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

In the matter of an Appeal against an order of the High Court under sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Kamani Manjula Ponnamperuma
ACCUSED - APPELLANT

Case No. CA 95/2017

HC (Puttalam) Case No. HC 65/2013 **VS**

The Hon. Attorney General
Attorney General's Department
Colombo 12.
RESPONDENT

BEFORE : Deepali Wijesundera J.

: Achala Wengappuli J.

COUNSEL : Shavindra Fernando P.C. with
Sajith Weerasuriya,
Anjula Rajapaksha C. Athauda
For the Accused – Appeallant.
Parinda Ranasinghe P.C. A.S.G.
For the Respondent.

ARGUED ON : 11th December, 2018

DECIDED ON : 11th January, 2019

Deepali Wijesundera J.

The appellant was indicted in the High Court of Puttalam under section 296 of the Penal Code for the murders of Rita Mary Perera and Alfred Fernando and also under section 380 of the Penal Code for robbery. At the conclusion of the case the appellant was found guilty of all charges and was sentenced to death.

The story of the prosecution was that one of the deceased made a dying declaration while he was being taken to the hospital that the appellant cut him. Three witnesses were in the vehicle when the dying declaration was made and they have given evidence to say what was uttered by Alfred Fernando. Entire prosecution case was based on this dying declaration where he has said "හිල්ඩාගේ බාල එකී කමණි කැපුවා" according to prosecution witness number one.

Prosecution witness number two who has gone to cut curry leaves from the decease's house had seen Alfred Fernando on the floor and gone back to her house which was nearby and informed her son and come back to take him to hospital. She has stated in evidence while going in the vehicle Alfred said "හිල්ඩාගේ බාල එකී කැපුවා"

Prosecution witness number three who has gone to the deceased's house after he heard about the incident had seen Alfred lying on the floor covered in blood and the deceased has told him "හිල්ඩාගේ බාල එකී පිහියෙන් කොටලා වේන් එක කපා ගත්තා". According to these witnesses there are three dying declarations made to three persons and all three have different wordings.

The grounds of appeal are grave infirmities in the dying declaration made to three different witnesses. The learned counsel for the appellant citing the judgment in **Ranasinghe vs A.G. 2007 1 SLR 218** argued that applying the rule stated in the said judgment it is very unsafe to rely on three different versions of the dying deposition. He further said prosecution witness number two contradicts prosecution witness number one and prosecution witness number three with regard to the scene of the crime and the dying declaration. He also cited the judgment in **Dharshana Devi vs State of Punjab 1997 Cr. L.J. 796 (Bom).**

According to the evidence of the driver of the vehicle (Prosecution Witness number three) which took Alfred to hospital he had repeatedly heard the deceased making a dying declaration as to the appellant cutting him. But he has not mentioned a word about his wife Rita who was also murdered at the same time. He has not tried to rescue his wife but had

gone on saying he was cut by the appellant. The body of Rita was found later by people who rushed to the scene.

The Judicial Medical Officer has given evidence and said that three weapons have been used to cause the injuries on deceased Alfred Fernando. A knife was found embedded to the mouth of deceased Rita Perera which was marked as P7 at the trial. This makes altogether four weapons used to cause the injuries on both deceased. Here we have to apply the test of probability Can a single person a woman who is not heavily built use four weapons to injure two persons at the same time? One would say at least two persons participated in the crime and not a single assailant as alleged by the prosecution.

Prosecution witness number two who had gone to the deceased's house in the afternoon had seen two persons repairing the fence of the house. These people have not been questioned by the police nor have they made an attempt to find them.

The learned counsel for the appellant argued that the investigating officers did not check the finger prints on the weapons found at the scene of the crime. He stated that when a case is based on circumstantial

evidence the trial judge must consider all alternations that are compatible with the innocence of the accused.

The police had received an anonymous call to say a woman had been murdered inside a house and they had gone to the place mentioned but had failed to investigate who the caller was. All statements of the witnesses have been recorded at the same time and at the same place. The appellant's counsel stated the value of the gold chains robbed has not been established by the prosecution. Therefore charges three and four were not proved.

Referring to the judgment of the learned High Court Judge the appellant argued that the evidence of the defence was not considered as well as the defence of alibi, all these have been rejected without considering.

The learned Additional Solicitor General for the respondent argued that the judgment **in Ranasinghe vs AG** does not apply to the instant case since in the Ranasinghe's case it was the same witness who has given three different version and that in the instant case it was three different witnesses who are telling about the dying deposition.

The respondent citing the judgment in **Charles vs Motha 1961 65 NLR 294** submitted that the Judicial Medical Officer has stated that deceased Alfred would have been able speak for a while after he sustained the injuries. But the Judicial Medical Officer has not stated the exact time he could have been able to speak, he has said "සැලකිය යුතු වේලාවක්" which has to be established by the prosecution.

On perusal of the evidence and the judgment by the learned High Court Judge we find that the learned High Court Judge has failed to appreciate the use of more than three weapons on the deceased Alfred as stated by medical evidence it is impossible for a single person to use three weapons at the same time to injure a person.

The learned trial judge has failed to consider the infirmities relating to the dying declaration as stated in Ranasinghe's case. Also the section 27 (E.O) recovery has not been considered applying the test of voluntariness and has failed to consider the infirmities in the evidence.

The learned high Court Judge has failed to consider the defence of alibi and the defence evidence with proper consideration. He has stated there were no contradictions or omissions in the prosecution evidence while there were marked contradictions and omissions.

The learned High Court Judge has failed to apply the tests of probability and consistency when analyzing the prosecution evidence and has arrived at the wrong conclusion. A grave injustice has been caused to the appellant by these.

For the afore stated reasons we set aside the judgment and conviction dated 27/06/2017 and acquit the appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL