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 Criminal Procedure Act No 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:
HCC/273/16
HC of Colombo Case No; HC 6928/13

Ramaia Raju Alias Chuti

Accused

V.

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

Complainant- Respondent

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

Counsel: Sachindra De Zoysa for the Accused-Appellant
Azard Navavi, SDSG for the Respondent

Written Submissions On: 24.11.2017(by the Accused-Appellant)
30.01.2019 (by the Respondent)

Argued On: 07.08.2023

Decided On: 12.10.2023

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Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as 'the Accused') was indicted in the High Court of Ampara for committing the murder of Rajapaksha Pathiranage Sarathchandra an offence punishable under Section 296 of the Penal Code. After the trial, the Learned High Court Judge convicted the Accused guilty, and the death sentence was imposed.

Being aggrieved by the said conviction and sentence the Accused had preferred an appeal to this court and submitted the following grounds of appeal:

1. The learned trial judge was incorrect in the evaluation with regard to the credibility of the eye witness;
2. The learned trial has failed to evaluate the evidence with regard to the undue delay in making the complaint to the police; and,
3. The learned trial judge has failed to evaluate the evidence fully placed at the trial.

The following facts and circumstances are briefly summarised:

According to PW4, Indika Navaratne (wife of the Deceased), she was informed of her husband's death on the 9th of June 2010 at 6:40 a.m. by one Padma, who told her that the Deceased had succumbed to an illness. PW4, along with their son and daughter, arrived at the location and was informed by one Neil that her husband had been stabbed to death. She observed her husband's lifeless body from a distance of 50 meters. On the same day, she reported this incident to the Grandpass Police.

PW12, Victor Perera (principal eye witness), stated that on the fateful day of 09.06.2010, as he was traveling after work and upon climbing up the hill at 6:00 a.m., he saw the Deceased riding his motorcycle in PW12's direction from Madampitiya junction. PW12, having known the Deceased for about 15 to 20 years, greeted him, "ආ සරත් මහත්තයා කියලා මම ආචාර කලා." Subsequently, the Deceased parked his motorcycle in front of the gate of the communication. A green three-wheeler then stopped behind the Deceased. One Chootiya (the Accused), who is known personally by PW12, alighted from the three-wheeler and struck the Deceased with a "මන්නයෙන්" on the Deceased's right shoulder.
On page 61 of the brief:

ප්‍ර : එයාගේ පිටිපස්සට කිව්වේ කාගේ පිටි පස්සටද මහත්මයා?

උ : සරත් මහත්මයාගේ , එයාගේ පිටිපස්සේ ත්‍රිවිල් එක නැවැත්තුවා.

ප්‍ර : ඊට පසුව මොකද්ද කලේ ?

උ : ටක් ගාලා බැහැලා චුටියා කියන කෙනා මන්නයෙන් ගැහුවා.

PW12 indicated that there was a driver and another individual in the three-wheeler, whom he had not recognized because it became crowded. According to PW12, all of this occurred while he was at a clearly visible distance of 10 ft from the crime scene.
When asked by the court if the Deceased had dismounted from the motorcycle, PW12 stated that as he was alighting from the motorcycle, the Accused attacked him. The Deceased fell to the ground, followed by another attack which PW12 did not clearly see due to the crowd.

He mentioned that he did not report this to the police at the time because he was overwhelmed by fear. However, after 1 ½ months, he confided in the Deceased's sister. Later, PW12 gave his statement to the police.

During his cross-examination, he confirmed that he saw the Deceased traveling in the same direction as him, and the distance between them was 10 to 15 ft. After greeting the Deceased, approximately 5 to 10 minutes later, the Deceased dismounted his motorcycle. The Accused, who arrived in a three-wheeler, got down and attacked the Deceased. PW12 detailed how he witnessed the attack.

On page 79 of the brief:

ප්‍ර : බැහැපු හැටියටම පහර දුන්නා කියලා කිව්වා.

උ : එහෙමයි.

ප්‍ර : කොහොමද ගැහුවේ?

උ : අත උස්සලා ගැහුවා ගහන එක අතේ වැදුනා.

He witnessed the Deceased falling onto the main road, with his motorcycle subsequently landing on his legs. PW12 observed the three-wheeler heading straight towards Colombo. He further stated that police officers arrived at the scene. After informing the Deceased's sister, he reported the incident to the police, explaining that his delay in giving the statement was due to fear of possible repercussions.

The primary contention raised by the Counsel for the Accused was the belated statement by PW12, given 1 ½ months after the incident. PW12's justification was his fear for his own safety.

Following the observation made in the case **Dharmasiri vs. The Republic of Sri Lanka 2012 (1) SLR 268 Her Ladyship Tilakawardane, J held inter alia;**

"Two critical tests before considering belated evidence as reliable " evidence are: firstly reasons for delay and secondly, whether those reasons are justifiable."

In **Ajith Samarakoon v the Republic [2004] 2 SLR 209 at page 220 His Lordship Jayasuriya J**, held;

"Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the Test of Spontaneity the Test of Contemporaenity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."

In **Sumanasena v A.G [1999] 3 SLR 137 on page 140, His Lordship Justice Jayasuriya** held;

"Just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness."

The above cases were relied upon by **Justice Sisira De Abrew** in **Anandappan Vishawanadan alias Alli v A.G, S.C Appeal 15/2018, decided on 12.02.2021**.

Considering the above legal literature, I am of the view that this witness's evidence should not be rejected, as I find his reason for his delayed statement to be plausible. Therefore, I am satisfied with the veracity of this witness. Thus, the Learned Trial Judge correctly evaluated and accepted PW12's evidence.

On page 333 of the brief;

මොහු මේ සම්බන්ධයෙන් පොලිසියට ගොස් ඇත්තේ 2010.08.18 වන දින අතර, ප්‍රකාශයක් ලබා දී ඇත්තේ 19 වන දිනයි. එනම් මාස දෙකකට පසු එසේ පමා වී ප්‍රකාශයක් ලබා දීම සම්බන්ධයෙන් පැහැදිලි කිරීම වී ඇත්තේ ඔහු වයස අවුරුදු 75කට වැඩි වයෝවෘද්ධ පුද්ගලයෙකු වූ බවත් , මරණකරු සහ චිත්තිකරු ඔහු හොඳින් හඳුනන පුද්ගලයන් වන අතර, සාක්ෂි දීමට දැඩි බියක් කම්පනය නිසා ඇති වූ බව යන ස්ථාවරයයි.

The reasons for us to believe the evidence propounded by this witness in terms of corroboration will be discussed later.

According to PW10, Judicial Medical Officer Dr. Mayuradi observed five external injuries on the body. He reported three cut injuries on the upper right side of his neck, another beneath his elbow, and another on the chest cavity. The injuries observed were described on pages 107 and 108 of the brief. The neck was almost severed, severing two of his vital nerves as well as the 5th vertebra. When the murder weapon was presented to him at the trial (evidence marked as P2), in his expert opinion, considering the size of the wounds, they could have been caused by a weapon of this caliber.

The cause of death was established from the 1st and 2nd injuries reported. PW12 also indicated that the deceased was attacked from the front right side to the extent the weapon was used.

This expert witness properly deduced his findings before the Learned Trial Judge who duly evaluated PW12's evidence, thus accepting his testimony. Therefore, we find that the Learned Trial Judge correctly arrived at the adjudication of the adequacy of this witness's evidence.

In PW11, Government Analyst Priyanka De Silva's testimony, on 22.07.2010 she received from the police the following items: a knife, a piece of cloth, a blood sample, a t-shirt, and a pair of trousers for examination. She mentioned that she received three separate parcels marked 4872A which contained the items. She conducted her examination on 30.07.2010 and observed human blood smeared across the blade of the knife (evidence marked as P2). According to her, it was a very sharp blade. The properties of the knife were described on page 128 of the brief. On examination of the t-shirt and trousers (evidence marked as P5), she observed blood stains on both the front and back of the t-shirt.

PW6, C.I Suraweera, on 09.06.2010, upon receiving a message about a murder, left with another officer at 6:45 a.m. for the crime scene near the Madampitiya cemetery. They found the deceased's body lying in front of the gate of communication as well as his motorcycle, bearing the number 86 – 5648, which had fallen to the ground. He observed external cut injuries on the right side of the neck and a laceration on the deceased's elbow. The body was found lying face-up. He inferred that the Deceased was attacked as he was dismounting the bike, noting the position of his left leg in relation to the motorcycle.
In his cross-examination, he stated that the crime scene was crowded and no one came forward to give a statement about the incident. He affirmed that he observed lacerations on the right side and on the deceased's elbow. He also mentioned that he investigated the crime scene for 2 to 3 hours and recorded the deceased's wife's statement at the police station.

PW7, I.P Kasturiratne, upon receiving instructions from PW6 about a murder near the Madampitiya cemetery, and based on information received about the suspect named Ramiya Raju alias Chooti, was tasked with arresting him. He and two other officers went to the Negombo Lellama area. After identifying the Accused, they arrested him, taking into custody his t-shirt (evidence marked as P4) and trousers (evidence marked as P8), noting blood stains on the front of the t-shirt. The Accused later led officers to the knife, which was concealed in his room.

On page 190 of the brief;

ප්‍ර : ඔහු දීලා තිබුන ප්‍රකාශය මොකද්ද?

උ : මගේ කාමරයේ තියෙන ඇදට උඩින් ඇති යට ලීය උඩයි මම මේ පිහිය තිබ්බේ. තිබෙන තැන මට පෙන්වා දිය හැකියි.

ප්‍ර : කොතන තිබෙන බව?

උ : ඇදට උඩින් තිබෙන යට ලීය මතයි. මගේ කාමරයේ ඇදට උඩින් තිබෙන යටලිය මතයි මට මේ පිහිය තිබෙන තැන පෙන්වා දෙන්න පුළුවන්.

PW7 discovered the knife smeared with blood. After securing the evidence, he logged P4 and P8 under P.R no. 134/10 and P2 under P.R no. 121/10.

In his cross-examination, he confirmed that in the evening, acting on PW6's instructions, he went to Negombo with two other officers, arriving at 19:15 p.m. The Accused was identified by PW13. After the arrest, they went to his house at 22:00 p.m., where PW7 recovered the knife. The items were subsequently presented at the police station.

The question before us is what is the evidential value of the discovery in consequence of a statement made under **section 27(1) of the Evidence Ordinance**.

In the case of **Heen Banda v Queen [1969], 75 N.L.R 54, by His Lordship Sirimane J**, the above said passage was referred by **Justice Sisira De Abrew in Ranasinge v A.G [2007] 1 S.L.R 218,** held that;

"Where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more."

In the case of **De Saram v The Republic of Sri Lanka [2002] 1 S.L.R 288 at page 302, His Lordship Sarath N Silva CJ** held that:

"The rationale of the proviso in section 27 (1) is that even a confessional statement to a police officer, which is outside the pail of evidence, could be proved where it contains information that is confirmed by the discovery of a fact. The word "fact" appearing in the section should be construed in the light of the definition in section 3 which states, " 'Fact'

means and includes -

(a) anything, state of things, or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious".

It is seen that a fact is not merely an object or article. It is something that can be perceived by the senses or a mental state of which one is conscious.

Coomaraswamy in his Law of Evidence Vol. I, page 446, has made particular reference to the distinction that should be drawn between a fact that is discovered and an object that may found. He has stated:

"thus, the fact referred to in this section, may be any fact as defined in section 3 of the Ordinance as opposed to "fact". The object discovered may be the body of the injured person, the property stolen, bloody clothes, the weapon with which injury was inflicted or some other material evidence of the offence".

This distinction between the discovery of a fact and the finding of some object is clearly brought out by the Privy Council in the decision in the case of Pulukuri Kottaya v. Emperor where it was observed as follows :

"It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that: 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But, if to the statement, the words be added, "with which I stabbed A", these words are inadmissible since they do not relate to discovery of the knife in the house of the informant".

This reasoning of the Privy Counsel was followed in the cases of Piyadasa v. Queen and Etin Singho v. Queen. When the aforesaid reasoning and the definition of the word "fact" in section 3 of the Evidence Ordinance, is applied to the evidence of this case, it is seen that the fact discovered by the Inspector from the statement of the accused was that the accused knew the place where the body of the deceased was buried. This information is confirmed by the finding of the body itself, in that place."

It should be noted that when the Accused provided evidence from the dock, he did not challenge the evidence regarding the recovery of the blood-stained knife and the clothes with blood stains. This lack of challenge suggests that the Accused knew where the weapon was stored. The Learned High Court Judge correctly took this piece of evidence into account in his judgment.

Our Courts have determined that if a party does not challenge specific material evidence when given the opportunity to cross-examine a witness, or fails to provide evidence to contradict that testimony, such evidence must be considered as admitted. These propositions were followed in the following cases:

In *Ajith Samarakoon v. State 2004, 2 SLR page 209 at page 230, His Lordship Ninian Jayasuriya*, **J** held that,

"Evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused."

In **Modarage Athula Abeygunawardena v. Attorney General, CA 105/95 HC 20/92 decided on 18.05.99**, held that,

"Where the accused never suggested in his dock statement that the prosecutrix or her mother gave false evidence was a fact that could be relied on in deciding the credibility of the two witnesses."

In **Sarwan Singh v. State of Punjab 2002 AIR SC III 3652 at pages 3655 and 3656**,

"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."

It was held **Motilal v. State of Madya Pradesh (1990) Cri L.J. NOC 125 MP**,

"Absence of cross-examination of prosecution witnesses of certain facts leads to the inference of admission of that facts."

In **Himachal Pradesh v. Thakur Dass (1983) 2 Cri L.J. 1694 at 1983 V.D. Misra CJ** held; "whenever a statement of fact made by a witness in not challenged in cross-examination, it has to be concluded that the fact in question is not disputed."

In the case of **Bandara v. the state 2001 (2) SLR 63, His Lordship Kulathilake J** relied on the observation made by **His Lordship Justice H.N.G Fernando in Edrick De Silva v. Chandradasa de Silva 70 NLR page 169 at 170** held,

"When 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 a trial Judge or court must necessarily take that fact into consideration in adjudicating the issue before it."

The abovesaid judgements were heavily relied upon by **His Lordship Justice Ranjith Silva, in the case of CA Appeal 78-80/2001 Decided on 01.10.2007, *2007 (vol. ii) Appellate Court Judgments (Unreported)* he held that,**

"When this witness gave evidence she was never challenged on the important aspects. If certain material evidence was not challenged when it was opportune and possible for that party to challenge that evidence, that evidence has to be taken as admitted."

In the Indian Case **Harivandan Babubhai Patel v State of Gujarat, Cr.App No.1044 of 2010, decided on 01.07.2013, His Lordship Dipak Misra J**, held;

"There can be no shadow of doubt that the confession part is inadmissible. It is also not in dispute that the panch witnesses have turned hostile but the facts remains that the place from where the dead body of the deceased and other items were recovered was within the special knowledge of the appellant. In this context, we may usefully refer to A.N. Venkatesh and another v. State of Karnataka (5) wherein it has been ruled that by virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped person was found would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously

with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. In the said decision, reliance was placed on the principle laid down in Prakash Chand v. State (Delhi Admin (6). It is worth noting that in the said case, there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

He further held that;

In State of Maharashtra v. Damu S/o Gopinath Shinde and others (7), it has been held as follows: -

"It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor (8) is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

Same principle has been laid down in State of Maharashtra v. Suresh (9), State of Punjab v. Gurnam Kaur and others (10), Aftab Ahmad Anasari v. State of Uttaranchal (11), Bhagwan Dass v. State (NCT) of Delhi (12), Manu Sharma v. State (13)and Rumi Bora Dutta v. State of Assam (14).

In the case at hand, the factum of information related to the discovery of the dead body and other articles and the said information was within the special knowledge of the present appellant. Hence, the doctrine of confirmation by subsequent events is attracted and, therefore, we have no hesitation in holding that recovery or discovery in the case at hand is a relevant fact or material which can be relied upon and has been correctly relied upon"

We hold that since the Accused did not contradict the evidence of the witness regarding the recovery of the knife with the blood stain, it falls within the definition of the word 'proof' in Section 3 of the Evidence Ordinance. Such evidence could be treated as an adverse inference drawn against the Accused.

PW9, I.P. Pathmalal has stated that on the day in question at 7:30 am he has visited the scene of the crime to conduct investigation. Upon his arrival, he observed the Deceased's body lying on the ground, facing upwards. Upon further scrutiny, he discovered a large laceration on the right side of the deceased's neck and another laceration on his right arm. He also noted that the deceased's bike was in close proximity

to his body. PW9 then collected blood samples, took photographs of them, and compiled a report.

Upon perusal of the aforementioned evidence provided by these witnesses, we will now examine the corroborative evidence among them.

The evidence presented by the principal eyewitness deduces the entirety of witnessing the Deceased being attacked by the Accused as the Deceased was dismounting his bike, receiving a blow from a 'Manna' on his right side. This witness's testimony was corroborated by other prosecution witnesses who made observations at the crime scene and analyzed the items recovered from both the crime scene and during the arrest of the Accused.

On reviewing the evidence presented before us, no contradictions or discrepancies were highlighted by the defense, leaving no room for them to challenge or question the evidence given by PW12, apart from the contention of the belated statement. The consistent support and corroboration from the testimonies of other prosecution witnesses significantly influenced the Learned High Court Judge to correctly evaluate and accept this evidence as essential to this case. In my view, the prosecution witnesses have remained consistent and truthful in their testimonies; thus, I deem this evidence as paramount to the case

The Accused's version

Now, let's consider the Accused's dock statement:

The Accused delivered a dock statement during which he denied the murder allegation against him, refuted any connection to it, stated that there was no animosity between him and the Deceased, and pleaded not guilty.

Upon examination of the dock statement provided by the Accused, it becomes patently and manifestly clear that he has failed to create doubt regarding his connection to this murder. He neither offered an alibi nor presented a plausible argument related to the incident, only providing a mere flat denial.

I would like to refer to the sentiments referred by **Justice F.N.D Jayasuriya along with Justice P.H.K Kulathilaka J** in the case **Thalpe Liyanage Manatunga v. Attorney General, CA No.47/98, decided on 25.08.1999,** held that;

"The question arises on an evaluation and analysis of the dock statement whether the accused has attempted to explain away the incriminating circumstances elicited against him and the prima facie case established by the prosecution by explaining away those circumstances and stating that there was only an insertion of the male organ into her legs and not into the private part of the virtual complainant. If such, a fact took place and existed, it was within the power of the accused to come out with that explanation and to refute the charge of rape. Though the accused made a dock statement he has failed to explain away the incriminating circumstances and prima facie case established against him by indulging in any such explanation. Then as wise and prudent judges often observe in those circumstances both common sense and logic induce any Court to come to the conclusion that the accused did not come out with such an explanation because such circumstances never existed. The accused in his utterly deficient dock statement has merely stated thus. මම කිසිම වැරද්දක් කලේ නැහැ. පෙමවති තමයි තරහට කියා තිබෙන්නේ. කිත්සිරි සමග මගේ කිසිම වරදක් වී නැහැ. That is the bare and the deficient dock statement made by the accused. In view of the deficiency in the dock statement this Court is entitled to draw the presumptions and inferences arising from such a deficiency in terms of the speeches of Lord Ellenborough in Rex v. Cochrane-Gurney's Reports 479 and of Justice Abbott in Rex v. Burdet (1820 4 Band Alderman 95 at 120). I proceed to re-produce the extracts from both these speeches in the hope that the younger members of the legal fraternity would benefit by the exposition of the law contained in the speeches of these Judges and in the hope that they would do justice to Accused persons when called upon by the Court for the defence.

"No person accused of a crime is bound to offer any explanation of this conduct or of circumstances of suspicion which attaches to him; but nevertheless if he refuses to do so where a strong prima facie case has been made out when it is in his own power to offer evidence; if such exists in explanation of such suspicious circumstances which would show to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so, only from the conviction that the evidence so suppressed or not adduced, would operate adversely to his interest."

Justice Abbott giving effect to the same principle of common sense and logic observed:- "No person is to be required to explain or contradict until enough has been proved to warrant reasonable and just conclusion against him in the absence of explanation or contradiction, but when such proof has been given and the nature of the

case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

For the reasons enumerated, we hold that there is no merit in this appeal. Upon evaluating the evidence, we believe that there is no necessity to interfere with the findings and the conviction determined by the Learned High Court Judge. We, therefore, affirm both the conviction and the sentence imposed upon the Accused.

We therefore dismiss this appeal.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL