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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

1) Indrani Gunasekara.
2) Meehallage Preethi Anton.

Court of Appeal
Case No. CA 219-220/2013

Accused

Vs,

And Now Between

1) Indrani Gunasekara.
2) Meehallage Preethi Anton.

Accused-Appellants

High Court of Colombo
Case No. HC 4887/ 2009

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : Gayan Perera Attorney-at-Law for the 1st Appellant.

Anil Silva PC with Sahan Kulatunga Attorney-at-Law for the 2nd Appellant.

Chethiya Gunasekara DSG for the Respondent.

Written Submissions : 1st Accused Appellant – 23rd January 2018.

2nd Accused Appellant – 23rd January 2018.

Complainant Respondent-07th February 2018.

Argument on : 1st October 2018.

Judgment on : 8th November 2018.

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JUDGMENT

S. Thurairaja, PC. J

The 1st Accused – Appellant, Indrani Gunasekara (Hereinafter sometimes referred to as the 1st Appellant) and 2nd Accused-Appellant, Meehellage Preethi Anton (Hereinafter sometimes referred to as the 2nd Appellant) was indicted in the High Court of Colombo by the honourable Attorney General for possession and trafficking of 34.32 grams of heroin (dicetyl morphine) which are punishable under Section 54 A (b) and 54 A(d) of the Poison, Opium and Dangerous Drugs Act. After the trial the Appellants were found guilty and sentenced to death.

Being aggrieved with the said conviction and sentence the Appellants preferred this appeal to the Court of Appeal and submitted following grounds of appeal.

Grounds of appeal of the 1st Appellant are,

1) Discrepancies with regard to the raid were not considered by the Learned Trial Judge.
2) Dock statement of the 1st Appellant was not properly evaluated.

2nd Appellant submits that, the Learned Trial Judge has not considered the defence and the dock statement of the 2nd Appellant.

Prosecutiion led the evidence of Inspector of Police Kariyawasam Senadheerage Darshana, Officer Aruna Somasiri, Sub Inspector of Police Upali Jayaweera, Police Sergent Upananda Kuruppu, Officer Sirafdeen and Government Analysis Sandhya Kumuduni.

According to the witnesses for the prosecution, the Special Investigation Unit of the Mirihana Police Station received an information from an informant regarding trafficking of Heroin taking place at 45/10, Maligawatta Road, Ethul Kotte. They formed a team under the leadership of Inspector of Police K.S. Darshana. They have proceeded and laid in ambush. The 2nd Appellant, who had come there in a motor-cycle, parked the same and went to the house. In the same time the 1st Appellant came out of the house to receive the 2nd Appellant. Police flung into operation and apprehended these two Appellants and another person who was taken into custody and died subsequently because of natural causes. At the time of arrest the 1st Appellant, who ran into the kitchen was seen covering a parcel with a dirty kitchen cloth. This parcel was taken into custody and found there are several small parcels within that big parcel. On examining, the investigators suspected that brown powder to be Heroin. The 2nd Appellant had a parcel contains Rs.27, 900/-. All three were arrested and taken to Swarnamahal Jewellers at Nugegoda. There the Police Officers weighed the substance and it contained 87.430 grams of brown powder. Subsequently it was properly sealed and sent to the Government Analyst. After analysation the Government Analyst found that substance contained 35.32 grams of Heroin (dicetyl morphine).

Considering the grounds of appeal, witness IP Darshana and PS Anura Somasiri gave evidence and there are no material contradictions nor omissions. IP Darshana who was the leading investigator, had instructed the others of their participation in the raid. The Counsel submits that PS Somasiri saying that he did not see the bike coming creates a doubt in their evidence. We carefully perused the proceedings. There we find Police PS Somasiri was given clear instructions to keep his eye on the

door and house and be vigilant. IP Darshana was in the look out of the arrival of the 2nd Appellant. The PS Somasiri clearly described what happened there and says that he did not see the bike but heard the motor-cycle approaching the house. When the Appellant got down from the motor-cycle and went to the house he had a clear view of the Appellant and the others.

Similarly in many other issues both were speaking of the same incident through their own vision. If we carefully perused the evidence, we could see all these witnesses speaking of the main incident and corroborating each other. We do not see any contradictions or conflict of interest. Therefore we find that there is no merit in this ground of appeal.

The next ground of appeal of the 1st and the 2nd appellant is that, the Learned Trial Judge has not considered the defence and the dock statement. It is hard to say that the dock statement and the defence evidence were not properly considered.

Before we proceed this ground of appeal, we perused the judgment of the Learned Trial Judge. There we find he had considered all materials before him and analysed the same and evaluated all the evidence. The suggestions made by the defence were adequately addressed by the Learned Trial Judge.

Considering the dock statement the Learned Trial Judge had carefully considered the statements *per se* and analysed the same. There he had treated dock statement with certain value and concluded that it had not created any doubt in the case for the prosecution.

Acceptance of Dock Statement is discussed in many cases.

In **Gunasiri and two other vs Republic of Sri Lanka 2009 (1) Sri L.R 39**. It was held that,

> *In evaluating a dock statement the trial judge must consider the following principles:*

(1) If the dock statement is believed it must be acted upon.

(2) If the dock statement creates a reasonable doubt in the prosecution case the defence must succeed.

(3) Dock statement of one accused should not be used against the other.

In **The Queen v. Kularatne [1968] [71 NLR 529]** stated that,

"*we are in respectful agreement, and are out of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony*".

We carefully considered the dock statements made by the Appellants and conclude that those statements had not created any doubt in the case for the prosecution. Further as discussed in the above cases we have no reason to interfere with the judgment of the Learned Trial Judge.

Considering all materials before us we find that, there is no merit in this appeal, accordingly, we dismiss the appeal. Conviction and the Sentence are affirmed.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL

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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979 read with Article 138(1) of the Constitution of the Republic of Sri Lanka.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Yogarajah Sathees alias Jeagan

Court of Appeal
Case No. CA 26/2016

Accused

Vs.

And Now Between

Yogarajah Sathees alias Jeagan

Accused-Appellant

High Court of Jaffna
Case No. HC 1622/ 2013

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : R.H. Weerasena Attorney-at-Law for the Appellant.

P. Kumararatnam SDSG for the Respondent.

Written Submissions : Accused Appellant - 28th February 2018.

Complainant Respondent-8th June 2018.

Argument on : 11th October 2018.

Judgment on : 9th November 2018

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JUDGMENT

S. Thurairaja, PC. J

The Accused- Appellant, Yogarajah Sathees alias Jeagan (hereinafter sometimes called and referred to as the Appellant) was indicted by the honourable Attorney General for committing the murder of Kandasamy Ithayan. After the trial the Appellant was convicted and sentenced to death. Being aggrieved with the said conviction and the sentence the Appellant preferred this appeal to the Court of Appeal and submits the following grounds of appeal.

1) Medical evidence does not support the injury on the deceased.
2) The prosecution witness no.2 evidence was uncorroborated.
3) Dying deposition is not accurate.
4) Prosecution witness no.2 and 4 are contradicting each other.
5) The High Court Judge misled himself using untold evidence of the doctor (sic).
6) Confessionary part of the accused's statement was not considered.
7) Evidence of the Appellant was not properly analysed and considered.

The prosecution led the evidence of Judicial Medical Officer, Eswary Somasundaram, Thangarasa Nilan, Inspector of Police Kankanige Nimal Perera, Chief Inspector of Police Mahinda Padmakumara Waidyathilaka, Chief Inspector of Police Arampola Mudiyanselage Priyantha Ajith and Nishantha Tennakoon (Mudliyar of the Court).

According to the prosecution the incident had occurred on the 5th of January 2011 between 1.30 p.m. to 2.00 p.m. (noon). Prosecution witness no.2 Eeswary Somasundaram, who was the tenant of the deceased, had gone to the washroom. When she was returning, she had seen the Appellant clad in a black coloured jacket, armed with a knife, leaving the house. There she had seen the deceased was lying in a pool of blood with bleeding injuries. When she rushed to him the deceased had said, "Aiyo, Jegan stabbed me..". She knew that the Accused who was in the same neighbourhood and the deceased was the brother in law of the accused.

Considering the 1st ground of appeal that, Medical evidence does not support the injury on the deceased; the main witness had seen the accused near the scene of crime with the knife in hand. The said knife was recovered under Section 27(1) statement and shown to the Judicial Medical Officer (JMO). The JMO had clearly opined that the fatal injury could have caused with that type of weapon. Carefully perusing the evidence before the Court and the evidence of the JMO strongly supported the version of the deceased, main witness and the others. Therefore I find that there is no merit in this ground of appeal.

The second ground of appeal is that the prosecution witness No.2 evidence was uncorroborated. The prosecution witness No.2, Eeswaran Somasundaram gave evidence and revealed to court what she heard and what she saw. She was under extensive cross-examination and not contradicted on any material facts. Further her evidence was amply corroborated by the Judicial Medical Officer and the police investigators.

Under Section 134 of the Evidence Ordinance the prosecution does not require to prove a fact with certain number of witnesses. It can be even proved with one witness. In **King vs N.S.A. Fernando (46 NLR 255)** this principle affirmed and stated that,*"testimony must be weighed and not counted".*

In **Sumanasena v. Attorney General [1999 SLLR (3) 137]** held that,

> *"Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law.*

In **Welimunige John v. State (76 NLR 488)** , G.P.A. De Silva J. observed that,

> *"No particular number of witnesses shall be required for the proof of any fact. The adequacy of one witness to prove a fact in terms of Section 134 of the Evidence Ordinance will hold good in a case where only one witness is available to the party desiring to establish a fact, and where only one witness is called even though others are also available."*

I agree with the above judgments and re-iterate that the evidence must be weighed and not counted. Considering the above facts, I found that the 2nd ground of appeal also fails on its own merits.

The 3rd ground appeal is that dying deposition was not accurate. Prosecution witness No.2 is the one who heard the dying declaration of the deceased. The wordings were not contradicted at any point. The counsel submits to Court that it cannot be accepted because the others did not hear that.

It is evidenced before the Trial Court that prosecution witness No.2 went first and her son prosecution witness No.4 (Thangarasa Nilan) came later. So, what she heard would not have been heard by the others. Further this witness was consistent throughout and never contradicted at any time.

The 4th ground of appeal is that the prosecution witness No.2 and 4 are contradicting each other. Prosecution witness No.2 and 4 are mother and son respectively.

Prosecution witness No.2 was at home at the time of the incident. Prosecution witness No.4 was outside of the house and he came after a little while. On careful perusal of the evidence of both witnesses, I do not find any contradictions *per se* and *inter se* with these two witnesses. Further this was never substantially raised before the Trial Judge. After carefully considering the evidence before the court, I find that there is no merit in this ground of appeal.

The 5th ground of appeal is that the High Court Judge misleads himself using untold evidence of the doctor. At the argument stage perusing the original brief in Tamil and the translations. The Learned Counsel for the appellant withdrew this ground of appeal.

The 6th ground of appeal is that the confessionary part of the statement of the Appellant was considered. The knife was recovered with the help of a Section 27 (1) statement. According to the evidence it says "*I took the knife to home it is there in the box in the room of my house. I can show it to the police*". When we read this portion of the statement we do not see any confession directly or indirectly. The Learned Trial Judge had discussed the acceptability of this and come to his own findings and he had given reasons in the judgement. I do not find any inappropriateness of the decision of the Learned Trial Judge. Further considering statement and other materials before the Court I find there is no merit in this ground of appeal.

The last ground of appeal is that the evidence of the appellant was not properly analysed and considered. The Learned Trial Judge had given reasons for his findings in 44 pages. He had carefully analysed the evidence given by the appellant. I do not see there is any merit in this ground of appeal since the Learned Trial Judge had adequately considered the evidence of the appellant; I find that there is no merit in this ground of appeal.

We carefully perused the submissions and the evidence before the Court. We do not want to disturb the findings of the Learned Trial Judge. On a careful scrutinization of the evidence before the trial judge, we are convinced that there is sufficient material for the trial judge to come to a conclusion.

G.P.S. de Silva, C.J. in **Alwis vs. Piyasena Fernando [1993 (1) SLR 119]** held that,

> *"it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lighty disturbed on appeal."*

In **King vs. Rankira (42 NLR 145)** held that,

> *"the Court of Appeal will not interfere with the judicial discretion of a judge in passing sentence unless that discretion has been exercised on a wrong principle."*

We find that the findings of the Learned Trial Judge has warranted in the given circumstances. Therefore, we conclude that there is no merit in all these grounds of appeal. Accordingly, we dismiss the appeal and affirm the conviction and the sentence.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL