**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 Case No.**

**CA/HCC/0300-302/2018**

**High Court of Chilaw**

**Case No. HC/88/2013**

1. Susehewage Piyal Indrajith
2. Hitihamy Appuhamilage Prasad Priyanga alias Kolaya
3. Athauda Arachchilage Sujith Priyantha alias Anuradha

**APPELLANTS**

**vs.**

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

**RESPONDENT**

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

**COUNSEL** : **Kalinga Indatissa, P.C. with Rashmini Indatissa,Razana Salih,K.Banagoda and Nushani Ibrahim for the 1st Appellant.**
**Indica Mallawaratchy for the 2nd Appellant.**
**Darhsana Kuruppu with Dineru Bandara for the 3rd Appellant.**
**Riyaz Bary, DSG for the Respondent.**

**ARGUED ON** : **25/07/2022 and 11/11/2022**

**DECIDED ON** : **16/01/2023**

**JUDGMENT**

**P. Kumararatnam, J.**

The Appellants were indicted for committing the murder of Rexy Manoj de Seram on the 11th of March 2012, along with a person unknown to the prosecution.

After a non-jury trial, the Learned High Court Judge has found the Appellants guilty in terms of Section 296 of Penal Code and sentenced them to death on 27/09/2018.

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 have given consent to argue this matter in their absence due to the Covid 19 pandemic. Also, at the time of argument the Appellants were connected via Zoom from prison.

The Learned President's Counsel who appeared for the 1st Appellant had filed 07 grounds of appeal. The Counsels appeared for the 2nd and the 3rd Appellants filed 04 grounds of appeal each.

At the very outset on the first date of the argument, Learned President's Counsel appearing on behalf of the 1st Appellant highlighting certain portions of the judgment, had submitted to this Court that this is an appropriate case to be sent for a re-trial due to some misdirection. This suggestion was endorsed by the Counsels for the 2nd and the 3rd Appellants as well. The Learned DSG agreed to consider whether there are grounds for sending this case for a re-trial.

As there was no agreement reached between the Counsels for the Appellants and the Learned DSG regarding sending this case for a re-trial, the argument continued and concluded on 11/11/2022.

The prosecution had called 11 witnesses and marked productions P1-12 and closed their case. The Learned High Court Judge had called for the defence and all the Appellants made dock statements and closed their case.

**Background of the Case**

In this case PW2 and PW3 have given evidence as eye witnesses to the incident.

According to PW2, Tharanga Fernando, he, the deceased, PW3 and three others started to consume liquor from 12.00 noon on the date of the incident. After consuming liquor at one Roshan's house, all had gone to Pradeepa Grounds to watch an Elle match at about 6.00 p.m. The group had consumed liquor again at the side of the ground. At about 7.00 p.m. The 1st and the 2nd Appellant had come there in a motor bike and the 2nd Appellant had asked from the group whether they were police officers. Having offended by the said utterance of the 2nd Appellant, PW3 had thrown a bottle towards the 2nd Appellant which had struck on the nose of the 2nd Appellant. The deceased too had assaulted the 2nd Appellant

thereafter. After this incident the 1st and the 2nd Appellant had left the place. The deceased had told the 1st Appellant that he has no problem with him. But he had said that he has a problem with the 2nd Appellant.

After this incident, the group had continued drinking for about 15 minutes and the deceased had gone to a place called 4th section talking over the phone. PW2 had gone to 5th section to answer a call of nature. At that time, he had seen both the 1st and the 2nd Appellants cutting the deceased with swords. According to him, he had witnessed this incident with the aid of the light emanating from Niluraj's house and also from a street light. He had seen only the 1st and the 2nd Appellants cutting the deceased.

In the cross examination this witness had admitted that the group which consisted of 6 persons had consumed about six bottles of alcohol up to the time of the incident.

PW3, Indika had corroborated the evidence of PW2 but additionally he had said that he saw 3rd Appellant assaulting the deceased with an iron pipe with another person unknown to him.

Although full argument had been concluded, I consider it appropriate to consider whether this a fit and proper case to send for a re-trial. The appeal grounds raised by all three Counsels will be considered only if necessary.

The Learned High Court Judge in her judgment at page 441(26th paragraph) had stated even though the Counsels appeared for them had raised the state of intoxication level of the witnesses and the deceased, the defence had failed to prove the same. The relevant portion of the judgment is re-produced below:

(Page 441 of the brief.)

චූදිතයින් වෙනුවෙන් නීතිඥ මහතා මෙම සාක්ෂිකරු වෙතින් තමන් අරක්කු බීලා සිටියාද විමසා කොච්චර ප්‍රමාණයක් ද යන්න ප්‍රශ්න කර ඇති අතර, කට්ටියම එකතු වෙලා හයදෙනෙක් බෝතල් දෙකක් රෙක්ෂිල ගාවත් බෝතල් දෙකක් තිබුණා. ඒකත් පහක් හයක් බිව්වා යනුවෙන් පිළිතුරු

සපයා ඇත. මෙලෙස ප්‍රශ්ණ කිරීම් සිදු කර ඇති අතර, මෙම සාක්ෂිකරු නීතිඥ මහතුන් දේශනයේදී සඳහන් කළ පරිදි බේබද්දෝ ලෙස සනාථ කිරීමක් හෝ සාක්ෂිකරු අධිකව මත්පැන් බී සිද්ධිය පිළිබඳව ඔවුන්ගේ ඉන්ද්‍රියන්ට ගෝචර නොවන මට්ටමක සිටි බැව් සනාථ කිරීමක් කර නොමැත. මන්ද සාක්ෂිකරු පැහැදිලි ලෙසම ඔහු සිද්ධිය දුටු අයුරුත් ඔහුගෙන් ප්‍රශ්ණ කිරීම් හමුවේ නොදුටු දේ ගැන නොදුටු අයුරිනුත් සාක්ෂි ඉදිරිපත් කර ඇති බැවිනි. ඒ අනුව සිද්ධිය මතක් කර ඔහු සාක්ෂි ඉදිරිපත් කර ඇත.

In **King v. Albert Appuhamy 41 NLR 505** the court held that:

> *" ….Failure on the part of prisoner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting the jury such defence if it arises on the evidence".*

In this case the purported eye witnesses and the deceased had consumed six bottles of alcohol. Their group consisted of six persons. The average consumption per person is one bottle. This is very high consumption and this evidence should have been considered by the Learned High Court. Not considering the state of intoxication of the witnesses and the deceased is a clear misdirection. Further, the initial fight had started by PW2 and the deceased. Failure to consider this evidence by the Learned High Court Judge had caused great prejudice and denial a fair trial to the Appellants.

The Learned High Court Judge in her judgment admitted that on two occasions the defence had highlighted contradictory evidence given by PW2. She had simply ignored the said contradictory evidence simply because of the failure to mark those either as contradictions or omissions by the defence. The Learned President's Counsel strenuously argued that this ignorance of the Learned High Court Judge had caused a great prejudice to his client as well as the 2nd and the 3rd Appellants.

Jayant Patel, J. in the case of **Jusabbhai Ayubbhai v. State of Gujarat CR.MA/623/2012** stated that:

> *".....It is by now recognized principles that justice to one party should not result into injustice to the other side and it will be for the Court to balance the right of both the sides and to uphold the law."*

In this case the Learned High Court Judge had failed to evaluate the vital points of the evidence of PW2 which certainly affect the fair trial entitlement of the Appellants.

The Learned President's Counsel further argued that the Learned High Court Judge had perused the PW2's police statement and evidence given in the non-summary inquiry when she was writing the judgment.

The Learned High Court Judge in her judgment at pages 438-439(22nd paragraph) had compared the evidence of PW2 with his statement to police and evidence given in the non-summary inquiry. The relevant portions are re-produced below:

(Pages 438-439 of the brief.)

22. නමුදු ඔහු මහේස්ත්‍රාත්තුමා වෙත කළායැයි සඳහන් ප්‍රකාශයේ සැකකරුවන් දුටුවේ නැත යනුවෙන් ප්‍රකාශ කලද, ඔහු පොලිසියට කර ඇති ප්‍රකාශයේ මෙම 01, 02 චූදිතයින් රෙක්ෂි නැමැත්තාට කොටනවා දුටු බැව් දන්වා ඇති බවට පැහැදිලිවම සාක්ෂි ඉදිරිපත් කර ඇත. ඒ අනුව මෙම සාක්ෂිකරු සාක්ෂි ඉදිරිපත් කිරීමේදී එනම් මහේස්ත්‍රාත් අධිකරණයේ ලඝු නොවන පරීක්ෂණයේ මෙන්ම මෙම අධිකරණයේදී ද පොලිස් ප්‍රකාශය පරිදි සිද්ධිය දුටු බවට සාක්ෂි දී ඇත.

Further, the Learned High Court Judge in her judgment at page 474(78th paragraph) had referred the police statement of the 1st Appellant after the dock statements of all Appellants. The relevant portion is re-produced below:

(Page 474 of the brief.)

78. තවද මෙම චූදිතයින් ඉදිරිපත් කළ ප්‍රකාශ අනුව ඔවුන් සත්‍ය හෙළිකරන්නේද නැතහොත් ඔවුන්ගේ අවංකභාවය සම්බන්ධයෙන් ගැටළුම තත්ත්වයක් මතු වී ඇත. මන්ද 01 වන චූදිත ස්වකීය ප්‍රකාශය ඉදිරිපත් කිරීමේ දී ප්‍රථමයෙන් මැරිච්ච කෙනා මම ටිකක් අඳුරනවා යනුවෙන් සඳහන් කරමින් ප්‍රකාශය ආරම්භ කර ඇති අතර, අනතුරුව රෙක්ෂි යනුවෙන් ආමන්ත්‍රණය කරමින් වැඩිදුරටත් මෙම ප්‍රකාශය කර ඇත.

The above highlighted portions of the judgements are clear misdirection and bad in law.

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

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

It is trite law that a judge has no power to utilize the statements made by witnesses to the police, inquest evidence and non-summary evidence when they were not properly admitted in evidence. In this case as the Learned High Court Judge had adopted an incorrect approach by referring and comparing police statement and non-summary evidence of PW2 when she evaluated the evidence given by PW2 in the High Court trial. This is a fundamental error on the part of the Learned High Court Judge which certainly prejudicial to the substantial rights of the Appellant.

Finally, the Learned President's Counsel contended that the Learned High Court Judge had reversed the burden of proof on the defence.

In a criminal trial, it is incumbent on the prosecution to prove the case beyond reasonable doubt. There is no burden on the Appellant to prove his innocence. This is the "Golden Thread" as discussed in **Woolmington v. DPP** [1935] A.C.462. In this case Viscount Sankey J held that:

*"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt..... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal.*

The Learned Trial Judge in her judgment at page 460(57th paragraph) and at page 463(62nd paragraph) had stated as follows:

(Page 460 of the brief.)

57. ඒ අනුව දීර්ඝ වශයෙන් මෙවැනි ප්‍රශ්ණ කිරීම් චූදිතයින් වෙනුවෙන් සිදු කළද, ඒවා එකී කටයුතු නිසි පරිදි ඉටු නොකිරීමක් බවට සනාථ කර නැත. එසේම මෙම නඩුවේ මෙම ක්‍රියාව චූදිතයින් විසින් සිදු නොකළ බවක් සනාථ කිරීමක් ද නොවනු ඇත.

(Page 463 of the brief.)

62. වැඩිදුරටත් හරස් ප්‍රශ්න විමසීමේ දී නාත්තන්ඩියලාගේ පීවන් තරංග ප්‍රනාන්දු සහ සිසිර දීප්ත නැමැත්තන් අත්අඩංගුවට ගැනීම් කලේද යන්න විමසා ඇති අතර, එවැනි අත්අඩංගුවට ගැනීමක් නොකළ බවට විමර්ශන නිළධාරී මහතා සාක්ෂි ඉදිරිපත් කර ඇති අතර, ඔවුන් සැකකරුවන් ලෙස මෙම නඩුවට ඉදිරිපත් කර ඇත්ද යන්න චිත්තිය විසින් චූදිතයින් වෙනුවෙන් සනාථ කර නොමැත.

The above quoted portions of the judgment are clear indication that the Learned High Court Judge had reversed the burden of proof on the Appellants, which is unknown to the criminal prosecution.

The above considered submissions of Learned President's Counsel who appeared the 1st Appellant clearly endorses the fact that the Appellants had not afforded a fair trial, which is a fundamental responsibility bestowed upon the judiciary. When this responsibility is not followed properly, the outcome will vitiate the whole proceedings, including the judgments and therefore demand a re-trial.

The criteria and the principles when cases are sent back for re-trial has been discussed at length in the following authority.

In **Nasib Singh v.State of Punjab (2021 SCC online SC 924) Criminal Appeal No.1051-1054 of 2021** decided on 8th October 2021the court held that:

(i) The Appellate Court may direct a re-trial only in 'exceptional' circumstances to avert a miscarriage of justice;

(ii) Mere lapses in the investigation are not sufficient to warrant a direction for re-trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a re-trial be directed;

(iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;

(iv) It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a re-trial. It is incumbent on the Appellate Court directing a re-trial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

(v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

(vi) The following are some instances, not intended to be exhaustive, of when the Court could order a re-trial on the ground of miscarriage of justice:

a) The trial court has proceeded with the trial in the absence of jurisdiction;

b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade.

In this case the Judgment contains lots of irregularity. The said irregularities are so grave as it prejudiced the substantial rights of the Appellants which cannot be overlooked. Further, the Learned Trial Judge had totally ignored the concept of fair trial. Hence, I set aside the conviction and the sentence imposed on the Appellant on 27/09/2018 by the Learned High Court Judge of Chilaw.

As right to a fair trial is at demand in this case, I consider ordering a re-trial in this case is justifiable. Hence, I order a re-trial directing the Learned High Court Judge to conclude the re-trial expeditiously.

The appeal is, therefore allowed.

The Registrar of this court is directed to send a copy of this judgment to High Court of Chilaw along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**Sampath B. Abayakoon, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**