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

Hallyawattage Dayananda

Accused – Appellant

Court of Appeal

Case No. **CA 273 / 2018** **Vs.**

High Court of Embilipitiya

Case No. **25/2015**

The Attorney – General

Complainant – Respondent

Before	:	Menaka Wijesundera J.
		B. Sasi Mahendran J.
Counsel	:	Palitha Fernando P.C. with Sachithra Harshana for the Accused – Appellant.
		Dileepa Peiris, S.D.S.G. for the Respondent
Argued on	:	17.07.2023
Decided on	:	05.10.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 18.10.2018 of the High Court of Embilipitiya.

The appellant along with another accused had been indicted for murder in the High Court on the basis of common intention. But upon the conclusion of the

trial the trial judge had found the appellant guilty for the charge in the indictment and had acquitted the other accused. The appellant being aggrieved by the said conviction had lodged the instant appeal.

One of the main grounds of appeal raised by the appellant was that the identification of the dead body was not sufficient.

According to the version of the prosecution the entire case for the prosecution is based on circumstantial evidence.

The deceased on the 14th of April 1999 had told PW1 who is related to him, that he was going to the house of the appellant who was known by the name of Dayananda. Thereafter he had gone missing until his body had been found in a urea bag in a deserted place on the 23rd of the same month. When the body had been taken out of the bag it had been identified by the shirt he had been wearing last. PW1 also had identified the deceased from the toe of one foot of his because that particular toe had been shorter than the others

The evidence of the niece of the deceased had revealed that when she was at home soon after the body of the deceased had been discovered the appellant had come to her house and when the police also came at the same time, he had runoff. But when her mother later who is the sister of the deceased had confronted the appellant, he had said that he had killed the deceased, which had been told to the niece also.

But when referring to the evidence of the niece of the appellant the learned president's counsel appearing for the appellant stated that the niece of the appellant had been treated adverse but the learned High Court Judge had not considered the same. But upon perusal of the brief, we observe that there was no order by Court to treat the witness adverse but Court had given time for the state Counsel to consider the same. Therefore, there had been no material for the High Court Judge to consider under *section 154 of the Evidence Ordinance.*

But we observe that the sister of the appellant had not told the police about the confession made to her by the appellant. But we observe that the sister of the appellant appears to be a very illiterate person. Therefore, her laps in not telling the police about the confession does not create a reasonable doubt in her credibility as a witness, because hundred percent accuracy cannot be expected from a witness of this nature.

According to the evidence of the police officers the appellant had fled the area soon after the incident. The appellant had been taken in to custody on 01st of May 1999 at Udawalawe and on his statement two knives had been recovered. According to the evidence of the police the body of the deceased had been heavily decomposed at the time of the recovery, even the shirt on the body had surfaced after the body had been washed.

The hand written postmortem report of Professor Chandrasiri Niriella has been produced and given evidence on by Dr. Priyantha Perera. According to the evidence of the doctor that when the body is heavily decomposed possibility of identification could be difficult. But by certain individual outstanding features pertaining to the deceased the body can be identified. The body had been examined on the 29th of April 1999. The body had been identified by the younger brother of the deceased. Several injuries had been identified on the deceased, and injury number one, three, six, two have been identified to be instrumental in causing his death. The two knives shown to the doctor had been identified as being possible murder weapons.

At the conclusion of the prosecution case, the appellant had been called upon to place his defense before court. He had a made a statement from the dock. According to his dock statement he had denied the allegation and had said that he had been aware that the body of the deceased had been found but nobody identified the body. Subsequently police have arrested him and he had been badly assaulted by the police and a statement also had been recorded from him.

He further says that on the day of the New Year the deceased had come to his place along with two other friends and had brought him a tin of biscuits and thereafter had left. He completely denies the recovery of section 27 recoveries based on his statements.

Upon the conclusion of the defense case the trial judge had found the appellant guilty for the charge in the indictment.

According to the above mentioned material the deceased had been last seen on the 14th of April 1999. He had gone missing after stating that he was going to visit the appellant on the New Years Day. The body had been recovered from a deserted place on 24th of April 1999. The body had been decomposed but it had been identified by the relatives from the shirt and a special feature in his toe. The appellant admits in his dock statement that the deceased came to see him on the New Years Day with two friends. But he denies the allegation. The niece and the sister of the deceased had been confessed to by the appellant that he killed the deceased. The appellant had been arrested in Udawalawa. On his statements two weapons had been recovered. The doctor had identified very serious cut and stab injuries on the deceased. The two weapons recovered on the statement of the appellant had been identified to be as possible murder weapons. The prosecution witnesses have been subjected to lengthy cross examination. Certain contradictions and omissions had been marked in the evidence of the prosecution witnesses. But in the opinion of this court those contradictions and omissions have not gone to the root of the case.

It had been held in the case of **AG vs. Potta Naufer and Others (2007) 2 Sri L. R. 186 to 187 p.** that,

".. court should disregard discrepancies and contradictions which do not go to the root of the case. The mere presence of contradictions does not have the effect of diminishing the overall credit worthiness of witnesses."

It has been also held in the case of **Oliver Dayanand Adansonia alias Raju vs. Republic of Sri Lanka CA 28th of 2009 decided on 13.02.2013** that,

"It is an established principal that a criminal case cannot be proved with mathematical accuracy by evidence given by human beings as witnesses. "

Therefore, according to the evidence led before the trial judge the information possessed by the prosecution witnesses regarding the deceased is that he had left the relations house to visit the appellant. Nine days later he had been found dead with cut and stab injuries. Weapons which could have been used to cause the injuries on the deceased had been recovered on the statement of the appellant. Appellant also had admitted that the deceased visited him with two friends. The lengthy cross examination of the prosecution witnesses had not created a reasonable doubt in the case of the prosecution. It is a well established theory in criminal law that and allegation made against and accused person should be proved beyond reasonable doubt. In the instant case the prosecution had showed in circumstantial evidence that on the day the deceased disappeared he had visited the appellant. Appellant also admits the same. But the appellant says that the deceased was with two other friends. But the appellant does not divulge as to who those two people were. It is a well-established principal that an accused person has no liability to prove a case. But if something is withing his knowledge he needs to put forward an explanation. This has been set out under section 105 of the Evidence Ordinances which reads as follows,

"When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the general exemptions in the penal code or within any special exception or proviso or contained in any other part of the same code or in any law defining the offence is upon him and the court shall presume an absence of such circumstances. "

Illustrations (b)to section 105 is a clear example of that situation,

"An accused of murder, alleges that grave and sudden provocation he was deprived of the power of self-control. The burden proof is on A".

In the case of The King vs James Chandrasekera 44 NLR page 97, Howard CJ held that "In regard to section 105, the expression "burden of proving" is used in the sense of introducing evidence and not burden of establishing a case, for the latter remains throughout the trial on the prosecution. The burden of proof in section 105 is an evidentiary provision. All that the section says is that the duty of making a general or a special exception a fact in issue is on the accused."

Therefore, in the instant case the prosecution is alleging that the deceased disappeared after visiting the appellant and thereafter his body was found and the appellant is admitting that the deceased visited the appellant. But he says that there were two other people with the deceased at the time of the visit. Therefore, if the accused is to substantiate his denial in an acceptable way it would have been most prudent for the appellant to place the evidence of those two people with whom the deceased had visited him or at least have mentioned their names. This does not by any means suggest that an accused has to prove his innocence.

Furthermore, in the instant instance the prosecution has made an allegation against the appellant, with uncontradicted lengthily cross examined evidence that the deceased was last seen in the company of the appellant and later he had been found dead and the appellant had confessed to the relatives of the deceased that he killed the deceased. Therefore, the only irresistible inference that can be drawn from these circumstances is that the appellant committed the offence of murdering the deceased.

The dock statement made by the appellant does not create any doubt in the case of the prosecution. It has been held in many of our cases that when a dock statement is made that it has to be acted upon if the court believe the version

even if it is not subjected to cross examination. It has been held in the case of **B.A Premaratne vs The Democratic Socialist Republic of Sri Lanka court of appeal 168 of 2009 decided on 20th of February 2014** by Justice Sisira Abrew that,"

1. **Dock statement must be considered as evidence subject to the infirmities that it is not a sworn statement.**
2. **If dock statement is believed it must be acted upon.**
3. **If dock statement creates a reasonable doubt in the prosecution case defense must succeed**
4. **Dock statement of one accused must not be used against the others.**

In the instant matter one of the main grounds of appeal is the lack of identification of the dead body. On analyzing the evidence of the doctor it is very clear that the Judicial Medical Officer who conducted the post mortem has very clearly stated in the report that the relatives of the deceased identified the dead body with the shirt and a special feature in his toe. The doctor who gave evidence has also explained that although the body had been heavily discomposed closed associates of the deceased can always identify the body on special features of the deceased and of any remaining clothing. In the instant case these two features are available in the evidence led by the prosecution. Therefore we are unable to see any credit worthiness in this ground of appeal.

Another ground of appeal raised by the counsel of the appellant is that adverse witness in the prosecution had not been properly dealt by the trial judge. This position we had discussed above and have held that there was no order made with regard to any adverse witness.

The third ground of appeal is that the recoveries made under section 27 of the Ordinance Evidence has not been considered by the trial judge. But this too we observe has been dealt in page 379 of the brief but has inadvertently referred the Criminal Procedure Code in place of the Evidence Ordinance.

Thereafter the trial judge had referred to the circumstantial evidence and has itemized the circumstances which had arisen against the accused in the case of the prosecution.

In a case based on circumstantial evidence the prosecution lends itself to a reasonable inference that either the accused or another could have committed the act, the prosecution must exclude the other effectively in order to attach responsibility to the accused for that act. This has been discussed in the cases of **The Queen vs Kularatne (1968) 71 NLR 529, Kuruppaiah Serveys vs The King 1960 52 NLR 227 and in many others.**

In the instant matter the trial judge had discussed the adverse circumstances pertaining to the accused at page 382 and has concluded that the circumstantial evidence led at the trial draws the irresistible inference that the appellant and no other committed the murder of the deceased.

The counsel for the appellant raised three grounds of appeal which we have discussed above but we see no merit in the same. As such the instant appeal is dismissed and the conviction and the sentence of the appellant is here by affirmed.

JUDGE OF THE COURT OF APPEAL

<u>Hon. Justice B. Sasi Mahendran</u>

I agree.

JUDGE OF THE COURT OF APPEAL