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

In the matter of an appeal from the High Court in terms of Section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of SriLanka.

Complainant

Court of Appeal
Case No. HCC 0025-2015

High Court of Gampaha VS
Case No: 08/2008

Paluwatta Muhandiramge Mahinda

Accused

And Now Between

Paluwatta Muhandiramge Mahinda

Accused - appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Asanka Dissanayake with
Dushanthilee Dissanayake for accused-appellant
Shanil Kuleratne, DSG for State

ARGUED ON : 04/08/2021

DECIDED ON : 16/11/2021

R. Gurusinghe, J.

The appellant was convicted for having murdered one Sunil Perera on the 10th of December 2004 at a place called Mahawelawatte in the Gampaha District.

There were no eyewitnesses to the incident in which the deceased was murdered. The prosecution had called PW1, 2, 3, 6, 7, 8, 9, 11, 12, 13, and 14. The appellant made a dock statement.

From the evidence of PW3, Wimaladasa, it transpired that the deceased and the appellant came to the boutique of PW3 in the evening of the fateful day, and both of them had bought illicit liquor. The deceased, the appellant, and another person called Ratne had consumed liquor and smoked, while chatting near the boutique. After that, the three of them, namely the deceased, the appellant, and Ratne, left the place at about 5.30 p.m. They walked down the lane towards a rubber estate. On the same evening, around 7.00 p.m., a person known as Sena Aiya came in a Jeep and told Wimaladasa, that "Aiya was stabbed," and proceeded.

PW2, Lionel Perera, testified that he and his brother, the deceased, went to a paddy field to apply fertilizer. On their way back home, his brother went to

Wimaladasa's boutique around 5.00 or 5.15 p.m., and he (PW2) came home alone. While he was at home, he received information from Sugath that a person like his brother was lying fallen in the rubber estate. Immediately he went with his sister-in-law, Nandaseeli, and many others, to the rubber estate and found his brother lying fallen on the ground with around three stab injuries and six injuries on his chest. After that, his brother was taken to the Dompe hospital, where they learned that his brother was dead.

PW6, Simon Perera, testified that the villages said that Sunil Perera had been murdered. When he met the appellant on the following day, he asked the appellant if the police came in search of him. The appellant said, "it is said that Sunil was murdered by me", and went away. However, Simon Perera has not made a statement to the police regarding this until after four months of the incident.

Police witnesses gave evidence with regard to the investigation, the rest of the appellants, and the recovery of the knife, in terms of Section 27 of the Evidence Ordinance.

PW7, Ranjith, had made a statement to the police about four months after the murder. He testified that the appellant said to him,"I stabbed Jogi Sunil. Sunil attempted to attack me, so I stabbed".

The doctor had also testified regarding the injuries of the deceased in the post mortem report and has marked the same in evidence.

The appellant made the dock statement. He said that he had been serving as a laborer at Nelumdeniya Estate. While he was working, an unknown gang had come and assaulted him and taken him to a coconut estate, where he was again beaten severely. Then he was taken to the Dompe police station. After that, he was taken to his home at Mahawelawatte where he was again beaten

severely and introduced a knife, and forced him to admit it as his. Thereafter, he was again taken to the Dompe police station, and PW7 Ranjith, was also taken to the police station.

The appellant was convicted and sentenced to death. The main point alleged against the appellant was that he confessed to PW7, Ranjith, that "I stabbed Jogi Sunil. Sunil attempted to attack me, so I stabbed". The other points are that the deceased was last seen alive with the appellant. The appellant had been absconding from the police for about four months. The appellant said to PW6 that "it is said that I murdered Sunil", and the police recovered a knife from the appellant's house, on the statement made by the appellant to the police.

The grounds of appeal are as follows:

1) The Learned Trial Judge has failed to address her mind to the legal principles governing a case that solely rests on circumstantial evidence and seriously misdirected herself in coming to the conclusion that the prosecution had established a strong prima facie case against the appellant.

2) The Learned Trial Judge has failed to express her mind to the legal principles governing the discovery of a fact, consequential to a statement of an accused, under Section 27 of the Evidence Ordinance.

3) The Learned Trial Judge has failed to appreciate that PW7 Ranjith is not a reliable witness as there are many infirmities in his testimony.

4) The Learned Trial Judge has seriously misdirected herself with regard to the consequent conduct of the appellant and coming to the conclusion that the appellant was absconding after the incident.

5) The Learned Trial Judge has seriously misdirected herself and erred in law by treating the dock statement made by the appellant as inferior evidence and finding fault with the accused for not giving evidence from the witness box and failed to apply principles governing the evaluation of a dock statement.

6) The Learned Trial Judge has failed to evaluate and analyse the evidence properly and to consider the burden of proof cast upon the prosecution and the standard of proof in a criminal case.

PW7 was accused in a murder case where the appellant was also a co-accused, and the case was still pending at the time of the incident in this case. The alleged offence in this case was committed on 10th December 2004. The appellant was arrested on 23rd March 2005. PW7 had given a statement to the police on 27th April 2005. By this time, the appellant was in custody.

PW7 gave a statement to the police more than four months after the incident. In *Sumanasena vs. Attorney General 1999 3SriLR137,* Jayasooriya J stated,"If the reason for the delay is plausible and justifiable, the court could act on the evidence of the belated witness." However, here PW7 did not give a reasonable explanation.

The position regarding his delay in giving a statement is as follows:

At page 171 of the brief

"ප්‍ර: තම් විත්තිකරු එලෙෂ කිව්වාට පසුව එයා තමයි පොලීසියට ගොස් ඒයා ගැන දැනුම් දීමක්වත් කලේ නැත්තෙ.

උ: මම ඒක එච්චර ගනන් ගත්තෙ නෑ. ගම්මු දන්නවානෙ.

අධිකරණ ප්‍රශ්නය: ගම්මු කියන්නෙ කව්ද?

උ: ගමේ කතාවක් ගියා මේ අපි ගිහින් ඇන්නා කියා"

In the cross-examination, he has stated;

"ප්‍ර: එහෙමනම් ඇයි තමා එම කාරණය කියන්න පොලීසියට් ගියේ නැත්තේ?

උ: මම ඒක කියන්න ගියේ නැහැ."

Nothing has been stated about the delay in the judgment. The delay has not been considered at all. There was no decision by the Trial Judge as to whether the reason for the delay was plausible.

A confession is required to be proved like any other fact in a criminal trial. An extra-judicial confession is generally considered to be a weak form of evidence. However, in *Gopi vs. a State of Kerala (criminal appeal No. 129 of 1987)* dated 10/4/1990, Pathmanabam J. said this in paragraph 6 of the judgment.

"Extra judicial confession is said to be a weak form of evidence. But we do not feel any type of evidence could be said to be weak by categorization alone. It is the worth of evidence that counts. When extra-judicial confession spoken to by an impartial and trustworthy witness is found unblemished and acceptable, nothing prevents its acceptance as a basis for conviction. Only thing is that the

court must be cautious in accessing and accepting the evidence because wrong statements being put in. Evidence regarding extra-judicial confession is just like any item of evidence. When such evidence gets corroboration and support from other acceptable sources, the position is still better".

It has been the rule before a confession can be accepted, the exact words used by the accused must be established by cogent evidence. In this case, no questions were put to PW7 to ascertain the exact words used by the accused. Proof of extra-judicial confession should be very convincing. In this case, PW7 cannot be considered as an impartial and trustworthy witness. Witness PW7 himself was accused in a murder case along with the appellant. PW7 was no stranger to courts. He was familiar with the procedure and questioning of witnesses in court. He had delayed giving a statement to the police for more than four months. When considering the evidence of PW7 with the infirmities stated above, it is not safe to act upon that evidence.

Now we consider whether there is sufficient evidence to support a conviction after excluding the evidence of PW7.

One of the items of evidence against the accused was the testimony of PW6.

PW 6 stated as follows:

“මං ඇහැව්වා මහින්දගෙන් ඒයේ පොලිසියෙන ්හොයන්න ආවා ආරංචියි.

තමාකක්ද බං ඇහැව්වේ?

එතකොට එයා කිව්වා සුනිල් මැරුවා කියන්නෙ මමනෙ කියලා කියාගෙන ගියා.”

This statement is not a confession or admission. Therefore, this piece of evidence is clearly hearsay evidence and should not have been admitted and could not have been considered against the appellant. Similar to PW7, PW6 also made a statement to the police after four months of the incident. There was no explanation for the delay at all.

Another point relied on by the prosecution was that the appellant was absconding from the village. However, PW8 Upasena, the watcher of the estate, where the appellant was working at the time of his arrest, testified in court that the appellant had been working in that estate for about one year. The appellant was arrested after four months after the incident. The appellant had been working in the same estate even after the alleged incident. Furthermore, PW3 made statements in his evidence regarding the behavior of the appellant.

At page 60 of the brief;

“ගෙදර හිටියොත් පිට අයගේ වැඩකටයුතු වලට නිරත වෙනව, ගියොත් ගියපැත්තේ අවුරුදු ගාණක් ඉන්න පුද්ගලයෙක්."

Therefore, his absence from the village has no significance.

Other item of evidence against the appellant is that the recovery of a knife on the statement of the appellant. In his dock statement, the appellant said that the police severely assaulted him till he urinated in his sarong and introduced a knife. A police witness stated that the appellant urinated in his sarong when he was arrested. This shows that there is some truth in the appellant's dock statement. The knife was not sent to the government analyst. The doctor said that he could not say that the knife shown to him could have been used to stab the deceased. The doctor could not tell whether the injuries were caused by a single cutting-edge knife or a double side cutting edge knife.

All these items of circumstantial evidence do not pass the test that the evidence must consist with the guilt of the appellant and inconsistent with any hypothesis of his innocence. In order to base a conviction on circumstantial evidence, the evidence must be consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence, *(King vs Abeywickrama 44 NLR 254)*. This principle was consistently followed in many other cases.

Considering the above circumstances, I hold that the evidence is insufficient to convict the appellant. Therefore, the accused-appellant is acquitted.

The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal