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

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA 104/2015
HC/ BADULLA/ 158/2008

Vs

1.Herath Mudiyanselage Karunaratne

2.Herath Mudiyanselage Gunadasa

ACCUSED

AND NOW BETWEEN

Herath Mudiyanselage Karunaratna

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Devika Abeyratne J** **P. Kumararatnam J**
COUNSEL	:	**Mr. Teny Fernando for the Appellant.** **Mr.Shanil Kularatna DSG for the Respondent.**
ARGUED ON	:	**19/03/2021**
DECIDED ON	:	**03/05/2021**

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JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing murder of Samarakoon Mudiyanselage Gunabanda on 23/12/2000 which is an offence punishable under Section 296 of the Penal Code.

The 2nd accused was charged under Section 198 of Penal Code for concealing the dead body of the deceased Samarakoon Mudiyanselage Gunabanda. At the initial stage of the trial the 2nd accused had pleaded guilty to the charge and he was sentenced to 02 years RI suspended for 07 years.

After a non-jury trial, the Learned High Court Judge has found the Appellant guilty of the charge and sentenced him to death on 24/07/2015.

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

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. Also, at the time of argument the Appellant was connected via zoom from prison.

On behalf of the Appellant following Grounds of Appeal are raised.

1. Learned Trial Judge misdirected himself by concluding the principal witness as an accomplice by accepting that his testimony consisted of visible improbabilities that does not match the standard of an accomplice or in conflict with definition of an accomplice; however, assessed the prosecution version accordingly and

thereby a conviction of Murder carrying capital punishment solely based on such testimony is unsafe and bad in law.

2. The Learned Trial Judge has misdirected himself by placing total reliability on the most important witness Wijetunga who had displayed a complete lack of creditworthiness when defence counsel highlighted several material omissions and thereby a conviction for murder is not safe based on his testimony.
3. The Learned Trial Court Judge misdirected himself by admitting and accepting inadmissible evidence specially when Identity card was not produced before the court and the Katty was recovered beyond the information provided by the accused appellant's evidence led under section 27 (1) of the Evidence Ordinance to arrive at the conclusion that the accused appellant has a nexus to the alleged offence, is bad in Law and thereby the conviction is also unsafe and becomes bad in Law.
4. The Learned Trial Judge misdirected himself by not considering that the prosecution has failed in their duty to establish a nexus between gun recovered being the one that accused appellant used to kill the deceased with and thereby the evidence led at the trial fall short of the standard required to prove its case beyond reasonable doubt.
5. Learned Trial Judge misdirected himself by failure to observe and consider that the prosecution has failed to establish the time of death of the deceased which is vital to prove the liability of the accused appellant since two different and conflicting versions emerged in the

prosecution case and thereby the conviction is unsafe and bad in Law.

6. Learned Trial Judge misdirected himself while analysing the evidence by completely failing to consider the Dock Statement of the accused appellant and its evidentiary value failed to afford substance of a fair trial and adhere to established Legal principles when arriving at the conclusion of convicting the accused appellant caused Miscarriage of Justice and thereby the conviction is unsafe and bad in Law. (Learned Deputy Solicitor General too conceded of this misdirection of the Learned Trial Judge).

In this case PW01, K.M.Wijetunga was arrested along with the Appellant and was remanded till he was granted a conditional pardon by the Hon. Attorney General under Section 256 of the Code of Criminal Procedure Act No. 15 of 1979.

Background of the Case

According to PW01 on the date of the incident while he was in his chena cultivation with his wife and children, around 9.00am heard a report of a gun some distance away from his chena. At that time son of the Appellant PW06 had come to his place and requested him to inquire about the gun sound as he suspected that his father's trap gun may have gone off. He had accompanied the son of the Appellant and his son to the place of incident and saw one of his uncles namely Gunabanda had sustained gunshot injuries on his leg and fallen on the ground. As the hospital is situated very far from the place of incident, he had first gone in search of a tractor to take the deceased to the hospital. Having failed to find a tractor he had gone with his wife to meet the Appellant and conveyed the message. The

Appellant was attending a funeral with his wife at that time. The trap gun which had gone off was the trap gun set up by the Appellant.

After he informed the incident, the Appellant had told him not to worry as he would take care of the injured and ordered him not to reveal the incident to anyone. Thereafter, the Appellant armed with a gun and a Katty, had accompanied him to the place of incident and fired shots at the deceased after seeing him alive. At the same time the Appellant had dealt several blows on the deceased with the Katty. This had happened around 6.30pm on that day.

On the following day, the Appellant, the 2nd accused and the witness had gone to the place where the deceased was lying, the Appellant again dealt several blows on the deceased and put his body into a gunny bag and disposed it in a stream with the assistance of the 2nd accused. The Appellant had also concealed the belongings of the deceased.

Thereafter he had stayed with the Appellant for about 03 days due to fear and warning given to him. After that he had voluntarily gone to the police station with PW04 Gramasevaka Premaratna on 28/12/2000 and divulged the incident to the police and assisted the police to recover the dead body and the belongings of the deceased.

After the conclusion of the prosecution case, the defence was called and the Appellant made a dock statement. In his dock statement he had taken up the position that he was attending the funeral on that day and denied the incident. He further said that he suspects that the PW01 would have killed the deceased.

In the first ground of appeal the Appellant contends that the Learned Trial Judge misdirected himself by concluding that the principal witness as an accomplice by accepting that his testimony consisted of visible improbabilities that does not match the standard of an accomplice or in conflict with definition of an accomplice; however, assessed the prosecution

version accordingly and thereby a conviction of murder carrying capital punishment solely based on such testimony is unsafe and bad in law.

According to sec. 114 (b) of the Evidence Ordinance, accomplice is unworthy of credit unless he is corroborated in material particulars.

According to sec. 133 of the Evidence Ordinance an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

In the case of **De Saram v The Republic of Sri Lanka** 2002 SLR Vol 1 page 296 the Honorable Judge states that sec. 133 of the Evidence Ordinance is an absolute rule of evidence while sec. 114 (b) is a rule of guidance. Additionally, in the aforementioned case it is stated that in order to take a witness in light of S. 114(b) and S. 133 of the Evidence Ordinance, the court should first clarify whether the said witness can be considered as an Accomplice.

In the case of **King v. Peiris Appuhamy** 43 NLR 412 it is was held:

> *"Even assuming that after the murder had been committed the witness had assisted in removing the body to the pit and that he could have been charged with concealment of the body under S.198 of the Penal Code that was an offence perfectly independent of the murder and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to be corroborated had no application to the case".*

Similarly, in **Queen v E.H Ariyawantha** 59 NLR 241 it was stated that,

> *"burden of proving a witness to be an accomplice for the purpose of inducing jury to presume that he is unworthy of credit unless corroborated in material particulars, is upon the party alleging it".*

According to E.R.S.R.Coomaraswamy in his book titled "The Law of Evidence Vol. II, Book I at page 364, it is stated with approval the following passage from Wharton on Criminal Evidence 11th Ed. Vol. II at page 1229 –

"An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was an admitted participant in a related but distinct offence. To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission."

In this case PW01 had only witnessed the sequence of events until the concealment of the dead body and the belongings of the deceased. He has not taken part in committing the offence or concealing the dead body. He is the person who had furnished information to police and helped to recover the dead body and other productions. He had kept silent for a few days due to fear for the Appellant. Further he had only informed the Appellant upon his failure to find a tractor to transport the deceased to a hospital. When he went to inform the incident to the Appellant, he had accompanied his wife who was named as witness No.PW07 by the prosecution.

Considering the above cited judicial decisions, especially **King v. Peiris Appuhamy** (supra) PW01 is not an accomplice in this case. Therefore, no necessity arises to corroborate his evidence by the prosecution in this case.

Even though, no necessity arises to corroborate the testimony of PW01 his testimony has been corroborated not only by the medical and police evidence but also with other additional corroborative evidence.

In this case PW01 K.M.Wijetunga is an eye witness. His evidence is not tainted with improbabilities or with any visible ambiguity. Therefore, acting on PW01's evidence will not prejudice the Appellants rights.

In his second ground of appeal the Appellant contends that the Learned Trial Judge has misdirected himself by placing total reliability on the most important witness Wijetunga who had displayed a complete lack of creditworthiness when defense counsel highlighted several material omissions and thereby a conviction for murder is not safe based on his testimony.

PW01 in his evidence stated that when he saw the deceased with the leg injury, he had dressed up the wound using his son's T-shirt. But the defence highlighted this as an omission as the witness had not said this in his statement to police.

The second omission highlighted is that the failure to inform police that he went in search of a tractor after leaving the two children at the place of incident.

The third omission highlighted is that the failure to testify in the non-summary inquiry that the Appellant had struck the deceased with the butt of the gun.

The fourth omission highlighted is that the failure to inform the police that the Appellant had suggested to dispose the dead body as the deceased had passed away.

The fifth omission highlighted is that the failure to inform the police that the Appellant had struck the deceased's body with a Katty.

The importance of an omission in criminal trials has been discussed in several judicial decisions by the Appellate Courts of our country. It is pertinent to discuss whether the above-mentioned omissions have any adverse effect on the evidence given by PW01 in this case.

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."*

Now I consider whether the aforementioned omissions are material and affect the trustworthiness and creditworthiness of the evidence of PW01.

The incident happened on 23/12/2000 and the PW01 had given evidence before the High Court on 27/01/2011 after about 10 years of the incident. Considering the omissions and the passage of time passed after the incident a reasonable court cannot expect hundred percent accurate evidence from a witness. The Appellate Courts have repeatedly endorsed this position in several decided cases.

Justice Thakkar in **Bhoginbhai Hirigibhai v State of Gujara**t 1983 AIR SC 753 stated:

> "*Discrepancies which do not go to the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important probabilities-factors echoes in favour of the version narrated by the witnesses".*

Considering the totality of evidence of PW01 the omissions highlighted by the Appellant do not go to the root of the prosecution's case. It is noteworthy to mention that the defence was unable to mark a single contradiction from the evidence of PW01.

The third ground urged by the Appellant is that the Learned Trial Court Judge misdirected himself by admitting and accepting inadmissible evidence specially when the Identity card was not produced before the court Katty was recovered beyond the information provided by the accused appellant evidence led under section 27 (1) of the Evidence Ordinance to arrive at the conclusion that the accused appellant has a nexus to the alleged offence, is bad in Law and thereby the conviction is also unsafe and becomes bad in Law.

At the High Court trial PW15 CI/Wedagedera giving evidence stated that upon the statement of the Appellant he had recovered several items including a Katty and an Identity card. The relevant extract of the statement of the Appellant was marked as P08. The same was already marked at the non-summary inquiry as P04. The relevant portion pertaining to recover of the Katty was marked as P4(b) and the relevant portion pertaining to recover the Identity card was marked as P4(e).

Although he mentioned about the recovery of the Identity card belonging to the deceased at the High Court Trial, the prosecution has failed to mark the same in the proceedings. Hence the Appellant argues that the learned

High Court Judge has placed much reliance on inadmissible evidence in his judgment.

In **Queen v Kularatne** 1968 NLR 529 it was held that:

> *"We wish to observe that in a criminal case, the identity of the productions must be accurately proved by the direct evidence which is available and not by way of inference".*

In this case the Learned High Court Judge has not fully relied on the evidence pertaining to the recovery of the identity card but he has placed greater reliance on other evidence to come to his decision. Hence no prejudice has been caused to the Appellant by only referring to the recovery of an identity card.

The Appellant also argues that considering evidence pertaining to recovery of the Katty under section 27(1) of the Evidence Ordinance raises doubt and therefore the conviction is bad in law.

The investigating officer PW15 had narrated how he has conducted the investigation and arrested the Appellant. In his evidence he clearly mentioned that the Katty was recovered in consequence of the statement made by the Appellant. The Katty was marked as P01 and the relevant portion of the statement of the Appellant was marked as P8 under Section 27(1) of the Evidence Ordinance.

The admissibility of an accused's statement under section 27(1) of the Evidence Ordinance had been discussed in several cases by the superior court of this county.

Section 27(1) of the Evidence Ordinance reads as follows:

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a

confession or not, as relates distinctly to the fact thereby discovered may be proved".

In **De Saram v The Republic of Sri Lanka** [2002] 1 SLR page 288 held that:

> *"for the basis of admissibility of the accused statement was not that the accused confessed to the crime but the fact that he knew where the deceased's body was buried. Evidence of the accused's information was therefore admissible under section 27(1) of the Evidence Ordinance".*

In this case after the arrest of the Appellant the investigating officer had properly followed the necessary requirements under section 27(1) of Evidence Ordinance and had recovered a Katty and presented it to court properly to establish nexus to the alleged offence by the Appellant. As no improper procedure has been followed to adduce this evidence in the trial, the Learned High Court Judge had very correctly considered this as admissible evidence in his judgment. Hence no prejudice has been caused to the Appellant.

The fourth appeal ground urged by the Appellant is that the Learned Trial Judge misdirected himself by not considering that the prosecution has failed in their duty to establish a nexus between the gun recovered being the one that accused appellant used to kill the deceased with and thereby the evidence led at the trial fall short of the standard required to prove its case beyond reasonable doubt.

The gun which had been marked as P02 was recovered upon the statement made by the Appellant. PW01 giving evidence very correctly had identified the gun as belonging to the Appellant which had been used to shoot the deceased. This evidence was never challenged during cross examination by the defence. As this evidence was not challenged or contradicted the Learned Judge had very correctly considered this evidence in his judgment.

In his fifth ground of appeal the Appellant contends that the Learned Trial Judge misdirected himself by failure to observe and consider, that the prosecution has failed to establish the time of death of the deceased which is vital to prove the liability of the accused appellant since two different and conflicting versions emerged in the prosecution case and thereby the conviction is unsafe and bad in Law.

The PW01 in his evidence stated that when he accompanied the Appellant to the place of incident after informing the incident, the deceased was still alive and he had again insisted that the deceased should be taken to the hospital. But contrary to his request the Appellant had opened fire and dealt several blows with a Katty on the deceased and killed him. After that the Appellant had told him that the deceased was dead and requested his assistance to dispose the body. According to PW01 the time was around 6.30pm. Due to his refusal the body was disposed on the following day with the assistance of the 2nd accused. Hence with this evidence the prosecution without any contradiction established the time of death in this case.

Further, the doctor who had performed the post-mortem examination on 03/01/2000 had observed that the dead body was swollen and had reached complete putrefaction. He also opined that the deceased would have died before his body was dumped into the water.

Hence with the eye witness's evidence and the medical evidence considered above, the prosecution has clearly proved that the deceased had died on 23/12/2000 around 6.30pm.

In the final ground of appeal, the Appellant contends that the Learned Trial Judge misdirected himself while analysing the evidence by completely failing to consider the Dock Statement of the accused appellant and its evidentiary value failed to afford substance of a fair trial and adhere to established Legal principles when arriving at the conclusion of convicting the accused appellant caused Miscarriage of Justice and thereby the

conviction is unsafe and bad in Law. (Learned Deputy Solicitor General too conceded of this misdirection of the Learned Trial Judge).

The Learned Counsel for the Appellant had fortified his argument by citing number of judgments on this point.

On perusal of the High Court Judgment, it is not correct to say that the Learned High Court Judge had not considered the Dock Statement of the Appellant in his judgment. At page 220 of brief the Trial Judge had fully mentioned the contents of the Dock Statement and at page 227 of the brief he had analysed one point after considering the same. But no further consideration of the Dock Statement is present thereafter in his judgment.

In **Dharmadasa v Director General, Commission to Investigate Allegations of Bribery or Corruption and Another** [2003] 1 Sri.L.R 64 Gunesekera J after examining the evidence of the Appellant in some details held:

> *"I am of the view that no credence whatever could be given to the evidence of the Appellant".*

Following the above-mentioned Supreme Court Judgment now I consider whether a substantial miscarriage of justice had occurred due to the failure to consider the Dock Statement of the Appellant in its entirety. In the High Court Trial, the Appellant had taken up the defence of total denial by suggesting that the PW01 was the person who committed the murder of the deceased. In his Dock Statement he had taken up the defence of alibi which had never been put to the prosecution witnesses. Considering his dual standard defence taken up during the trial, in my view will not substantially shake the prosecution case. Hence, I conclude that no substantial miscarriage of justice had occurred in this case.

For the reasons stated above, we are of the view that there is no merit in any of the appeal grounds urged by the counsel for the Appellant. The evidence presented by the prosecution establishes beyond reasonable

doubt that the Appellant is guilty of the charge with which he has been convicted.

Accordingly, we affirm the conviction and the sentence imposed and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree

JUDGE OF THE COURT OF APPEAL