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/0164-166/2020
High Court of Kalutara
Case No: HC/709/2006

1. Mawarakanda Wathukarage Padmasiri
2. Pallewage Kapuralalage Rohana Anurasiri
3. Weragala Hewage Chaminda Pushpakumara

ACCUSED-APPELLANTS

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Palitha Fernando, P.C with Janaka Hewasinghe for the 1st Appellant.**
Rushdhi Habeeb with Samadhi Lokuwaduge for the 2nd Appellant.
Neranjan Jayasinghe for the 3rd Appellant.
Sudharshana De Silva, DSG for the Respondent.

ARGUED ON : **25/01/2023**

DECIDED ON : **15/03/2023**

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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 under Section 296 read with Section 32 of the Penal Code for committing the murder of Bodhiya Baduge Dayaratna alias Ukkun on or about 03rd June 2003.

The trial commenced before the Judge of the High Court of Kalutara as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence. The 1st and the 2nd Appellants had made dock statements and had denied the charge. The 3rd Appellant had given evidence from witness box, and he

too had denied the charge. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants for murder and sentenced them to death on 14/07/2020.

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

The learned Counsels for the Appellants informed this court that the Appellants had given consent for this matter to be argued in their absence due to the Covid 19 pandemic restrictions. Further, at the time of argument the Appellants were connected via Zoom platform from prison.

Background of the Case.

In this case the deceased was living with PW1 and PW2 more than 2 years in the same house. He was to be married to the sister of PW1. PW2 is the wife of PW1.

The 1st Appellant is an uncle of the deceased. The 2nd Appellant is a relative of the deceased, while 3rd Appellant is a person known to the deceased. The incident happened in dark as the village where PW1's house situated was not provided with electricity. At the time of the incident PW1's house was lit with three kerosine bottle lamps.

On the date of the incident, PW1 had gone to a neighbor's house to assist him to bring medicine for his child. When he returned home the deceased was seated on the bed and the deceased had told him that the Appellants had assaulted him. At that time, the witness's wife and mother were also in the house. The wife, the PW2 had told him that the Appellants had entered the house through the window after removing the mackintosh. Even though the deceased did not want to go to the hospital, after much difficulty the deceased was taken to the Baduraliya Hospital, and he died at the hospital.

PW2 is the wife of PW1. She was at home when the incident had taken place. According to her when she was sleeping, she heard somebody calling "Chootiyo, open the door". Chootiyo is the nick name of her husband PW1. She identified that voice is of the 1st Appellant. Thereafter the 1st Appellant

had come into the house and taken the deceased out. She had seen the other Appellants at the front of the house. Then she heard someone shouting not to assault him. Thereafter she had seen the deceased fallen in front of the house. The deceased had asked for water and PW1 had come home after the deceased was taken into the house. She heard the deceased telling her husband that the Appellants assaulted him.

The JMO who conducted the postmortem of the deceased had stated that there were two injuries on the deceased's body. The cause of the death was blunt force injury to back of the head which resulted in an internal hemorrhage, and it is a necessarily fatal injury. The 2nd injury is a contusion at the rear of the chest behind 7th,8th, and 9th ribs. The injuries are caused by blunt force and could have been caused by clubs. The JMO also opined that the deceased could speak for some time after the injuries.

Having satisfied that the prosecution had made out a prima facie case against the Appellants, the learned Trial Judge had called for the defence and the 1st and 2nd Appellants had made dock statements and denied the charge. The 3rd Appellant had given evidence from witness box, and he too denied the charge.

The Appellants had separately canvassed their Appeal grounds through their Counsel.

The First Appellant had filed following grounds of appeal.

1. Although the case for the prosecution depends on the dying deposition of the deceased, the infirmity of a dying deposition is not discussed in the judgment.
2. The identification of the Appellants is not considered adequately in the judgment.
3. The Learned High Court Judge accepts the infirmities of prosecution witnesses but proceeds to say that people are uneducated and given evidence after 13 years of the incident.

4. The Learned High Court Judge has concluded that the defence has not challenged the prosecution version that the Appellants are the culprits in this case.
5. Though all the accused have been convicted based on common intention, common intention was not considered in the judgment with the laid down principles.
6. The defence case has been rejected applying the probability test, but not given reasons for the same.
7. In view of these matters the accused were not given a fair trial.

The second Appellant had filed following grounds of appeal.

1. The case against the 2nd Appellant has not been proved beyond reasonable grounds.
2. Application of the Ellenborough principle is unfair in this case.
3. The identification of the 2nd Appellant is tainted with infirmities.
4. Although the Learned High Court Judge had relied on circumstantial evidence to come to his conclusion, has not elaborated in his judgment.
5. The dock statement of the 2nd Appellant has not been given due consideration in the judgment.
6. Absence of shared intention and motive.

The third Appellant had filed following grounds of appeal.

1. The prosecution had failed to prove the identity of the accused Appellant beyond reasonable doubt.
2. The Learned High Court Judge had rejected the evidence of the 3rd Appellant without giving reasons.
3. Learned High Court Judge had wrongly applied the law and thereby shifted an extra burden on the accused appellant by expecting the accused Appellant to explain the items of evidence placed by the prosecution without taking into consideration that the accused

appellant had totally denied the participation in the crime. Vide page 393.

4. The Learned High Court Judge had failed to take into consideration about common murderous intention.

In this case there are three grounds urged by the Learned Counsels which are to be discussed first. Those grounds are set out below:

1. Dying deposition of the deceased.
2. Identification of the Appellants.
3. Infirmities in the prosecution witnesses.

In a criminal trial the above mentioned three grounds of appeal are especially important as the outcome of the case is very much depended on said grounds. Hence, considering those grounds as common grounds, I now proceed to discuss each of the same below.

In the first common ground, the Learned President's Counsel strenuously argued that as the prosecution depends on a dying deposition of the Appellant, the Learned High Court Judge should have discussed the infirmities in a dying deposition in his judgment.

As the prosecution relies on the dying declaration made by the deceased, it is very important to discuss the relevant laws pertaining to the acceptance of dying declaration as evidence in criminal trials under our law.

According to Section 32(1) of Evidence Ordinance,

Statements, written, or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases: -

(1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which

resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.

Therefore, following requirements must necessarily be established before any evidence is led under section 32(1) of the Evidence Ordinance.

1. That the maker of the statement is dead.
2. That the statement made by the deceased refers to his/her cause of death or to the circumstances of the transaction which resulted in his/her death.

Hence such evidence would become admissible only where the cause of death of the person making the statement is in question in the particular judicial proceedings. Admissibility of such evidence would ultimately be decided by the trial judge as per Section 136 of Evidence Ordinance.

In **Dharmawansa Silva and Another v. The Republic of Sri Lanka [1981] 2 Sri.L.R.439** it was held:

> *"When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or part. Thirdly, the value of the whole or part that is admitted. A dying deposition is not inferior evidence but it is wrong to give it added sanctity"*

In **Sigera v. Attorney General [2011] 1 S.L.R.201** it was held that:

> *"An accused can be convicted of murder based on mainly and solely on a dying declaration made by a deceased".*

In this case, PW2 was at home when the incident had taken place. In her evidence she had stated that when she went out after the assault the deceased requested some water first. After drinking water, according to PW2, the deceased had told her that the Appellants had assaulted him. Prior to the assault, the 1st Appellant also known as Bande Mama called the deceased and requested him to open the door. She identified the 1st Appellant by his voice at that time. The relevant portion is re-produced below:

(Page 152 of the brief.)

ප්‍ර : ගයානි බැලුවා ද කවුද ආවේ කියලා ?

උ : අපි බැලුවේ නැහැ.

ප්‍ර : කවුරු හරි ඇවිත් කතා කළා ද?

උ : කතා කළා චූටියෝ චූටියෝ දොර ඇරපන්, මම මේ එගොඩ බන්ඩා දොර ඇරපන් කියලා කතා කළා.

ප්‍ර : ගයානි දන්නවා ද මේ චූටියෝ චූටියෝ කියලා කතා කළේ කවුද කියලා ?

උ : බණ්ඩේ මාමා.

When 1st witness came home PW2 had informed the incident to PW1. The deceased did not tell anything to PW1. The relevant portion is re-produced below:

(Page 161 of the brief.)

ප්‍ර : වතුර දුන්නා ද ?

උ : එහෙමයි.

නිශ්ශංක ආව වෙලාවේ උක්කුං කතා කලා. නිශ්ශංක ආවාට පස්සේ අපි කිව්වා, බණ්ඩෙ මාමා ඇවිල්ලා, උක්කුං හිටපු කාමරයට ඉටි රෙදි ගහල තිබුන තැනින් ගෙට ඇවිල්ලා කාමරයට ගිහිල්ලා පණිවිඩයක් කියන්න එලියට අරන් ගිහිල්ලා ඒ ගියාට පස්සේ කෑගැහැව්වා කියලා කිව්වා.

ප්‍ර : ඔය වෙලාවේ උක්කුං නිශ්ශංකට මොකවත් කිව්වා ද ?

උ : නැහැ.

PW2 had further said that when her husband, PW1 asked from the deceased as to who had assaulted him, the deceased had first said that he will tell in the morning. The relevant portion is re-produced below:

(Page 181 of the brief.)

ප්‍ර : ඒ ඇහුවේ තමන්ගේ ස්වාමි පුරුෂයා නිශ්ශංක ?

උ : ඔව්.

ප්‍ර : නිශ්ශංක අහන කොට තමයි කිව්වේ දැන් කියන්න බැහැ හෙට උදේට කියන්නම් කියලා ?

උ : ඔව්.

ප්‍ර : ඊට පස්සේ තමයි මේ ගැන අහන කොට මේ තුන්දෙනා ගැන කිව්වේ කියලා තමන් කියනවා?

උ : ඔව්.

When PW2 gave her statement to the police, she had said that the deceased did not speak after the assault. This contradiction was marked as V8 by the defence. The relevant portion is re-produced below:

(Page 189 of the brief.)

ප්‍ර : තමුන් පොලිසියට කට උත්තර දෙන කොට තමුන් කිව්වා, මෙන්න මෙහෙම, මා ඔහු ළඟට ගොස් කතා කලමුත් කතා කලේ නැත. තමුන් එහෙම කිව්වා ද?

උ : උක්කුං කතා කලා. එහෙම කිව්වේ නැහැ.

එම කොටස **වී.8** වශයෙන් පරස්පරතාවයක් ලෙස සලකුණු කිරීමට ගෞරවයෙන් යුතුව අවසර අයැද සිටී.

PW1 in his examination-in-chief took up the position that when he came home, the deceased was on the bed inside the room. But he had told police that the deceased was lying fallen face downward at the compound of the

house. This contradiction was marked as V1 by the defence. The relevant portion is re-produced below:

(Page 127 of the brief.)

ප්‍ර : ඒක හරිද වැරදිද ?

උ : මතකයක් නැහැ.

ප්‍ර : තමන්ට තමකයක් නැත්නම් තමන් පොලිසියට කියලා තියෙනවා නම් කටඋත්තරයක් දීලා තමන් නිවසට එනකොට දයාරත්න මල්ලි මුනින් අතට මිදුලේ වැටී සිටියා කියනවා නම් ඒ දෙක දෙකක් නේද ?

උ : ඔව්.

ප්‍ර : ඒක එකකට එකක් වෙනස් කියලා පිළිගන්නවා

උ : ඔව්.

("දයාරත්න මල්ලි මුනින් අතට මිදුලේ වැටී සිටියා" කියන කොටස ඒ අනුව **වී.1** ලෙස පරස්පරයක් වශයෙන් ලකුණු කිරීමට අවසර පතයි.)

When PW1 was confronted by the defence about the genuineness of his evidence, the witness remained silence. The relevant portion is re-produced below:

(Page 143 of the brief.)

ප්‍ර : මම කියන්නේ තමන් මේ සම්බන්ධයෙන් මේ කියන කතාව සම්බන්ධයෙන් කිසිම සිද්ධියක් නොදැක තමන් අහල පහල අයයි තමන්ගේ මව කියපු දේවල් අහලා තමන් පසු අවස්ථාවක පොලිසියට කටඋත්තරයක් දුන්නා කියලා ?

උ : (උත්තරයක් නොමැත.)

In the re-examination, PW1 stated that he came to know about the injury sustained by the deceased when he came home from his neighbour's house. Further, he had admitted that he spoke to PW2 about the incident. The relevant portion is re-produced below:

(Page 144 of the brief.)

ප්‍ර : සාක්ෂිකරු මෙම සිද්ධිය සිදු වුනේ ශාන්ත බාප්පලාගේ ගෙදරට ගිහිං ආවාට පසුව තමයි දයාරත්න තුවාල වෙලා ඉන්නවා කියලා දැන ගත්තේ ?

උ : ඔව්.

ප්‍ර : ඒ වෙලාවේ තමන්ගේ බිරිඳගෙන් තමන් ඒ ගැන ඇසුවා කිව්වා ?

උ : ඔව්.

In **Tapinder Singh v. State of Punjab [1970] AIR SC 1586** the court held that:

> *"In fact inasmuch as a dying declaration is admitted on the basis of necessity an obligation lies on the Learned Trial Judge to direct the jury to be on its guard to scrutinize all relevant surrounding circumstances"*

Considering the evidence given by PW1 and PW2, the dying deposition of the deceased creates a serious issue in respect of the credibility of their evidence. The contradiction marked V8 and V1 creates a serious doubt about the evidentiary value of PW1 and PW2 which should have been considered by the Learned High Court Judge in his judgment. Hence this ground of appeal has merit.

In the second common ground of appeal, the Learned Counsels contends that the identification of the Appellants has not been proven beyond reasonable doubt due to the contradictory nature of the evidence given by PW2.

Proper identification of the accused persons is a fundamental point that needs to be determined at the beginning of a criminal trial. In this case it is very important to discuss whether the prosecution has established the identity of the Appellants beyond reasonable doubt. If the identification is compromised, the net result would be the acquittal of the accused persons

from the case. Hence evidence of identification should be considered very seriously due to its delicate nature. In this case an identification parade had not been held in respect of the Appellants.

Visual identification evidence is when an eyewitness identifies a suspect from memory. It can sometimes be unreliable due to poor light conditions.

The following judgments are very important as it elaborates the vitality of identification evidence and discusses how the fate of a case depends upon it.

In **Karunaratne Mudiyansege Madduma Bandara v. The Attorney General CA/190-192/11** decided on 15/03/2013, the court acquitted the accused on the ground that the identification of the accused persons have not been proven beyond reasonable doubt because the prosecutrix failed to divulge the names of the accused persons to the police who was known to her prior to the incident.

In **R v. Turnbull [1977] QB 224** the court held that:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused-which the defence alleges to be mistaken-the judge should be cautious before convicting the accused in reliance on the correctness of the identification(s). The judge should take into consideration that:*
>
> - *Caution is required to avoid the risk of injustice;*
> - *A witness who is honest may be wrong even if they are convinced, they are right;*
> - *A witness who is convincing may still be wrong;*
> - *More than one witness may be wrong;*
> - *A witness who recognizes the defendant, even when the witness knows the defendant very well, may be wrong.*

The identification of the Appellants solely rests on the evidence given by PW2 Lasanthika. According to her evidence, she had seen the Appellants'

presence in their compound through a torn mackintosh. During that time, no electricity was available in her village. Hence the villagers used Kerosine oil lamp to generate light. According to her, she had used three Kerosine oil lamps in her house on the day of the incident. After hearing the calling, this witness had seen the 1st Appellant creeping into the house through the window after tearing mackintosh. Further she had only seen the 1st Appellant forcibly taking the deceased out from the side of the kitchen. Thereafter she had come to the living hall area, gone near the window and witnessed all three Appellants standing outside of the house. She had identified the Appellants from the light which emanated from the bottle lamp. Thereafter she had heard the cries of the deceased pleading not to harm him.

But in the cross examination she had said that she did not witness that the deceased being taken out by the 1st Appellant. The relevant portion is re-produced below:

(Page 184 of the brief.)

ප්‍ර : එයා කොහොම ද එළියට අරගෙන ගියේ ?

උ : කියන්න දැක්කේ නැහැ. මම හිටියේ මගේ කාමරේ.

ප්‍ර : තමන් කියන විදිහට බණ්ඩෙ මාමා ගේ ඇතුලට එනවා තමන් දැක්කෙත් නැහැ ?

උ : ඔව්. ප්නේලෙ ඉටි රෙද්ද ඉරන සද්දය ඇහුනා. ඒ අය ගෙට එන සද්දය ඇහුනා. උක්කුං කියලා ළඟට ගිහිං යමු උක්කුං කියලා කුස්සිය පැත්තෙ දොර ඇරගෙන යන සද්දය ඇහුනා. එතකොට ළමයත් ඇහැරුනා. එතකොට සාලෙට ආවා. ඒ ආවාට පස්සේ තමයි මම දැක්කෙ චමින්දයි, රෝහණයි, බණ්ඩෙ මාමයි එළියෙ ඉන්නවා.

Further it was brought to the notice of the court that PW2 had never stated in her police statement that she saw the 1st Appellant taking away the deceased out. This had been highlighted as omission by the defence.

Considering the evidence given by PW2 about the identity of the Appellants, there are contradictions and omissions which certainly affect the outcome of the decision.

The proof of contradiction is vital to destroy the credibility of the case of the prosecution. Proven contradictions and omissions which can affect the case of the prosecution plays a vital role in a criminal case.

PW2 is the most important witness in this case. The contradictions marked in her evidence are vital and certainly affects her credibility. They also raise doubts about the probability of the incident as described by the PW2. What she told to the police and at the inquest needs to be considered carefully as PW2 had fresh memory regarding the incident when she gave her statement and evidence during the inquest. Failing to mention important facts which result in the failure to accurately identify the accused certainly affects the prosecution case. Hence, this ground also has merit.

In the final common ground, the Counsels contended that the infirmities in the prosecution witnesses have not been adequately considered by Learned Trial Judge.

PW2's omission in mentioning to the police that the 1st Appellant took the deceased out affects her credibility in this case. This is a vital omission that should not be considered lightly, as it certainly affects the conviction of the 1st Appellant.

The contradictions marked on the evidence of PW1 and PW2 are very material which certainly affect the root of the case.

In the case of **AG v. Sandanam Pitchai Mary Theresa (2011) 2 Sri L.R. 292** the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and should consider whether they are material to the fact in issue".*

In the case of **K. Padmathilaka alias Sergeant Elpitiya v. The Director General of Commission to Investigate Allegation of Bribery and Corruption** [2010] BLR 67 the court held that:

> *"Credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the judge. When witness makes an inconsistent statement in their evidence either at one stage or two stages, the testimony of such witness is unreliable……It is a cardinal principle that unreliable evidence cannot be rendered credible, simply because there is some corroboration material".*

The evidence of PW1 and PW2 to the incident creates serious doubt about the identity of the Appellants. The contradictory positions taken by the witnesses are vital and certainly goes to the root of the case and is sufficient to create a reasonable doubt in the prosecution's case.

In this case the Learned High Court Judge had not correctly analyzed the evidence presented by the prosecution. The conclusion reached by the Learned High Court Judge that the evidence given by the prosecution witnesses is convincing and trustworthy is a total misdirection. The Learned High Court Judge had failed to consider evidence favorable to the Appellants.

In **Kumara De Silva and 2 others v. Attorney General** [2010] 2 SLR 169 the court held that:

> *"Credibility is a question of fact, not of law…… The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial judge….".*

As the common grounds of appeal considered above which was jointly raised by the Counsels for the Appellants are sufficient to affect the credibility of prosecution case and certainly disturbs the judgment of the learned High Court Judge, it is not necessary to address the remaining grounds raised by the Counsels for the Appellants in this appeal.

Due to the aforesaid reasons, I set aside the conviction and the sentence dated 14/07/2020 imposed on the Appellants by the learned High Court Judge of Kalutara. Therefore, all the Appellants are acquitted from the charge.

The Appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL