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

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979

CA 164/2018
HC/ GALLE/ 4138/2014

Kogge Gihan Kumara

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : Devika Abeyratne J
P. Kumararatnam J

COUNSEL : Mr Anil Silva PC with Asela Serasinghe for
the Appellant.
Mr.Dilan Ratnayake DSG for the Respondent.

ARGUED ON : 11/02/2021

DECIDED ON : 22/03/2021

JUDGMENT

P. Kumararatnam J

[01] The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted along with another by the Attorney General for committing offences as follows:

1. On or about the 24th July 2011 in Rathgama the accused committed the murder of Thimira Malinga Alwis Manawadu which is an offence punishable under Section 296 of Penal Code read with Section 32 of the Penal Code.
2. In the course of the same transaction the accused committed the offence of hurt by striking Denagamage Indika with a cutting weapon which is punishable under Section 315 of the Penal Code read with Section 32 of the Penal Code.

[02] As the Appellant had absconded and not appeared before the High Court of Galle, an inquiry under Section 241(1) of Criminal Procedure Code Act No.15 of 1979 was held and the trial proceeded in absentia of him. However, the Appellant was represented by an Attorney-at-Law during the trial. After the trial the Appellant was convicted for culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of a sudden fight and was sentenced to 18 years RI and a fine of Rs.5000/-. In default 03-months simple imprisonment imposed. He was acquitted from the second count.

[03] Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

[04] The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic.

[05] On behalf of the Appellant following Grounds of Appeal are raised.

- A. Has the Learned High Court Judge misdirected himself when he failed to consider that the prosecution has failed to prove its case against the Appellant beyond reasonable doubt?

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- B. Has the Learned High Court Judge misdirected himself on the question of identity of the Appellant?
 - C. Has the Learned High Court Judge failed to consider the matters favourable to the Appellant and thereby has the Appellant deprived of a fair trial?
 - D. Has the Learned High Court Judge misdirected himself when he ordered the trial to be held in absentia against the Appellant under section 241 of the Code of Criminal Procedure Act No. 15 of 1979?
 - E. In the circumstances of the case is the sentence imposed on the Appellant excessive and /or illegal?

[06] On the day of the incident witness PW1 Indika had gone to the playground and played till 6.pm and went for a party along with the deceased. All including the deceased had consumed liquor till 11.15 pm. Thereafter he and the deceased had gone to a nearby hotel for dinner. At the hotel they had met the Appellant along with another person. An argument erupted between the parties. Although he and the deceased went inside the hotel the Appellant had followed them and continued to argue with them near the cashier. As two Navy officers had come to the hotel and told them to stop the fight, the Appellant shouting that he is also from the Navy had stabbed deceased twice with a knife. The other person had assaulted the PW1 with a sharp object. He had witnessed the incident from the light of the hotel as well as the street light. After the assault he had gone to the place where he consumed liquor and came with two of his friends to the place of the incident. By that time the deceased had been taken to the Karapitiya Hospital. He too had gone to the hospital at about 12.30am and spoke to the deceased and remained there for some time. In the morning he was told that the deceased had been taken to the intensive care unit of the hospital. According to PW01 the Appellant is a known person to him.

[07] In the first ground of appeal the Appellant contends whether the Learned High Court Judge misdirected himself when he failed to consider that the

prosecution has failed to prove its case against the Appellant beyond reasonable doubt.

The PW01 in his evidence had said that he identified the Appellant who was known to him for several years prior to the incident. But during the cross examination this witness had reiterated that he identified the Appellant at the time of the incident and mentioned the name of the Appellant to police when he gave his statement on the following day at 1.35pm. But in his statement to police, he had not mentioned the name of the Appellant. This omission has been brought to the notice of the trial court by the defence counsel. It was further elicited during the cross examination of PW1 that he had not mentioned the name of the Appellant even during the Non-Summary Inquiry. This witness had further admitted that he had never spoken to the Appellant.

The Learned High Court Judge in his judgment at page 272 without analysing the said omission simply stated that the said omission is not affect the root of the case.

Not only in this case but also in every criminal case where identity of an accused is disputed, it is the paramount duty of the prosecution to place undisputed evidence to establish the identity of the accused. The importance of an omission in criminal trials have been discussed in several judicial decisions by the Appellate Courts of our country.

[08] In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 held that,

“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgement on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.

Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct

his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.”

[09] Although, PW1 stated that he knew the Appellant three to four years prior to the incident and he knew that the Appellant works for Sri Lanka Navy, but failed to reveal the name of the Appellant to the police and in the Non-Summary Inquiry. Further the incident had happened on 24/07/2011, and the witness had for the first time mentioned the name of the Appellant only before the High Court on 07/02/2018.

The Learned Deputy Solicitor General submitted that during the cross examination the defence was unable to mark a single contradiction from the evidence of PW1. Therefore, he submits that the Learned High Court Judge has correctly admitted the evidence of PW1. Although, no single contradiction was marked by the defence but has raised a very important omission which certainly affect the root of this case.

[10] In the judgment Learned High Court Judge has mentioned that the PW01 in the short history to the doctor had clearly described the happening of the incident to the doctor who had examined him at the Karapitiya Teaching Hospital on 25/07/2011. This has prompted the Learned High Court Judge to accept the evidence of PW01 as credible.

In this case, as the doctor who examined PW01 had gone abroad, relying on the Section 414(1) of the Code of Criminal Procedure Code Act No. 15 of 1979, the prosecution had called another doctor who had been named as PW13 in the indictment to give evidence on the Medico-Legal Report of PW01. PW13 while giving evidence had read out the short history of the report which had been heavily relied on by the Learned High Court Judge in his judgment. (Page 272 of the brief)

The admissibility of recorded history in Medico-Legal Report as evidence in criminal trials has been discussed in several decided cases. In **Gamini Dolawatte V. Attorney General** [1988] 1 Sri.L.R 221 held that:

“While a Medico-Legal Report is admissible in evidence under Section 414(1) of the Code of Criminal Procedure Act, hearsay evidence by way of the case history embodied in such a report is not

admissible as such history is information is not ascertained by the Doctor from his own examination of the injured”.

“Even if such a statement (case history) is technically admissible it should have been ruled out by the judge and not left to the jury as its probative value is far outweighed by the prejudice it will cause the accused”.

In this case, a very high prejudice has caused to the Appellant due to the reference of the case history in the Medico-Legal Report of PW01 by the Learned High Court Judge in his judgment.

[11] In the second ground of appeal the Appellant contends whether the question of identity has been sufficiently dealt by the Learned High Court Judge in his judgment.

According to PW01 the incident had happened in a hotel where they went to have dinner after consuming liquor for about five hours. PW01 admitted that the deceased had consumed considerable amount of liquor. In the cross examination the PW01 had admitted that he failed to inform police that there was a street light which was on at the time of the incident. He further admitted when the incident had happened the lights of the hotel had been switched off. He further added that he ran away from the place of incident when the incident occurred. When he returned to the place of incident the lights of the hotel had been switched off and the victim was not to be seen. He only met the deceased at the hospital after several hours.

The police officer who had conducted the investigation and visited the crime scene had failed to note about the existence of a street light in his investigation notes. He only referred to a light which was burning in a junction close to the Navy Camp.

The investigating officer of this case and the PW01 had given contradictory and unreliable evidence with regard to the light condition existed at the time of the incident. This uncertainty could have been resolved, had the prosecution called other witnesses who had given evidence in the Non-Summary Inquiry.

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- [12] Having considered the appeal grounds 01 and 02 of the Appellant, it is crystal clear that the prosecution has failed establish the identity of the Appellant beyond reasonable doubt. Hence, the benefit of the doubt, certainly be accrued to the Appellant in this case.
- [13] As the appeal grounds 01 and 02 have merits and greatly affect the findings of the trial court, it is not necessary for this court to consider the other grounds of appeal raised by the Learned Counsel on behalf of the Appellant.
- [14] For the reasons stated above, we set aside the conviction and sentence imposed on the Appellant by the Learned High Court Judge of Galle on 02.07.2018.
- [15] The appeal is accordingly allowed.
- [16] The Registrar is directed to send a copy of this judgment to High Court of Galle along with the original case record.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree

JUDGE OF THE COURT OF APPEAL