

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

*In the matter of an Appeal in terms of 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:**

Democratic Socialist Republic of Sri Lanka

CA/HCC/0231/2018

**COMPLAINANT**

**Vs.**

**High Court of Colombo**

1.Mohomad Rauf Mohomad Hilmi *alias* Gama

**Case No:** HC/6832/2013

2.Mohomad Sadeek Mohomad Amjan

**ACCUSED**

**AND NOW BETWEEN**

Mohomad Rauf Mohomad Hilmi *alias* Gama

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General,

Attorney General's Department,

Colombo 12.

**RESPONDENT**

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

**Counsel** : Sheron Serasinghe, Assigned Counsel for the  
Accused-Appellant  
: Dileepa Peiris, SDSG for the Respondent

**Argued on** : 25-11-2022

**Written Submissions** : 18-06-2019 (By the Accused-Appellant)  
: 26-07-2019 (By the Respondent)

**Decided on** : 31-01-2023

**Sampath B. Abayakoon, J.**

This is an appeal by the first accused appellant (hereinafter referred to as the appellant) on being aggrieved of his conviction and the sentence by the learned High Court Judge of Colombo.

The appellant along with another was indicted before the High Court of Colombo for committing three counts of murder on or about 2<sup>nd</sup> November 2006, punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the learned High Court Judge of Colombo by his judgement dated 20<sup>th</sup> July 2018 found the appellant guilty as charged. The 2<sup>nd</sup> accused indicted was acquitted of all the charges.

This is a case where the prosecution has relied on one eye witness (PW-01) to prove the case against the accused. Evidence shows that this was a result of a gang related violence and the apparent target of this incident had been the PW-01 namely, Mohomad Zahir Mohomad Saleem.

According to his evidence, he has been released from remand custody a day before this incident took place. He was in remand custody as a suspect in a case of murder.

On the day of the incident, while being in the company of the three deceased persons, several persons have come and fired at them using a firearm he referred to as a machine gun. He says that after firing at two of the deceased persons, the appellant fired at the person called Berty who was in front of him and the mentioned Berty fell on him. As a result, both of them fell onto the ground. As there was blood all over him, he has pretended as if he too got shot, which resulted in the assailants running away from the scene of crime believing that their target was achieved. He has given evidence saying that when he looked at the persons who were fleeing, he saw the appellant, the 2<sup>nd</sup> accused indicted and several others, getting into a three-wheeler and fleeing from the scene.

He has stated that after the incident, he went into hiding fearing for his life and made a statement to the police three months after the incident. He has explained further that while in hiding, he informed about the incident to the Officer-in-charge of the police station over the phone, informing that he will come and make a statement later due to his fear of being attacked. However, the mentioned OIC who has given evidence as PW-09 has denied that PW-01 gave him a call and informed of his difficulty to come to the police station. He has specifically stated that if such an information was provided, he would have definitely made notes of it and proceed with his investigations.

The position taken up by the appellant as well as the 2<sup>nd</sup> accused indicted had been that they were never involved in this crime. They have claimed that they were never arrested nor any statement was recorded from them, and they came to know that they are being charged for the crime, only after they received summons from the High Court, requiring them to appear before the Court. They have denied any involvement in this crime.

At the hearing of this appeal, the learned Counsel for the appellant formulated one ground of appeal on the basis that the learned High Court Judge has convicted the appellant without considering the reasonable doubts that have been created as to the involvement of the appellant to the crime.

In her submissions, she relied mainly on the belatedness of the statement made by the only alleged eyewitness to the incident contending that relying only on such a witness is highly unsafe, given the facts and the circumstances that led to the charges being laid against the appellant and the other person indicted.

The learned Senior Deputy Solicitor General (SDSG) having considered the facts and the relevant circumstances, brought to the notice of the Court that, in fact, the appellant and the other person indicted had never been arrested and statements recorded by the police. Having considered the procedure followed by the police to investigate the matter and conduct the non-summary proceedings on the basis that the appellant and the other person cannot be apprehended, it was his view that he is in no position to agree with the way the investigations that had been conducted in this matter.

Under the circumstances, he agreed that the appellant has not been afforded a fair trial in accordance with the due process of the law and therefore, relying on a witness who has made a belated statement was not safe to conclude that the charges have been proved beyond reasonable doubt against the appellant.

As pointed out by the learned Counsel for the appellant as well as the learned SDSG, this is a matter where the conviction has been solely based on the evidence of PW-01, who was the only witness who speaks about the involvement of the appellant and the other person to the crime. Therefore, it becomes necessary for this Court to consider whether the evidence of PW-01 was reliable and trustworthy to rely on his evidence alone for a conviction. In view of the appellant's contention that he was unaware that he was an accused or even a suspect in this matter, and he came to the High Court only upon summons is concerned, it is also necessary to find out the reasons for such a situation.

It was in evidence that when this incident took place, there were four persons and three of them were shot. When police came to the place of the incident, the 4<sup>th</sup> person who could have provided vital information as to the crime, was nowhere to be seen. The 4<sup>th</sup> person mentioned was the PW-01 who has given evidence at the trial.

Although this incident has happened on 02-11-2006, PW-01 has given a statement to police on 21-02-2007, around three months after the incident. Giving evidence in Court, he has explained the delay in making a statement claiming that he was fearful of his life and was in hiding. But he has also claimed that he informed about the incident to the OIC of the Wellampitiya police station. However, the then OIC of the Wellampitiya police station has denied that he was informed by PW-01 of his inability to make a due statement.

It appears from the Magistrate Court case record that initially, the police have arrested two other persons in relation to the crime and they had been kept in remand custody over a period of time until they were discharged after the conclusion of the non-summary proceedings, of the order dated 18-11-2008 by the learned Magistrate. It is not in evidence on what basis that they were initially arrested soon after the crime, if not for the information that may have been provided by an eyewitness.

The OIC of Wellampitiya police has filed the plaint and the charge sheet before the Magistrate in this matter, initially on 13-03-2008, and again on 14-07-2008, naming the appellant as the 3<sup>rd</sup> accused and the 2<sup>nd</sup> accused indicted, as the 4<sup>th</sup> accused to the murders committed.

Apparently, this has been a result of the statement made by PW-01 21-02-2007. It appears that until the plaint was filed, the Wellampitiya police have failed to file additional information before the learned Magistrate to indicate that PW-01 has given a statement and even to name the appellant and the other person indicted, as suspects for this murder.

The Magistrate Court case record bears testimony that at the non-summary inquiry stage, police have informed the learned Magistrate that the 3<sup>rd</sup> and the 4<sup>th</sup> accused mentioned in the charge sheet are evading arrest. Accordingly, it appears that a police officer from Wellampitiya police has given evidence before the learned Magistrate stating that the 3<sup>rd</sup> and the 4<sup>th</sup> accused, namely the appellant and the 2<sup>nd</sup> accused indicted, are not residing in their given addresses and cannot be arrested, and they are evading arrest. On that basis, an application has been made to commence non-summary proceedings in terms of section 148 (4) of the Code of Criminal Procedure Act.

However, although the police have given the residential addresses of the appellant and the other person to the Court and claimed that they are not living at the addresses given, when the High Court issued summons for them to the same addresses, they have promptly appeared before the High Court. This goes on to show that they have been living there and had not absconded but due to the failures of the police to conduct proper investigations, they have not been arrested or statements recorded.

As agreed by the SDSG, this is not the way the proceedings should be conducted in a serious crime of this nature. As an accused person too is equally entitled to the protection of the law, I find that the appellant has been denied of a fair trial due to the irregularities in the investigations in this case.

The delay in making a statement to the police becomes relevant in the above context. Although PW-01 has claimed that he informed the OIC his inability to make a prompt statement, the OIC has denied such an information was provided. If such an information was provided, the police would have provided that information to the learned Magistrate and name the appellant and the other person as suspects from the inception of the proceedings in this case.

PW-01 is a person who is well conversant with the way the legal system functions. He had been a suspect in a previous murder case, where he has been released, according to his own evidence, upon him producing the relevant

documents to show that he was elsewhere at the time the alleged murder took place. To make such a submission to the Court, he must have had necessary legal advice as well. Therefore, for such a person, even though if he was in hiding as claimed, there cannot be any impediment to provide the necessary information as to the suspects of this murder to the police. Such a person making a statement three months after the incident in my view, is a statement that cannot be relied upon on that alone. I am of the view that relying on the evidence based on such a belated statement in a serious crime of this nature is highly unsafe, without sufficient corroboration.

In the case of **Alim Vs. Wijesinghe, S.I. Police Batticaloa, 38 CLW 95**, it was held that; where the same facts are capable of inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred.

For the reasons as set out above, I find merit in the appeal and find that it is not safe to let the conviction and the sentence of the appellant stand.

Accordingly, I set aside the conviction and the sentence and acquit the appellant from the charges preferred against him.

The appeal is allowed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal