellant cut the infant with a manna knife while the 1st Appellant prevented PW1 from calling out help by shouting or seeking help by running to her neighbours. At no point of time the 1st Appellant made an attempt, at least verbally, to prevent the 2nd Accused from repeatedly inflicting cut injuries on the neck of the sleeping infant with a manna knife. The entire episode lasted less than five minutes and both Appellants have disappeared into darkness before the arrival of neighbours upon being alerted by PW1.

These circumstances amply justify drawing of an inference of common murderous intention of the 1st Appellant that is shared with the 2nd Appellant as the *"necessary inference deducible from the circumstances of the case and an inference from which there is no escape"* as per the judgment of ***Wijesinghe and three Others v The State*** (1984) 1 Sri L.R. 155.

In addition, the 1st Appellant made submissions as to the erroneous evaluation of the evidence of PW1 on the basis that the version and sequence of events as narrated by her is improbable when viewed in the ordinary conduct of people. He particularly relied on the evidence of PW1 that she did not implicate any of the Appellants when she ran to *Karunawathi* for help and her husband did not even ask her who is responsible for this when he rushed home. The 1st Appellant claimed that non-disclosure of a known suspect raises a reasonable doubt as to the truthfulness of PW1.

The evaluation of the evidence of PW1 is a question of fact attributed to the Jury and they found it credible. We are in agreement with this finding. It is correct that PW1 did not implicate any of the Appellant until she was questioned by the medical officer who pronounced the death of her infant. This behaviour had to be considered in the light of the circumstances under which the witness was placed at.

It is her evidence that when the Appellants forced themselves into her house that evening she initially thought they have come to sexually molest her. She did not suspect that the 2nd Appellant would attack the sleeping infant with the manna knife he was armed with. No doubt she was frightened at the sight and as she claimed. The thought of escaping death crossed her mind. She ran out of the house overpowering the resistance offered by the 1st Appellant when she saw what happened to her child. She only said to *Karunawathii* that her *"child is finished"*. Then she rushed back to her house with two of her neighbours directly to where her infant was. She had then picked her up from the blood-soaked pillow. What was foremost in her mind was to take the child to a hospital. Then her husband arrived. Without wasting time, he grabbed their child and rushed her to hospital in a pillion of a motor cycle. PW1 too got into the next available motor cycle and rushed to hospital with the pillow, only to be told that the child was dead.

She provided an acceptable answer as to her delay as she said what was foremost in her mind was to save her child and not to give description of the attack to anyone. She implicated the Appellants, in her complaint to Police made in less than three hours since the incident. Considering the fact that they initially went to *Horana* Police from the hospital to lodge a complaint only to be turned away and it was at 10.00 p.m. her statement was finally recorded, we find the delay in implicating the Appellants are justified in the circumstances.

The 1st Appellant complained that the trial Court put "embroidery" in its summing up by providing an explanation for the delay in making a statement to Police at p. 995. This complaint is based on the directions given by the trial Court to the effect that Police would not record complaints as you go to them and to have her complaint recorded at 10.00 p.m. PW1 would have to turned up at Police by at least 9.30 p.m. This sentence ends with the invitation to consider what the trial Court had directed on these lines. There was no determination by the trial Court of the delay is justified.

It would have been more appropriate if the trial Court left these considerations in a different presentation directing the Jury to utilise their knowledge as members of public whether the delay in reporting to police is justified under the circumstances. However, we find no prejudice caused to the Appellant with this direction even if it is considered not appropriate, when considering the directions given during the entirety of the summing up.

Another ground urged by the 1st Appellant is what he termed as "Ellenborough syndrome" and this is based on, as alleged by him, by "arguing for the prosecution" and showing "partiality" as disclosed in pages 1019 and 1020 of the appeal brief. Upon perusal of the segment of the summing up contained in these two pages, it is revealed that the trial Court was merely inviting attention of the Jury as to the conduct of the PW1 when the intrusion by the Appellants into her house that evening. The trial Court wanted the Jury to consider the several probabilities of her conduct.

With due respect to the submissions of the learned President's Counsel, we do not find any objectionable direction on the part of the trial Court in these two pages.

Lastly the complaint by the 1st Appellant that the trial Court failed to record some remarks it made during the cross examination by the 1st Appellant of PW1. The proceedings revealed that there was some observations made by the trial Court and communicated that in English language to the learned Counsel for the 1st Appellant in the presence of the Jury. Learned Counsel for the 2nd Appellant who appeared for him at the trial requested the Court to record them, but the Court decided not to. The record does not indicate the content of the observation or at least any indication as to the topic on which such observations were made. In the absence of any record, we are not in a position to make a positive determination. It must be recorded that it is always best for the trial Courts to make whatever observations on the conduct of the Counsel in the absence of the Jury. The fact that there was no application to discharge the Jury by the Appellants after this episode indicates that it did not have an adverse effect on the minds of the Jury in relation to the Appellants.

The 2nd Appellant, whilst associating himself with the grounds of appeal as raised by the 1st Appellant, nonetheless relied on an exclusive ground of appeal that his defence of *alibi* had been wrongly rejected by the Jury upon misdirection and non-direction by the trial Court on its evaluation as to its credibility. He submitted that he suggested his defence of *alibi* to the prosecution witnesses before he took up it in his evidence under oath maintaining consistency.

There was no omission or contradiction was marked off his defence. The trial Court had commented upon his belatedness in making the defence and also had commented of his surrendering to Court after several days after the incident, when there was no evidence of "absconding". He drew our attention to the directions to the Jury in pages 1980 and 1087 where the trial Court, having referred to the evidence of the 2nd Appellant that he heard a shouting from the direction of PW1's house and had then ran towards it, directed the Jury to consider the evidence of his witness who has given an inconsistent evidence.

The 2nd Appellant then referred to the direction of the trial Court at p.1087 where it is stated that the witnesses called by the 2nd Appellant had taken "different positions". It must be noted that this particular statement follows the directions that the evidence given by the wife of the 2nd Appellant is inconsistent when questioned by the prosecution and by Court. Then the trial Court proceeded to direct the Jury to consider whether that evidence is consistent with the evidence of the 2nd Appellant. When considered these directions in the context in which it is stated, we find no wrong in inviting attention of the Jury to the inconsistencies of evidence in assisting to evaluate the credibility of the evidence of the 2nd Appellant. There is no difference in the process of evaluating the credibility of evidence, whether that evidence is presented by the prosecution or by the accused. In evaluating any evidence the same yardstick would apply. The trial Court is duty bound to assist the Jurors to evaluate the credibility of evidence placed before them irrespective of the party presented them. In this instance the Court was merely fulfilling its duty by assisting them in evaluation of evidence.

In the circumstances, we are of the view that there is no merit in the appeals of the Appellants and therefore their appeals ought to be dismissed. Therefore, we affirm the conviction and sentence of the Appellants and proceed to dismiss their appeals.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL