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

In the matter of an appeal in terms of Section 331 of the code of Criminal Procedure Act No. 15 of 1979.

The Attorney General

Complainant

Imiyage Sujeer Rangana Kumar Perera alias Rangana,
No: 659,Waragoda road,
Sinharamulla,Kelaniya.

Accused Appellant

CA No. 149/2015

HC Gampaha No. 182/13

Vs.

Imiyage Sujeer Rangana Kumar Perera alias Rangana,
No: 659,Waragoda road,
Sinharamulla,Kelaniya.

Accused-Appellant

The Attorney General

Complainant-Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Shyamalie Athauda for the Accused-Appellant
Janaka Bandara, DSG for the State

Argued On : 22.02.2023

Decided On : 09.05.2023

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B. Sasi Mahendran, J.

The Accused-Accused (hereinafter referred to as "the Accused") was found guilty in the High Court of Gampaha of murder and punished with death under Section 296 of the Penal Code. This an appeal preferred by the said Accused impugning the conviction.

The Accused, along with the 2nd Accused, was indicted before the High Court of Gampaha on two counts; the second, for which he was found guilty, was for committing the murder of one Hasitha Kelum Madawala, which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the Penal Code.

Both, the Accused and the 2nd Accused opted for trial by a judge. The Prosecution led the evidence of twenty-one witnesses and drew its case to a close. The Accused gave a dock statement. Two witnesses gave evidence for the Defence.

At the conclusion of the trial the learned Trial Judge convicted the Accused and sentenced him to death for count two (vide judgment and sentence dated 14th August 2015, respectively on pages 1006 and 1079 of the Brief). The 2nd Accused was convicted for the first count (that the Accused and himself conspired to commit the murder of the said Hasitha Kelum Madawala, liable to be punished under Sections 113B, 102, 32 read with Section 296 of the Penal Code) and punished with five years rigorous imprisonment and a fine of Rs. 25,000/- with a default term of one-year simple imprisonment. Being aggrieved by the aforesaid conviction and sentence the Accused preferred the instant appeal. In passing it must be observed that the sentence passed upon the 2nd Accused is erroneous in law, and it is evidently so on the face of the record. However, since neither the Attorney General nor the 2nd Accused appealed that conviction and sentence it would be unfair to the 2nd Accused for us to delve into this matter.

The factual background, in brief, as deduced from the evidence is as follows. On or around the 5th of January 2013, the 1st Accused met at a pub/restaurant with Anura Abeygunawardena (PW7) and one Nalin Kumara. Having received a call, purporting to be from the son of the Accused, the Accused had agitatedly sought to leave the pub/restaurant at around 7 pm. Meanwhile, at around 7 30pm two persons donning full-face helmets arrived on a black motorcycle and fired shots within close range at the deceased victim, whilst the deceased victim was leaning against his car along a road in the vicinity of his residence, which was situated around 15 minutes away from the pub/restaurant at which the Accused was that evening. There were three wounds on the body of the deceased victim that was observed by the Judicial Medical Officer (PW22) to be caused by gunshots.

At first glance, the aforesaid narration of events seems to run parallelly and there does not appear to be any connection between the Accused who was at a pub drinking and then left the same, and the deceased who was shot by two persons on a motorbike. However, as with most cases of circumstantial evidence in which the pieces of the puzzle must be fitted together, in the present matter, as morefully discussed below, the confessions made to certain witnesses, the subsequent conduct of the Accused, and finally the absence of any explanation to save one's self from the incriminating facts makes it apparent that the case against the Accused has been proved sufficient enough to satisfy the standard of proof in a criminal trial.

The learned Counsel for the Accused agitated before this Court that the learned Trial Judge had erred in law, especially in her failure to appreciate the facts of the case correctly; including the wrongful reliance on the evidence of "accomplices", which in the absence of corroboration of material particulars becomes dangerous to rely on.

Evidence of an accomplice

It is the contention of the Accused that the evidence of the PW1 and PW2 must be treated as evidence of Accomplices and therefore independently corroborated.

The learned Trial Judge has sought to treat the evidence of PW1 and PW2, who were arrested for this murder, as evidence of accomplices. They turned State witnesses following conditional pardons granted by the State. The learned Trial Judge observed that

she had no difficulty in accepting their evidence; that the statements made by the Accused to PW2 over the phone would constitute a "confession" in terms of the law.

An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice (vide Section 133 of the Evidence Ordinance). Section 114(b) provides the Court may presume that an accomplice is unworthy of credit unless the accomplice is corroborated in material particulars.

The Indian Supreme Court in Haroom Haji Abdulla v. State of Maharashtra [1968] AIR 832 analysing Sections 133 and 114(b) of the Indian Evidence Ordinance which contains provisions similar to that of Sri Lanka lucidly explained how these two statutory provisions maybe reconciled:

"The law as to accomplice evidence is settled. The Evidence Act in s. 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in illustration (b) to s. 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. **This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true.** It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law." [emphasis added]

Recently, the Indian Supreme Court in Somasundaram v. the State (Criminal Appeal No. 403 of 2010 decided on 03.06.2020), referring to this judgment, provided a useful summary of the Indian stance on the evidence of an accomplice (at para 65):

"The combined result of Sections 133 read with illustration (b) to Section 114 of Evidence Act is that the Courts have evolved, as a rule of prudence, the requirement that it would be unsafe to convict an accused solely based on uncorroborated testimony of an accomplice. The corroboration must be in relation to the material particulars of the testimony of an accomplice. It is clear that an accomplice would be familiar with the general outline of the crime as he would be one who has participated in the same and therefore, indeed, be familiar with the matter in general terms. The connecting link between a particular accused and the crime, is where corroboration of the testimony of an accomplice would assume crucial significance. The evidence of an accomplice must point to the involvement of a particular accused. It would, no doubt, be sufficient, if his testimony in conjunction with other relevant evidence unmistakably makes out the case for convicting an accused."

Our law on evaluating the evidence of an accomplice, stemming from a similar cautionary approach, is similar to the Indian line of thinking, as illustrated in the following line of authorities. This cautionary approach can be traced back to the wisdom of the English judgment of Rex v. Baskerville [1916] 2 K.B. 658.

In Ilangatilaka v. Republic of Sri Lanka [1984] 2 SLR 38 at 42 his Lordship Colin-Thome J. held:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: See R v. Atwood and Robbins. But it has long been a rule of practice at common law for a judge to warn a jury that it is extremely dangerous to convict a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence ; the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence : Reg. v. Stubbs (2), in re Meunier (3). **This rule of practice has become virtually equivalent to a rule of law.**

The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal who has cast his erstwhile associates and friends to the wolves in order to save his own skin. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it." [emphasis added]

Their Lordships of the Supreme Court in Sudu Aiya v. the Attorney General [2005] 1 SLR 358 also citing the well-known judgment of Rex v. Baskerville (supra) observed (at p. 371):

"The important consideration when looking for corroboration is that, the complete story need not be corroborated, but what the law requires is corroboration in some material particulars so that a

court could act on that evidence as being reliable. In other words **what is necessary is some additional evidence direct or circumstantial, rendering it probable that the accomplice's story is true and reasonably safe to act upon, and such evidence has the effect of connecting or tending to connect the particular accused with the crime**." [emphasis added]

However, for this principle to be applicable it is imperative that the witness must first be identified as an accomplice. Who an accomplice is has been the subject of discussion in the following line of cases:

Their Lordships of the Supreme Court in De Saram v. Republic of Sri Lanka [2002] 1 SLR 288 cited with approval the definition of an accomplice set out in Wharton on Criminal Evidence. An accomplice is thus:

"a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was an admitted participant in a related but distinct offence. **To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission**." [emphasis added]

In W.M.M. Kumarihami v. Galagamage Indrawansa Kumarasir & Others SC TAB Appeal No. 02/2012 SC Minutes 02.04.2014 her Ladyship Shiranee Thilakawardane J. cited the definition given in Chetumal Rekumal v. Emperor [1934] AIR 183,

"An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is admittedly, not every participation in a crime which makes a party an accomplice in it so as to require his testimony to be confirmed."

Her Ladyship further observed:

"Thus, the idea that all acts pertaining to a crime can make a party an accomplice is ill-founded."

A person merely assisting in the disposal of the body of the deceased in respect of whom a charge of murder is made cannot be considered an accomplice within the meaning of Section 114(b) of the Evidence Ordinance. Buttressing this proposition are the cases of King v. Peiris Appuhamy 43 NLR 412 and Queen v. Ariyawathie 59 NLR 241.

An observation of his Lordship Soza J. in Attorney General v. D. Seneviratne [1982] 1 SLR 302 at p. 328 is pertinent to the facts of the instant case:

"Glanville Williams in his Textbook of Criminal Law (1978) p. 285 defines accomplices as parties in different degree of complicity to a crime and adds "Accomplices consist of the perpetrator and the accessories". This indeed is the primary and natural meaning of the term. The perpetrator is the person who in law commits the offence. A person who incites or helps the commission of an offence by the perpetrator is an accessory. But help given after the commission of the crime does not make the helper an accomplice.

While a co-perpetrator and an accessory before the fact clearly, are accomplices, an accessory after the fact is not necessarily always so. The principal danger in the evidence of an accomplice is that he; may be tempted to purchase immunity by currying favour with; the prosecution and implicating another while reducing his own role in the offence. But no such danger exists in the case of. an accessory, after the fact. Indeed the interest of an accessory after the fact should be to establish the innocence of the principal offender not his guilt."

In the facts of the present case, the role played by PW1 and PW2 cannot be treated as that of an accomplice for the reason that, their role was, if at all, to assist the Accused to disappear following the murder. There is no evidence to establish that they had knowledge of the Accused's plans to commit this heinous crime. As such, we are of the view that they are not "accomplices" within the meaning of the law. Consequently, there does not appear to be a need for corroboration in material particulars as required by the wisdom of Section 114(b) of the Evidence Ordinance or that of the common law.

Confession

Even if it is assumed, although it cannot be so, for the sake of argument, that PW2 is an accomplice, his evidence is sufficiently corroborated by other witnesses. For instance, let us examine the matter of the confession.

Prior to examining the same, it is pertinent to set out the test to determine whether a statement is a confession.

Section 17(2) of the Evidence Ordinance provides that,

A confession is an admission made at any time by a person accused of an offence **stating or suggesting the inference** that he committed that offence.

E.R.S.R. Coomaraswamy in his tome, 'Law of Evidence' (Volume 1 p. 378) explains that this definition suggests four elements. Those are:

" a)must be an admission, that is, a statement, oral or documentary, which suggests an inference as to any fact in issue or relevant fact within the meaning of Section 17(1) of the ordinance:

b) It may be made at any time;

c) It must be made by a person accused of an offence;

d)It must state or suggest the inference that he committed the offence.

This definition tallies substantially with Stephen's definition of a "confession" as an admission made at any time by a person charged with a crime stating or suggesting the inference, that he committed that crime."

In the notable judgment of Anandagoda v. the Queen 64 NLR 73 at 79 the Privy Council laid down the test to determine whether a statement is a confession. The relevant excerpt of the judgment reads:

"**The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts…**

The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt? A useful definition of a " confession " is to be found in Wigmore's Law of Evidence. Section 821 page 930 quoting from a judgment of Wolverton J. in State v Porter 32 Or. 135, 49 Pac. 964 : " We take it that the admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so 'with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, " I am guilty of this " ; and this imports the admission of all the acts constituting guilt '. It is necessary, however, that the accused should speak with, an animus confitendi, or an intention to speak the truth touching the specific charge of guilt; and when he, with such intention, narrates facts -constituting a crime, the guilt becomes matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude

that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the admission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions." [emphasis added]

In the present case, in the evidence of PW2, he notes that on the night of the murder, the Accused had telephoned him and asked whether he can visit PW2, who was at home. At home, the Accused had told PW2 "**මම මඩයට ගැහුවා**" (page 340 of the Brief), which initially led PW2 to believe that the Accused assaulted or attacked the deceased. However, subsequently, it became apparent that the statement meant something more than fisticuffs. This is apparent in the evidence of PW2 (pages 345-348 Brief– proceedings dated 27.11.2014):

"ප්‍ර :. හොඳට මතක් කර කියන්න මොකද්ද රංගන තමාට ඇවිත් කිව්වේ?

උ : ඉස්සරවෙලා කිව්ව එක තමයි. මඩයට ගහල දාලා ආවා කියලා කිව්වේ.

ප්‍ර: තමා ඇසුවාද වැඩිහිටියෙක් වශයෙන්, අයියා කෙනෙක් වශයෙන් තමා ඇහුවාද, මොකද්ද මේ ගහලා දාලා කියන්නේ කියා තමා ඇහුවේ නැද්ද?

උ : මම අහන්න ගියේ නැහැ.

ප්‍ර: ඇයි අහන්න ගියේ නැත්තේ? ගහලා දාලා ආවා කියන එකෙන් මොකද්ද කියන්නේ කියා තමා ඇහුවේ නැද්ද?

උ: මම ඒක එච්චර තේරුම් ගත්තේ නැහැ. පස්සේ මැතිනියනි යනකොට තමයි, මම එයාව බස්සවන්න යන කොට තමයි කෝල්ස් ආවෙ.

<u>අධිරණයෙන්</u>

ප්‍ර : මොනවා කියාද කෝල්ස් ආවේ?

උ: මඩවල මැරිලා කියලා.

ප්‍ර: කෝල්ස් වලින්ද දැන ගත්තේ?

උ : ඔව්. ඉස්සරවෙලාම රංගන කිව්වේ අර විදියට තමයි.

ප්‍ර: ඒ කියන්නේ මැරුවා කියා?

උ : නැහැ. ගහලා දාලා ආවා කියා.

ප්‍ර : එතකොට මැරිලා කියා කෝල්ස් ආවාම තමා තේරුම් ගත්තා ගහලා කියන්නේ මරලා කියා?

උ : ඔව්.

ප්‍ර : එතකොට තමා වාහනයේ යනකොට දන ගත්තා?

උ : ඔව්.

ප්‍ර : තමා වැඩිහිටියෙක් වශයෙන් තමා ඇහුවද ඇයි ගැහුවේ කියා?

උ : මම ඇහුවා මෙහෙම ප්‍රශ්නයක් කර ගත්තේ ඇයි කියා?

ප්‍ර : එතකොට මොකද්ද කිව්වේ?

උ : අපේ අම්මට මඩවල ගහපු නිසයි ගැහුවේ කියා කිව්වා.

ප්‍ර : ඒ අවස්තාව වන විට සාක්ෂිකරු තමා දැන ගෙන සිටියාද මේ රංගනගේ අම්මයි, මඩවලයි අතරේ යම් කිසි මත භේදයක් තිබුනා කියා?

උ : එහෙමයි.

ප්‍ර : මොකද්ද ඒ ආරවුල?

උ : පොල්ගසක කෙස් එකකට මොකක් හරි ආරවුලක් වෙලා තිබුනා.

ප්‍ර : කොහේ තිබුන පොල් ගසක්ද?

උ : රංගනලාගේ ගෙදරද?

ප්‍ර : මොකද්ද මේ ආරවුල කියා තමා දැන ගත්තේ මොකද්ද, කොහෙදිද එම ආරවුල සිද්ධ වුනේ, කොහෙදිද රංගනලාගේ අම්මාට ගැහුවේ කියා තමා දැන ගෙන සිටියාද ?

උ : ඒවා දන්නේ නැහැ.

ප්‍ර : නමුත් තමා දැන ගෙන සිටියා මිය ගිය මඩවල මන්ත්‍රීවරයායි රංගනගේ අම්මයි අතර යම් කිසි මත භේදයක් තිබුනා කියා?

උ : එහෙමයි.”

The evidence of PW2 is further buttressed by the evidence of PW7. In the evidence of PW7, it is revealed that the same words amounting to a confession were uttered to PW7, who is an independent witness, with whom the Accused had been at a pub prior to the incident. The Accused had telephoned PW7 after the incident took place. The evidence of PW7 notes that the Accused had told him; “මඩයට ගහලා මඩය මැරිලා” (page 301,302 – proceedings dated 21.11.2014). Although admittedly, PW7 was drunk at the time when

the Accused had called him, his evidence remained unshaken in cross-examination. There was no denial that the Accused had called. Further, there were no suggestions to the effect that it was not the Accused who spoke to him, or that he was lying.

We are of the view that the statements uttered by the Accused to two different witnesses are of a confessionary nature.

Justice V.R. Krishna Iyer in Nandhini Satpathy v. P.L.Dani (1978) 2SCC 424 notably remarked "Confession is a potency to make crime conclusive". A statement recently referred to in the judgment of his Lordship Priyantha Fernando J. in Artygala Vithanage Indika Ruwan Kumara v. the Attorney General CA- HCC188/2016 CA Minutes 23.09.2019.

We are mindful of a school of thought that a sense of caution must be exercised in dealing with extra-judicial confessions. However, as mentioned above, the statements of a confessionary nature, in the instant case, are only one piece of a puzzle, which must be read in conjunction with all the facts pointing in the direction of the Accused. It is not the sole basis for conviction. Further, the defence has not been able to impeach the veracity of the statements made by the Accused to the two witnesses. It must also be noted that the statements appear to be voluntary and of his free will.

Subsequent Conduct

Section 8 of the Evidence Ordinance makes subsequent conduct of a party, an offence against whom is the subject of the proceeding, relevant if it influences or is influenced by any fact in issue or relevant fact. As the learned author Coomaraswamy notes (at p. 233) there must be a "departure with intent to defeat or delay the arrest. It is to go out of the jurisdiction of the court or to conceal oneself to avoid legal process."

In the instant case, it cannot be said that the conduct of the Accused is mere absconding, similar to that of the tendency of an innocent person to evade arrest when suspected of grave crimes; "an instinct of self-preservation in an average human being" (Woodroffe and Ameer Ali in 'Law of Evidence' p. 815). The learned authors citing the cases of Mureed v State of Rajasthan (1980) 5 Raj Cr C 387, p. 391 and Rameshwar v. State of Rajasthan (1980) Raj Cr C 127, observe (at p. 817):

"It is no doubt true that per se absconding is not enough to prove the guilt of the person who has absconded. But it comes in as an important piece of corroborative evidence, if there is other evidence to prove the connection of the accused with the crime. In this case, the accused ran away to Pakistan after the commission of the murder and came back from there after 40 days. The accused gave no plausible explanation for his absence. The motive on the part of the accused to commit the murder of the deceased was established. The absconding of the accused for such a long period was taken into consideration by the court and the accused was convicted on charge of murder under s302, IPC 1860."

The fact that he was immediately taken to a relative's place in Negombo, foreign currency provided, and a ticket purchased to leave for Singapore, and arrested at the airport (at around 1.30 am on the 8th of January 2013), all culminates in the inescapable conclusion that he absconded with an intent to defeat or delay the arrest. The learned High Court Judge has correctly analysed that evidence.

Defendant has not sought to controvert the incriminating evidence

In Phillipu Mandige Nalaka Chrishantha Kumara Thisera v. Attorney General C.A. Appeal 87/2005 C.A. Minutes 17.05.07 it was stated that when the evidence has not been challenged by the defence such evidence is considered as proved.

His Lordship M.M.A. Gaffoor J. in Ambagahagedara Nimal Ratnayake v. Attorney General CA 24/2011 CA Minutes 01.04.2019, alluding to this principle, observed that it is in line with the approach adopted by the Indian Courts. His Lordship cited the decision of Sarwan Singh v. State of Punjab (2002) AIR SC 111, which held:

"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted."

His Lordship Ranjith Silva J. in Renuka Subasinghe v. Attorney General [2007] 1 SLR 224 also refers to the same principle. Similarly, his Lordship Achala Wengappuli J. in Joseph Nilantha Rodrigo v. Attorney General CA/HCC/204/2015 C.A. Minutes 26.06.2020 adopts the same principle. His Lordship cited the following dictum from the judgment of Edrick de Silva v. Chandradasa de Silva 70 NLR 169:

"... Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the Word "prove" in section 3 of the Evidence Ordinance, and as trial Judge or Court must necessarily take that fact into consideration in adjudicating the issue before it ..."

A careful analysis of the dock statement (on pages 857 to 860 of the Brief) of the Accused demonstrates that the Accused has not attempted to address any of the incriminating evidence against him, whilst staring into the abyss of the death penalty. Instead, it is claimed that he was framed; he denied any personal enmity towards the deceased victim. The defence witnesses have not been successful in assailing the Prosecution's case to create doubt in our minds. Neither in the matters referred to above, pertaining to the confessionary statements or subsequent conduct, has there been a valid impeachment in cross-examination.

For the foregoing reasons, we are of the view that the conviction must stand. The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL