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/0300-301/2015

High Court of Colombo
Case No: HC/477/2001

1. Liyadupitiya Wijesinghe Koralage Don Tyron Godwin
2. Liyadupitiya Wijesinghe Koralage Don Lishan Webster

ACCUSED-APPELLANTS

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Gayan Perera with Prabha Perera and Panchali Ekanayake for the Appellant.**
Azard Navavi, DSG for the Respondent.

ARGUED ON : **20/10/2022**

DECIDED ON : **30/11/2022**

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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 Colombo as follows:

1. On or about 16th October 1990 committing the murder of Noel Antony Alfred Barry an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction committing the robbery of a gold chain from Turin Nishara Amaan an offence punishable under Section 380 of the Penal Code.
3. In the course of the same transaction voluntarily causing hurt to Turin Nishara Amaan an offence punishable under Section 315 of the Penal Code.
4. In the course of the same transaction voluntarily causing hurt to Turin Nishara Amaan an offence punishable under Section 315 of the Penal Code.

The trial commenced before the High Court Judge of Colombo as the Appellants 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 Appellants had made dock statements and closed their case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants for 1st, 2nd and 3rd counts and acquitted them from 4th count.

The Appellants were sentenced as follows on 26/11/2015:

- For the 1st Count both were sentenced to death.
- For the 2nd Count each sentenced to 10 years rigorous imprisonment.
- For the 3rd Count each sentenced to 02 years rigorous imprisonment.

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

Background of the Case.

According to PW3, the deceased is her second son whose family also lived in the same house where the witness lived. On the day of the incident, when she was attending to some work inside the house, at about 10 a.m. PW1 Haleema, the wife of the deceased came crying into the house and informed her husband was stabbed. When she rushed to the scene, she had seen the deceased fallen on the ground and the Appellants were standing beside the deceased. When she tried to reach the deceased the 1st Appellant had kicked her and the 2nd Appellant brandishing a knife prevented her going close to the deceased. Although the deceased was taken to hospital in a three-wheeler, he was pronounced dead on admission.

PW10 Dr.Dayapala was called by the prosecution to give evidence on the Post Morten Report prepared by AJMO Dimuth Gunawardene. In his evidence he had stated that there were 09 injuries on the deceased and most of it being cut or stab injuries. According to him the injuries sustained by the deceased are necessarily fatal in nature. According to the AJMO who held the post mortem, the death had resulted due to multiple penetrating stabbed injuries to the chest.

The Learned Counsel for the Appellant had raised three grounds of appeal which are set out below:

1. Are the available items of evidence not sufficient enough to prove the case against the Appellants beyond reasonable doubt.
2. Has the Learned Trial Court Judge misdirected himself and had used some portions of PW1's evidence when writing the judgement which was adopted under Section 33 of Evidence Ordinance and later rejected by the trial judge.
3. Has the Learned Trial Judge evaluated the two dock statements given by the Appellants.

In the 1st ground of appeal, the Appellants contend that the available items of evidence are not sufficient to prove the case against the Appellants beyond reasonable doubt.

In this case nobody had seen how the deceased sustained the injuries. According to PW3, her daughter-in-law who had married the deceased had told her that the deceased had been stabbed but not divulged the identity of the assailants. When PW3 had rushed to the place of incident she had seen the Appellants standing there and the second Appellant had possessed a knife and the 1st Appellant had prevented her reaching the deceased. She further said that when she went out nobody except the Appellants were present at the scene. As PW1 had gone abroad during the pendency of the

trial before the High Court, her evidence given in the non-summary inquiry was adopted. Although it was adopted, it was rejected by the Trial Judge as it had not been led properly during the trial. Hence, PW1's evidence has no material value at all.

PW2, the second daughter of PW3 also came out upon hearing that the deceased had been stabbed. But she had not divulged anything the Appellant had done when her mother went to the spot. She only confirmed that that the 2nd Appellant had possessed a knife and the 1st Appellant had snatched her gold chain. She also said when she came out people had already gathered there.

In the cross examination she admitted that the deceased had number of cases and was one time taken to the Criminal Investigation Department.

Although PW3 and PW2 rushed to the scene after hearing that the deceased had been stabbed, both had contradicted their evidence on material points. According to PW3 when she went to the spot the Appellants were present and 1st Appellant had assaulted her while 2nd Appellant had threated and prevented her reaching the deceased. But according to PW2 when she came out people had already gathered there nothing done by the Appellants as described by PW3. She only added that her gold chain had been snatched by the 1st Appellant. PW3 nowhere in her evidence mentioned about snatching a gold chain from PW2.As the two witnesses simultaneously came out from the house after hearing about the incident, but they deviated themselves on material points which certainly endorses the 1st ground of appeal of the Appellants.

In the second ground of appeal, the Counsel for the Appellants contended that the Learned Trial Court Judge misdirected himself and had used some portions of PW1's evidence when writing the judgement which was adopted under Section 33 of Evidence Ordinance and later rejected by the trial judge.

As stated earlier even though an order was made by the Trial Judge to adopt the evidence given by PW1 at the non-summary inquiry under Section 33 of evidence Ordinance, it had not been adopted properly into the proceedings. Hence PW1's evidence had not gone into the proceedings. Hence the Court cannot rely on such evidence.

But in the judgment as pointed out by the Appellants, the Learned High Court Judge had relied on the evidence of PW1. This has caused a serious prejudiced to the Appellants' right to fair trial. The relevant portion is re-produced below:

Pages 300-301 of the brief.)

සිද්ධිය වූ අවස්ථාවේ දී මරණකරු අසළම සිට ඇත්තේ පැ.සා. 01 වන සිත්නි හලීමා ය. ඇය මරණකරුට විත්තිකරුවන් පහර දීම ආරම්භ කළ විගසම ඇයත් තුවාල ලබා කෑ ගසමින් අඩි කිහිපයක් ඈතින් පිහිටි ඇයගේ නිවසට ගිය අවස්ථාවේ දී නිවසේ තුලා යනුවෙන් අනුවර්ථ නාමයෙන් හඳුන්වන මරණකරු මරණ බවට ඇය පැ.සා. 02 සහ 03 ට පවසා ඇත.

In this case no one had seen the stabbing to the deceased. But the Learned High Court Judge in his judgment had come to the conclusion that the 2nd Appellant had assaulted the deceased with the knife he had possessed at that time. This is totally incorrect and thereby caused prejudiced to the Appellant's right to a fair trial. The relevant portion of the judgment is re-produced bellow:

(Page 303 of the brief.)

ඒ අනුව 02 වන විත්තිකරු අතේ පිහිය තිබූ අතර ඔහු ප්‍රහාරය එල්ල කර ඇති බව සාධාරණ සැකයෙන් තොරව පැමිණිල්ල ඔප්පු කර ඇති බව මගේ තීරණයයි.

Due to aforesaid reasons this ground also has merit.

In the final ground of appeal, the Counsel for the Appellants contends that the Learned Trial Judge has not properly evaluated the two dock statements given by the Appellants.

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

> *"That the right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value unless such 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."*

The Learned High Court Judge in his judgement at pages 294-295 and 300 had considered the dock statements of the Appellants. But he had not discussed the legal basis as to acceptance or rejection of a dock statement. He had only considered the dock statements but had not given reasons as to why he rejecting the dock statements of the Appellants and accepting the prosecution case. Hence it is incorrect to say that the Learned High Court Judge had properly analyzed the dock statements in the judgment. Hence this appeal ground also has merit.

In this case the learned High Court judge has failed to appreciate the weak evidence led against the Appellants by the prosecution. Evidence given by PW3 and PW2 had contradicted each other on material points. The evidence given by PW1 at the non-summary inquiry had been rejected by the Trial Judge. As the prosecution had failed to establish that the Appellants were the perpetrator of the crime for which they had been charged in this case, the benefit of the doubt should be accrued to the Appellants.

Therefore, I allow the appeal and acquit the Appellants from all the charges.

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

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL