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 Case No:
CA/HCC /0392-393/2018
High Court of Batticaloa
Case No. HC/2473/2007

1.Deivanayagam Maheswaran
2.Deivanayagam Megarasa

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 Appellants.**

Shanil Kularatne, SDSG for the Respondent.

ARGUED ON : **28/07/2022**

DECIDED ON : **10/08/2022**

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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 Batticaloa under Section 296 of the Penal Code for committing the murder of Mylvaganam Vadivel on or about 09th October 2005.

When the case was called on 12/07/2007 in the High Court of Batticaloa, both the Appellants were present and the indictment was served on them. When this case was called again on 10/09/2007 the 2nd Appellant had absconded and an inquiry was held under section 241 of the Code of Criminal Procedure Act No. 15 of 1979 and the case was fixed for trial in absentia of the 2nd Appellant. A non-jury trial was commenced on 03/09/2009 and the prosecution closed their case on 29/04/2014 and the learned High Court Judge had called for the defence. On 21/07/2014 the 1st Appellant had made a dock statement and closed his case.

On 15/12/2014 the 2nd Appellant was produced before the High Court of Batticaloa and the learned High Court Judge after considering the submissions of both parties had vacated the order made on 15/06/2009 and allowed the 2nd Appellant to cross-examine the prosecution witnesses

who had already given evidence in the trial. After electing a non-jury trial, the Counsel for the 2nd Appellant had cross examined the witnesses already called by the prosecution. When the defence was called, the 2nd Appellant also made a dock statement and closed the case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants under Section 296 of Penal Code and sentenced them to death on 30/10/2018.

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 for this matter to be argued in their absence due to the Covid 19 pandemic restrictions. Also, at the time of argument the Appellants were connected via Zoom from prison.

Background of the Case

In this case PW1 and PW2 who are the wife and the son of the deceased respectively, were considered as eye witnesses to the incident.
According to PW1, on the day of the incident the deceased had returned home at about 6.00 p.m. and had left to pluck coconuts. After having a bath and before having dinner, he had walked towards the gate to lock it around 9.00 p.m. As the dogs started barking unusually, PW1 had asked PW2 to check outside. However, both had stepped out of the house to check what issue was and had witnessed two persons hiding behind a mound of earth piled near the garage and the parked three-wheeler. They had identified the Appellant's as the brothers of PW1 and the uncles of PW2. According to PW1, the 1st Appellant had dealt a blow with a club and the 2nd Appellant had stabbed the deceased with a knife. As a result, the deceased had fallen down. After the stabbing both appellants had escaped on a bicycle.

The PW2 also narrated the same course of events as her mother PW1.

PW3 who had arrived at the scene upon hearing the cries of PW1 had taken the deceased who had been stabbed in the chest and was bleeding to Kalawanchikudy hospital in his three-wheeler. But the deceased had passed away upon admission.

PW4, the Judicial Medical Officer had conducted the post-mortem examination and made note of two injuries on the deceased's body. The stab injury which was on the left chest of the deceased caused by the knife was observed to be the fatal injury. As per the evidence of PW4, the injury which was found on the left chin had been caused with a blunt weapon and since the jaw bone had been fractured that too was identified as a grievous injury.

As the evidence presented by the prosecution warranted the presence of a case to be answered by the Appellants, the learned Trial Judge had had called for the defence and both Appellants had made statements from the dock. In their dock statements both had denied any involvement in committing the murder of their brother-in-law.

The grounds of appeal advanced by the Appellants are as follows.

1. Section 03 of the Evidence Ordinance is grossly violated rendering the conviction flawed.

2. The learned Trial Judge has totally failed to narrate the dock statements of the Appellants thereby causing serious prejudice to the Appellants and occasioned in a deprivation of a fair trial.

3. The Judgment is in total violation of Section 283 of the Code of Criminal Procedure Act No.15 of 1979. Hence the application of the proviso is wholly inexplicable.

Under the 1st ground of appeal, the Counsel for the Appellant contends that Section 03 of the Evidence Ordinance is grossly violated by the learned High Court Judge rendering the conviction flawed.

E. R. S. R. Coomaraswamy in Volume I of "The Law of Evidence" at page 4 states:

> "The question, therefore, arises, what degree of probability is essential to belief? In England, the verdict of the jury implies that the necessary degree of probability has been attained. In Sri Lanka, except in some criminal cases, this responsibility is also placed on the judge. He must decide according to the interpretation in Section 03 of the Evidence Ordinance, whether:
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> 1) A fact has been **proved:** this happens when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists; or
>
> 2) A fact has been **disproved:** here, the court, again after consideration of the matters before it, either believes that the fact does not exist, or considers its non-existence, act upon the supposition that it does not exist: or

3) A fact has **not** been **proved:** this means that it has neither been proved nor disproved.
In discharging this responsibility, the judge must use good sense, good judgment, insight and experience".

In this case the learned High Court Judge has adequately considered the incident in its correct perspective. He had firmly relied on the evidence of the eye witnesses.

In this case PW1 and PW2 had clearly witnessed the incident and identified both the Appellants as they are very close relations of PW1. Fabrication of evidence against the Appellants had been disregarded by the learned High Court Judge in his judgment. Hence, it is incorrect to say that section 03 of the Evidence Ordinance had been grossly violated by the learned High court Judge. Hence, this ground of appeal has no merit.

In the second ground of appeal the Counsel for the Appellants argued that the learned Trial Judge has completely failed to at the least narrate the dock statements of the Appellants thereby causing serious prejudice to the Appellants thereby occasioning a deprivation of a fair trial for the Appellants.

The Appellants have the right to a fair trial to determine whether they are innocent or guilty which is an internationally recognised human right. Fair trials help establish the truth and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure the development of fair and just societies, and limiting of abuse perpetrated by state authorities.

The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

> *"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".*

In the present case upon perusal of the judgment delivered by the trial Judge it is manifestly clear that the learned High Court Judge had completely disregarded the dock statements of the Appellants and thereby had failed to provide a fair trial for them. The importance of considering the dock statement had been discussed in several judgments by the Superior Courts. However, its evidentiary value is less than the evidence given from the witness box by an accused.

In **Queen v. Buddharakkitha Thero** 63 NLR 433 the court held that:

> *"The right of an accused person to make an unsworn statement from the dock is recognised in our law (King v. Vellayan[10 (1918) 20 N. L. R. 251-at 266.].) That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination'.*

In **Queen v. Kularatne** 71 NLR 529 the court held that:

> *"We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that;*
>
> *a) If they believe the unsworn statement, it must be acted upon.*
>
> *b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed,*
>
> *c) That it should not be used against another accused".*

As the learned High Court Judge had not considered the dock statements of the Appellant as evidence, this ground of appeal has merit.

In the final ground of appeal, the learned Counsel for the Appellants contends that the judgment is in total violation of Section 283 of the Code of Criminal Procedure Act No.15 of 1979. Hence application of the proviso is wholly inexplicable.

In **Chandrasena and Others v. Munaweera** 1998 (3) SLR 94 the court held that:

> *'The mere outline of the prosecution and defence without reasons being given for the decision is an insufficient discharge of duty cast upon a judge by the provisions of S.306(1).".*

In **Karunadasa v. OIC Police Station, Nittambuwa** (1987) 1 SLR 155 the court held that:

> *"Merely reciting the facts and giving no reasons for the judgment is insufficient. The Magistrate must give reasons for his conclusions and scrutinize the evidence led on behalf of the*

accused. Failure to give reasons can occasion a failure of justice. An outline of the facts embellished with phrases like "I accept the evidence of the prosecution", 'I disbelieve the defence" is insufficient to discharge the duty cast on the prosecution. Section 283 (1) of the Code of Criminal Procedure Act makes it imperative to give reasons in the judgment. The Magistrate has said "the evidence of the witness called by the accused does not in any manner help the defence. Therefore, I accept the evidence adduced on behalf of the prosecution'. This shows that the Magistrate has given his decision very largely on the weakness of the defence rather than on the strength of the prosecution. It is an imperative requirement that the prosecution must be convincing no matter how weak the defence is before the court can convict. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond reasonable doubt".

In **CA 34-35/2005** decided on 03/04/2007 Sisira De Abrew,J, held that:

"In this case the Learned Trial Judge has merely narrated the evidence of the prosecution witnesses without giving adequate reasons for the conclusion and for the acceptance of the evidence of the prosecution witnesses. In our view, a judgment devoid of adequate reasons for the conclusion reached and a mere reproduction of evidence of witnesses is not a judgment in the eyes of the law. We find that the judgment of the Learned trial judge in this case is no judgment and would amount to nullity".

Upon the perusal of the judgment, it becomes evident that the learned trial Judge had only narrated the evidence given by the prosecution witnesses. The learned High Court Judge had failed to analyze and evaluate the evidence in his judgment. Therefore, the judgment cannot be considered as a proper judgment. In the absence of a proper judgment delivered by the Trial Courts the only conclusion that could be reached by an Appellate Court is to declare the judgment pronounced by the High Court a nullity. When the Appellate Court concludes that the judgment pronounced in the High Court trial is a nullity, application under Section 436 of Code of criminal Procedure Code Act No. 15 of 1979 and proviso to under the Article 138 of the Constitution cannot be availed.

W. L. R. Silva,J. in **CA/34-35/2005** (Supra) had correctly held that:

> *"One cannot expect the Court of Appeal to re-write the judgment when the judgment pronounced by the Learned High court Judge is a nullity.*

Hence this ground also has merit.

As the 2nd and 3rd Appeal grounds have merit, it is certainly sufficient to disturb the outcome of the trial. Therefore, I set aside the conviction and the sentence imposed on the Appellants.

The Appellants had not been successful under the first ground of appeal. Hence, the evidence presented by the prosecution should be considered by the learned High court Judge. Therefore, I conclude that this is an appropriate case to be sent for a re-trial even though the incident happened on 09/10/2005.

The learned High Court Judge is hereby directed to conduct a re-trial expeditiously.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL