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

The Democratic Socialist Republic of Sri Lanka

- Complainant-

V.

1. Waduwange Harold Shantha Kumara.

1st Accused

Court of Appeal
Case No. CA 224/2013

H.C. (Gampaha)
Case No. H.C. 143/2003

And Now Between

1. Waduwange Harold Shantha Kumara.

- 1st Accused Appellant -

V.

The Attorney General

- Respondent -

Before A.L. Shiran Gooneratne, J.,

K.Priyantha Fernando, J.,

Counsel Anil Silva P.C. with Sahan Kulathunga for the Accused-Appellant.

Suharshi Herath SSC for the Respondent

Argued on 01.02.2019

Written Submissions Filed on 05.02.2016 – By the Appellant

30.11.2018 – By the Respondent

Decided on 05.03.2019

K. PRYANTHA FERNANDO, J.

1. The Accused Appellant was indicted with two others before The High Court of Gampaha for committing murder of one Waduwange Thilak Rohana on 4th April 2000. Appellant was the 1st accused, and the 2nd accused died during the course of the trial. After trial the Learned High Court Judge by her judgment dated 18.12 2013 convicted the Appellant and acquitted the 3rd accused of the charge. Upon conviction, the Appellant was sentenced to death and aggrieved by the said conviction and sentence the Appellant filed the instant appeal against the same.

2. The grounds of appeal urged by the Appellant as settled on 1.2 2019, the day of the argument of the appeal were as follows;

1. Has the learned Trial Judge considered that trustworthiness in witness (PW1) Martin's testimony is in doubt?
2. Has the Learned Trial Judge misdirected herself when she came to certain inferences from the fact that weapon and trousers were found consequent to a statement recorded in terms of section 27 of the Evidence Ordinance?

3. Has the Learned Trial Judge misdirected herself as regards the evidence of purported absconding by the Appellant?
4. Has Learned Trial Judge misdirected herself in respect of the recovery of the vehicle from the house of a relative of the Appellant?
5. Has the Learned Trial Judge misdirected herself when she did not consider the material contradictions and omissions in the evidence of the prosecution witnesses in the case?
6. Has the Learned Trial Judge misdirected herself when she drew adverse inference from the fact that the accused did not give evidence?
7. Has the Learned Trial Judge misdirected herself when she has come to the conclusion that the prosecution has proved the case beyond reasonable doubt?

Case for the prosecution.

3. The deceased who was 16 years old had been living with his parents in the same house. On the day of the incident, Srimathie the mother of the deceased had left the house to do a religious ritual for her son, the deceased, as he was going through a bad period and had death threats. She had told her father- in- law Martin (PW1) to keep an eye on the deceased son.

4. Mean time witness Podina had come to get some beetles from Martin and had told Martin that she saw the deceased going towards the school with two other children after lighting a cigarette from the boutique. Martin had then gone towards the school searching for the deceased. He then had seen the Appellant dragging the deceased from the boutique to the compound and stabbing the deceased with a 'manna'. When the deceased tried to escape the 2nd accused had held the deceased with the collar and had cut the deceased. Martin also had seen the van belonged to the appellant at the scene. When Martin came near the deceased, on seen him injured, Martin had fainted.

5. It was evident that Martin had gone to the scene again when the Learned Magistrate visited the crime scene on the same day. It was also evident that the Appellant had an enmity with the deceased for having an affair with his sister.

6. We have carefully considered the evidence adduced at the trial, all grounds of appeal urged on behalf of the Appellant and the submissions made by both counsel for the Appellant and Respondent.

Ground No 1

7. Counsel for the Appellant contended that the sole eye witness Martin is an unreliable witness and Court should not act upon his evidence. In that, Counsel submitted that Martin had given the statement after a delay of 5 days. Alleged incident had taken place on 4th April 2000 but he had made the statement to the Police only on 9th April 2000. Counsel further submitted, the evidence that Martin saw the incident may have been an afterthought and a made-up story to implicate the Appellant who had a previous enmity over the deceased having an affair with the appellant's sister.

8. It was the contention of the Counsel for the Respondent that witness Martin who was the grandfather of the deceased had explained the delay in giving a statement to the Police to the satisfaction of the Court and therefore is a reliable witness and the Learned Trial Judge was correct in acting upon his evidence.

9. Delay in making the statement to the Police would affect the credibility of the witness. However, if the witness explains the delay to the satisfaction of the Court, his evidence can be relied upon. The explanation has to be plausible. (Perera V. Attorney General CA107/2012, Sumanasena V. Attorney General [1999] 3S.L.R. 137).

10. Witness Martin in explaining the delay in making the statement to police said that they were not in proper senses (අපි තැන් තැන් වල වැටිල අඬනවා, අපිට සිහියක් පතක් තිබුණේ නැහැ.) He was the sole eye witness to the incident. Although he had fainted on seeing the deceased being stabbed and cut, according to him he had come back to the place of incident when the Learned Magistrate visited the crime scene the same day. He had not even volunteered to make a statement to the Learned Magistrate although it was evident that an announcement was made for any person who had seen the incident to come forward.

11. It is natural for the family members to discuss about the murder, especially as to who committed the murder. If the witness Martin saw the deceased being killed, naturally Martin would have informed that to the family members. He had not even told what he saw to his son Thilakaratne who is the father of the deceased. Thilakaratne had given three statements to the Police on 5th, 6th and 8th April 2000. Even by 8th April after 4 days of the murder his father Martin had not told Thilakaratne that he saw the incident. It is most probable that If Martin saw the incident, he would have told the family members at least the following day. All these circumstances taken together create a doubt as to whether Martin really saw the incident or was it a made-up story to see that the Appellant is taken to task because of the previous enmity.

12. Superior Courts have observed that evidence of the sole eye witness needs to be subjected to deeper scrutiny. If the conduct of the solitary eye witness is highly unnatural and his presence at the crime scene is doubtful, it is unsafe to record a conviction based on the testimony of such a solitary eye witness. (Gaital V. State 1988 CrLJ 960, Wijepala V. AG [2001] 1S.L.R. 46, Sumanasena V. AG [1999] 3S.L.R. 137).

In case of Wijepala V. AG [2001] 1S.L.R. page 46, at page 57, Ismail J. said;

> *"Senaratne who was the sole eye witness has thus been cross examined on vital aspects relating to the incident and doubt has been raised in regard to his presence at the scene. ... Evidence of a single witness, if cogent and impressive, can be acted upon by a court, but, whenever there are circumstances with suspicion in the testimony of such witness, then corroboration may be necessary."*

13. The Learned Trial Judge had failed to take the above legal position with the facts I have mentioned in paragraphs 7,10 and 11 into account when she evaluated Martin's evidence and when she arrived at a favourable finding with regard to the testimonial trustworthiness of sole eye witness Martin. In the above premise, I find that ground of appeal No. 1 has merit.

Ground No.2

14. Police investigators had recovered a knife, a pair of shorts and a T-shirt consequent to a statement made by the Appellant in terms of section 27 of the Evidence Ordinance. Although the recovery officer testified as to the presence of blood like stains in those items, it was evident that the Government Analyst had reported that there was no blood found in those items. Therefore, the clothes recovered cannot be connected to the incident of causing injury to the deceased by the Appellant.

15. With regard to the knife, the Medical Officer who conducted the post mortem had said in evidence that the cut injuries as well as stab injuries could have been caused by the said knife. However, in cross examination it was revealed that only one side of the knife had a sharp edge. The witness had not observed whether the stab injuries were caused by a weapon which had

sharp edge on one side. He had said that they did not have facilities to investigate into that extent. However, as I said before, although the Police witness said that he saw blood stains on the knife, Government Analyst had opined that there was no human blood. Hence, recovery of the knife from the funeral parlour of the Appellant who was a mortician would not have much support for the case for the prosecution.

Grounds 3 and 4

16. It was evident that the house of the Appellant was burned down after the incident. Appellant was arrested at a hotel at Pasyala and his vehicle he had kept with a relative. Counsel for the Appellant contended as the house of the Appellant was burned down, he had no option but to find resident somewhere. It is pertinent to note that when the Appellant's vehicle was recovered Police have observed blood like stains on the cloth on the dash board. More than that PW 9 Police officer Wijeratne had said in evidence that he saw drips of blood on the door of the van. Government Analyst had again opined that there was no human blood. In the circumstances, the Learned Trial Judge had misdirected herself when she decided that the accused had been absconding.

Ground 6

17. The Learned Trial Judge in page 24 of her judgment has said that the accused could have given evidence to prove his innocence although it was not obliged to do so. (අපරාධ නඩුවකදී චූදිතයෙකු සාක්ෂි කූඩුවට නැග සාක්ෂිදීමට අත්‍යවශ්‍ය නොවුවත්, තමාට එරෙහිව තිබෙන චෝදනාවකදී පැමිණිල්ලේ සාක්ෂි ප්‍රබලව ඉදිරිපත්කර ඇති අවස්ථාවකදී චූදිතයෙකු තම නිර්දෝෂීභාවය ඔප්පුකිරීම සඳහා සාක්ෂි දියහැක. එහෙත් 1 වන විත්තිකරු එසේ ක්‍රියා නොකොට විත්තිකූඩුවේ සිට ප්‍රකාශයක් පමණක් ඉදිරිපත්කොට ඇත.)

18. It seems that the Learned Trial Judge had drawn an adverse inference against the Appellant for not giving evidence under oath on his behalf to prove his innocence, which is against the law.

19. As I have discussed in ground of appeal No. 1, the testimonial trustworthiness and credibility of the sole eye witness is in doubt and cannot be acted upon. The rest of the evidence adduced including the evidence of witness No.3 Srimathie Jayawardene mother of the deceased who said that she saw the three accused persons near the school, travelling in a van is not at all sufficient to prove the charge beyond reasonable doubt. Rest of the circumstances lead in evidence is not sufficient to come to an inescapable inference that the Appellant was involved in causing the death of the deceased as charged.

20. For the reasons given above, grounds of appeal No. 5 and 7 also should be decided in favour of the Appellant.

21. In the above premise, I find that the prosecution has failed to prove the charge against the Appellant beyond reasonable doubt and that the conviction could not stand. Hence the conviction and the sentence of the Appellant by the Learned Trial Judge dated 18.12. 2013 is set aside. Accused is acquitted of the charge.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL