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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 277-2014

High Court of Polonnaruwa
Case No: HC 70-2009

Vs.

1) Lagamuwathanna Viyannalage Premadasa

Accused

And Now Between

1) Lagamuwathanna Viyannalage Premadasa

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Amila Palliyage with Savani Udugampola

for the Accused-Appellant

Chethiya Goonesekera,PC. ASG

for the Respondent

ARGUED ON : 12/01/2022

DECIDED ON : 30/03/2022

R. Gurusinghe, J.

The Accused-Appellant (the appellant) was indicted in the High Court of Polonnaruwa for committing the murder of a person by the name of D.M. Damayanthi Senehelatha on or about the 19th of March 2006, and on the same day, in the same course of the transaction, committing the attempted murder of a person by the name of M.G. Anulawathie, which are offences punishable in terms of Section 296 and 300 of the Penal Code respectively.

After Trial, the Learned High Court Judge found the appellant guilty of the two charges and sentenced him to death for the first count, and a term of five years rigorous imprisonment for the second count.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal.

The grounds of appeal set forth by the appellant are as follows:

1) The Learned Trial Judge erred in law by failing to consider, that it is unsafe to convict the appellant by relying on the voice identification.

2) The Learned High Court Judge has erred in holding that PW1 was a hostile witness to the prosecution, where the prosecution had not made any such application in terms of section 154 of the Evidence Ordinance.

3) PW4 was threatened by the prosecutor when she was giving evidence.

4) The Learned Trial Judge erred in holding that the evidence of PW1 was corroborated by the short history given to the doctor.

Since PW1 is the wife of the appellant, the Learned Trial Judge had noted that the evidence given by her would be considered only with regard to count two. PW1 stated in her evidence that her vision had been completely impaired since 2003. On the 19th of March 2006, PW1 had stayed the night at her son's house. While she was sleeping with her daughter-in-law and three grandchildren, someone had opened the door, entered the house, and attacked her and the daughter-in-law. The witnesses position is that she was not able to recognize the attacker because of her poor vision. She had later got to know that her daughter-in-law had been killed by the person who had attacked her, and the daughter-in-law.

PW 1 had been taken to the hospital with head injuries.

PW2 Janaka Lakshan is the son of the deceased and was seven years old at the time of the incident. As per his evidence, he was sleeping with his mother, grandmother, and sisters on the day of the incident. When he was asleep, he

heard his grandfather's voice (the appellant) asking them to open the door and shouting "Sakuni Sakuni". At that moment, his mother, the deceased, had closed Sakuni's mouth and remained silent without opening the door. Then the appellant broke opened the door and entered the house. He thereafter, had cut the neck of the mother of PW2 with a knife which had a long handle and had attacked his grandmother too. PW2 had also stated that there was a very dim lamp. He had identified his grandfather, (the appellant), by his voice. He had also recognized the appellant in court. PW9, the doctor, in giving evidence, stated that he had examined PW1 and had not noticed any impairment of her vision, as she had walked into his room without any assistance. He had also stated that there were two cut injuries on PW1; one above her right eye and the other on her head. He further testified that those injuries could have been caused by the weapon shown to him, marked as P1.

According to the evidence given by PW4, Padma Damayanthi (the appellant's daughter), the appellant had visited her around 8.00p.m. on the day of the incident. She further stated that the appellant had asked her to take care of her mother. On being questioned as to why he said so, the appellant replied that, "I attacked your mother". (අම්මාට කෙටුවා කිවා). Her brother had later informed her over the phone that her sister-in-law had been killed.

The police discovered the knife produced as P1, from an irrigation canal, followed by the information received from the appellant. The doctor who conducted the autopsy also gave evidence and produced the post-mortem report, The police officers who conducted the investigation also gave evidence.

The appellant gave a very short dock statement denying the allegation against him.

The first ground of appeal is that it is not safe to act on the evidence of PW2, as he had identified the appellant only by the voice

In this case, the appellant was the grandfather of PW2 and PW 2 stated as follows:

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ප්‍ර: **කොහොමද අත්තාව හඳුනාගත්තේ?**

උ: **කටහඬින්**

ප්‍ර: **අත්තාගේ කටහඬ ඔබට හුරු පුරුදුද?**

උ: **ඔව්.**

ප්‍ර: **ස්ථිර වශයෙන්ම අත්තා කියලා කියුත්ත පුලුවන්ද?**

උ: **ඔව්. සෙල්ලම් කරන්න යන නිසා අත්තාගේ කටහඬ හුරුයි.**

ප්‍ර: **ඊට පසුව අම්මාට පසුව අත්තා මොකද කලේ?**

උ: **අත්තා යන්න ගියා**

ප්‍ර: **කෙටුවේ පිහියකින් බව කිව්වා?**

උ: **ඔව්.**

ප්‍ර: **සීයා එන්නේ නැද්ද ගෙදර?**

උ: **නෑ.**

ප්‍ර: **ඇයි?**

උ: **අම්මා මරපු නිසා**

ප්‍ර: **සිද්ධිය වන දවස වන විට සීයා එන්නේ නැද්ද?**

උ: **එනවා.**

ප්‍ර: **ඇවිල්ලා මොනවාද කරන්නේ?**

උ: **වත්තේ ඇවිදලා ඔහේ යනවා.**

Identification of the assailant by the voice cannot be excluded as unsafe. As per illustration (b) of the Evidence Ordinance "that a man heard or saw something is a fact". It is not possible for the court to disregard the testimony of a witness, on the ground that he had not visually identified the assailant. However, the court has to be mindful that the identification by the voice alone is a weak piece of evidence.

E.R.S.R. Coomaraswamy's book "The Law of Evidence" Volume 1 page 257, says as follows:

"Identification of accused by voice

Some witnesses purport to identify a person by his voice. It is not safe to rely on such identification and the liability to error is great. This is particularly for when the identification was at night. But when the accused was intimately known to the witnesses who identify him by his voice and gait, the Supreme Court of India decline to hold that identification was unsafe. In South Africa voice identification parades have been held with dubious results"

In this case, PW1 had the opportunity to be familiar with the voice of his grandfather very often. Besides, the voice identification is not the only evidence against the appellant. After careful consideration of all the facts, if the court is satisfied with the identification of a person by the voice alone, there is no reason to prevent its acceptance on the basis of conviction.

In the case of ***Dalbir Singh vs State Of Haryana*** decided on 15 May 2008 the Supreme court of India (Indian Kanoon.org/doc/817642) stated as follows:

"He had categorically also stated that from the voice of accused who raised the lalkara he recognized the assailant as his grandson. The stand of the appellant that in dark night recognition would not have been possible from voice is clearly untenable. In a dark night, ocular identification may be difficult in some cases but if a person is acquainted and closely related to another, from the manner of speech, gait and voice identification is possible"

Likewise, in this case, relying on the fact that the appellant is a close relative of PW2 and PW2 had the opportunity to hear the appellant's voice very often, we can conclude that the voice identification is possible and it provides no reason to believe that the identification is not accurate.

As per the evidence of the appellant's daughter (PW4), the appellant had visited her house at around 8.00 p.m. and stated that he had attacked the mother.

In State of Rajasthan v. Raja Ram [(2003) 8 SCC 180], it was held by the Supreme Court of India

"An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact."

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ප්‍ර: තාත්තා ඇවිත් එදා රෑ මොකක්ද කිව්වේ කියා කියන්න?

උ: අම්මා බලන්න කියා කිව්වා. ඇයි කියා ඇහුවහම අම්මාට කෙටුවා කිව්වා ඊට පස්සේ මට සිහිය නැති වුණා.

ප්‍ර: තාත්තා කිව්වාද අම්මාට කෙටුවා කියා?

උ: ඔව්.

ප්‍ර: අම්මාට කෙටුවා කිව්වාට පසුව ඔබ දැන ගත්තාද?

උ: පස්සේ දැන ගත්තා දෙදෙනෙක් තුවාල ලබා තිබෙනවා කියා.

ප්‍ර: කව්ද ඒ දෙන්නා?

උ: අනුලාවතී අම්මයි, දමයන්තියි.

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ප්‍ර: අම්මාට කෙටුවා කිව්වාම ඔබට බය හිතුණාද?

උ: ඇයි තාත්තේ රංඩුවුණාද කියලා ඇහැව්වා.

ප්‍ර: ඊට පස්සේ ?

උ: ඊට පස්සේ මම අම්මාට කෙටුවා ගිහින් බලන්න කිව්වා.

ප්‍ර: ඔබ ඇහැව්වේ නැත්ද අම්මා මොන වගේ තත්වයකින්ද හිටියේ කියලා?

උ: එහෙම අහන්න ශක්තියක් තිබුණේ නැහැ. අහළ පහළ අයට කියලා ගෙදර ගියා.

ප්‍ර: කොහොම හරි තාත්තා ඇවිල්ලා අම්මා ගැන සිද්ධියක් එදා රාතියේ කව්වාද?

උ: ඔව්.

PW4 being the daughter of the appellant, she had no animosity towards him. In fact, she tried to avoid giving answers that were detrimental to the appellant. However, the above evidence of PW4 clearly fits into the evidence of PW1 and PW2. The doctor's evidence also supports the version of PW2.

The place from where the weapon was recovered by the police, consequent to the statement of the appellant is a unique place. The appellant stated that **"කැත්ත පහල ජලාශයට විසි කරා. කැත්ත විසිකලා ස්ථානය පෙන්වාදිය හැකි".**

The appellant had shown the police the place where the weapon had been thrown. But initially, the police was unable to recover the weapon from the canal of the reservoir as the water level was twenty feet high. Thereafter, with the assistance of the irrigation officials, the sluice gates were closed and the water level was reduced the next day. Only then that the police was able to recover the weapon. It would not have been possible for the police to find the weapon in such a place if the appellant had not shown the place.

The doctor was of the opinion that the injuries on the deceased body could have inflicted with the weapon marked as P1, which was recovered by the police as stated above.

The Learned High Court Judge had stated that he had not considered the evidence of PW1 against the appellant, with regard to the charge of murder, as per the provisions of Section 120 of the Evidence Ordinance.

PW 1 stated that she had been assaulted by the assailant at the incident and hospitalized with the cut injuries. PW2 in his testimony stated that the appellant had assaulted both, his mother 'the deceased', and his grandmother PW1. Moreover, PW4 in giving evidence said that her father had stated to her

that he attacked the mother and asked her to take care of the mother. The doctor testified that PW1 had two grievous cut injuries on the head and the skull was also damaged. Eventhough PW1 did not divulge the name of the assailant, the above evidence sufficiently prove that the appellant had attacked PW1. When considering the gravity and the place of the injuries, we can come to a conclusion that he had the intention to kill her. Thus, the evidence is sufficient to justify the second count.

In the above circumstance, the Learned High Court Judge has used only legally admissible evidence to convict the appellant.

The next argument is that the Learned High Court Judge has held that, PW1 was a hostile witness to the prosecution, whereas the prosecution had not made an application under section 154 of the Evidence Ordinance to do so. The term hostile or adverse witness is not found in that section. In terms of section 154 of the Evidence Ordinance, the court may permit the person who calls a witness to ask any questions, can also be asked by the adverse party.

PW1 had clearly omitted to state all she had stated to the doctor and stated it in the Magistrate's Court. The Learned High Court Judge has only observed that PW1 had given evidence detrimental to the prosecution. The Learned High Court Judge has not used such observations to bolster the prosecution case.

The argument that PW4 was threatened by the prosecutor does not manifest in the proceedings. The evidence of PW4 is consistent, though she has omitted a considerable part of what she had stated to the police and to the Magistrate's Court, which was not favourable to the defence. She has not added anything new in the High Court. No single contradiction is marked. It is true that she naturally tried to give answers favouring her father, the appellant. This argument cannot be sustained.

The next argument is that the Learned High Court Judge had not accepted or rejected the dock statement of the appellant. The Learned High Court Judge has referred explicitly to the dock statement on pages 14 and 15 of the Judgment. He has decided that the dock statement had not created a reasonable doubt in the prosecution case. The dock statement is a very short statement and a mere denial. The High Court Judge has rejected that evidence.

This argument, therefore, has no merit.

For the reasons stated above, the appeal of the appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal