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/0408/2018

High Court of Gampaha
Case No. HC/175/2004

Abeykoon Mayadunnege Athula Abeykoon

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Indica Mallawaratchy for the Appellant.**
Dileepa Peiris, SDSG for the Respondent.

ARGUED ON : **21/11/2022**

DECIDED ON : **31/01/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General on following charges:

1. On or about the 12th November 2000 the accused committed the murder of Delpitiya Acharige Jayasena De Silva which is an offence punishable under Section 296 of Penal Code.
2. In the course of the same transaction for committing the offence of attempted murder of Hettiarachchige Sampath which is an offence punishable under Section 300 of the Penal Code.
3. In the course of the same transaction for committing the offence of attempted murder of Milaththe Arachchige Hemalatha which is an offence punishable under Section 300 of the Penal Code.
4. In the course of the same transaction for committing the offence of attempted murder of Ranawaka Denipitiya Acharige Shirani which is an offence punishable under Section 300 of the Penal Code.
5. In the course of the same transaction for committing the offence of attempted murder of Ranawaka Arachchige Karunasena which is an offence punishable under Section 300 of the Penal Code.
6. In the course of the same transaction for committing the offence of attempted murder of Hettiarachchige Sampath by using an offensive weapon which is an offence punishable under Section 4(2) of the Offensive Weapon Act.

7. In the course of the same transaction for committing the offence of attempted murder of Milaththe Acharige Hemalatha by using an offensive weapon which is an offence punishable under Section 4(2) of the Offensive Weapon Act.
8. In the course of the same transaction for committing the offence of attempted murder of Delpitiya Acharige Shirani by using an offensive weapon which is an offence punishable under Section 4(2) of the Offensive Weapon Act.
9. In the course of the same transaction for committing the offence of attempted murder of Ranawaka Arachchige Karunasena by using an offensive weapon which is an offence punishable under Section 4(2) of the Offensive Weapon Act.

As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led 11 witnesses and marked production P1-06 and X and closed the case. Learned High Court Judge having satisfied that the evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. Having selected the right to make a statement from the dock, the Appellant had proceeded to deny the charges by way of his dock statement. The defence called the wife of PW1, Deepani Rajapaksha but she had been treated as an adverse witness by the defence.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellant as charged on 07/12/2018 and sentenced him as follows:

1. Count 01 – death sentence.
2. Count 02 – 10 years RI with a fine of Rs.5000/-. In default 06 months simple imprisonment.
3. Count 03 – 10 years rigorous imprisonment with a fine of Rs.5000/-. In default 06 months simple imprisonment.

4. Count 04 – 10 years rigorous imprisonment with a fine of Rs.5000/-. In default 06 months simple imprisonment.
5. Count 05 – 10 years rigorous imprisonment with a fine of Rs.5000/-. In default 06 months simple imprisonment.
6. Count 06 – 20 years rigorous imprisonment with a fine of Rs.10000/. In default 06 months simple imprisonment.
7. Count 06 – 20 years rigorous imprisonment with a fine of Rs.10000/. In default 06 months simple imprisonment.
8. Count 06 – 20 years rigorous imprisonment with a fine of Rs.10000/. In default 06 months simple imprisonment.
9. Count 06 – 20 years rigorous imprisonment with a fine of Rs.10000/. In default 06 months simple imprisonment.

The Learned High Court Judge further ordered the sentence imposed on Counts 2-5 to run concurrent to each other. Similarly, sentence imposed on Counts 6-9 also ordered to run concurrent to each other.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing the Appellant was connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. Trial Court flawed by perusing the police statement of PW1 at the time of writing the judgment, in contravention of Section 110(4) of the CPC.
2. Inconsistent and self-contradictory versions of PW1, creates a serious doubt as to whether he was an eye-witness to the bomb being hurled.

3. Trial court failed to evaluate the evidence of the police witness Attanayake, which evidence is favourable to the accused and throws a doubt on the prosecution version implicating accused-appellant.
4. Evidence of PW2 namely Hemalatha is inconsistent, unreliable and does not favour the test of probability and the Trial Court failed to evaluate the said evidence in its correct judicial perspective.
5. Evidence of PW4 namely Sampath is unsafe in view of the belated statement to the police.
6. Inherent weakness in the evidence of PW3 namely Sylvia renders her evidence of unworthy of credence.
7. No plausible reasons were adduced for the belatedness by PW3 and PW4 and the Trial Court failed to address its judicial mind to the belatedness.
8. Rejection of the dock statement is on an erroneous premise, thereby causing serious prejudice to the Accused-Appellant.

The background of the case *albeit* **briefly is as follows:**

According to the eye witness PW1, he is the eldest son of the deceased. The Appellant was their neighbour who was not in good terms with the deceased's family due to an unsuccessful attempt by him to marry deceased's daughter Sylvia (PW3). On the day of the incident when all family members with two of their neighbours were watching T.V. at the living room, at about 8.45 p.m. heard the movement of a person as the path leading to his house was laid with gravels. When he looked at the main door, had seen the Appellant tripping near the entrance and throwing something that resembled a black coloured ball into the living room. The deceased having thought somebody had thrown a stone into his house, picked up the same and went towards the main door to throw the same out of the house. At that time that black coloured object had exploded and the deceased sustained serious injuries including losing a hand of him. The witness had seen the Appellant running

away from the scene after throwing the bomb. On a previous occasion the Appellant was accused of throwing stones at the deceased's house. Due to this explosion the deceased was sustained serious injuries and was pronounced dead on admission to the Wathupitiwala Hospital. Further his mother PW2, his sister PW3 and his brother PW4 also had sustained injuries.

PW2, Hemalatha, wife of the deceased also corroborated the evidence of PW1.When she was carried out by her neighbour Dayawathie, she had seen the Appellant running from the scene. For her injuries she was taken to the Radawana Hospital for treatment.

PW3, Sylvia while confirming the evidence given by PW1 and PW2, she further said that she knew the Appellant since her childhood and the Appellant had romantic interest towards her. As she did not like him, the Appellant had harassed the deceased's family in numerous ways. The Appellant went to the extent of preventing potential suitors from visiting her house. The Appellant had also threatened her when she refused his advancement. More than 15 complaints had been lodged in the police against him during last 06 years before this incident. She was admitted to Wathupitiwala Hospital for treatment.

PW4, Sampath, an adopted son of the deceased also corroborated the evidence given by PW1, PW2 and PW3. He too knew the Appellant from his childhood. He had identified the Appellant at the scene of crime. According to him the Appellant was wearing a white coloured T-shirt and a pair of trousers. According to him, two months prior to the incident the Appellant had threatened that he would bump off the entire family of the deceased in a day. As he sustained serious injuries, he was transferred to Colombo General Hospital where he had received in house treatment for five days. This witness had admitted there was a case filed against the deceased's family for causing grievous injuries to the Appellant in the High Court of Gampaha. For which the deceased party had pleaded guilty and even paid compensation to the Appellant.

PW6, Dr.Bisrul Haji had conducted the post mortem of the deceased held that the death has caused due to cardio-respiratory failure following shock and internal haemorrhage due to multiple injuries caused by bomb blast.

All injured persons had been examined by doctors and their respective medico-legal examination reports had been marked during the trial.

PW13, A.Welianga, the Government Analyst had examined the productions sent for analysis by the court. According to him the hand grenade was discovered to be of Singaporean made with S.F.G. type lever, and to be within the definition of an "offensive weapon" in terms of the Offensive Weapons Act.

PW12, IP/Wijeratne had conducted the investigations along with a team of police officers from the Krindiwela Police Station in this case.

As the appeal grounds 2,4,5,6 and 7 are interconnected, all will be considered together hereinafter.

In the second ground of appeal, the Appellant contends that the inconsistent and self-contradictory versions of PW1, creates a serious doubt as to whether he was an eye-witness to the bomb being hurled.

According to PW1, the Appellant was their neighbour who had created enough trouble to deceased's family due to his romantical advancement towards PW3 for which she had refused. Due to this number of complaints had been lodged against the Appellant. He had very clearly identified the Appellant who ran away after throwing the bomb. This witness was recalled for further cross examination for a second time before the trial judge who succeeded the trial judge who heard this case first.

This position had been corroborated by the defence witness who had been treated adverse by the defence. The Learned High Court Judge had considered this evidence in his judgment. Hence no doubt whatsoever had been created of the evidence given by PW1.

In the fourth ground of appeal the Appellant contended that the Evidence of PW2 namely Hemalatha is inconsistent, unreliable and does not favour the test of probability and the Trial Court failed to evaluate the said evidence in its correct judicial perspective.

In this case, including PW2, witnesses PW1, PW3, PW4 and the defence witnesses are eye witnesses. This had been endorsed by the Learned High Court Judge in his judgment. They had clearly witnessed the incident while they were watching T.V. Their evidence had not been contradicted on any material point. The Learned Trial Judge had considered the evidence given by PW2 in his judgment.

In the fifth ground of appeal, the Appellant contended that the evidence of PW4 namely Sampath is unsafe in view of the belated statement to the police.

This witness was seriously injured in the bomb blast. As such he was transferred to the Colombo General Hospital. After receiving treatment, he was transferred back to the Wathupitiwala Hospital. He had remained there for about 5 days. Even though the police officers had spoken to him, no statement was recorded. The relevant portion of evidence is re-produced below:

(Page 181 of the brief)

ප්‍ර : තමුන් ඉස්පිරිතාලේ දවස් කීයක් හිටියා ද?

උ : කොළඹ දවස් 05 ක් හිටියා. වතුපිටිවල මූලික රෝහලේ දවස් 05 ක් හිටියා.

ප්‍ර : ඉස්සෙල්ලා වතුපිටිවල සිට කොළඹට ගියා ?

උ : ඔව්.

ප්‍ර : වතුපිටිවල දවස් 05 ක් ඉන්න අවස්ථාවේ දී තමුන්ට සිහිය ඇවිත් තිබුනා ?

උ : ඔව්.

ප්‍ර : පොලිසිය තමුන්ගෙන් ප්‍රකාශයක් ගන්න ආවේ නැහැ ?

උ : නැහැ.

ප්‍ර : වතුපිටිවල රෝහල් පොලිසියේ නිලධාරියෙක්වත් ආවේ නැහැ තමුන්ගෙන් ප්‍රකාශයක් ගන්න ?

උ : ආවා. ඇවිත් කතා කරලා ගියා.

ප්‍ර : තමුන් කිවුවාද මෙවැනි බරපතල සිද්ධියක් සිදු වුණා කියා ?

උ : ඔව්.

ප්‍ර : මෙවැනි දෙයක් කලේ කවුද කියාත් කිවුවා ?

උ : ඔව්.

ප්‍ර : ඒත් තමුන්ගෙන් කිසිම ප්‍රකාශයක් ගත්තේ නැහැ.

උ : නැහැ.

As he was unable to walk properly for about three weeks after the incident, he was taken to Kirindiwela, Welihena for native treatment. As he was sustained injuries in his legs he could not go to police until native treatment was over. Hence, he had given his statement on 31/12/2000, nearly one and half months after the incident. The relevant portion is re-produced below:

(Pages 182-183 of the brief.)

ප්‍ර : තමුන්ට කියා සිටින්නේ විත්තිකාරයා සමඟ තිබෙන අමනාපය නිසා තමුන්ලා එකතු වෙලා ගිහින් දවස් ගණනකට පස්සේ මෙම සිද්ධිය සිදු වෙලා සති 03 කට පස්සේ කතන්දරයක් ගොතලා විත්තිකාරයාගේ නම සඳහන් කරලා පොලිසියට ප්‍රකාශයක් කලා කියා.

උ : මම එය ප්‍රතික්ෂේප කරනවා. සති 03 ක් මට ඇවිද ගන්න බැරුව හිටියේ.

ප්‍ර : මෙම සිද්ධිය වුනේ 00.11.12 වන දින කීවොත් හරිද?

උ : හරි.

ප්‍ර : තමුන් පොලිසියට ප්‍රකාශයක් කලේ 00.12.31 වන දින කීවොත් හරි ද?

උ : හරි.

ප්‍ර : ඒ කියන්නේ මෙම සිද්ධිය සිදු වුනේ 11.12 වන දින නම් මාස 01 කුත් සති 03 කට විතර පස්සේ කීවොත් හරි ?

උ : හරි.

ප්‍ර : තමුන් වතුපිටිවල ඉස්පිරිතාලේ හිටියේ දවස් 05 යි. කොළඹ ඉස්පිරිතාලේ හිටියේ දවස් 05 යි ?

උ : ඔව්.

ප්‍ර : දවස් 10 කට පස්සේ තමුන් තමාගේ නිවසට ආවා ?

උ : නැහැ. කිරිඳිවැල වැලිහේන වත්තේ 40 ඒ කියන නිවසට එක්ක ගෙන ගියා.

ප්‍ර : තමුන් කිරිඳිවැල පොලිස් වසමට ආවේ දවස් කීයකට පස්සේ ද?

උ : 10 කට පස්සේ.

ප්‍ර : සිද්ධිය වෙලා 11 මාසේ අවසන් වෙන්න ඉස්සෙල්ලා තමුන්ට හැකියාවක් තිබුනා කිරිඳිවැල පොලිසියට යන්න ?

උ : ස්වාමීනි මගේ කකුල් බැන්ඩේජ් වලින් ඔතලා තිබුනේ. මම සිංහල බෙහෙත් කලා. මම වේදනාවෙන් හිටියේ.

ප්‍ර : කිසිම පොලිස් නිලධාරියෙක් තමුන්ගේ නිවසට ආවේ නැහැ 31 වන දින ප්‍රකාශයක් කරන තෙක් ?

උ : නැහැ.

The witness had given plausible reasons as to why recording of his statement was delayed. Hence, it is incorrect to say that relying on his evidence is unsafe.

In the sixth ground of appeal the Appellant argued that inherent weakness in the evidence of PW3 namely Sylvia renders her evidence of unworthy of credence.

This witness had been subjected to lengthy cross examination on both occasions. According to her, the Appellant had started troubling them since she turned down his proposal. This troubling went into the extend that on several occasions witness's family went into hiding to escape from the Appellant. Although 15 complaints were lodged the police could not concur his atrocity. She came to attend deceased's funeral from the hospital after treatment. While she was in the hospital, several times the police had spoken to her about the happening of the incident. But she was unaware whether her statement had been recorded while she was at the hospital. She admitted that she gave her statement on 25/11/2000, after the alms giving of her deceased father. As she was mentally disturbed over to this incident, she had not gone to the police station to give her statement until she became normal. She had given very consistent evidence when she was subjected for cross examination twice. She had identified the Appellant at the time of throwing the bomb into her house. Therefore, her evidence cannot be considered of unworthy of credence.

In the seventh ground of appeal, the Appellant contended that no plausible reasons were adduced for the belatedness by PW3 and PW4 and the Trial Court failed to address its judicial mind to the belatedness.

The Learned High Court Judge had considered the evidence of PW3 and PW4 in its correct perspective and decided act on their evidence. Further, even though the Appellant contended that PW3 and PW4 had given their

statement to police late, but they had given plausible reasons as to why they delayed it. Hence, accepting and acting on their evidence has not caused any prejudice to the Appellant.

Due to aforementioned reasons, I conclude that the appeal grounds advanced under grounds 2,4,5,6 and 7 have no merit.

In the third ground of appeal the Appellant contended that the trial court failed to evaluate the evidence of the police witness Attanayake, which evidence is favourable to the accused and throws a doubt on the prosecution version implicating the accused-appellant.

The Learned Trial Judge in his judgment at page 537 had analysed the evidence of PW9, SI/Attanayake. As the Appellant foregone his right to cross examine the witness, the court has posted questions to the witness. By doing so, the court has conducted an impartial trial in this case. Hence, it is incorrect to argue that the Learned Trial Judge had not evaluated the evidence of PW9. Hence, this ground also sans any merit.

In the eighth ground of appeal the Appellant contended that the rejection of the dock statement is on an erroneous premise, thereby causing serious prejudice to the Accused-Appellant.

Treating unsworn statement of an accused from dock as evidence has been recognised and consistently followed in our courts despite the fact that statement not being subjected to cross examination. It has to be treated as other evidence which had been subjected to cross examination. Acceptance of dock statement as evidence has been recognised in several land marked cases in our jurisdiction.

In **Kathubdeen v. Republic of Sri Lanka** [1998] 3 SLR 10 the court held that;

> *"It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt".*

In this case, the Learned High Court Judge had considered the dock statement of the Appellant in his judgment at pages 541-543 of the brief. As the Learned High Court Judge had considered the dock statement of the Appellant in his judgment adequately, the judgment cannot be considered as an invalid judgment. Further, the Learned High Court Judge had given his reasons as to why he has rejected the dock statement and upheld the prosecution version. Therefore, it is incorrect to argue that the rejection has caused serious prejudice to the Appellant. Hence, this ground of appeal also devoid any merit.

Now I consider the 1st ground of appeal raised by the Appellant. In this ground the Appellant contends that the Trial Court flawed by perusing the police statement of PW1 at the time writing the judgment, in contravention of Section 110(4) of the CPC.

In **Punchimahaththaya v. The State 76 NLR 564** the court held that:

> *"Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statements of witnesses recorded by the police in the course of their investigation. (i.e., statements in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise".*

The Learned High Court Judge in his judgment at page 530 of the brief stated as follows:

බෝම්බ පිපිරීමේ සිද්ධිය සිදුවීමෙන් අනතුරුව පැ.සා. 1 කිරිඳිවැල පොලිසියට කටඋත්තරය දුන් අවස්ථාවේ දී පැහැදිලිව ම සඳහන් කොට ඇත්තේ, විත්තිකරු විසින් සාලයට විසිකරන ලද කළු පැහැති බෝම්බය අතින් අහුලාගත් තාත්තා එය රැගෙන එලියට යන විට එක්වරම පුපුරාගොස් තිබුණු බවයි. විත්තිය වෙනුවෙන් හරස් ප්‍රශ්ණ අසන අවස්ථාවේ දී පොලිස් කටඋත්තරයේ සඳහන් කරුණු විකෘති කොට දක්වමින් පැ. සා. 1 නොමඟ යැවීමට උත්සහයක් දරා ඇති බව මා නිරීක්ෂණය කරමි. එයට හේතුව වන්නේ, පියා විසින් බෝම්බය අහුලාගෙන එය විසිකිරීම සඳහා ඉදිරි දොරෙන් එලියට යනවාත් සමඟම එම බෝම්බය පුපුරාගිය බව පැ.සා. 1 පොලිසියට ලබාදුන් කටඋත්තරයේ සඳහන්ව තිබීමයි. නමුත්, හරස් ප්‍රශ්න අසන අවස්ථාවේ දී පියා බෝම්බය විසිකළ බවට පොලිසියට කටඋත්තර දුන්නා දැයි විත්තියේ උගත් නීතිඥ, මහතා ප්‍රශ්න කොට තිබුණත්, පැ.සා.1 සිදු වූ සිද්ධිය සම්බන්ධයෙන් ඉතා පැහැදිලි ලෙස විස්තර කොට ස්වකීය සාක්ෂිය ලබා දී තිබෙන බව නිගමනය කරමි. බෝම්බය පිපිරීමෙන් අනතුරුව විත්තිකරු එම ස්ථානයේ සිට නැමී ඇතට දුවගෙන ගිය බවද පැ.සා. 1 ගේ සාක්ෂියෙන් තහවුරු වී තිබේ. පැ. සා. 1 අසත්‍ය සාක්ෂි ප්‍රකාශ කරන අයෙකු යැයි විත්තියෙන් යෝජනා කොට ඇතත් සිදු වූ සියල්ල සත්‍ය ලෙසම අධිකරණය හමුවේ හෙළිදරව් කළ නිර්ව්‍යාජ සාක්ෂිකරුවෙකු සේ පැ. සා. 1 හැඳින්විය හැකිය.

The Learned High Court Judge only had referred the statement of PW1 to iron out the misleading cross examination regarding occurrence of the explosion. Although this is a misdirection but not suffice to overcome overwhelming evidence adduced by the prosecution which consisted of evidence of four eye witnesses. Hence, I conclude that this ground of appeal has no significant impact on the prosecution case.

In this case, the prosecution has led uncontradicted cogent evidence to prove the charges levelled against the Appellant. The Appellant's previous and subsequent conduct and the motive had further strengthened the prosecution case.

Considering all the circumstances, I am of the view that the appeal ought to be dismissed as there is no merit in the pleaded grounds of appeal. Hence, I affirm the conviction and sentence of the Appellant and proceed to dismiss his appeal.

Further, in this case the Learned High Court Judge had sentenced the Appellant on counts 6,7,8 and 9 as well. As the said counts are alternative counts to counts 2,3,4 and 5, I set aside the sentence imposed on counts 6,7,8 and 9.

The Registrar of this Court is directed to send a copy of this judgment 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