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.

Court of Appeal No:

CA/HCC/0290/2018

High Court of Rathnapura

Case No: HC/05/2005

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Mawarakanda Wathukarage Ariyaratna

ACCUSED

AND NOW BETWEEN

Mawarakanda Wathukarage Ariyaratna,

Gawaragiriya, Kolabewa.

Now, Prison- Welikada.

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Nisasiri Dayananda with Priyangika Hettiarachchi and Sanjaya Senevirathne for the Accused Appellant

: Chethiya Gunasekara, ASG for the Respondent

Argued on : 04-08-2022

Written Submissions : 28-05-2019 (By the Accused-Appellant)

: 25-08-2019 (By the Respondent)

Decided on : 15-09-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant, Mawarakanada Wathkarage Ariyaratne, (hereinafter referred to as the appellant) on being aggrieved by the conviction and sentence on him by the learned High Court Judge of Rathnapura.

The appellant was indicted before the High Court of Rathnapura for causing the death of one Hewage Don Lyonsingho on 22nd March 1994, an offence punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged, and accordingly, sentenced to death.

At the hearing of the appeal the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

(1) Admissibility of the evidence of PW-02 is questionable.
(2) The death certificate submitted to prove the death of PW-02 is not the death certificate of PW-02.
(3) The prosecution failed to comply with the provisions of section 33 of the Evidence Ordinance before admitting the evidence of PW-02.
(4) The prosecution failed to prove the case beyond a reasonable doubt against the accused.

Before considering the grounds of appeal in detail, I will now consider the facts as elicited in the evidence.

Facts in Brief

PW-02 Mawarakanda Wathukarage Pathmasiri was the only eyewitness to the incident. He was about sixteen years of age at that time and was living with the appellant who was a younger brother of his father, for whom he has referred to as Bappa (බාප්පා). The appellant was also known as Chuti in the village. On the day of the incident, around noon, the witness had gone to fetch some water from the nearby stream. On his return, he has heard a sound of a quarrel. Upon nearing the house, he has seen the appellant and the deceased whom the witness referred to as Basunnahe (බාසුන්නැහැ) scuffling with each other. Although the witness has attempted to separate them, he could not. Later, when the deceased was leaving pushing his foot bicycle, the witness has seen the appellant attacking him with a Keththa Knife to the neck of the deceased. After the deceased fell the appellant has attacked the deceased again to the neck and the Keththa Knife has broken as a result. As the appellant has ordered him to run, the witness has run away from the scene of the crime and had promptly informed the incident to one Senaviratne. The witness has

admitted making a statement to the police on 23-03-1994, a day after the incident.

Under cross examination, the witness has admitted that his father killed his mother and the appellant was a witness to that incident, and his father was sentenced to death over the killing. The position taken up by the appellant was that the witness was lying and he was away from the village on the day of the incident.

The Seneviratne mentioned by the PW-02 has given evidence and has confirmed that on the day of the incident, around 11-11.30 in the morning, PW-02 came running to his house and informed that the deceased who was his brother-in-law was attacked and killed by the appellant using a keththa. He has admitted that the deceased and the appellant were not in good terms. The suggestion put forward to the witness on behalf of the appellant when he was subjected to cross examination was that it was, he who attacked the deceased with a Keththa Knife, which the witness has denied.

The District Medical Officer who has conducted the postmortem at the scene of the crime has confirmed that the deceased had seven cut injuries. The two cut injuries he has observed in the neck of the deceased were necessarily fatal injuries. Other cut injuries had been in the back and the face of the deceased.

PW-04 is a relative of the appellant who has met and spoken to him at the village on the day of the incident. Although he was unable to give the exact time he met the appellant, his evidence suggests that it may be mid-day, going by the way he has explained his activities during the day. PW-05 Jayasena is another fellow villager who has seen the appellant walking by his house. He has been specific that he saw the appellant between 11 a.m. and 12 noon on the day of the incident. Later he has come to know about the attack on the deceased. PW-06 Kanthihlatha is a relative of the appellant as well as the

deceased. She too has met and spoken to the appellant on the day of the incident.

PW-08 Chief Inspecter of Police Ajantha Perera was the officer who has arrested the appellant at the Main Bus Stand of Mathugama on suspicion. In this matter, several police officers who conducted the investigations as to the crime have given evidence. Although several items of productions have been recovered based on the statement given to PW-16 by the appellant, none has been produced as evidence due to the non-availability of the productions which have been destroyed as a result of a fire in the production room of the Rathnapura Magistrate Court. Although the relevant extract of the statement which led to the recovery of several items has been marked as P-02, there cannot be any evidential value in it, because of the failure of the prosecution to produce the items recovered as a result of the statement at the trial.

In this matter the PW-01 named in the indictment was the daughter of the deceased who has identified his body at the inquest. An admission in that regard has been recorded in terms of section 420 of the Code of Criminal Procedure Act during the trial.

At the conclusion of the prosecution and when the appellant was called for a defence, he has chosen to make a statement from the dock. He has taken up the position that on the day of the incident, namely, on 22-03-1994 he left the village and went to Colombo through Mathugama and from there, went to his sister's house in Uswetakeiyawa and reached her house around 1.30 in the afternoon. It was his position that he left the house of the sister around 8 in the morning of the following day and came to Mathugama Bus Stand, where he was arrested by the police. He has denied any connection to the murder. He has claimed that the witness Pathmasiri is angry with him because he gave evidence against his father and witness Senaviratne also an enemy, who set fire to his house in 1992.

The sister of the appellant Karunawathi has given evidence to support the appellant. It was her evidence that she came to her village from Colombo in order to celebrate her birthday on the 14th of March. It was her evidence that she, accompanied by the appellant who is her brother, left their house in the village at 6.20 in the morning of the 22nd of March in order to reach her house.

Consideration of the Grounds of Appeal

As all the grounds of appeal are interrelated, they will be considered together.

The main contention of the learned Counsel for the appellant revolves around the submission that had been made to the trial Court by the prosecuting State Counsel at one stage of the trial that PW-02 has died, and the production of a death certificate in that regard. It was the basis for the argument that the evidence of the PW-02 was questionable and a wrong death certificate has been tendered to the Court and also the failure to comply with the section 33 of the Evidence Ordinance.

As pointed out correctly by the learned ASG for the respondent, by the time the prosecuting State Counsel made that statement, the PW-02 has already concluded his evidence. It becomes clear from the extract of the witness statements that the person who provided the first information as to the crime was a person named Mawarakanda Wathukarage Pathmasiri whose name was similar to that of PW-02. He was a person of 32 years of age at the time he provided the first information to the police and the PW-02 was about sixteen years of age at the time of the incident. When giving evidence before the High Court, he has stated his age as 30 years, which goes on to establish that it was the same person who has seen the incident that has given evidence in the Court.

It appears that due to this misunderstanding, the death certificate of the then deceased first informant who was not a listed witness in the indictment has

been tendered to Court, which has led to this confusion as to the witnesses. I find that the PW-02 named in the indictment has given evidence in this action and acting under section 33 of the Evidence Ordinance had no relevancy at the trial, as the first informant of the crime to the police was not a listed witness.

Accordingly, I find no basis for the first three grounds of appeal urged by the learned Counsel for the Appellant.

Therefore, the next matter to be considered in this appeal is whether the contention that the prosecution has failed to prove the charge against the appellant beyond reasonable doubt has any merit.

It is correct to say that there was only one eyewitness testimony as to the actual incident. However, that alone is not sufficient to argue that the prosecution has failed to prove the case, as it is the quality of the evidence that matters and not the quantity. Even in a case where there was only a single witness, if the testimony was cogent, trustworthy and without any material contradictions or omissions, a trial Court can rely on such evidence to find an accused guilty.

The relevant section 134 of the Evidence Ordinance reads as follows;

> **134. No particular number of witnesses shall in any case be required for the proof of any act.**

In the case of **Mulluwa Vs. The State of Madhya Predesh 1976 AIR 989** it was stated that,

> *"Testimony must always be weighed and not counted."*

After considering the relevant principles, Jayasuriya, J. in the case of **Sumanasena Vs. Attorney General (1999), 3 SLR, 137** stated thus;

> *"The Court could have acted on the evidence of solitary witness Nandasena, provided the trial judge was convinced that he was giving cogent, inspiring and truthful testimony in Court. The learned trial judge*

has come to such a favourable finding in favour of witness Nandasena as regards to his testimonial trustworthiness and credibility."

PW-02 was a close relative who was living with the appellant at the time of the incident. He was about sixteen years of age at that time. Although it has been claimed on behalf of the appellant that since the appellant was a witness to the murder of the mother of the PW-02 by his father, the witness held a grudge against him, I find no basis for such a claim. The evidence suggests that after the death of the mother, the witness had been cared for by the appellant. It clearly appears that the contention, the witness held a grudge against the appellant was an afterthought, not based on any acceptable reasoning.

In his evidence, the witness has clearly described what he saw and the injuries caused by the appellant to the deceased while he was there. The evidence of the doctor who performed the postmortem is consistent with that of the witness. The doctor has observed two deep cut injuries on the neck of the deceased among the other cut injuries which are necessarily fatal injuries. The marked contradictions are not contradictions that go into the root of the matter. In fact, the first contradiction marked had been in relation to something the witness has said in favour of the appellant, while giving evidence at the trial.

The Supreme Court of India in the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, 1983 AIR 753,** observed that;

"Discrepancies which do not go to the root of the matter and shake the basic version of the witness therefore cannot be annexed with undue importance. More so when the all-important probabilities factor echoes in favor of the version narrated by the witness. The reasons are, by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is relayed on the mental screen…"

In the case of **Bhagwan Jagannath and Others Vs. State of Maharashtra (2016) 10 SCC 537** it was held:

> *"While appreciating the evidence of a witness, the Court has to asses whether read as a whole, it is truthful. In doing so, the Court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details."*

I am not in a position to find that the truthfulness of the sole eyewitness has been shaken in any manner in this action.

It had been the evidence of witness Seneviratne that PW-02 came running to his house and informed that the deceased was cut and killed by the appellant, whose evidence has not been contradicted on any material points.

The position taken by the appellant when the PW-02 gave evidence was that he was not in the village on the day of the incident, without specifying, which amounts to an alibi. However, the contention put forward to the witness Seneviratne had been that it was Senaviratne who attacked the deceased.

The position of the appellant when called for a defence had been that he was not in the village at the alleged time of the incident and he left the village with his sister and went to Uswetakeiyawa where his sister lives. According to the evidence of the sister of the appellant they have left the village at 6.20 in the morning.

Apart from the PW-02 Pathmasiri and PW-03 Senaviratne as to the time the incident happened, the prosecution has led the evidence of PW-04. PW-05 and PW-06, all of whom are fellow villages and relatives of the appellant. They have confirmed in their evidence that they met or saw the appellant during the time

relevant to the incident at the village. PW-05 had been specific that he saw the appellant walking past his house around 11 a.m. and 12 noon on the day of the incident. None of the said witnesses who confirmed the specific time they saw the appellant in the village had been confronted in any manner relevant by the appellant at the trial. In fact, PW-06 had not been cross examined at all.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655, 3656** it was stated 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."*

His Lordship **Sisra de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

> *"….I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

I find that the prosecution has well established the presence of the appellant and his culpability for the crime beyond reasonable doubt. The stand taken by the appellant has not created any reasonable doubt as to the truthfulness and trustworthiness of the evidence of the prosecution.

Although the learned High Court Judge has decided that he will not be considering the alibi of the appellant for the reason of his failure to give due notice of the alibi as provided for in section 126A of the Code of Criminal Procedure Act, I find that even if considered, that would have made no difference to the judgement as for the reasons set out.

For the reasons considered as above, I find no merit in the last ground of appeal as well.

The appeal, therefore, is dismissed as it is devoid of any merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal