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/0170/2016
High Court of Galle
Case No: HC/3761/2012

Kanatta Hewage Jayamini

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Saliya Peiris, PC with Susil Wanigapura For the Appellant.**
Chethiya Goonasekera, PC, ASG for the Respondent.

ARGUED ON : **15/09/2022**

DECIDED ON : **28/10/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Galle under Section 296 of the Penal Code for committing the murder of Chau Min, a Chinese National on or about 1st of February 2005.

The trial commenced before the High Court Judge of Galle as the Appellant 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 Appellant had given evidence from the witness box. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 26/07/2016.

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

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

Background of the Case.

PW1, Hao Inping Honsu, was the manager of the massage parlor run at Sameera Hotel Unawatuna where the incident had happened. She had given her statement to Habaraduwa Police Station and had given evidence at the non-summary inquiry held at Magistrate Court of Galle under case No. NS 45942. PWI had gone missing after the matter was committed to the High Court and before the trial began in the High Court of Galle. After concluding that PW1 could not be brought to court, the learned High Court Judge of Galle ordered her evidence to be accepted under Section 33 of the Evidence Ordinance.

In her evidence, in the non-summary inquiry PW1 had stated that she came to Sri Lanka in the year 1998 to start a lobster farm. But she had started a massage parlor at Sameera Hotel Unawatuna. She had number of trained Chinese girls for the job. Despite the fact the police had searched her massage parlor several times on the suspicion of running a brothel house instead of a massage parlor, the police were unable to prove the said allegation in court.

On the day of incident, the Appellant had visited her place in the night to have the services of a girl to massage him. After selecting a girl, when the Appellant had gone into a room, PW1 had heard the screaming of the girl from the room. When she entered the room had seen the deceased was lying on the ground with bleeding injury on her stomach. The deceased was nude at that time. The deceased, who was incapacitated, had shown PW1 the Appellant, who was hiding behind the door, by winkling her eyes.

The prosecution after leading evidence of seven witnesses and marking the evidence given by PW1 in the Magistrate Court under Section 33 of Evidence Ordinance, had closed their case. The defence was called and the Appellant

gave evidence from the witness box, admitting the visit to the place on the date of incident but denied any involvement in committing the murder.

The Appellant had filed the following grounds of appeal.

1. Whether the admission of evidence of PW1 under Section 33 of Evidence Ordinance was erroneous and whether the said evidence should have been rejected.
2. Whether a reasonable doubt would arise on the prosecution case in view of the vital discrepancies in the evidence of PW1 and PW2.
3. Whether the circumstantial evidence led at the trial is adequate to establish the guilt of the Appellant.
4. Whether the rejection of the evidence of the defense by the learned High Court Judge is erroneous.

In the first ground of appeal, the learned President's Counsel contended that the admission of evidence of PW1 under Section 33 of Evidence Ordinance was erroneous and therefore the said evidence should have been rejected. This ground was raised as an additional ground of appeal taken up at the hearing of the appeal.

The Learned President's Counsel submitted that the evidence of PW1, which had been admitted under Section 33 of Evidence Ordinance has heavily influenced the findings in the judgment and such evidence is not divisible from the rest of the evidence led in the trial.

Section 33 of the Evidence Ordinance states as follows:

> "Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceedings, or in a later stage of the

same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount or delay or expense which, under the circumstances of the case, the court consider unreasonable:

Provided-

(a) That the proceeding was between the same parties or their representatives in interest;

(b) That the adverse party in the proceeding had the right and opportunity to cross-examine;

(c) That the questions in issue were substantially the same in the first as in the second proceeding.

Before enacting Code of Criminal Procedure (Special Provisions) Act No.15 of 2005, non-summary inquiry in terms of Chapter XV of the Criminal Procedure Code of Act No.15 of 1979, was held with witnesses' evidence being led at the inquiry and the defense having the opportunity of a full-blown cross-examination. By the aforesaid amendment, the manner in which non-summary inquiries were held were drastically changed.

Section 6(2), (3) (a) (b) and 10 of Criminal Procedure (Special Provisions) Act No.15 of 2005 states:

> "6 (2) Subject to the provisions of subsection (11) the Magistrate shall read out, or cause to be read out to every witness produced against the accused, in the presence and hearing of the accused, the statement made by the witness in the course of the investigation conducted in terms of Chapter XI of the Code of Criminal Procedure Act No.15 of 1979 and shall ask the witness whether the statement is an accurate record of what he had stated to the police".

"6 (3) (a) If the witness states, in response to an inquiry made of him under subsection (1), that the statement is an accurate record of what he had stated to the police, the Magistrate shall record that fact. The Magistrate shall permit the witness, if the witness so desires, to make such additions to his original statement. Every such addition or alteration shall be recorded.

(b) The Magistrate shall not permit any cross examination of the witness by the accused or his pleader, but the Magistrate may put to the witness, any clarification required by the accused or his pleader of any matter arising from the statement made by the witness in the course of the investigation, or any additions or alterations to his original statement if any, and may put to the witness any clarification which the Magistrate himself may require of any such matter. Every clarification so made shall be recorded:

Provided that having considered the nature of the material contained in the statement of a witness made to the police, the prosecution may tender the witness for cross-examination by the accused or his pleader.

10.A statement made by an expert witness or police officer and the deposition made by a witness tendered for cross examination under this section, shall deemed to be admissible in evidence in terms of section 33 of the Evidence Ordinance.

Under the Code of Criminal Procedure (Special Provisions) Act No.15 of 2005, it is a pre-requisite condition that the admissibility of the evidence is that the statement which is put to the witness for confirmation, addition or alteration must be one which is made in the course of the investigation.

PW6 the investigating officer in this case, in his evidence confirmed that a statement was recorded from PW1 on the 2nd of February 2005, the day after the incident. The statement had been recorded with the assistance of her translator and by speaking to her in English Language. (Pages 296-297 of the brief).

However, the statement provided to the witness during the trial was made on 3rd October, 2005, eight months after the incident. It is not the statement made during the inquiry. It is a statement that was recorded once the investigation was concluded. The date on which the second statement was recorded had been the first date of non-summary inquiry. But on perusal of the journal entry of the 3rd October 2005 it is revealed that the PW1 was absent to court and a warrant was issued against her on that day. However, the statement of PW1 which had been read over to her in the non-summary inquiry was recorded on 3rd October 2005. The said statement was marked as X4 by the prosecution. (Page 1254 of the brief).

Further, it is revealed that the said statement was recorded on 3rd October 2005 at the Galle Magistrate Court premises. It is also questionable as to how the police used the services of the translator appointed by the Judicial Services Commission to record a statement from PW1, when that appointment was for the purpose of court proceedings.

The non-production of the statement recorded on 2nd February 2005 to PW1 at the non-summary inquiry led to a serious error to the admission of the evidence of PW1 under section 33 of Evidence Ordinance. This suppression has deprived both the trial court and the Appellant of the opportunity to analyse her testimony on the claims made in that statement. In the circumstances, I too agree that the evidence led under section 33 of Evidence Ordinance had not been properly led and therefore, acceptance of PW1's evidence should be rejected.

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.

Therefore, the Appellant is successful on his first ground of appeal for the reasons stated above.

As the second and third grounds of appeal are pertaining to the evidence led at the trial, the said grounds would be considered together in this appeal. In those grounds the Learned President's Counsel contends that the whether a reasonable doubt would arise on the prosecution case in view of the vital discrepancies in the evidence of PW2 and whether the circumstantial evidence led at the trial is adequate to establish the guilt of the Appellant.

PW2 was the security guard at the place of incident on the date of incident. He has neither witnessed the incident nor apprehended the Appellant at that time. PW2 confirmed that only when the owner of the massage parlour called him and when he went into the room, he found the deceased lying down with a knife penetrated into her body, and that the Appellant was being held by the owner and the establishment's staff. He had then wrapped the deceased with a bedsheet and taken the deceased to hospital with the help of the three-wheeler driver and the next-door gentlemen. His evidence is insufficient to consider against the Appellant in view of the rejection of the evidence of PW1. Further, I consider the contradictions marked on his evidence as vital as it certainly affects the root of the case.

The Learned President's Counsel also submitted to this court that the Learned High Court Judge, in his judgment has failed to consider that this was a matter pertaining to circumstantial evidence and it was incumbent that the court should have considered matters pertaining to circumstantial evidence. The consideration that should apply in a case pertaining to circumstantial evidence has completely escaped the mind of the trial judge.

Both the prosecution and the defense admit that this case is rest on circumstantial evidence.

In **Nandasena v. The Rebublic of Sri Lanka [1994] 3 SLR 172** the court held that:

> *"In a case which turns on circumstantial evidence it is essential that the trial judge should explain clearly to the jury that circumstantial evidence, if it is to support a conviction, must be altogether inconsistence with the accused is innocence and explicable solely on the hypothesis of his guilt..."*

In **Samantha v. Republic of Sri Lanka [2010] 2 SLR 236** the court held that:

> *"a. In a case of circumstantial evidence if an inference of guilt is to be drawn against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime.*
> *b. It is the duty of the trial judge to tell the jury that such evidence must be totally consistence with the innocence of the accused and must only be inconsistence with his guilt.*

The Trial Judge in his 233 paged judgment nowhere mentioned on what basis he found the Appellant guilty to the charge of murder. The Learned High Court Judge has not explained the circumstantial evidence in his judgment. This is a clear misdirection which certainly affects the outcome of the judgment. Hence, this ground also have serious repercussion on the finding of the trial judge.

Further, the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provides provisions to rectify any error, omission or irregularity in a judgment where such error, omission or irregularity which

has prejudiced the substantial right of the parties or occasioned a failure of justice.

Considering the above discussed two grounds of appeal, the irregularity and the failure occasioned in this case cannot be rectified by this court as the irregularity and the failure has caused great prejudice to the Appellant. Also, the Appellant had not been afforded a fair trial in this case.

It is appropriate to consider in this case the two significant events, the failure of the Learned High Court Judge to disclose the basis on which he has come to the finding and the suppression of the very first statement recorded from PW1 warrant a re-trial.

In **Nandana v. The Attorney General [2008] 1 SLR 51** the court held that:

> *" (2) A discretion is vested with the Court whether or not to order a re-trial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration. Since the date of appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the allege crime, should be considered".*

The incident pertaining to this case had taken place on 01/02/2005 and the Appellant was found guilty and sentenced to death on 26/07/2016. The Appellant has been in prison custody since then.

Even if a re-trial is ordered the prosecution will not be able to bring PW1 to Sri Lanka as she was even untraceable during the High Court trial. Due to the improper application made under Section 33 of Evidence Ordinance to mark the deposition of PW1, the prosecution will not be able mark PW1's evidence in the second trial. As discussed above, the remaining evidence is insufficient to prove the case beyond reasonable doubt against the Appellant. Nearly eighteen years have been passed since the occurrence of the incident and the Appellant was in prison little more than six years to date. In the circumstances, I do think ordering a re-trial is not justifiable in this case.

For the reasons stated above, I allow the appeal and set aside the conviction and sentence imposed on the Appellant. The Appellant is acquitted from the charge.

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

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL