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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/187/2017

High Court of Chilaw
Case No: HC 06/2008

VS

Subramaniam Mohan alias Iseya Amudan

Accused

And now between

Subramaniam Mohan alias Iseya Amudan

Accused– Appellants

VS

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant -Respondent

BEFORE	:	N. Bandula Karunarathna, J.
	:	R. Gurusinghe, J.
COUNSEL	:	Asthika Devendra, AAL with Selvaraja Dushyanthan, AAL for the Accused-Appellant Riyaz Bary, DSG for the Respondent
ARGUED ON	:	04/10/2022
DECIDED ON	:	02/11/2022

R. Gurusinghe, J.

The accused-appellant was indicted in the High Court of Chilaw on three charges.

1. Having committed the murder of one Arumugam Kuwendran on the 16th of July 2005, an offence punishable under section 296 of the Penal Code.

2. Having attempted to murder M.M. Jayasiri on the same day, an offence punishable under section 300 of the Penal Code.

3. Being in possession of a gun, an offence punishable under section 22 (3) of the Firearms Ordinance as amended by Act No 22 of 1996.

The appellant was convicted as charged and sentenced to death for the first charge. For the 2nd charge, the appellant was sentenced to 10 years imprisonment and fined Rs. 7,500/=. For the 3rd charge, the appellant was fined Rs. 20,000/- with a default term.

Being aggrieved by the aforesaid conviction and the sentence, the appellant appealed to the Court of Appeal.

The prosecution called PW1, PW5, PW8, PW9, PW10, PW14, PW15, PW17, PW11, PW12 and PW13.

The appellant made a lengthy dock statement.

Facts of the case

The incident happened in a restaurant named New Lanka Hotel, situated in the Chilaw town, on the 16th of July 2005. The deceased was employed at the restaurant as a waiter. The deceased was shot dead, and PW10 sustained gun shot injuries. The person who shot the deceased fled the area. Police recovered seven cartridge cases on the floor of the restaurant. As per the evidence of PW14 (police officer), he was on duty on that day and happened to go to the place where the incident occurred. PW14 asked the people who were gathered there as to what happened. He came to know that a person was shot and the criminal had got into a green-coloured three-wheeler and left towards the direction of Puttalam. Then PW14 got into another three-wheeler along with two other officers and went in search of the three-wheeler in which the criminal travelled. A three-wheeler was parked at Sithara Pharmacy. The driver of that three-wheeler told PW14 that a person had asked him to drop him in a Anamaduwa bus. That person got into a Anamaduwa bus near Jude church. PW14 gathered three other police officers who were on duty at a check point. PW17 stopped a van and proceeded towards the Anamaduwa bus. They

stopped the bus near a place called Weherakale. All the passengers who were standing were asked to get down from the bus, and they were searched. The seated passengers were also checked. PW14 suspected the appellant and searched his trouser pockets. There was a pistol in his right trouser pocket with a magazine and one live cartridge. In his left trouser pocket, there was another magazine which had eight cartridges, the full compliment. The appellant was then arrested.

The police found a bag left at a lottery seller's place by an unidentified person. Inside that bag, there were 16 live cartridges, which can be used in the pistol, which was alleged to be in possession of the appellant. According to the Govt. Analyst, the pistol which was alleged to have been found in the pocket of the appellant is proven to be the weapon which was used to kill the deceased.

The prosecution case depends on circumstantial evidence.

The grounds of appeal are as follows:

1. The prosecution has failed to prove the guilt of the appellant for all charges by independent witnesses who testified in the trial.

2. The learned Trial Judge has failed to properly analyze and evaluate the evidence of PW14.

3. The learned Trial Judge was erroneous and contradictory to the law and facts and he failed to apply the principles of law.

The only evidence against the appellant is the evidence of PW 14 that he had recovered a pistol from the possession of the appellant and that it was the pistol used to kill the deceased.

PW1 was an eyewitness to the incident. As per his evidence, he had asked from the perpetrator what food he preferred to have, and he served him what

he ordered. PW1 had not identified the appellant at the identification parade held on the 26th of July 2005, 10 days after the incident. PW5, the driver of the three-wheeler, identified the wrong person in the identification parade, and he had not identified the appellant in the parade. The cashier also did not identify the appellant at the identification parade.

The people who had the opportunity to see the criminal at the crime scene had not identified the appellant as the man who shot the deceased.

As per PW14, he and five other officers chased the bus and arrested the appellant with a gun. Out of those five officers, the prosecution called only PW17. The evidence of PW17 was that he was at the front door of the bus. PW14 had taken out a person from the bus in about 5 minutes. The arrested person was the appellant. PW17 had not seen that PW14 had searched the appellant or taken out a gun from the appellant's trouser pocket. The evidence of PW17 does not support that PW14 had recovered a firearm and two magazines from the appellant. The prosecution did not call the other police officers who participated in the arrest.

PW8 was the driver of the bus. As per his evidence, he was driving a bus from Chilaw to Anamaduwa that day. He recollects that the police officers stopped the bus and there were three officers who were in uniform and the other three were in civilian clothes. All the passengers standing in the bus were asked to get down from the bus. The seated passengers were asked to remain seated. One passenger was arrested. This witness had not seen the recovery of a weapon from the arrested person. PW9 was the conductor of the bus; he stated that about six police officers stopped the bus, and the passengers who were standing in the bus were asked to get down, and the seated passengers were asked to remain seated. This witness did not state that PW14 had recovered a weapon from any passenger. The other police officers who participated along with PW14 were not called to support the evidence of PW14. The only person called was PW17, who had not seen the recovery of any

weapon at that time. The driver and conductor had not seen the recovery of any weapon.

If the appellant was a standing passenger, the weapon should have been recovered by the police officers who were at the doors of the bus. As per the evidence of the appellant, the appellant was a seated passenger. If the appellant was a seated passenger, the weapon in the trouser pocket could not be taken out while he was seated. Suppose the weapon was recovered after he was asked to stand while all the others were seated, then in that case, it is very prominent that it could be noticed by the bus driver or definitely by the conductor, who would have also been curious to know as to what was going on, or by the other police officers who were with PW14.

The witnesses at the crime scene who had the opportunity to see the person who shot the deceased, had not identified the appellant as the culprit. The driver of the three-wheeler had not identified the appellant as the person who got into the three-wheeler that day at the identification parade. Furthermore, he had identified the wrong person who participated in the parade as the person who got into his three-wheeler. No other police officer had seen the recovery of the weapon or at least after the recovery of it at that time.

PW15 was the acting Headquarters Inspector of the Chilaw police station at that time and he gave evidence. PW15 had recovered a bag with 16 live cartridges left at a lottery seller's shop. The lottery seller was not called as a witness. It was unclear whether the bag was left before the shooting incident or afterwards. That bag of cartridges was not connected to the appellant by any evidence.

Furthermore, PW15 had not stated that PW14 had recovered the pistol which was used to kill the deceased. In these circumstances, the recovery of a gun by PW14 from the appellant was not supported by any of the lay witnesses or by police evidence. Besides, the evidence of PW14 is not consistent. PW14 said PC

Sarath stopped the bus, but PW17 said he stopped the bus. PW14 said that PW17 Rajakuruna had stopped the van and all six police officers had got into that van. On page 225, PW17 answered as follows:

ප්‍ර: වෙන කාගෙන්වත් කිසිදු ආකාරයක සහායක් ලබා ගත්තේ නැහැ මහත්මයා විසින්ම ඔය වෑන් එකෙන් ගිහිල්ලා බස් එක නැවැත්වුයේ?

උ: අපි වෑන් රථයේ ගමන් කළේ. වෑන් රථය ඉදිරියට ගොස් අත දාලා බස්එක නතර කර ගත්තා.

ප්‍ර: කාගෙද වෑන් එක?

උ: පොලිස් පරීක්ෂක මනෝශාන්ත මහතා තමයි එම වෑන් එක රැගෙන ආවේ

In view of these contradictory positions, the evidence of PW14 cannot be considered as consistent at all times to completely rely on this evidence to convict the appellant.

The learned High Court Judge has stated that the defence had failed to make suggestions regarding their version to the prosecution witnesses in the cross-examination. The only witness who implicated the appellant in the crime was PW14. The stance taken up by the defence was duly suggested to PW14 as follows:

At page 202

ප්‍ර: තමාට යෝජනා කරනවා කිසිම අවස්ථාවක අද දින මෙම විත්ති කූඩුවේ සිටින විත්තිකරුගෙන් මෙම අදාල නඩු භාණ්ඩ සොයා ගැනීමක් සිදු කළේ නැහැ කියා?

උ: එය පිළිගන්නේ නැහැ මම සොයා ගෙන එදිනම ඉදිරිපත් කළා. අදාල අපරාධය කරලා විනාඩි 35ක් 40ක් ඇතුලත මෙම සැකකරු සහ නඩු භාණ්ඩ අත් අඩංගුවට ගැනීමක් සිදු කළා.

ප්‍ර: තමා එම අදාල දිනයේදී සොයා නොබලා අදාල බස් රථයේ යන සැකකරුවෙකු අත් අඩංගුවට ගෙන ඔහු ද්‍රවිඩ ජාතිකයෙක් නිසා තමාලා මෙම පිස්තෝලය ඔහුට ආදේශ කිරීමක් කර නඩු පැවරීමක් සිදු කළා කියා?

උ: එහෙම දෙයක් කළේ නැහැ.

The finding that the defence had not suggested the position taken up in the dock statement is erroneous.

The case for prosecution completely depends on circumstantial evidence. There was no apparent motive on the part of the appellant to kill the deceased. There was no evidence to say that at least the appellant knew the deceased. The absence of motive is a factor in favour of the accused in the case of circumstantial evidence. It is a settled principle that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

None of the eyewitnesses to the incident had identified the appellant as the person who shot the deceased.

The conviction of the appellant is completely based on the fact that PW14 had recovered the weapon from the appellant. This evidence is not corroborated by any lay witness or any police witness, especially those who participated in the arrest of the appellant.

The learned Deputy Solicitor General pointed out, drawing attention to the case of SC/Appeal 154/2010, the Attorney General vs Devunderage Nihal, decided on 03/1/2019, that such evidence need not be corroborated. In that case, the Supreme Court quoted the following passage from Sir John Woodruff and Syed Amir Ali (Law of Evidence 1st edition, Vol. I page 601 – 603)

“ It is open to the court to accept the evidence of a police officer and to convict the accused on the basis thereof, if the evidence of the police officer is trustworthy and reliable. If the court feels that the uncorroborated testimony of the police officer by itself is capable of inspiring confidence there is nothing forbidding the court from acting upon the same. The law does not require that such evidence should be corroborated. In prosecution under the prevention of Corruption Act 1947, the testimony of police officials cannot be rejected merely because they are interested in the success of the prosecution. In another case, the investigation officer was not investigated. This cannot be said to have prejudiced the defence […]

A court cannot reject the evidence of witnesses, merely because they are government servants, who, in the course of their duties or even otherwise might have come into contact with investigating officers and who might have been requested to assist the investigating agencies. Even in cases where officers who, in the course of their duties, generally assist the investigating agencies, there is no need to view the evidence with suspicion as an invariable rule. […]

The evidence of witnesses cannot be judged on the basis of their being officials, and non-officials simply because they are officers, they cannot be said to be interested or uninterested. The merit of the evidence is to be considered and not the persons who come to depose. […]

The credibility of public officers should not be doubted on mere suspicion and without acceptable evidence. Presumption that person acts honestly applies as much in favour of Police as of other persons. It is not proper judicial approach to distrust and suspect them without proper ground. There is no principle of law that without corroboration by independent witnesses, their testimony cannot be relied upon. […]”

Sir John Woodroffe and Syed Amir Ali (Law of Evidence 20th edition, Vol. 4 page 5171) says that,

> *"It is true that there is no rule of law that uncorroborated testimony of one witness cannot be accepted. If there is any such rule, it is the rule of prudence, and whether the rule should be adopted or not, will depend on the circumstances of each case. Whether the general rule should be adopted or not depend on the circumstances of each case. As a general rule a court can and may act on the testimony of a single witness though uncorroborated. Unless corroboration is insisted upon by a statute, the court should not insist on corroboration except in the cases where nature of testimony of single witness itself requires corroboration. One credible witness outweighs any number of other witnesses. In an appropriate case, conviction can be founded on solitary testimony of a witness but court must be satisfied that the evidence of the witness, which it is asked to accept, is wholly true. In a murder case, conviction can be based on the testimony of sole eyewitness. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise."*

In this case, there were witnesses who should have identified the appellant if it was the appellant who shot the deceased. Further, there were five police officers, the driver and the conductor at the time of the alleged recovery of the weapon by PW14. None of the five police officers had seen the recovery of the gun by PW14 and none of them was informed by PW14 that he recovered a weapon from the appellant. Neither the conductor nor the driver had seen such recovery of a gun by PW14.

In these circumstances, it is not safe to convict the appellant of a capital offence, by completely relying on the evidence of PW14.

For the reasons set out above, the case against the appellant is not proved beyond reasonable doubt. Therefore, the conviction and the sentence imposed on the appellant is set aside.

The Appellant is acquitted.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal