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

In the matter of an Appeal made under 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.

Court of Appeal No:
CA/HCC/016-017/2015

High Court of Chilaw
Case No: HC/101/2006

1. Rathnayake Mudiyanselage Duminda Thushara
2. Rathnayake Mudiyanselage Sugath Deshapriya alias Chuti

ACCUSED-APPELLANTS

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL	**:**	**Indica Mallawarachchi for the 1st Accused-Appellant.** **Anil Silva, P.C. with Isuru Jayawardena for the 2nd Accused- Appellant.** **Riyaz Bary, DSG for the Respondent.**
ARGUED ON	**:**	**30-31/05/2022**
DECIDED ON	**:**	**21/07/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted in the High Court of Chilaw under Section 296 of the Penal Code for committing the murder of Narayana Mudiyanselage Ananda Kulatilaka on or about 11th August 2003.

The trial commenced before the High Court Judge of Chilaw as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the 1st Appellant had given evidence from the witness box while the 2nd Appellant had made a dock statement. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced both to death on 12/03/2015.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence due to the Covid 19 pandemic. Also, at the time of argument the Appellants were connected via Zoom platform from prison.

Background of the Case.

According to PW1, the wife of the deceased, at about 3.45 p.m. on the date of the incident, while her deceased husband and herself were in the garden in front of their house playing with their youngest daughter, the Appellants who are well known to them had come there with the 1st Appellant possessing a sword and 2nd Appellant possessing an iron bar. On seeing them the deceased ran towards a house adjacent to the land but the Appellants had chased him. The deceased thereafter, left that house and when he tried to creep through a fence, the 1st Appellant had cut the deceased who had then landed on his hands. When he fell down the 1st Appellant had cut the deceased's leg. Thereafter, the 2nd Appellant had dealt a blow on his head. After assaulting the deceased severely, both Appellants had left the place quickly.

The deceased was rushed to the hospital but was pronounced dead upon admission. The deceased was speechless after the attack by the Appellants. The Appellants were arrested on the following day by the police and a sword and an iron bar were recovered upon the statement of the 1st and 2nd Appellants respectively.

The deceased had suffered 5 external injuries in the nature of a laceration on the head, 3 cut injuries on the right leg and groin and left wrist and a contusion on the head.

Having satisfied that the prosecution had made out a prima facie case against the Appellants, the Learned Trial Judge had called for the defence. The 1st Appellant had given evidence under oaths while the 2nd Appellant had made a statement from the dock and closed their respective cases.
The learned High Court Judge had sentenced the Appellants to death on 12/03/2015.

The Appellants had separately canvassed their Appeal grounds through their counsels.

The First Appellant had filed the following grounds of appeal.

1. The learned trial Judge has erred with regard to the principles relating to Section 27(1) recovery.
2. The Learned trial Judge has erred by relying upon inadmissible evidence thereby causing grave prejudice to the Appellant thereby denied a fair trial.
3. The learned trial Judge has drawn adverse inferences against the 1st Appellant his failure to give evidence in relation to the statutory statement.
4. The Judgment pronounced in this case is devoid of proper judicial analysis and evaluation of evidence and total disregard of Section 283 of Code of Criminal Procedure Act No.15 of 1979.

The Second Appellant had filed the following grounds of appeal.

1. The prosecution has not proved the case beyond reasonable grounds.
2. The Learned trial Judge has rejected the defence evidence on unreasonable grounds.

3. The Learned trial Judge has permitted the confessionary statement of the 1st Appellant to be used to impeach his credibility.
4. Evidence under Section 27(1) of the Evidence Ordinance has been led contrary to law.

Considering the grounds of appeal raised by the Appellants, it is apparent that few grounds are inter related to each other. Hence, I decided to consider this appeal under the following common appeal grounds:

1. The prosecution has not proved the case beyond reasonable doubts.
2. Evidence under Section 27(1) of the Evidence Ordinance has been led contrary to law.
3. The learned trial Judge has permitted the confessionary statement of 1st Appellant to impeach his credibility causing grave prejudice to the Appellants thereby denying them a fair trial.
4. The Learned trial Judge has rejected the defence evidence on unreasonable grounds.
5. The Judgment pronounced in this case is devoid of proper judicial analysis and evaluation of evidence and total disregard of Section 283 of Code of Criminal Procedure Act No.15 of 1979.
6. The Learned trial Judge has drawn adverse inferences against the 1st Appellant's failure to give evidence in relation to the statutory statement.

Considering the first ground of appeal it is admitted by the Appellants that they had gone to the deceased's house on the date of incident to inquire in to a rumor that had been spread against the 1st Appellant allegedly by the

deceased. Hence, presence of the Appellants at the crime scene is not disputed in this case.

Although motive is not necessary to prove in a criminal trial, existence of a motive would strengthen the prosecution case. In this case the evidence revealed that the deceased had taken his friend's son to the police station to make a complaint against the 1st Appellant for sexually abusing the boy. According to PW1, while they were playing and enjoying with their little daughter in front of her house, the 1st Appellant and the 2nd Appellant had come there armed with a sword and iron rod respectively, chased the deceased and cut and assaulted him to death. She had vividly explained how the deceased tried to avoid the Appellants after seeing them. PW2, the deceased's daughter also narrated the same as her mother PW1.

The defence had marked two contradictions on the evidence of PW1 and one contradiction on the evidence of PW2. As those contradictions are not forceful enough to create a doubt on the prosecution case, the rejection of those contradictions has not caused any prejudice to the Appellants. Further, none of the witnesses are expected give 100% accurate evidence in a trial.

In State of **Uttar Pradesh v. M. K. Anthony** [AIR 1985 SC 48] the court held that:

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the*

general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. …Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."

Further the evidence given by PW1 and PW2 had been corroborated by an independent witness PW4, a neighbor of the deceased. He had seen the Appellants running behind the deceased. He had further confirmed that the 1st Appellant had possessed a sword while the 2nd Appellant had a black colored rod. He had not witnessed the attack, but had seen the deceased lying on the ground motionless with severe cut injury on his hand and legs. The evidence given by the lay witnesses had very well corroborated with the medical evidence pertaining to the injury inflicted on the deceased.

The learned High Court Judge had considered and analyzed the evidence accurately even though he did not have the advantage of seeing the demeanour and deportment of the witnesses.

As the prosecution had presented overwhelming evidence against the Appellants, it is not correct to say that they had not proved the case against the Appellants beyond reasonable grounds. Hence, I reject this ground of appeal as it has no merit.

In the second ground of Appeal the Counsels contended that the evidence under Section 27(1) of the Evidence Ordinance has been led contrary to law.

Ordinarily, a statement made by an accused person is inadmissible against him. As exception to this rule is the admissibility of statements under Section 27(1) of the Evidence Ordinance where a portion of a statement made to a police officer and which leads to the discovery of a fact can be led in evidence.

The Appellants contend that the prosecution led evidence about purported statements made by the Appellants in consequence of which the weapons were discovered. The Police officer who recorded the statements was dead at the time the evidence was sought to be led. In such circumstances the learned Trial Judge should not have permitted the leading of that confessionary part of the statements under Section 27(1) of the Evidence Ordinance. The prejudice caused by such statements far outweigh the evidentiary value of such statements. In the circumstances the Appellant further contended that the learned Trial Judge should not have permitted this evidence to be led.

In this case, after receiving information a team of police officers led by PW7(dead) had conducted investigations, arrested the Appellants and recovered the production based upon their statements under Section 27(1) of the Evidence Ordinance. During the trial PW9, who was a member of the police team had given evidence covering the investigation done by PW7. The learned State Counsel before leading the substantial evidence satisfied the court that he was a member of the investigation team, worked under PW7 and was very well acquainted with PW7's handwriting and signature. Thereafter, he had given substantial evidence pertaining to the investigations and recoveries done in this case. Also marked the relevant

portions from the statements of the Appellants pertaining to Section 27(1) recoveries, identified the productions and the Appellants.

The Defence had not objected when the prosecution led evidence of PW9 based on the investigation notes put by PW7. The learned State Counsel obtained a clarification from PW9 that he acted under Section 159(2) of the Evidence Ordinance and satisfied himself of the accuracy of the investigation done by PW7 who was dead at the time of the trial.

PW7 had given evidence with regard to the very commencement of the investigation until the arrest and recovery of productions. Correct identity of the Appellants also established without any contradiction. Even if PW7 is alive, he would have given the same evidence as PW9 in this case because of his active participation in the investigation.

In a similar situation in the case of **CA/296/2009** decided on 07/08/2015 the court held:

> *"Accused-Appellant whilst challenging the conviction and Sentence both, took up the position, that this is a single witness case where the prosecution has relied entirely on Police Constable Ranil, whose evidence could be only treated as hearsay evidence, in the absence of the Chief Investigating Officer, IP Tennakoon……..*
>
> *Even though Police Constable Ranil has not made the arrest, this court is of the view that the above evidence of police Constable Ranil will have the same effect as if IP Tennakoon had given evidence in this case. Police Constable Ranil speaks from the time he received the information up to sealing of Productions at the Police Narcotic Bureau where he actively took part in the investigation as the raid had been carried out on information provided through his informant."*

Given the reasons above, I conclude that leading investigation evidence and marking recovery done under Section 27(1) of Evidence Ordinance through PW9 is not improper and has not occasioned any prejudice to the Appellants in this case. Hence, I find no merit in this appeal ground as well.

In the third ground of appeal the Appellants contest that the learned trial Judge has permitted the confessionary statement of the 1st Appellant to impeach his credibility causing grave prejudice to the Appellants thereby denying them a fair trial.

Section 110(3) of the Code of Criminal Procedure Act No.15 of 1979 provides in general that a statement made to a police officer in the course of an investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroboration.

It further provides that a statement of an accused person in the course of an investigation shall only be used to prove that he made a different statement at a different time. By way of further proviso, it states that the limitation placed in respect of the statement made by an accused in the course of an investigation would not apply in respect of section 27 of the Evidence Ordinance. Hence, in the case of an accused's statement, it could be used for the purpose of marking contradictions.

Section 25 of the Evidence Ordinance states:

1. No confession made to a police officer shall be proved as against a person accused of any offence.
2. No confession made to a forest officer with respect of an act made punishable under the Forest Ordinance, or to an excise officer with

respect of an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession.

In **The Queen v. Abadda** 66 NLR 397 the court held that:

> *"The question whether a statement made by an accused person to a police officer is a confession within the meaning of section 25 of the Evidence Ordinance is one that has to be decided upon reading the entire statement. If the statement as a whole contains a statement that the accused person committed an offence or that suggests the inference that he committed an offence, then it would come within the prohibition contained in section 25 of the Evidence Ordinance.*
>
> *Where the accused's statement contains a confession, the prohibition contained in section 25 of the Evidence Ordinance bars the proof against the accused of not only those portions of the statement which admit guilt or suggest the inference that he committed the offence but also those portions of the statement which when taken out of the context by themselves are innocuous. No portion of a confession can be proved against an accused person."*

In this case the 1st Appellant had given evidence under oaths and had been subjected to cross-examination by the State Counsel. Under cross-examination the State Counsel had marked 07 contradictions, X1-X8 against the statements given to the police after his arrest. The said contradictions are reproduced below:

“ඉන්පසු චූටි කිව්වා උඩලවෙල පැත්තට යමු කියලා. පසුව අපි දෙදෙනා උඩලවෙල සෙල්වකුමාරගේ ගෙදරට ගොස් කසිප්පු තුන්කාලක් අරගෙන උඩලවෙල පැත්තට ආවා.” යන කොටස **X-1** ලෙස ලකුණු කර සිටින බවයි.

(Page No. 342)

“මමත් එහේ තිබුණ කඩුවක් අර ගත්තා. ඒ දෙකම අරගෙන අපි දෙන්නා අපේ බයිසිකලෙන් ශාන්තගේ ගෙදරට ගියා” යන කොටස **X-2** ලෙසට ලකුණු කර සිටින බවයි.
(Page No. 346)

“අපි දෙන්නා ඔහුගේ ගේ ලඟට යනවිට ඔහු ඔහුගේ බිරිඳ සමඟ වාඩිවී සිටියා” යන කොටස **X-3** ලෙස ලකුණු කර සිටින බවයි.
(Page No. 348)

අපි දැකලා දිව්වා පසුව ඔහු පසුපස පන්නා ගියා යන කොටස **X-4** ලෙස ලකුණු කර ඉදිරිපත් කරයි.
(Page No. 349)

මේ අවස්ථාවේදී ආනන්ද දුවගෙන ගොස් අසල තිබූ නිවසකට රිංගුවා යන කොටස **X-5** ලෙස ලකුණු කර ඉදිරිපත් කරයි.
(Page No. 350)

මමත් ඒ නිවස තුලට ගියා යන කොටස **X-6** ලෙස ලකුණු කර ඉදිරිපත් කරයි.
(Page No. 350)

මම ඔහු සමඟ පොර බැඳුවා. ඔහුව තල්ලු කලා යන කොටස **X-7** ලෙස ලකුණු කර ඉදිරිපත් කරයි.
(Page No. 350)

මේ අවස්ථාවේදී අපි ගම් ප්‍රදේශය අතහැරලා යන්න සූදානම් වෙලා සිටියේ යන කොටස **X-8** ලෙස ලකුණු කර ඉදිරිපත් කරයි.

(Page No. 354)

Out of the seven contradictions the learned Trial Judge had only considered X2 in his judgement at page 24. The learned High Court Judge had taken into consideration that the 1st Appellant had said to the police that he had gone to the deceased's house carrying a sword. The learned High Court judge despite the stiff resistance from the defence Counsel allowed that contradiction to be marked as X2. In his Judgement at page 24, he further held that the contradiction X2 affects the root of the defence case.

In **King v. Kiriwasthu** 40 NLR 289 the court held:

> *"A confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself."*

In **King v. Fernando** 41 NLR 151 the court held that:

> *"That the Crown was not entitled to cross-examine the accused on the statement as it was obnoxious to section 25 of the Evidence Ordinance.*
> *"Further, that the statement could not be regarded as an exculpatory statement, as it was capable of being construed as establishing a prima facie case against the accused."*

In **Regina v. Batcho** 57 NLR 100 the court held that:

> *"It is contrary to the provisions of section 25 of the Evidence Ordinance to cross-examine an accused person on what are, in*

effect, the contents of a confessional statement made by him to the Police."

Considering above mentioned judicial decisions, in this case the learned Trial Judge should not have allowed the prosecution to mark contradictions on his statement which contain the confessionary portions, given to the police upon his arrest. This is a clear misdirection by the learned Trial Judge. This could have been averted had the Trial Judge considered the timely objection raised by the Defence Counsel during the trial.

Even though the prosecution had marked 08 contradictions on the statement of the Appellant, as said earlier, the Learned High Court Judge had only considered contradiction X2 in his judgment.

The prosecution had led firm evidence that the 1st Appellant had come there armed with a sword. This evidence is not contradicted in the trial. Even though X2 is improperly admitted, it is not capable of creating a doubt on the overwhelming evidence presented by the prosecution. Hence acceptance of prosecution evidence has not occasioned a failure of justice in this case.

In **R v. Voisin** [1918] 1 K.B. 531 it was held that there is a discretion to exclude evidence obtained in breach of the rules.

Further the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provide provisions to rectify any error, omission or irregularity in a judgment where such error, omission or irregularity which has not prejudiced the substantial right of the parties or occasioned a failure of justice.

Section 436 of the Code of Criminal Procedure Act No: 15 of 1979 states as follows:

> "Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-
>
> (a) of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code; or
> (b) of the want of any sanction required by section 135,
>
> **Unless such error, omission, irregularity, or want has occasioned a failure of justice."** [Emphasis added]

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be 111 [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things 112 [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:

> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice".** [Emphasis added]

Considering X2 in the judgment I find no prejudice occasioned nor the occurrence of a failure of justice in this case. Hence this ground of appeal is also devoid of any merit.

In the fourth ground of appeal the Appellant contends that the learned Trial Judge has rejected the defence evidence on unreasonable grounds.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of the trial.

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He has properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the learned High Court Judge in this case cannot be faulted. Therefore, I reject the fourth ground of appeal urged by the Appellants as well.

In the fifth ground of appeal, the Appellants contend that the judgment pronounced in this case is devoid of proper judicial analysis and evaluation of evidence and have affected total disregard of Section 283 of Code of Criminal Procedure Act No.15 of 1979.

In this case the learned High Court Judge even though he had not had the benefit to observe the demeanor and deportment of the witness who gave evidence during the trial, had properly evaluated the evidence given by both sides to arrive at a correct finding. Considering the entirety of the judgment, it is incorrect to say that the learned High Court Judge had totally disregarded Section 283 of Code of Criminal Procedure Act No.15 of 1979. Hence, this ground has no merit for consideration.

In the final ground of appeal, the 1st Appellant contends that the learned trial Judge has drawn adverse inferences against the 1st Appellant based on his failure give evidence in relation to the statutory statement.

The learned High Court in his judgment at the second paragraph of page 27 mentioned about the contents of the statutory statements of both the Appellants which had been marked as P6. When Learned Magistrate acted under Sections 150, 151 and 152 of the Code of Criminal Procedure Act No.15 of 1979, the Appellants had expressed their willingness not to give evidence nor to call witnesses and had reserved their rights to adduce evidence at the High Court.

Even though the learned High Court Judge had mentioned about the statutory statements of the Appellant in his judgment, it has not caused any prejudice to the rights of the Appellants. Hence, I find this final ground also devoid of any merits.

In **Alwis v. Piyasena Fernando** [1993] 1 Sri. L. R 119 the court held that:

> *"It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. …The findings in this case are based largely on credibility of witnesses."*

As discussed under the appeal grounds advanced by the Appellants, the prosecution had adduced strong and incriminating evidence against the Appellants. The Learned High Court Judge had very correctly analyzed all the evidence presented by all the parties and come to a correct finding that the Appellants were guilty of committing the murder of the deceased in this case.

Therefore, I affirm the conviction and dismiss the Appeal of the Appellants.

The Registrar is directed to send a copy of this judgement to the High Court of Chillaw along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree

JUDGE OF THE COURT OF APPEAL