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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No:
CA 118-119/2013

Complainant

High Court of Kegalle Case No.
HC 2468/2006

-Vs-

1. Vidanalage Lakshman Jagath Fonseka
2. Vidanalage Thamara Dhananjaya Fonseka
3. Kanahelage Sarath Chandrasiri

Accused

-And Now Between-

1. Vidanalage Lakshman Jagath Fonseka
2. Vidanalage Thamara Dhananjaya Fonseka
3. Kanahelage Sarath Chandrasiri

Accused-Appellants

-Vs-

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

Before: **S. Thurairaja PC, J**

&

A.L. Shiran Gooneratne J.

Counsel : Anil Silva, PC with Sahan Kulatunga for the 1st and 2nd Accused-Appellants.

R.C. Gooneratne for the 3rd Accused - Appellant.

Dileepa Peiris, DSG for the Respondent.

Written Submissions of the 1st, 2nd and 3rd Accused - Appellants filed on: 13/10/2017

Written Submissions of the Respondent filed on: 06/03/2018

Argument on: 16/10/2018

Judgment on : **21/11/2018**

A.L. Shiran Gooneratne J.

The 1st, 2nd and 3rd Accused-Appellants (hereinafter sometimes referred to as the 1st, 2nd and 3rd Appellants) were indicted on 3 counts namely, for causing the death of William Hettiarachchi, an offence punishable under Section 296 of the Penal Code, as count 1, the robbery of a Van belonging to Mapatunage Wilson Wijesinghe, an offence punishable under Section 383 of the Penal Code as count

2, and retention of the said Van knowing it to be stolen property, an offence punishable under Section 394 of the Penal Code, as count 3.

At the conclusion of the trial the Learned High Court Judge convicted the Accused-Appellants on all charges and were sentenced to death on count 1, and imposed 20 years rigorous imprisonment and a fine of Rs. 10,000/- each with a default sentence of 5 years imprisonment, on count 2. There was no sentence imposed on count 3.

According to the prosecution, on 25/08/1996, a dead body of an unidentified person had been found on the Aguruwella - Avissawella Road, which was later identified as that of the deceased, William Hettiarachchi.

On 06/09/1996, the 1st and 2nd Appellants were arrested while they were seated in a Van in the Ruwanwella Police Area. At the time of detection, the 3rd Appellant had approached the parked van. The police have recovered two knives concealed in the Van in which the 1st and 2nd Appellants were seated. A purse had been recovered with several personal documents belonging to the deceased from the possession of the 3rd Appellant.

The prosecution case is based on 3 incidents which took place in separate locations.

Firstly, the body of the deceased is found on 25/08/1996, in an isolated place at Habaragala in the Ruwanwella police area.

Secondly, the 1st, 2nd and 3rd Appellants are arrested on 06/09/1996, by the Bandaragama police. The 1st and 2nd Appellants while seated in a van, the 3rd when approaching the Van.

Thirdly, the 1st Appellant entrusted a van to PW6, to be re-painted.

I will now evaluate the relevant evidence.

According to Sunil Russell Kumara (PW4), on 24/08/1996, around 10 p.m., the 1st Appellant had walked to his house stating that they were returning from Sri Pada. The next morning, Russel Kumara on his way to work had seen the 1st Appellant and another unidentified person in a white Van parked about a quarter of a mile away from his house. When he inquired, the 1st Appellant had told him that he had slept the previous night in the Van. In his evidence this witness failed to positively identify the van he had seen that morning.

Sisira Kumara, (PW6) in his evidence states that, a person like the 1st Appellant had come to him to get a vehicle re-painted. Resorting to a dock identification, this witness has repeatedly stated to Court that a person like the 1st Appellant brought the Van in question to be re-painted. Since identity is in issue, the ability to have positively identified the 1st Appellant for the first time, in the

dock, after a lapse of several years, is certainly questionable. The 2nd Appellant was not identified by this witness.

Professor Ian Dennis in his book titled, ***The Law of Evidence (3rd Edition), at page 274***, has this to say about dock identifications;

> *"the term "dock identification" refers to the procedure whereby a witness is asked whether he or she can see in the courtroom the person who committed the offence, and the witness then identifies the defendant in the dock. It has been recognized for many years that such identifications may be very unsatisfactory where identity is in dispute."*

In this case further caution is necessary, since the witness refers to the 1st accused as a person "like the 1st appellant".

The counsel for the Appellants have referred to the case of ***Kekulkotuwage Don Anton Gratien Vs. The Attorney General*** (CA 226/2007 decided on 01/07/2010), in a similar situation, where the witness could not affirmatively identify the accused, the Court held, that it was unsafe to act on such evidence to convict the accused.

According to Sub Inspector Pradeep Ananda Silva (PW12), the 1st and 2nd Appellants were arrested while seated in a Van parked in an isolated place in the

Bandaragama police division. According to his evidence the 3rd Appellant who was arrested at the same place was in the possession of a purse which contained a photograph, an Identity Card and documents belonging to the deceased.

According to the evidence of the Commissioner of Motor traffic (PW22), the registration number of the Van taken into custody did not correspond with the engine number. It is also in evidence that the registration documents recovered from the Van did not correspond with the said Van. However, there is no satisfactory identification of the Van, by PW6, which is alleged to have been given by the 1st Appellant to be re-painted, or a positive identification of the 1st Appellant by this witness as the person who brought the Van to be re-painted. The only reference to the 2nd Appellant is that, he is the brother of the 1st Appellant and was seated in the Van at the time of arrest.

Two knifes have been recovered on statements obtained from the 1st and 2nd Appellant's.

In the case of ***Devidas Vs. State of Maharashtra, 1982 Cr LJ 2189, 2193 (1981) Bom Cr 577***, it was held that,

> *"the mere discovery by the accused cannot be said to be of any legal consequence, if it is not preceded by an informative statement on the part of the accused".*

According to evidence, a knife had been concealed between the upholstery and the roof of the Van and a second knife concealed inside the rear frame of the Van. The discovery of fact with regard to the information given by the 1st and 2nd accused are marked as P13a and P14a, respectively, in which the 2nd accused state, "on instructions given by my brother I removed the rear upholstery and concealed it. I can show it to you", with no reference with regard to any discovery of fact. Therefore, the fact discovered cannot be considered as consequent to the statement given by the accused led in evidence under Section 27 of the Evidence Ordinance, with regard to any discovery of fact. The discovery of the knifes were made 10 days after the recovery of the dead body. It is also observed that the information leading to the discovery was made after the alleged re-painting of the Van. Therefore, we are of the view that the said statement allegly made by the accused, and led in evidence is not protected under Section 27 of the Evidence Ordinance.

When evaluating evidence against the 3rd Appellant the learned, Trial Judge has concluded that the items of evidence belonging to the deceased, recovered from the possession of the 3rd Appellant was within the knowledge of all the accused. This is on the basis that the 3rd Appellant was in the company of the 1st and 2nd Appellants at the time of arrest. We find that there is no basis on which the learned trial judge could have arrived at such a conclusion. Such adverse

inferences cannot only cause prejudice to the accused but also attach undue weight to the prosecution case.

We also observe that the learned High Court Judge has failed to consider the dock statement given by the Appellant's in its proper legal context, considering the evidence led by the prosecution.

In ***S.H. Badurudeen Vs. Hon Attorney General C.A. 167/2006, decided on 23/02/2010***, the court held that,

> *"it is trite law that when an accused sets up the defence of denial, there is no burden on the accused to prove the truth of his version and it is more than sufficient to create merely a reasonable doubt on the prosecution case".*

In the case of ***The Queen vs. M.G. Sumanasena 66 NLR 350 at 351***, it was held that,

> *"Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence.... The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence*

remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence."

The prosecution case is based on circumstantial evidence gathered from three separate and distinct events. However, it is observed that the evidence presented before Court lies in limbo, with no nexus between the accused and the incriminating evidence. Accordingly, the totality of evidence before Court does not lead to the exclusion of every reasonable doubt and to the irresistible inference and conclusion that it was the Accused-Appellants who inflicted the fatal injuries on the deceased or to the robbery of a van.

Therefore, for all the above reasons, we hold that the impugned judgment dated 15/07/2013, cannot be upheld. Accordingly, we decide to set aside the conviction and the sentence of the Learned High Court Judge and acquit the Accused-Appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL