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 77/2012

High Court of Tangalle
Case No: HC 08/2004

Vs.

1) Rajapurage Sugath Weeraratne

2) Rajamunige Nihal Chaminda *alias* Mahattaya

Accused

And Now Between

1) Rajapurage Sugath Weeraratne

2) Rajamunige Nihal Chaminda *alias* Mahattaya

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : A. Bandara

For the 1st Accused-Appellant

Yalith Wijesurendra

for the 2ndAccused-Appellant

Rohantha Abeysuriya, PC, ASG

for the Respondent

ARGUED ON : 09/05/2022

DECIDED ON : 09/06/2022

R. Gurusinghe, J.

The two appellants were indicted in the High Court of Tangalle for having committed the murder of Vijayamunige Goonewardene, an offence punishable under section 296 read with section 32 of the Penal Code. The appellants pleaded not guilty to the charge and preferred to have the trial before the Judge without a jury.

The prosecution called PW1, PW2, PW7(JMO), PW8, PW9, PW3, and the Court Interpreter.

On behalf of the appellants, the first appellant gave evidence. The second appellant made a dock statement. In addition, M. Amarawathi, Siri Baddanage Nimal, the Court Interpreter and the Registrar of the High Court of Tangalle were called as witnesses.

After trial, both appellants were found guilty of the charge and imposed death sentences.

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

Prosecution case

On the 13th of July 1996, the incident occurred at Kandabedda in the Walasmulla police area. The deceased was a mason and constructed a house in their own compound. After finishing his masonry work, he had gone to have a shower and returned home at about 5.00 or 5.30 p.m. Around 7.00 p.m., he left the house to find another mason to get assistance for his masonry work. Between 9.00 and 9.30 p.m. PW1, the father of the deceased heard someone was threatening his son (the deceased). PW1 then rushed towards the road with a torch in his hand. When he was flashing the torch, he saw that the first appellant stabbed the deceased while the second appellant was holding the deceased to the ground. When PW1 rushed towards them shouting, the first appellant tried to assault him too. At this juncture, the deceased managed to creep through the fence of their compound. PW1, thinking that the deceased would have managed to come home, went back to his house and told PW2 that the appellants had stabbed the deceased and then heard a groaning sound; he went to that place, followed by PW3 and saw the deceased fallen on the ground. Then they brought him home, but the deceased succumbed to his injuries in a few minutes.

The grounds of appeal

1) The learned Trial Judge has failed to duly analyse and evaluate the evidence of the witnesses of the prosecution.

2) The learned Trial Judge has failed to give the Defence the benefit of the doubt, created by the evidence of the Medical Officer called by the prosecution to give evidence.

3) As per the evidence of PW1, the distance between the place of the incident and the place where the deceased was found is approximately 45 feet. According to the evidence of the Medical Officer, the deceased could not have travelled that far. The learned Trial Judge has not correctly applied the test of probability when analysing the above facts.

4) The benefit of the doubt created by the evidence led by the prosecution, with regard to the identification of the accused by the sound of the voice, the identification of the accused at the crime scene, was not given to the defence by the learned Trial Judge.

5) The inquest report was produced by the defence marked as VX1. However, the learned Trial Judge disregarded the report and solely relied on contradictory evidence given by the police inspector Kavisena. As a result, the learned Trial Judge has failed to analyse the evidence properly.

6) The conclusion drawn by the learned Trial Judge regarding the evidence of defence witness Amarawathie indicates that, the learned Trial Judge has failed to consider the said evidence duly.

7) The learned Trial Judge has failed to consider the fact that the prosecution case must stand on its own. Failing to consider the

presumption of innocence in favour of the accused was adversely affected.

8) The learned Trial Judge has failed to consider the acceptability of the evidence of the defence properly.

PW1 giving evidence in court, clearly stated that he took an electric torch and ran to the road upon hearing the shouting of his son. He said that he saw the first appellant stabbed his son while the second appellant was holding his son to the ground. He said that he recognised the voices of his son and the first appellant. PW1 stated as follows:

On page 49 of the appeal brief;

ප්‍ර: පාරට ගියාම කවුරුවත් සිටියද?

උ: ඔව්

ප්‍ර: කව්ද?

උ: මගේ පුතා උඩුබැලි අතට ඔබාගෙන උන්නා. එක්කෙනෙක් ඇඟ උඩ ඉඳලා පිහියෙන් ඇන්නා.

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ප්‍ර: පිහියෙන් ඇන්න සුගත් අද මේ ගරු අධිකරණයේ ඉන්නවද?

උ ඉන්නවා

ප්‍ර: කී වෙනියටද?

උ: පළ වෙනියට

ප්‍ර: තමාගේ පුතාට පිහියෙන් අනිනවා දැක්කද?

උ: ඔව්

It is to be noted that not a single contradiction was marked in the evidence of PW1. PW1 had made the first complaint within a few hours of the incident. His complaint was recorded at 2.20 a.m.on the 14th of July, 1996. He had given evidence in the inquest. Then he had testified in the non-summary proceedings. He had given evidence in the Hambantota High Court and was cross-examined by the defence. As a result of establishing a new High Court at Tangalle, within the Hambantota district, the case was re-allocated to the Tangalle High Court. In the Tangalle High Court, before adopting the evidence led upto then, the appellants were asked whether they were agreeable to adopting the evidence or recalling the witnesses. The counsel for the appellant wanted to recall PW1 and cross-examine him. This application was allowed, and PW1 once again was cross-examined by the defence counsel. PW1 was cross-examined twice in the High Court. Even so, there was no in-consistency in his testimony. PW2 and PW3 also gave evidence. They have also stated that they heard his brother's voice and the appellant's voice. The appellants argued that the voice identification is not safe to rely on. It is true that voice identification is considered as a weak piece of evidence. However, as PW1 is an eyewitness and his evidence is convincing and compelling, the identification by voice is not essential to prove this case.

The appellants' next point is that, after receiving the fatal injury, described as injury No. 1 in the post-mortem report, the deceased could not have run a distance of 45 feet. However, the Judicial Medical Officer explained how it might have happened. The doctor was of the opinion that, after receiving injury No. 1, the deceased would have died in a few minutes. However, he explained that the deceased could have lived upto half an hour if the wound had closed for a while. The doctor said that the deceased could have walked a few meters,

but he could not run. PW1 never said that the deceased had run. PW1 stated that the deceased had crept through the fence. There was a geographical incline from the place of the incident on the road abutting the compound of the deceased. The police observed that the distance between the two locations was 45 feet, and there was a geographical incline in which the gradient was 45 degrees. As such, it is not improbable that the deceased had crept into that place.

The doctor stated in the cross-examination as follows:

(Page 130)

ප්‍ර: **ඒබදු තුවාල සිදුවු** (refer to injury No. 1) **පුද්ගලයෙක් ක්ලාන්තය වීමෙ හැකියාවක් තිබෙනවද?**

උ: **10 වන කපාලයේ ස්නායු කැපී උත්තේජනය ඒ ආකාරයෙන් සිදු නොවෙන්න පුළුවන්. මෙහි රුධිරය එළියට එමෙන් හෘදය වස්තුවේ සිදුර සංකෝචනය වීමෙන් සිදුර සමානත්‍ය මට්ටමට වැසෙන්න පුළුවන්. එවැනි විටෙක පැය ½ ක් වගේ ඉන්න පුළුවන්.**

Page 131 in cross examination

ප්‍ර: **ඒ වගේම ඔබතුමා සඳහන් කලා ඇඟඋඩ යමකු ඉදිමීන් සිදු කරන්න පුලුවන් කියලා?**

උ: **ඔව්. ඇඟඋඩ වාඩිවී, පිහියෙන් ඇනීමක් සිදු වෙන්න පුළුවන්.**

ප්‍ර: **ඔබ තුමා කියන්න 08, 09 තුවාල සිදු වෙන්න පුළුවන්ද?**

උ: **ඒත් වෙන්න පුළුවන්.**

at page 132

ප්‍ර: **ඇවිදීමේ හැකියාවක් තිබෙනවද?**

උ: **ඉතාමත්ම අඩුයි**

ප්‍ර: **තුවාලය සිදුවූ විගසම ?**

උ: **පියවර 05ක් පමණ**

ප්‍ර: **බඩගාගෙන යාමේ හැකියාවක් තිබෙනවද?**

උ: **ඔව්**

As per the police observation, the gradient was the same upto the place where the deceased was lying. In these circumstances, there is nothing to suspect the evidence of PW1. PW2 and PW3, giving evidence, stated that they heard the voice of their brother and the first accused. Counsel for the second accused contended that PW1, PW2 and PW3 differed from what they have heard as described by these witnesses. Some of the words were different, but the effect of those words was the same. A person may not be able to echo the exact words he heard as a tape recorder. The counsel for the respondent pointed out that they may have heard different parts. However, the effect of the words spoken was the same. This difference is not on the main issue, that is stabbing. Therefore, this contention cannot be accepted to doubt the evidence of the witnesses, especially the evidence of PW1, which stands consistent at all times.

One of the contentions of the appellant is that the defence had marked the inquest report as V6 and the learned Trial Judge had disregarded the report and relied on the evidence of PW1 Kavisena. As per the evidence of this witness, he had gone to the scene at 3.10 a.m. He had recorded the observation at that time. The police had reported the incident to the Magistrate at 9.30a.m. on the 14th of July, 1996. No contradiction was marked in the evidence of PW8. The inquest proceedings had not become a part of the evidence. As

pointed out, the above evidence of PW1 stands un-contradicted. Therefore, this argument cannot be sustained.

The Judicial Medical Officer who conducted the post mortem found eleven stab injuries on the body of the deceased. The injury No. 1 was a necessarily fatal injury that penetrated the deceased's heart. No. 2, 3, 4, 5, 6, and 7 injuries were though not necessarily fatal, those injuries could have caused the death in the ordinary cause of nature. Therefore, it is obvious that the intention of the assailants was to kill the deceased.

The first and second appellants had actively participated in the murder of the deceased which clearly proves the common intention of the appellants. The first appellant had held a grudge against PW1, thinking that PW1 had given information to the police during the 1988, 1989 insurrections. As per the evidence of the first appellant, one of his brothers went missing at that time.

The learned High Court Judge observed that there were no contradictions in the evidence of PW1. Two omissions marked were also considered. The two omissions were regarding whether, PW1 had stated to the police that the appellants had turned to the side of PW1 when he flashed the torch, and the other one is whether he had told PW 2 and PW 3 that the first accused had stabbed the deceased. The learned High Court Judge had considered the two omissions and came to the conclusion that those were not vital omissions. In this regard, the Judge had followed the guidance given in the cases of *Kularatne vs Queen* 73 NLR and Keerthi *Bandara vs Attorney General* [2000] 1 Sri LR 245.

The learned High Court Judge has observed that it was not difficult to understand the trauma that a father had to undergo when a son was killed before him. This observation was not a mere surmise. PW1 had stated this in his cross-examination on Page 73

ප්‍ර: පාරෙ සිද්ධිය වූ අවස්ථාවෙ ටෝච් එක අරගෙන ගියා බව කිව්ව. ඒ අවස්ථාවෙ අසල්වාසින් ඇවිත් සිටියාද?

උ: කීප දෙනෙක් ඇවිත් සිටියා. ඒ ගැන කවුරු ආවද කියන්න හැකියාවක් නැහැ. මගේ පපුව වේගවත් කම නිසා.

The two omissions should be considered inlight of this situation. The complaint was not a delayed one. It was made within four hours of the incident.

The defence had the chance to cross-examine PW1 on three occasions. First at the non-summary inquiry, the second and third in the High Court trial. In the High Court, PW1 was cross-examined twice by the defence. The appellants wanted to cross-examine PW1, before adopting the evidence of PW1. There were four occasions where the defence could have contradicted PW1 if there was any inconsistency. However, there was nothing to contradict the evidence of PW1. The two omissions should be considered against this backdrop. Therefore, I find no reason to disagree with the findings of the learned High Court Judge in this regard.

PW3 had given a statement to the police on the 27th of July 1996, which was a delayed statement. PW3 was only eighteen years old at that time. PW1, the father, made a complaint without delay. The police officers came to the scene and recorded a statement from PW2 on the same day as well. However, they had not recorded a statement from PW3 at that time. Later he was asked to come to the police station and recorded a statement. He explained that he was asked to come to the police station on that day, which he did as he was directed.

The learned Trial Judge had accepted the delay as reasonable. The prosecution case rests mainly on the evidence of PW1. Even if PW3 had not given evidence,

the judgment could still be justified. Therefore the delay in making a statement to the police by PW3, does not make any difference to the prosecution case.

One of the contentions of the appellant is that even if the prosecution version was believed, the Judge should have considered the possibility of bringing down the offence to culpable homicide not amounting to murder. There was no suggestion by the appellants under any circumstances that warrant the reduction of the culpability. The evidence reveals that there was an incident between the appellants, including another person named Wijeratne and the deceased, in the evening. However, the deceased was not willing to fight. The first accused stated that the deceased admitted that he and his friend had eaten the fowl belonging to Wijeratne. The deceased agreed to pay Wijerathne for it. The stabbing took place around 9.00 - 9.30 p.m. At that time, the witnesses heard the threatening voices of the accused. But the deceased only said "**මම උබලාට කර වැරැද්ද මොකද්ද**". No evidence to show that there was a sudden fight.

Both appellants took up the defence of alibi and complete denial. There was no reason for the Trial Judge to consider reducing the charge to a lesser offence in these circumstances.

The next contention is that the Learned High Court Judge had not considered the defence evidence. The learned Trial Judge considered the defence evidence, referring to the relevant case laws. He has referred to *King vs Tholis Silva* 39NLR267, Karunadasa *vs OIC, Nittambuwa Police station*,[1981]Sri LR 155 *Sunil Appuhamy vs The Republic* CA 74/05. The first appellant gave evidence and stated that the person named Wijeratne told him that his fowl had been stolen. Then the first appellant said that the deceased could have done it. At that time, the deceased came to the road on a motorcycle. They stopped his motorcycle; the first appellant told the deceased to admit if he had eaten the fowl. That matter was ended there, and he went to sleep at about 9.15 p.m. In

the morning, he went to gather his cattle and came home around 11.00 a.m. Then his mother told him that the deceased had been murdered last night and the police came searching for him. After that, the police constantly followed him. He evaded the police for a few days but later, he surrendered to court with the assistance of a lawyer.

The second appellant made a dock statement and stated that there was an incident in the evening; however, he had nothing to do with the murder.

It is to be noted that the first appellant had evaded the police for about one month. The police arrested the second appellant after seven months of the incident. Both of them had enough time to prepare a story. Their subsequent conduct is also relevant. The defence also called two witnesses. One was a neighbour of the deceased. What she said was that around 9.00 to 10.00 p.m. she heard somebody screaming "මෙන්න මරනවෝ". She went out to her compound, but as it was dark outside, she could not see anybody. Then she went to sleep. In the morning, she came to know that the deceased had been killed the previous night.

This evidence does not help the version of the appellant. She also admitted that she and the members of the deceased family were not on good terms. The defence also called the witness listed as PW5. He said that he went with the deceased on a motor bicycle to a place called "පොකුන ලිඳ". After that, on their way home, they saw there were few people near his home. The deceased stopped the motorcycle for him to get down. At that time, Wijeratne asked the deceased whether he had eaten his fowl, which the deceased denied. However, later the deceased admitted his fault and agreed to pay for it. The first accused told the deceased to pay for the fowl. The following morning, he came to know that the deceased had been murdered the previous night. This evidence does not support the defence case of alibi.

The defence of the first appellant in his evidence said that he was never present at the scene of the murder. This was not put to PW1 or any other witnesses. The second appellant in his dock statement took up the position that he was at his home when this murder took place. The defence of alibi was also not put to PW1 or to other witnesses by the defence.

In the case of *Gunasiri and two others vs Republic of Sri Lanka 2009 1 SRI LR 39,* Sisira de Abrew J held 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. State of Kamatakal 5)* Applying the principles laid down in the above judicial decision, I may express the following view. Failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it was a false one. Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused-appellant is an after thought."

In the instant case, the failure to suggest the defence of alibi to the prosecution witnesses indicates that this is an afterthought.

The defence of alibi should cover the time of the alleged offence so as to exclude the presence of the accused, at the crime scene at the relevant time.

The defence evidence does not indicate that the accused were so far away from the place of occurrence and it is highly improbable that he would have participated in the crime. The two accused lived in a very close neighbourhood. They could reach the place of the deceased within a few minutes.

The learned High Court Judge has considered the defence evidence and come to the conclusion that, the defence evidence did not create a reasonable doubt in the prosecution case. The learned Trial Judge had carefully considered all the defence evidence. He referred to the abovementioned case laws as well. The defence evidence did not reveal anything more than that, there was an incident between the two appellants, Wijeratne and the deceased, regarding the killing of a fowl in the evening. The said Wijeratna had given evidence in the Non-summary proceedings. That evidence does not create a reasonable doubt in the prosecution case.

In the circumstances, the appeal of the appellants cannot be sustained. I affirm the judgment of the learned High Court Judge dated 30/05/2012 and the sentence imposed on the appellants.

Appeal dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal