

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Application for Leave to Appeal made in terms of Section 340 of the Code of Criminal Procedure Act, No. 15 of 1979 read with Section 16 of the Judicature Act, No. 2 of 1978.

Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:

LTA / 0004 / 08

Complainant

High Court of Matara Case No:

HC 04 / 2000

Vs.

1. Diyabore Gedara Sanath Kumara.
2. Adimalee Kankanamge Don Sisira Kumara.
3. Pinnapaya Disawala Walawwe Erantha Bandara Dharmakeerthi.
4. Hewa Pathiranage Munidasa.
5. Malew Kankanamlage Piyathilake.
6. Alagagallage Thilakaratne.
7. Muniyandi Selvaraj.

8.Kariyawasam Hettithanthri
Andrson.

Accused

AND NOW BETWEEN

Lasika Udayanganee Samaranayake,
Samara Mills,
Akurugoda,
Kamburupitiya.

Aggrieved Party – Appellant

Vs.

- 1.Diyabore Gedara Sanath Kumara.
2. Adimalee Kankanamge Don Sisira Kumara.
- 3.Pinnapaya Disawala Walawwe Erantha Bandara Dharmakeerthi.
- 4.Hewa Pathiranage Munidasa.
5. Malew Kankanamlage Piyathilake.
6. Alagagallage Thilakaratne.
7. Muniyandi Selvaraj.

Accused – Respondents

8. Hon. Attorney General
Attorney General's Department
Colombo 12.

8th Respondent

Before: Menaka Wijesundera J

Neil Iddawala J.

Counsel: Ranil Samarasooriya with Madhawa De Alwis for the Appellant.

R. Arasekularatne, PC with Punsiri Gamage for the 2nd and Accused –
Respondents.

Amila Palliyage with S. Utugampola for the 5th 6th & 7th Respondents.

Rohantha Abeysuriya, ASG for the State.

Argued on: 06.09.2022

Decided on: 12.10.2022

MENAKA WIJESUNDERA J.

The aggrieved party appellant (hereinafter referred to as the appellant) has filed this application to set aside the judgment dated 26.03.2008 of High Court of Mathara.

The accused respondents (hereinafter referred to as the respondents) were indicted in the High Court for the abduction of Sunil Widanage and Anura Samarathunga. The aggrieved party is the wife of Sunil Widanage.

Upon the conclusion of the trial all the respondents have been acquitted by the High Court and being aggrieved by the said judgment the instant application has been filed.

Counsel for the appellant made his submissions on two grounds,

- (1) The statements being made by the witnesses of the prosecution after a lapse of seven years
- (2) Lack of proper identification due to lack of illumination being incorrectly considered by the High Court Judge.

The story of the prosecution is that, the two abductees namely; Anura Samarathunga and Sunil Widanage had hired a vehicle and had gone to the Kamburupitiya Police Station 12.01.1990. The vehicle owner and driver had returned home but the two abductees have not returned home. Therefore, the sister of Anura Samarathunga namely Chandra Malkanthi Samaathunga along with the mother and the elder brother of Anura Samarathunga had gone to the Police Station. Thereafter, they had seen a bus coming from the police Station and they had identified second, third respondents inside the bus along with the abductees and the second respondent had got off the bus and had rushed towards the police Station and had brought the OIC of the police Station who is the eighth respondent outside and the eighth respondent has given orders to kill the abductees. Thereafter, the second and third respondents had got into the bus and bus had proceeded towards Mathara. Thereafter, the skulls of the abductees have been found.

The Learned High Court judge has analyzed each witness. He had analyzed the evidence of Chandra Malkanthi and had concluded that the two abductees had gone to the police Station to obtain police Reports. She had identified the second, third and the accused respondents in the bus. She had also overheard

the eighth respondent giving orders to dispose the two abductees. But, the high Court judge had observed that she had made a statement to the CID only in 1997, and he has concluded that she fails the test of spontaneity. Further, he had stated that he is unable to accept the fact that, the eighth respondent would be giving instructions to his subordinates to dispose the two abductees in public knowing the consequences of such an Act. Furthermore, he had said that the state of illumination as referred to by the witness is not satisfactory. Therefore he had rejected the evidence of Malkanthi.

Thereafter, he had proceeded to examine the evidence of Lasika Udayangani Samaranayake who is the wife of Sunil Widanage and she alleges of a money transaction between Sunil Widanage and the eighth respondent. She too has made a statement only in 1997. Therefore, the High Court judge had rejected the evidence on the basis that she too has made a belated mistake. Thereafter, the high Court judge has considered the evidence of Munidasa Dissanayake, who alleges that he had seen the two abductees in the police station in 1990 but he too has made a statement only in 1997. Then again the high Court judge has rejected his statement too on the basis of belatedness. Thereafter he has examined the evidence of a Ceylon transport Bus Driver who had said that in 1990 some Police Officers had taken a bus for some reason but the date and other details have not been revealed. Therefore, that evidence also the High Court judge has rejected for lack of clarity.

The evidence of the brother of the abductee had been analyzed but he being an army officer had failed to take necessary action regarding the alleged disappearance of his brother for seven years and the failure on the part of the witness as a responsible citizen had been a basis for the rejection of the evidence by the High Court Judge.

Therefore, the learned High Court judge has basically rejected the evidence of the prosecution on the basis of the statements of the witnesses being made belatedly, and the lack of illumination at the time of identification of the respondents by the witnesses.

The Additional Solicitor General appearing for the Attorney General stated that he is playing the role of an amicus to Court in this instance and he too has concerns regarding the belatedness of the statements of the prosecution and the improbability of the prosecution story at times and he added that he is not supporting the submissions of the appellant.

The two Counsels who appeared for the respondents stated that analysis of the High Court Judge with regard to the evidence of the prosecution is the only conclusion he could have arrived at, in view of the belatedness of the evidence of the prosecution and the improbability of the prosecution story at times.

Both the Counsel for the respondents vehemently objected for the request of the Counsel for the appellant for the instant case to be sent for a retrial or for the acquittal to be revised. They quoted the case of ***Attorney General vs Baranage where Amaratunga J had held that "in an appeal against an acquittal on a question of fact the prosecution has a heavy burden to discharge. Such an appeal could only be justified if there had been a palpable misdirection by the judge when considering the facts of the case which could be demonstrated to be wrong on the very face of the record and which had in effect resulted in a miscarriage of justice"***

Upon consideration of the submissions of all parties this Court is of the opinion that the story narrated by the witnesses of the prosecution gravely lack spontaneity and probability in view of the statements being made after seven

years from the incident and as very correctly pointed out by the trial judge the alleged behavior of the 8th respondent is highly improbable in view of the fact the 8th respondent being a police officer, and even the behavior of the brother of the abductee is also very unlikely, because he being an army officer did not take legitimate steps to lodge a formal complaint soon after the incident in a suitable place. Furthermore the identification of the respondents inside the police bus is also very unbelievable in view of the level of illumination available at the time of the incident. Therefore the learned trial judge has arrived at the only conclusion possible in view of the evidence of the prosecution.

At this point this Court draws its attention to the case of Tudor Perera v AG (SC 23/75 D.C. Colombo Bribery 190/B where justice Rajarathnam has held that “ ...when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be referred to an interested witness in a case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury laws of England, 4th Edition, para 29). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified by one party may not prevail over the testimony of an independent witness (Vide, Hasker v Summers(1884) 10 V.L.R (Eq.)204-Australia; Leefunteum v Beaudoin (1897)28 S.C.R.89-Canada).Therefore in the instant matter the trial judge had to evaluate the evidence of family members of the abductee hence as stated in the above judgment the trial judge had to weigh the evidence as opposed to motive prejudice partiality accuracy incentive and reliability.

We also draw our attention to the principles laid down in the case of **Sunil Jayaratne vs. Attorney General (2011)2 SLR 91** where it has been held by the Supreme Court that “unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first hand evidence put before her to which the Judges of the Appellate Court would not have the ability to witness”.

It has also been held in the cases of **King v Endoris 46 NLR 498; Alwis v. Piyasena Fernando 1993 (1) SLR 119; Fradd v. Brown and Co Ltd: Attorney General v. D. Senevirathne 1982 (1) SLR 302**, “ No doubt the Court of Appeal has the power to examine the evidence led before the High Court. However when they go far as to conduct a demonstration of the evidence, they observe the material afresh and run the risk of stepping into the role of the original Court. The trial judge has the unique opportunity to observe evidence in its totality including the demeanor of the witness. Demeanor represents the trial judges’ opportunity to observe the witness and his deportment and it is traditionally relied on to give the judge’s findings of fact their rare degree of inviolability.” (Vide, Bingham, ‘ The Judge as Juror’ 1985 p.67)

Hence in the instant case the trial judge had the opportunity of observing the demeanor and the deportment of witnesses first hand and conclude rather than us sitting in appeal trying to attribute unnecessary weight to evidence spoken to by witnesses in trial to fit in to situations which the witnesses may not have thought of in the actual scenario of events to which they were privy.

Hence it is the opinion of this Court that the Counsel for the petitioner has not urged any circumstances grave enough to set aside the judgment of the learned trial judge hence we affirm the judgment of the trial Court.

As such the instant application is dismissed.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.