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 Sri Lanka.

Court of Appeal Case No.CA-HCC-155-18

COMPLAINANT

Vs.

High Court of Gampaha
Case No. HC 107/2003

llangakoon Arachchige Ajith Kumara

ACCUSED

AND NOW BETWEEN

llangakoon Arachchige Ajith Kumara

ACCUSED-APPELLANT

Vs.

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

RESPONDENT

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Shanaka Ranasinghe PC with Niroshan Mihindukulasooriya AAL, Tharakee Manchanayaka AAL and Sandamali Peiris AAL for the Accused – Appellant

Janaka Bandara SSC for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 14.05.2019

By the Complainant-Respondent on 03.06.2019

Argued on : 03.08.2021

Decided on : **14.12.2021.**

N. Bandula Karunarathna J.

The accused-appellant was indicted in the High Court of Gampaha for committing the murder of one Wickrama Arachchige Chandrasena alias Dasa, on 06.10.1999, punishable under section 296 of the Penal Code.

The appellant pleaded not guilty to the charge and the case proceeded to trial.

The prosecution led the evidence of the following witnesses;

(a) P/W 03 - Rodrigo Appuhamilage Pushpa Ranjani Rodrigo

(b) P/W 04 - B.A. Gemunudasa

(c) Amarasinghe Lekamge Somapala- Grama Niladari

(d) P/W 08- Kolamabage Dharamasiri Fernando -Inspector of Police

(e) P/W 09 - L.R.H. Liyanaarachchi

(f) P/W 06 - S. Douglas Perera

(g) P/W 11 - Sarath Kumara Welikala

(h) P/W 05 - U.M. Mahinda Samaranayake — JMO

(i) P/W 12 - A.W.A. Priyaganie Damayanthi Jayawardana

The depositions of, P/W 01- Yapage Premaratne Dahanayake (deceased) and P/W 02- Wickrama Arachchige Laxman Srilal Wickramasinghe (deceased) were led in terms of Sec 33 as evidence.

At the conclusion of the case for the prosecution, the learned High Court Judge called for the defence and the appellant made his statement from the dock.

After trial without a Jury, the learned High Court Judge convicted the accused-appellant and imposed the death sentence on 31.05.2018. Being aggrieved by the conviction and sentence, the accused-appellant has preferred this appeal to this court.

The appellant had raised 5 grounds of appeal.

I. The learned Trial Judge has failed to judicially evaluate the circumstantial evidence as required by law.

II. The learned Trial Judge failed to consider that the prosecution failed to prove the third person who was in the location.

III. Failure of the learned High Court Judge to consider whether there had been a sudden fight.

IV. The learned Trial Judge did not reject the dock statement and

V. the learned High Court Judge did not judicially analyse the depositions of P/W01 and 02 accepted under Section 33 of the Evidence Ordinance as required by Law.

The case of the prosecution was that, on the day in question, 06.10.1999, at about 10.00 p.m, Pushpa Ranjani Rodrigo (P/W 03) the wife of the deceased had got to know from her daughter that the deceased was attacked by a person called Ajith and was admitted to the hospital. Later she has informed of the death of the deceased. There were 2 eyewitnesses namely Yapage Premarathna Dahanayaka (P/W 01) and Wickrama Arachchige Luxman (P/W 02). Both of them were dead when the case came up for trial before the High Court. They have given evidence on the 14th February 2000, and 17 April 2000, respectively before the learned Magistrate of Gampaha, during the non-summary inquiry. That evidence were adopted before the High Court on 03.01.2018 by the interpreter-mudliyar. It was marked as පැ 1 and පැ 2 at the High Court trial. It is evident that the said evidence was cross-examined and the appellant was represented by an attorney-at-law.

The main eyewitnesses of the prosecution were P/W 01 and P/W 02, who had participated soon after the crime occurred. But their evidence could not be led before the High Court trial since both had died before the commencement of the trial.

Accordingly, to P/W 01, upon a scream of a woman that "කොලුවට ගහනවෝ" he had gone to check the situation and at 'Nedungahahena Temple, he had observed that the deceased was lying on the floor and the appellant was standing nearby. P/W 01 could easily identify the appellant over the light of the beacons at the road. After seeing P/W 01, the appellant had stated that "දාසට නැගිටින්න බැරි වෙන්නම ගැහුවා" and at the same time P/W 01 had noticed a club in appellant's right hand. The appellant had turned tail while he was trying to be apprehended by P/W 01.

In the evidence of P/W 01, it was further revealed that there was personal animosity between the deceased and the appellant. When giving evidence at the non-summary trial, P/W 02 stated that on the day in question, at about 8.30 p.m, whilst the appellant and P/W 02 were going to appellant's house, at Nedungahahena Temple, the appellant had got down from the motor bicycle after seeing two people and had started quarrelling with one, the deceased. P/W 02 stated further that the person who didn't interfere in the quarrel had left the said place and P/W 02 had also done the same as he couldn't manage to take the appellant away. P/W 02 confirmed that there was only the appellant and deceased when he left the said place.

When P/W 02 was coming back he had noticed that the person (the deceased) who quarrelled with the appellant was lying on the floor and the appellant was standing there. In the evidence of P/W 02, a confession of the appellant was also revealed thus, "මම දාසව මැරුවා. තව දෙන්නෙක් තුන්දෙනෙක් ඉන්නවා මරන්න". P/W 02 had admitted the belatedness of his evidence and also given reasons for the same. "මම මේ සිද්ධිය සම්බන්ධයෙන් පොලිසියට දින අටක් යනතුරු ප්‍රකාශයක් නොදෙන්න හේතුව මා පොලිසියෙන් හොයන්න ආවේ නැහැ. පොලිසියෙන් හොයන්න ආවට පස්සෙ තමයි මම පොලිසියට කටඋත්තරයක් දුන්නේ. පොලිසියෙන් එන්න කියලා තිබුණා. ඒ අනුව මම පොලිසියට ගියා."

IP Fernando (P/W 08), had got a telephone call in respect of the death of the deceased and accordingly the investigations had been commenced. He had failed to identify any mark at the crime scene but observed the lights at the said place was bright enough to identify a person. P/W 08 had also offered evidence on the absconding of the appellant after the crime.

According to the evidence of the Judicial Medical Officer (P/W 05), there were 4 injuries on the body of the deceased and the finding of the Post Mortem was "a shock by internal bleeding caused from an attack with a blunt tool". He further said that the said tool could be a heavy club. Even without those eyewitnesses to the crime, the prosecution, relying upon several strong circumstantial evidence, had proved the culpability of the appellant beyond any reasonable doubt.

The accused-appellant made a very brief dock statement at the end of the prosecution and denied the allegations levelled against him

> "ස්වාමීනි, මම මෙම සිද්ධිය සම්බන්ධයෙන් කිසිම දෙයක් දන්නේ නැහැ. මෙම සිද්ධිය සම්බන්ධයෙන් මගේ මස්සිනා වැලිවේරිය පොලිසියෙන් අත්අඩංගුවට ගත්තා. ඉන්පසුව පසුදා මම ගියා. මාව වැලිවේරිය පොලිසියෙන් අධිකරණයට පසුව ඉදිරිපත් කළා"

The learned president's counsel who appeared for the appellant argued that the prosecution's case was entirely based on circumstantial evidence as there were no eyewitnesses of the incident.

In the case of <u>Amarasiri Vs Republic of Sri Lanka</u> CA Appeal No. 107/2005 decided on 26.112009 it was held that requirements of conviction on circumstantial evidence are;

1. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proven items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

2. In a case of circumstantial evidence in order to base a conviction on circumstantial evidence the jury or the trial Judge as the case may be must be satisfied on the following grounds:

    a. proved facts must be only consistent with the guilt of the accused;

    b. proved facts must point the finger of guilt only to the accused;

    c. proved facts must be incompatible and inconsistent with the innocence of the accused;

    d. proved facts must be incapable of any other reasonable explanation than that of his guilt.

3. In a case of circumstantial evidence, if two decisions are possible from the proven facts, then the decision which is favourable to the accused must be taken.

4. In a case of circumstantial evidence, if an inference of guilt is to be drawn from the proved facts such inference must be the necessary, irresistible and inescapable inference and it should be the only inference.

In the present matter the evidence of the brother-in-law of the deceased, Balasuriya Arachichilage Gamunudasa (P/W 04) was led by the prosecution where he testified to the fact that, he saw the deceased fallen on the ground injured with no one around.

ප්‍ර : ඒ දෙන්නා අතර මොන වාගේ සම්බන්ධකමක් තිබුණාද?

උ : මට කියන්න බැහැ. තරහ මරහක් නැහැ. ඒ දෙන්නා අතර හිතවත්කමක් තිබුණා.

ප්‍ර : කොහොමද ඒ ගැන දන්නේ?

උ : ගෙවල් ළග ගමේ සිටියේ ඒ දවස්වල

ප්‍ර : තමාගේ මස්සිනා දාසට මිය යන්න මොකක්ද වුනේ කියල දන්නවද?

උ : මම දැක්කෙත් නැහැ. මම යනකොට මස්සිනා වැටී සිටියා විතරයි. ගම්පහ රෝහලට එක්කරගෙන ගියා.

The evidence of PW 4 explains that he arrived at the scene almost instantly after he was informed that the deceased was in distress.

The depositions of P/W 01- Yapage Premaratne Dahanayake (deceased)

marked as P2 **states as follows:** “He says that he was watching television and when he heard the loud cry and got into his motorcycle and went to the location where the incident had taken place” and states that,

> “යන විට ලයිට් එළියෙන් දැක්කා මිනිහෙක් හිටගෙන ඉන්නවා. ලයිට් එළිය කියන්නේ ලයිට් කණුවේ එළිය. මම ඒ පැත්තට ගියා. ඉදිරියට යනවිට විත්තිකරු හිටගෙන ඉදලා එහාට ගියා.”

The depositions of P/W 02- Wickrama Arachchige Laxman Srilal Wickramasinghe (deceased) marked as P3 states that the accused travelled with him in the bike where the accused wanted him to stop when they saw two people and the accused walked towards them and then he saw the accused holding a person but not attacking.

මම දැක්කේ ෂර්ට් එකෙන් අල්ලනවා විතරයි. පහරදෙනවා දැක්කේ නැහැ.

In the case of <u>Gambir Vs State of Maharashtra (AIR 1982(S.C)1157)</u>, it was also decided that certain principles and rules have been evolved from the cases for the evaluation and application of circumstantial evidence in a particular case.

Rule 1- The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

Rule 2- Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

Rule 3- The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability

> the crime was committed by the accused and no one else. The circumstantial evidence to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

It is important to note that in all cases, whether direct or circumstantial evidence, the best evidence must be adduced. The suppression or non-production of pertinent and cogent evidence necessarily raised a strong presumption against a party who withholds such evidence.

The learned trial Judge had summarized and analysed the evidence of the prosecution witnesses and found the failure of the defence to mark any contradictions on the said evidence. When perusing the judgement and the proceedings, it can be seen the duly adoption and analysis of the evidence offered by P/W 01 and P/W 02 at the non- summary trial.

“මෙම නඩුවේ පැ.සා. 1, 2 මේ වන විට මියගොස් ඇති බවට වාර්තා වෙනවා. ඊට අදාල මරණ සහතිකය ගොනු කර තිබෙනවා. විත්තිය විසින් මරණ සහතිකය අනුව මියගොස් ඇති බව පිළිගන්නේ නම් මෙම නඩුවේ පැ.සා. 1, 5 මෙම නඩුවට අදාල අත්තනගල්ල මහේස්ත්‍රාත් අධිකරණයේ පවත්වන ලද ලඝු නොවන පරීක්ෂණයේ අංක 87170 දරණ නඩුවේ ලබා දෙන ලද සාක්ෂි එම සාක්ෂි හරස් ප්‍රශ්න වලට ලක් වී ඇති බවත්, නීතිඥ නියෝජනයක් තිබූ බවත් පෙනී යනවා. සාක්ෂි ආඥා පනතේ 33 වගන්තිය ප්‍රකාරව මෙම නඩුවේ නඩු විභාගයට අනුකූල කර ගැනීමට පැමිණිල්ලට අවසර ලබා දෙන ලෙස ගෞරවයෙන් අයැද සිටිනවා.”

“පැ.සා. 1, 2 ලඝු නොවන පරීක්ෂණයේදී සාක්ෂි දී ඇති අතර, හරස් ප්‍රශ්න වලට භාජනය වී ඇති බැවින්, එම නඩුවේ සාක්ෂි මෙම නඩුවට අනුකූල කර ගැනීමට අධිකරණයේ රෙජිස්ට්‍රාර්වරයා කැඳවීම සඳහා කරන ලද ඉල්ලීමට ඉඩදෙමි.”

“සාක්ෂි ආඥා පනතේ 33 වන වගන්තිය යටතේ ආදේශ කර ගන්නා ලද සාක්ෂි සැළකිල්ලට ගැනීමෙදී එම සාක්ෂි සළකා බැලිය යුත්තේ පහත දූර්වලතාවයන්ට යටත්වය. එනම්, එම සාක්ෂිකරුවන් මෙම අධිකරණයේ සාක්ෂි නොදීම හේතුවෙන් මෙම අධිකරණයේදී ඔවුන්ගෙන් හරස් ප්‍රශ්න ඇසීමට අවස්ථාවක් නොමැති වීම මෙන්ම, ඔවුන් සාක්ෂි දෙන ආකාරය සහ විලාශය අධිකරණයට දැක බලා ගැනීමට අවස්ථාවක් නැතිවීමය. එසේ වුවද, මෙම සාක්ෂිකරුවන් දෙදෙනාගේම සාක්ෂි මහේස්ත්‍රාත් අධිකරණයේදී විමසූ අවස්ථාවේදී විත්තිකරු වෙනුවෙන් නීතිඥ මහතුන් පෙනී සිට එම සාක්ෂිකරුවන් දෙදෙනාම මහේස්ත්‍රාත් අධිකරණයේ හරස් ප්‍රශ්නවලට භාජනය වී ඇති කාරණයද අධිකරණය විසින් අවධානයට යොමු කළයුතුය.”

After having observed and analysed all the available material in the light of the well-established legal principles, the learned trial Judge had come to the firm finding that the appellant is guilty of the charge of murder.

It is important to note that to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In other words, the proved facts and the circumstances of the case must in their cumulative and total effect, lead irremissibly and unmistakably to the only conclusion that the accused is guilty of the offence of which he is

accused. Where the circumstances point to a conclusion that the accused committed the offence, but there is also a reasonable probability incompatible with his innocence, he cannot be convicted. A clear distinction must be kept in mind in this connection between the basic or primary facts and the inferences of facts to be drawn from the primary facts.

Circumstantial evidence can be held to be sufficient for conviction only when all the above rules and conditions are satisfied. In examining a case based purely on circumstantial evidence the court believes:

i. That any fact or circumstance which was a necessary link in the chain has not been proved, or

ii. that though the chain of evidence is unbroken, it is not so conclusive to exclude entirely the possibility of the accused being innocent, the accused must get the benefit of the doubt that exists and be acquitted.

It was argued by the learned president's counsel for the appellant that the learned Trial Judge failed to consider that the prosecution had not proved the third person who was in the location.

The deposition of P/W 02 reveals that three persons were present where the incident took place.

> "ඒ යනවිට පන්සල ළගදි විත්තිකරු කිව්වා පොඩ්ඩක් නවත්වන්න කියල. නැදුන්ගහහේන පන්සල ළගදි.ඒ අවස්ථාවේ මා පදවාගෙන යන විට ලයිට් එළියට දැක්කා දෙන්නෙක් යනවා. ඒ දෙන්නා ඉන්න කිට්ටුව නවත්වන්න කිව්වේ. මම නැවැත්තුවා විත්තිකරු බැහැලා පයින් යන දෙන්නා ළගට ගියා."

Indeed, this third-person was never identified nor called as a prosecution witness. The learned High Court Judge did not consider that the prosecution failed to give an adequate explanation as to who this third person was before arriving at his judgment.

As per the deposition of P/W 02 he had not identified the deceased.

> "ඒ වෙලාවේ ඒ සිද්ධිය දැක්කේ පාරේ ලයිට් එක තිබුණා. පන්සලේ ලයිට් එක තිබුණා. මම එතනින් යන විට විත්තිකරු සහ අනිත් පුද්ගලයෙකුයි පමණයි හිටියේ. ඒ වෙලාවේ අනිත් පුද්ගලයා කවුද කියා මා හැදිනුයේ නැහැ."

Coomaraswamy in his Law of Evidence of Ceylon says about proving a case on circumstantial evidence that in,

(a) the accuracy of the witness's original observation, there is the risk of mistake;

(b) the correctness of his memory; the risk of forgetfulness and

(c) in his veracity; the risk of falsehood.

But in considering circumstantial evidence a judge also must depend on:

(d) The cohesion of each circumstance in the evidence with the rest of that chain of circumstances of which it forms a part.

(e) The logical accuracy of the inference drawn by the Judge himself from this chain of facts for "every fact has two faces."

On behalf of the appellant, it was argued that the learned High Court Judge failed to direct himself to consider whether there was a sudden fight especially with the depositions of P/W 01 and P/W 02 placed before the court.

In the deposition of P/W 01 it states the following;

> "ඒ චන්ද්‍රසේනගේ දුවට බැනපු එක ගැන බහින්බස් වීමක් වෙලා තියෙනවා. විත්තිකරුයි එයාගේ අයියයි සමග මේ මරණකරු බහින්බස් වීමක් ඇතිවෙලා තිබුණා."
>
> "මේ අය අතරේ පෞද්ගලික ආරවුල් තිබුණා. විත්තිකරුගේ හා මරණකරුගේ පවුල් අතර."
>
> "ඒ විදිහට අහනවිට මම දැක්කා ඔහුගේ දකුණු අතේ පොල්ලක් තිබෙනවා කියල."

The evidence does not reveal that there was a fight between the deceased and the accused-appellant on that fateful day.

In the deposition of P/W 02 it states the following;

> "විත්තිකරු බැහැලා පයින් යන දෙන්නා ළගට ගියා. බහින්බස් වෙනවා දැක්කා. ඊට පස්සේ එක්කෙනෙක් ෂර්ට් ඒකෙන් අල්ලුවා. ෂර්ට් එකෙන් ඇල්ලුවේ විත්තිකරු."
>
> "ඊට පස්සේ බහින්බස් වීමක් ඇහුණා. මොකද්ද ඒ බහින්බස්වීම කියලා මම දැක්කේ නැහැ."

It was argued by the learned President's Counsel for the accused-appellants that on a careful and reasonable considering that the learned High Court Judge could only have arrived at a conclusion of a sudden fight as there were not an iota of evidence to indicate a premeditated murder. Further, in the light of the depositions of P/W 01 and P/W 02 the learned High Court Judge has failed to consider that the suspicious circumstances are inadequate to prove the guilt of the accused.

If there is any reasonable doubt of the guilt of the accused, he is entitled to of right to be acquitted. But in my view, there was no doubt at all of the guilt of the accused, on available circumstantial evidence.

In <u>Queen Vs Sumanasena 66 NLR 350</u> Hon Justice Basnayaka stated:

> "Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. We are unable to reconcile what the learned Judge said earlier in his summing-up with what he said in the passage to which exception is taken. The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and in a case of circumstantial evidence as in a case of direct evidence."

The accused-appellants stated in his dock statement that he does not know anything about the incident and that his brother-in-law was taken in and subsequently he was arrested on the matter.

In the case of Queen Vs M.G.Karolis 69 C.L.W. 47 Justice H.N.G.Fernando stated,

> "that when an accused person makes a statement from the dock, it would be quite unsafe to draw unfavourable inference from such statement, and particularly from the failure or omission of the accused to mention some matter."

This notion can be further strengthened by the Indian judgment Manuel Vs Emperor 36 Cr LJ (1935) 1462 where it states:

> " As we have so often pointed out in criminal trials it is not for the accused to say anything unless he chooses and in any case, the prosecution must prove their case, apart from any statement made by the accused or any evidence tendered by him."

It was argued by the learned President's Counsel for the appellant that it is apparent that the learned High Court Judge drew a negative inference from the dock statement of the accused contrary to the above guidelines and in any event the learned High Court Judge has not accepted nor rejected the dock statement with a reason as expected in our law.

The dock statement of the appellant was taken into consideration and rejected to act upon the same on given reasons.

> "විත්තිකරු විත්ති කූඩුවේ සිට ඔහු මෙම සිද්ධියට සම්බන්ධතාවයක් නොමැති බවට පමණක් කර ඇති ප්‍රකාශය පැමිණිල්ලේ ඉහත සාක්ෂි කෙරෙහි කිසිදු ආකාරයක සැකයක් මතු කිරීමට සමත් වී නොමැති බවද පෙනී යයි."

The learned High Court Judge had judicially analysed the depositions of P/W 01 and P/W 02 accepted under Section 33 of the Evidence Ordinance as required by law.

> "මෙම සාක්ෂි සැලකිල්ලට ගැනීමේදී පැමිණිල්ලේ 01, 02 සාක්ෂිකරුවන් සාක්ෂි ඉහත පෙර 23 ඡේදයේ සඳහන් පරිදි දුබලතාවයන්ට යටත්ව සලකා බැලුවද මෙම මරණකරුට පහර දී ඔහුගේ මරණය සිදුකරන ලද්දේ මෙම විත්තිකරු විසින්ම බවට සාක්ෂි ඉදිරිපත් වී ඇති බවට මම සෑහීමකට පත් වෙමි."

"33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, to prove, in a subsequent judicial proceeding, or a later stage of the same judicial proceeding, the truth of the facts which, it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable

: Provided—

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation. —A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

Indian Evidence Act Section 33 is as follows;

"Section 33:

Section 33 deals with 'Relevancy of certain evidence for proving, in a subsequent proceeding, the truth of facts therein stated:

It reads as follows:

Section 33: Relevancy of certain evidence for proving, in a subsequent proceeding, the truth of facts therein stated.- Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

The evidence contemplated by this section is evidence given by a witness in an earlier judicial proceeding or before any person authorized by law to take evidence. The section states that such evidence is relevant in a subsequent proceeding for the purpose of proving the truth of the facts which it states when;

(a) the witness is dead, or
(b) the witness cannot be found, or
(c) the witness is incapable of giving evidence, or
(d) the witness is kept out of the way by an adverse party, or

(e) witness's presence cannot be obtained without any amount of delay or expense which, under the circumstance of the case, the Court considers unreasonable.

This is subject to three conditions:

1. that the proceeding (i.e. earlier proceeding) was between the same parties or their representatives in interest;
2. that the adverse party in the first proceeding had the right and opportunity to cross-examine;
3. that the questions in issue were substantially the same in the first as in the second proceeding.

In a committal procedure, where a witness was examined at the committal stage before a Magistrate, and could not be cross-examined there, then the evidence given by the witness in the Committal Court could not be used against the accused at the sessions trial. If before a Magistrate, there was an opportunity to cross-examine and a defence counsel did not choose to cross-examine a witness, the evidence in the committal proceeding could be used in the later proceedings and the defence, which did not avail of its right to cross-examine before the Magistrate, would not be able to complain.

Now, if we read sec. 33 again, it uses the words 'Evidence given by a witness in a judicial proceeding or before any authority authorized by law to make it, is relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding'- and the first clause in the proviso uses the word "proceeding was between the same parties or their representatives in interest" while the third clause of the proviso uses the words "that the questions in issue were substantially the same in first as in the second proceeding". It will be seen that the main clause uses the word 'subsequent proceeding' while the third clause in the proviso uses the words 'first' and 'second' proceeding. In the first clause of the proviso, the word 'proceeding' is used without any qualification.

Considering the above legal principles, it is my view that the case of the prosecution was not entirely based on circumstantial evidence as the crime was seen taking place partly (though not entirely) by two eye-witnesses.

The learned High Court Judge was rightly satisfied that the depositions did qualify to be adopted under Sec 33 of the Evidence Ordinance.

Therefore, it is my view that the evidence reveals that there was no clear possibility of a sudden fight and circumstantial evidence about the said incident has been evaluated in the light of the judicial guidelines laid down by the authorities.

In conclusion, standing by the reasoning essayed above on questions urged by the counsel for the appellant, this Court finds no flaw in the conviction and sentence of the instant case and proceeds thereby to dismiss this appeal.

For the reasons set out in my judgment, I affirm the conviction and the sentence dated 31.05.2018 by the learned trial Judge and dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal