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 Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 379-381/2017

Vs.

High Court of Tangalle
Case No: HC 20/2005

1) Senarath Ratnayakage Dharmadasa
alias Ratna

2) Siriwardane Pathiranage Sugathadasa

3) Vitharanage Somapala *alias* Miti Mahatun

Accused

And Now Between

1) Senarath Ratnayakage Dharmadasa
alias Ratna

2) Siriwardane Pathiranage Sugathadasa

3) Vitharanage Somapala *alias* Miti Mahatun

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Ranjan Mendis with C. Kandamby

for the first Accused-Appellant

Anil Silva, PC with Tharidu Rukshan, AAL

for the second Accused-Appellant

K. Kugaraj

for the third Accused-Appellant

Dilan Ratnayake SDSG

for the Respondent

ARGUED ON : 23/03/2022

DECIDED ON : 25/05/2022

R. Gurusinghe, J.

The three accused-appellants (the appellants) were indicted along with Ranjith Jayaratne *alias* Riti Kaluwa; the second accused who was dead pending the trial, in the High Court of Tangalle for committing the murder of Karanayakage Dayaratne on or about the 7th of August 1997 at Mithdeniya, an offence punishable under Section 296 read with Section 32 of the Penal Code.

At the conclusion of the trial, three appellants were found guilty as charged and sentenced to death.

Being aggrieved by the said conviction and sentence, the appellants appealed to this court.

The learned Counsel for the appellants, in their submissions, raised several grounds of appeal. These grounds of appeal could be summarised as follows:

1. Did the learned Trial Judge correctly analyse the evidence of the sole eye witness Karanayakage Leelawathie (PW1) before acting on her evidence.

2. Whether the dock statements of each appellant were given due consideration by the learned High Court Judge.

3. Whether the learned Trial Judge who delivered the Judgment would have adopted the proceedings of her predecessor, as provided in section 48 of the Judicature Act.

4. Whether the learned Trial Judge cast upon the second and the third appellants an additional burden to prove their case.

5. Whether the amended indictment was read out to the appellant

The facts of this case briefly are as follows:

PW1 is one of the elder sisters of the deceased. On the 7th of August 1997, at about 8.00 a.m., PW1 had gone to fetch water. Her younger brother, the deceased, led the way a little ahead of her, but they walked talking to each other. As per the evidence of PW1, the first accused had shot her brother from the road side and the deceased had fallen on the road. Then the second accused had come near the deceased and shot him. The third and the fourth accused had stabbed the deceased several times while he was lying on the ground with gunshots. PW1 raised cries of distress and the assailants fled towards the thicket. The father of PW2 had gone to the police station in order to inform him about the incident.

One of the grounds that is brought out by the appellants to challenge the credibility of PW1's evidence is that she had made a statement to the police only on the following day. That is on the 8th of August 1997. The learned Trial Judge has stated in her judgement that PW1 had made a statement to the police on the 8th of August 1997. However, this is factually incorrect. After a thorough perusal of the original case record and the evidence, I found that PW1 had made a statement to the police on the same day of the incident, that is 7th of August 1997 at 10.30 a.m. The statement was recorded by PW6 PS16918 Ariyasena. It is manifestly clear from the evidence given by PW6 who stated in court, that the statement of PW1 was recorded on the 7th of August, 1997. None of the counsel appeared for the appellants, had taken up the position that PW1 had made a statement to the police on the following day. The defence on the other hand did not challenge the evidence of PW6. All the statements made by the witnesses are available in the case record. Those statements also verify the fact that PW1 had made a statement to the police within two hours of the incident. As argued by the counsel for the first appellant, the statement of PW1 to the police was not belated at all. The learned High Court Judge has thus made a mistake in this regard. Not a single question was put to PW1 on the basis that she made her statement to the police on the following day. Furthermore, the acting magistrate who conducted the investigation had

recorded a statement from PW1 on the 7th of August 1997. She had identified the body of the deceased at the postmortem in the presence of the doctor on the same day, in the evening. Therefore, a mistake on the part of the Trial Judge regarding the date of the statement by PW1 cannot be regarded as a ground to attack the credibility of PW1.

There was a contradiction marked as V1 concerning as to whether the assailants shot the deceased from the road or from the land. The learned High Court Judge has considered this discrepancy. She has observed that the position of PW1 was that "**වත්ත සහ පාර දෙකම එකට තිබෙන්නෙ**...". The police witness also confirmed that the road was not a very wide road and only a gravel road. There was a thicket on one side of the road. The Judge has observed that the counsel for the third appellant has repeated the same questions many times. The learned Trial Judge decided that V1 is not a vital contradiction. Thus, I see no reason to disagree with this finding, especially when the second accused came near the deceased who was fallen on the ground and shot him. The fact that the second accused had shot the deceased after he had fallen on the ground was not challenged by the defence counsel. The learned High Court Judge has observed that the defence did not contest the position "**වත්තයි පාරයි එකටම තිබෙන්නේ**. Therefore, the decision that the contradiction does not go to the root of the case is correct.

Another point taken up by the counsel for the first appellant is that the evidence of PW2 has no reference to PW1. PW2 was informed of this shooting incident by Dayawathi, the eldest daughter of PW2. PW2 who had not gone to the scene at that time, proceeded immediately to the police. PW2 had mentioned that the two daughters were at home on that day. PW2 came to the scene with the police. Therefore, there was nothing to suspect from the evidence of PW2, that PW1 was not at the scene at the time of the shooting. Counsel for the first appellant argued that the entire evidence of PW2 was hearsay. What PW2 had stated to the police contains some hearsay evidence,

but it was the first information received by the police which led the police to arrive at the crime scene and to take immediate action. The police had started the investigation on the complaint made by PW2. The fact that the deceased had left for the boutique at around 9.00 a.m is not hearsay. The fact that her daughter informed him of the incident was not hearsay. The learned Trial Judge had only stated that PW2 had made the first complaint to the police mentioning four names and the police had taken action based on that complaint. The learned Trial Judge has not stated that the first complaint was admitted as evidence. The learned Trial Judge has mentioned that the complaint was made without delay. The Learned Trial Judge has not acted on inadmissible evidence to convict the appellants. The learned Trial Judge has mentioned the following:

"ඒ අනුව පළවන විත්තිකරු හා දැනට මියගොස් සිටින විත්තිකරු කැලේ සිට එක පාරටම පාරට පැන තම සහෝදරයාට වෙඩි තබන ලද බවට පැ.සා. 01 විසින් සිද්ධිය සිදුවූ දිනට, පසුදින ඇති ප්‍රකාශයේ සඳහන් කරුණු පිළිගත හැකිය."

Counsel for the appellant vehemently attacked this portion in the judgment. Counsel for the appellant submitted that the learned Trial Judge had violated the provisions of section 110 of the Criminal Procedure Code. In this regard, he cited the case of *Rathinam vs Queen 74 NLR 371.* The above portion was mentioned by the learned Trial Judge when considering a contradiction to compare it with what has been stated by PW1 in court. However, the conviction was based on the evidence that had been led before the court and not on inadmissible evidence. The learned Trial Judge did not use the statement to the police as a basis for the conviction.

The contradictions of V1 and V2 have been considered by the learned High Court Judge and she has come to the conclusion that they did not go to the root of the matter. The contradiction of V1 was with regard to what the appellants were wearing at the time of the incident. This is not a material fact

in relation to what they have been charged with. The contradiction of V2 is "**ඉස්සර වෙලා පැන්න දෙන්නා පැනලා, විනාඩි ගනණකින් අනිත් දෙන්නා, පැන්නේ**".

The evidence in High Court is that immediately after the first two accused had shot the deceased, the third and the fourth also had come and stabbed the deceased. Few minutes means a very short time. When someone describes something, the most appropriate words may not come out to describe it correctly and properly. The Judge has decided that the contradiction does not go to the root of the matter and that has no affect to the fact, that the accused had shot or the accused had stabbed the deceased. Therefore, I see no reason to disagree with these findings of the learned High Court Judge.

The appellants have made dock statements. The first appellant took up the position that he was in hospital when he was arrested and he denied any involvement in the death of the deceased. The second appellant also took up the denial and denied any knowledge of the crime. He said that he lived in a different area. The third appellant also denied any involvement in the crime. He further stated that the family members of the deceased were involved in criminal activities and they suspected him of being a police informant in such activities. As such, they have implicated the third accused in this incident. The claims of the third appellant were not put to the witnesses. None of the appellants has put their defences to the prosecution witnesses. The learned Trial Judge has observed that none of the appellants produced any evidence to support their position. The appellants took this observation as the judge had imposed a burden on them to prove their case.

In the case of *Sumanasena vs Attorney General 1999 3 SriLR 137 F.N.D. Jayasuriya J.*stated as follows; "*The prosecution established a strong and incriminating cogent evidence against the accused, and the accused in these circumstances was required in law, to offer an explanation of highly incriminating circumstances established against them".*

The appellant had not offered a creditworthy explanation in this case. The position of the second appellant is that he was residing elsewhere and he has nothing to do with the crime.

In the case of *Gunasiri vs Republic of Sri Lanka 2009 1 SriLR 39*,*Sisira de Abrew* J. stated as follows:

"Although the 3rd accused-appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused-appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh vs. State of Punjab at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew vs. the State of Karnataka.2004 Cr. LJ 3003"

The learned High Court Judge has observed that none of the appellants had put their defences to the prosecution witnesses; the learned Trial Judge had the benefit of observing the demeanour and the deportment of the accused when they made their dock statements. The learned Trial Judge has considered the dock statements and come to a conclusion to reject them. The second and the third appellant had taken up the position that the learned Trial Judge had misdirected regarding the burden of proof. The learned Trial Judge has said that there was no evidence produced by the appellant to believe their defence. There was no shifting of the burden of proof here. I see no reason to disagree with the findings of the Trial Judge in this regard.

The next ground of appeal by the second appellant was that they had not taken part in the non-summary inquiry. Hence no statement was recorded from the

second and the third accused. The second appellant contends that non-summary proceedings were not valid in law. The appellant had been absconding for nine years. The police have recorded a statement from the wife and the mother-in-law of the second accused-appellant. He surrendered to the High Court after nine years. The second appellant was given every chance to put forward any defence in the High Court. Therefore, it cannot be argued that he was not given a fair trial, on the basis that he did not participate in the non-summary proceedings.

One of the grounds of appeal set forth by the third appellant is that the learned High Court Judge, who delivered the judgment had not adopted the evidence recorded by her predecessor. The learned High Court Judge had adopted the evidence on a subsequent date with the consent of all appellants. (vide proceedings of 14th March 2006,) none of the accused-appellants had demanded the witnesses to be re-summoned and re-heard. Thus the learned Trial Judge has sufficiently complied with the provisions of section 48 of the Judicature Act.

The next ground of appeal raised by the third appellant is that after the death of the second accused, the indictment was amended but the amended indictment was not read to the appellants. The counsel for the third appellant has drawn attention to page 228 of the brief. However, on page 117, proceedings dated 13th February 2012, the learned State Counsel who appeared for the prosecution made an application to amend the indictment, as the second accused was dead. As per the proceedings, the indictment was amended accordingly, inserting the name of the deceased accused. The amendment was informed to the accused and explained. They pleaded not guilty on the 14th of March, 2016. Only the words **"තිස් දෙවන වගන්තිය සමඟ කියවන්න"** were added on 14/3/2016. Counsel for the defence did not object to this application. Therefore, there had been no prejudice caused to the appellant.

In the circumstances, I hold that the evidence is sufficient to support the conviction of the appellants. I see no reason to interfere with the judgment of the learned High Court Judge. I affirm the conviction and sentence imposed on the appellants.

The appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal