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 No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/0253/2017

High Court of Kegalle
Case No: HC/2312/2006

VS

1. Godawatte Gamaralalage Nimal Anurasiri *alias* Verathul Athula Kumara

2. Basnagala Gamaralalage Priyantha Padmakumara

Accused

And now between

Basnagala Gamaralalage Priyantha Padmakumara

Accused– Appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Indica Mallawaratchy

for the Accused-Appellant

Sudharshana De Silva. DSG

for the Respondent

ARGUED ON : 12/01/2023

DECIDED ON : 26/01/2023

R. Gurusinghe, J.

The second accused-appellant (the-appellant) was indicted in the High Court of Kegalle along with the first accused for having murdered one Gamini Gunawardena on the 27th February 2003, an offence punishable in terms of section 296 of the Penal Code.

The second accused-appellant (the-appellant) was convicted as charged and sentenced to death. Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal to this court. The appellant relied on three grounds of appeals as follows:

1. The evidence of the sole eye-witness is wholly unsafe to form the basis of the conviction.

2. The learned Trial Judge failed to evaluate the testimonial trustworthiness of PW1 in its correct judicial perspective.

3. The learned Trial Judge erred in law on the principles relating to section 27 recoveries.

Case for the prosecution

PW2 was living with the deceased as husband and wife. PW2 had made a complaint to the police on the 25th of February 2003, that the two accused had threatened to kill the deceased.

On the 27th of February 2003, PW2 and her husband went to his uncle's home to watch TV. Around 7.45 pm, the deceased and PW1 Chaminda Gunasekera left his uncle's home to drop a person called Ukkuhamy at his house as he was an elderly person who had poor eyesight. PW1 and the deceased both carried torches with them. When they were coming back, the two accused persons were near a jak tree. The appellant shot the deceased. When the deceased fell down, PW1 ran towards his house. Near his home he met PW2 and his father. PW1 told them that (අයියා ඉවරයි). He also told PW2 that the appellant had shot the deceased. PW2, PW1 and some other people went to the place of the incident.

The Judicial Medical Officer stated that the death of the deceased was due to necessary fatal injuries caused by a firearm.

The first ground of appeal is that the evidence of PW1 is unsafe to form the basis of the conviction. The second ground is also on the same point. PW1 was an eye-witness to the scene of the crime. He and the deceased both had torches at the time of the incident. Besides, PW1 had given a statement to the police on the same night, which shows that there was no delay. In that statement, PW1 stated the fact that the appellant had shot the deceased, and the first accused was also present at the scene at that time. The appellant complained that PW2 had not stated to the police that she had been told by PW1, that it was the appellant who shot the deceased. However, PW2 had made the first complaint

to the police on the same night, naming the two accused. That is the first accused and the appellant. She made the complaint to the police before the statement of PW1 was recorded. PW2 had given evidence saying that PW1 told her that the appellant had shot the deceased. Moreover, the appellant and the first accused were known people to PW1 and PW2.

The learned High Court Judge has considered the evidence of PW1 carefully. There was no reason to reject the testimony of PW1. Evidence of PW1 was consistent right throughout all the proceedings. There is only one contradiction marked in the evidence of PW1, where he stated at the trial that he and the deceased came together and conversely, in his police statement, he stated that the deceased came just behind him. This contradiction was considered by the learned High Court Judge, and he decided that it was not a serious contradiction. I see no reason to disagree with it. All substantial matters stated by PW1 according to the police statement, the evidence in the inquest proceedings, evidence in the non-summary proceedings and the evidence in the High Court, stand un-contradicted and consistent. PW2 had made a complaint to the police two days before the incident occurred, that the appellant and the first accused had threatened to kill the deceased.

In the case of *State Of U.P. vs M.K. Anthony* decided on 6 November 1984,AIR 1985 SC 48, at para 10, the Indian Supreme Court stated as follows:-

> *10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case,*

hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.

This case was cited with approval by Justice Sisira de Abrew in *Oliver Dayananda Kalansuriya alias Raja vs The Democratic Socialist Republic of Sri Lanka* *CA 28/2009 HC Galle 2900 decided on 13.2.2013*.

It is an accepted principle that a criminal case cannot be proved with mathematical accuracy as it has to be proved by the evidence given by human witnesses. Thus discrepancies, errors and contradictions are bound to occur. If they do not create a reasonable doubt in the prosecution case court should disregard them. Courts should not reject evidence of witnesses on the basis of minor discrepancies and contradictions. This view is supported by the judicial decision in State of Uttar Pradesh Vs MK Anthony [1984] SCJ 236. Indian Supreme Court in that case held thus: "While appreciating…"

In these circumstances, the first and second grounds of appeal are rejected.

The third ground of appeal is that the learned High Court Judge had erred in law on the principles relating to section 27 recoveries. The appellant was

arrested around 3.00 a.m. on the same night. Police recorded a statement and recovered the gun from the appellant's kitchen. The gun was identified by the witnesses. The gun was produced as P2. The police witness further said that there was a smell of gun powder.

The Judicial Medical Officer gave evidence to the effect that the injuries on the body of the deceased would have been inflicted by a muzzleloader gun. P2 was found to be a muzzleloader gun. The learned High Court Judge cited the following case laws when he considered the recovery of the gun.

King vs Pakir Thambi 32 NLR 262 Nissanka vs The State 2001 3 SLR 78, Chuin Pong Shiek vs The Attorney General 1999 2 Sri Lanka law report 277.

The gun was recovered by the police consequent to the statement of the appellant within a few hours of the incident. The appellant had not explained how he acquired that knowledge as to how the gun came to his house. He only denied the recovery of the gun in his dock statement. The learned High Court Judge has considered the law relevant to 27 recoveries.

In the case of Queen *vs Murugam Ramasamy 66 NLR 265, at pages 268 and 269 Viscount Redcliff* stated as follows:

The principle embodied in section 27 has always been explained as one derived from the English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century. It can be traced in English law as early as the late eighteenth century, sea R. v. Warickshall1[1 (1783) 1 Lea. 263] and R. v. Butcher2.[2 (1798) 1 Lea. 265n.] The principle was stated by Baron Parko in the trial of Thurtell and Hunt (1825) (see Notable British Trials page 145), where he said, " A confession obtained by saying to the party ' You had better confess or it will be the worse for you' is not legal evidence. But though such a confession is not legal evidence, it is everyday practice that if in the course of such confession that party state where stolen goods or a body may

be found and they are found accordingly, this is evidence, because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him."

I see no misdirection on the part of the learned High Court Judge regarding 27 recoveries.

This case does not depend entirely on circumstantial evidence. There is an eye witness to the incident, and his testimony is acceptable.

I see no reason to disturb the findings of the learned High Court Judge. Therefore, the conviction and the sentence is affirmed.

The appeal of the appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal