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

In the matter of an appeal in terms of Article CA 138 (1) of the Constitution and section 331 (1) Of the Criminal Procedure Code Act No 15 of 1979.

Court of Appeal Case No: CA /HCC/0335/17
HC Kegalle Case No: HC/3370/14

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

Complainant

Vs.

Henakaralalage Senarathna Alias Sena

Accused

And Now Between

Henakaralalage Senarathna Alias Sena

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Nayantha Wijesundara AAL for the Accused-Appellant

Dilan Ratnayake SDSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 30.11.2021 and 11.07.2018

By the Complainant-Respondent 11.06.2019

Argued on : 21.09.2022

Decided on : **12.12.2022**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Kegalle, dated 29.11.2017 by which, the accused-appellant, who is before this court via Zoom Platform, was convicted and sentenced to death for having murdered Wahumpurayalage Pushpakumara Wijekoon.

The accused-appellant, had been indicted on 13.05.2014 in the High Court of Kegalle for committing the murder of Wahumpurayalage Pushpakumara Wijekoon on or about 23.04.2013, which is punishable in terms of section 296 of the Penal Code.

After the trial without a Jury, the learned High Court Judge convicted the accused-appellant and imposed death sentence on 29.11.2017. Being aggrieved by the conviction and sentence, the accused-appellant has preferred this appeal to this court.

The appellant has raised 3 grounds of appeal.

(i.) Whether the learned Trial Judge correctly followed the Procedure with regard to section 196 of the Code of Criminal Procedure Act.
(ii.) Whether the learned Trial Judge correctly followed the Procedure with regard to section 195(ee) of the Code of Criminal Procedure Act.
(iii.) Whether the learned Trial Judge has considered the evidence of the Sniffer Dogs as credible evidence in this case when it was unsafe to act on such evidence

The trial had commenced on 20.05.2015, during which the prosecution had, led evidence of 16 witnesses, marked documents පැ - 1 to පැ - 28. Once the prosecution had closed its case, the accused-appellant had made a statement from the dock. Thereafter, the learned magistrate who conducted the inquest was summoned to give evidence on behalf of the accused person. At the conclusion of the trial, the accused-appellant had been found guilty on the murder charge and sentenced to death. Aggrieved by the said decision the accused-appellant preferred this appeal.

The aforesaid charges were read out to the accused-appellant in open courts, the accused person requested for a non-jury trial. The learned counsel for the accused-appellant argued that the Trial Judge failed to comply with the mandatory provisions of section 196 of the code of Criminal Procedure Code as the aforesaid charges were only read out to the accused appellant but not explained the charges to him. Whereas according to section 196 he "shall read over and explain the charges to the accused".

The purpose of reading out and explaining a charge to an accused Is that he should be fully informed of the Accusation against him to enable him to respond. Merely reading out a charge will not achieve this purpose since a person who is not educated in law will not understand the contents of a charge sufficiently to enable him to effectively plead the charge. In the present case the charge in the indictment is specifically mentioned as follows;

> “වර්ෂ 2013ක් වූ අප්‍රේල් මස 23 වන දින හෝ ඊට ආසන්න දිනයකදී මෙම අධිකරණයේ බල සීමාව තුළ පිහිටි කෑගල්ලේදී යුෂ්මතා, වහුම්පුරයලාගේ පුෂ්පකුමාර විජේකෝන් යන අයගේ මරණය සිදු කිරීමෙන් දණ්ඩ නීති සංග්‍රහයේ 296 වන වගන්තිය යටතේ දඩුවම් ලැබිය යුතු වරදක් සිදු කරන ලද බවය.”

Even if the accused person appeared in person, the present charge could have been understood very well as it was in simple language. If the charge was expressed using legal terms and if it cannot be understood for a layman then it is a different matter to be considered at the appeal stage. I do not agree with the said argument of the learned counsel for the appellant that the accused person did not understand the charge against him. Not only that the accused person was represented by learned defence counsel and therefore if the charge was complicated and difficult to understand it is the duty and responsibility of the defence counsel to inform the court that the charge should be explained to his client. There was no such request from the learned counsel for the accused person according to the proceedings dated 20.05.2015.

It is important to note that on 07.08.2014 when the indictment was served on the accused person for the first time there was no appearance on behalf of the accused person when the indictment was read over to him the accused person has pleaded not guilty and requested for a nun-jury trial. It was recorded and thereafter counsel was assigned by the learned High Court Judge at that time. There was no request from the assigned counsel that the charge was not understood by the accused person thereafter it was fixed for the trial. It is very clear that, by not explaining the charge no prejudice was caused to the accused-appellant.

The argument of the learned counsel for the appellant that the operative part of the section is to explain and reading over is merely to complement the operative part. The very purpose of the section is to make sure that the accused understands the accusation before he pleads. A plea taken without complying with this obligation is not a valid plea and renders the proceedings *ab initio void* due to the absence of a valid plea. Considering the above-mentioned circumstances, I do not agree with the said argument raised by the learned counsel for the appellant, on section 196 of the Criminal Procedure Code (CPC).

The learned counsel for the appellant further submitted that the right conferred to an accused by section 196 of the CPC is the most important right given to an accused in our Criminal Justice system in view of the fact the right ensures that an accused understands the nature of the accusation against him before he pleads.

In Attorney General Vs Segu Lebbe Latiff 2008 (1) SLR 225 (Supreme Court) where it was stated that an accused must be informed in detail the charges against him in a language he understands and the cause and nature of such charges. Their Lordships in the Supreme Court further found that the right to a "fair trial " is a Constitutional right given to an accused person recognized in all civilized systems in the world and the right to a "fair trial" includes this right as well. A plea made by an accused without the charges being explained is void and hence the entire trial became *ab initio void*.

Learned Counsel for the accused-appellant says that this fundamental importance of this requirement can be properly appreciated only when viewed with the following section 197 by which the accused (not the Counsel) is required to plead guilty or not guilty. In the above-mentioned case in page 67 the accused person opted for a non-jury trial. In the said appeal their Lordships held that “the Trial Judge had an obligation not only to inquire from the accused whether he wished to be tried by a jury or by Judge without a Jury, but also to inform the accused that he has a legal right to make a choice. His Lordships further held that the right given to an accused and accused alone and not to the learned Counsel. Non observance of this procedure is an illegality and not a mere irregularity.”

In the present case, the learned Trial Judge did not fail to comply with section 195 (ee) of the Code of the Criminal Procedure Act. He had inquired from the accused whether he wishes to be tried by a Jury or by a Judge sitting alone without a jury, at pages 60 and 67 of the appeal brief. That was proceedings dated 07.08.2014 and 20.05.2015 respectively.

In a case of murder, the allegation against the accused does not need explaining for the accused to understand as all the essential elements are clearly specified as to the time, the place, the identity of the person killed and the offence committed mentioned by name as murder. Further the indictment in writing is handed over to the accused who can even read it himself. Thus, there is no prejudice caused to the accused by the fact that he had not recorded as "having explained it to the accused" It is my view that section 456A of the Code of Criminal Procedure Act No. 15 of 1979 specifies that the failure to comply with the provisions of the said act would be material if only such failure has resulted in a "miscarriage of Justice".

There is due compliance of recording the Jury Option from the accused and therefore there is no merit in the 1st and 2nd grounds raised by the accused-appellant.

Next argument raised by the appellant was based on the learned Trial Judge considering the evidence of sniffer dog as credible. The argument raised by the learned counsel for the accused-appellant was that the prosecution Witness No 11, Sarath Weerakoon Police Constable, who was the handler of the Police dog Berty, cannot be relied upon. The instant case was based on circumstantial evidence of the behaviour of the police dog as well as DNA evidence. It would be necessary for evidence to be received about the training, skills and habits of the particular police dog and its handler. However, in the present case in page 347 police constable failed to tender the required documents related the training of Police dog and also the details of the handler.

No doubt that the handler should be well experienced in regard to the characteristics of the particular dog in question. In this instant case "Doberman" dog has been used as the Police Dog. Learned counsel for the accused appellant argued that usually, Dobermans are not used for police work because they lack an undercoat in their fur and they are vulnerable to overheating during prolonged exposure.

This was an opinion raised by the learned counsel for the accused-appellant. If it should be considered for the present case then it must come from an expert on that subject. In the present case there was no such opinion expressed by and expert of a dog handler. PW 11 should be considered as the dog handler who assisted the investigations in this murder trial. It is evident that Police Dog 10501 Berty was with the witness PW 11 for nearly 3 years and they have involved in more than 300 investigations successfully. Out of those 300 investigations more than 130 positive information were received by using Police Dog Berty.

Considering the experience and details of the said investigation connected to this murder trial the learned High Court Judge was having some doubt about the dog handler and the investigation procedure of the Police Dog Berty. Although the learned counsel for the accused-appellant failed to challenged the evidence of PW 11, he was a competent witness regarding sniffer dog handler. The learned Trial Judge expressly rejected acting on this evidence. When the Police Dog Berty was dead and the documentation in regard to its investigations were destroyed it doesn't mean that the Court should reject the whole evidence of PW 11. I am of

the view that PW 11 should have been considered as an expert witness and unless his evidence is challenged by the accused person, the learned High Court Judge could have considered the positive evidence given by the dog handler in favour of the prosecution.

The learned counsel for the respondent says that the learned Trial Judge has not given a high weightage to the sniffer Dog's evidence and has only treated this evidence with utmost caution. The learned Trial Judge has expressly rejected acting on the said evidence.

The strongest item of evidence to link the appellant to this crime is the DNA evidence. The hair follicles found from the deceased's shirt and vest at the scene of crime were confirmed to be the accused's hair on DNA evidence. This evidence supported by the other items of circumstantial evidence was considered by the learned Trial Judge in convicting the appellant for this murder.

The analysis of the DNA evidence is done at length by the learned Trial Judge in his judgement as heavy reliance was placed on this scientific evidence. The DNA evidence was supported by the evidence of witness Malanie (PW3) as to the accused's presence at about the time of death close to the vicinity where the child's body was found, the police observations at the scene, the time of death and the evidence of the deceased's conduct immediately prior to his death, the place and circumstances under which this body was found, all go on to make a formidable case against the appellant.

In the light of those evidence the appellant opted to give evidence under oath and presented a defence. The appellant's position was that he was arrested on 23.04.2013 and assaulted by the police. He also says in the early morning hours after his arrest some of his hair was pulled out from his head by the Police. This is the hair that the appellant states that was sent to the Gin-tec for DNA analysis.

It is important to note that the learned Trial Judge has considered the defence evidence to see whether such evidence causes a reasonable doubt in the Prosecution's case. In considering the defence evidence the learned Trial Judge has applied the test of consistency to the defence version.

The learned High Court Judge observes that the accused person takes up this defence for the first time only when the defence is called for. He further observes that the core position of his defence has not been suggested in cross-examination to the relevant prosecution witnesses to support his position.

The position that the appellant was actually arrested on 23.04.2013 was never suggested to witness number 9 Inspector Kamal Perera (PW 9) who stated that the appellant was arrested and produced on 25.04.2013. The appellant's position that when he was belatedly produced before the magistrate that the Magistrate found fault with the police was neither suggested to PW 9 as well as the Magistrate who was later called in the trial as a defence witness.

The position that the hair samples sent for DNA testing was not collected as testified to by the Doctor, was never suggested to Dr. Channa Perera who could have supported the appellants case as an independent witness if that was so. The learner' Trial Judge has considered these positions taken by the defence before deciding the creditworthiness of the appellant.

In Gunasiri and two others Vs. Republic of Sri Lanka 2009 (1) SLR 39, It was held that;

> "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. The failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it was false one".

Therefore, the learned Trial Judge has placed no reliance on the appellant's evidence and rejected it as not even adequate to raise a doubt in the prosecution's case.

In Sumanasena Vs. AG 1999 (3) SLR 137, it was held;

> "When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him."

In the instant case the evidence of the appellant was not worthy of credit. The appellant's failure to put his defence consistently to the prosecution witness would be a basis for the court, not to rely on the defence evidence. In the above circumstances the learned Trial Judge has correctly considered the accused's defence tendered.

Having rejected the defence evidence after due consideration the learned Trial Judge who had the benefit of having heard most of the witnesses both of the prosecution and the defence before him and observing the demeanour of them was best placed to decide on the credibility of all witnesses. Thus, the learned Trial Judge has done justice in this case in evaluating the total evidence.

In all the above circumstances I decide that the prosecution has proved their case beyond reasonable doubt. Therefore, I dismiss this appeal and affirm the conviction and the sentence imposed by the learned Trial Judge.

Appeal is dismissed.

Judge of the Court Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal