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

M. Ajith Kumara alias Ajith

ACCUSED-APPELLANT

C.A. No. 208/2012

H.C. Kalutara 301/2003

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT-RESPONDNET

BEFORE: Anil Gooneratne J. &

Sunil Rajapaksa J.

COUNSEL: Tenny Fernando for the Accused-Appellant

Ayesha Jinasena D.S.G., for the Complainant-Respondent

ARGUED ON: 31.07.2014 & 06.08.2014

DECIDED ON: 26.09.2014

GOONERATNE J.

This was a case of triple murder, involving members of one family. Unfortunate incident occurred on 06.07.1998. Victims are the wife, father and mother of the Accused-Appellant. Prosecution depends on the evidence of a small child who was only about 5/6 years old at the time of the incident who saw his own mother, grand-father and grand-mother being murdered by his own father, an estate labourer. When this child gave evidence in the High Court he was about 15 years old. One of the main points urged, against the child witness (as described by the defence) is the delay of recording the statement of this witness nearly 2 ½ years after the incident. The other matter being, the question whether a deposition of a witness, in the non-summary inquiry could be admitted under Section 33 of the Evidence Ordinance.

The place of incident is known as 'Thiriwanakettiya' in a estate in the Matugama electorate. The deceased party and the Accused-Appellant were staying in the same estate quarters, where the incident took place. Prosecution version in brief is that the time of incident was about 12.00 midnight, all three victims were at home. At that time the Accused-Appellant

was given his dinner when he came home, by his deceased wife but he refused to eat. Evidence reveal that the Accused-Appellant and his father had an altercation over refusal to eat by the Accused. It is said that the father of the Accused had also hit the Accused. When the Accused refused to eat his wife also reprimanded him. Thereafter the father of the deceased went out of the house and was seated on the steps. One and a half hours later witness heard a noise, and saw his grand-father and father of the Accused lying on the ground, being attacked by a club (මෝල් ගහ). Witness also testified that after about 2/3 minutes of hearing the noise the Accused stabbed both his wife and mother. Evidence also reveal that the Accused had on earlier occasions had disputes with this deceased wife after consuming liquor. P1 & P2 have been produced as weapons used for committing the act of murder. Witness had testified that there had been a Kovil light and an oil lamp being lit inside the house at the time of the incident, but the oil lamp later fell on the ground.

In view of the above infirmities pointed out by the defence it would be relevant to consider initially the relevant points suggested and raised in the cross-examination of the child witness.

(a) Delay of over 2 years of making a statement to the police (witness admit)

(b) Went to the police with his aunty (sister of mother) but later witness admitted that he was accompanied to the police by his aunty and uncle (බාප්පා).

(c) Position of uncle and aunty coaching the witness to give a statement in a particular way was denied by the witness.

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(d) Taken to police by uncle and aunty but the witness unhappy about it.

(e) Uncle called the witness stating that he has to attend court. Witness had been staying in uncle's house.

(f) Position of quarters and Kovil/Road etc.

(g) V1 contradiction pertaining to the fact that the witness slept on the mat

(h) Cannot remember the things the father brought with him, two coconuts, and kassippu bottle. (omission suggested - 128)

(i) About the father being under the influence of liquor

(j) About oil lamp – omission suggested

(k) Dispute with mother admitted. Dispute with grand-mother grandmother was a lie (pg. 139).

During the course of the argument our attention was drawn to folios 141, 144, 146, 149 & 150 of the brief/record. It would be relevant to refer to same since it is a fact recorded during the course of cross-examination of the child witness. The trial Judge observes (141) that the witness find it difficult to answer questions in the Sinhala language. J.S.C had been informed to make arrangements to send a Sinhala/Tamil Translator . Trial Judge had omitted to read that portion of the record. Trial Jude decided to commence trial De Nova (141). Call for a translator from JSC (143) . Order at (144) for trial De Nova. At (149) attention of court drawn to the fact by the defence counsel that the Accused party is willing to continue with the trial from the point it was stopped, and adopt the proceedings of this case, held by the predecessor of the trial Judge. Both parties agree to adopt proceedings and commence from the point the trial stopped (150) .

The child witness being of Tamil origin would have to undergo certain difficulties to understand the questions put by counsel, apart from the mental trauma he would have faced having had to witness a triple brutal murder. Trial judges had no doubt made every effort to get at the truth irrespective of the apparent difficulties the prosecution was confronted to elicit correct answers from a very young person. These are matters to be understood and explained

by the parties concerned. The Judgment of the learned trial Judge provides reasons for the delays, and infirmities of the prosecution case. The defence having consented and agreed to proceed with the trial from the point trial Judges had been of two minds as to whether to proceed all over again or conclude the case from the point it had stopped, may not attract a complaint of fair trial. Nevertheless then the defence having consented to proceed, continued the cross-examination, subject to the delay of recording the victim's statement. This court however would have to comment on above at a later stage of this judgment In order to bring the child witness's case to its conclusion, what remained is that, according to the testimony of the child, was that his father after the incident carried the child to the uncle's house, and left him. He also testifies that the victim, accused and himself had blood all over their clothes and bodies at that point of time. Next item of evidence which leads to another point is the child standing near the door of her aunty Pushparani's house and telling Pushparani about the altercation at home.

There was much arguments advanced from both sides as regards the deposition of the above named Pushparani. This witness had been present on 14 occasions before the trial in High Court, but had to leave the Island at a

certain point may be to secure employment. That led the prosecutor to apply to court and seek permission to admit the deposition of witness Pushparani who was prosecution witness No. (1) as described on the back of the indictment. (vide folio 311). The proceedings at folio 312 indicates that the defence counsel admit as a fact in term of Section 420 of the Code that witness Pushparani was not in the Island. The proceedings at 311/312 is relevant since the trial Judge allowed the application to admit the deposition marked X. Under Section 33 of the Evidence Ordinance and trial Judge observes that on opportunity is provided in the non-summary proceedings to cross-examine the witness. There are three points to be noted from the deposition.

(1) That child witness Ranjith tapped on her brother's door at night. He was clad in blood stained clothes.

(2) Having learnt of the incident from the child witness went to parent's house and proceeded to inform field officer of the estate.

(3) In the early hours of the day accompanied by a group of persons, gave the first information to the police.

Section 33 of the Evidence Ordinance reads thus:

Evidence given by a witness in a judicial proceedings, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense wnich, under the circumstances of the case, the court considers unreasonable:

Provided –

(a) That the proceeding was between the same parties or their representative in interest;

(b) That the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation – A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section

The said section is not at all confusing or difficult to be understood.

I had the opportunity to examine the submissions of both sides. I agree that evidence led under Section 33 of the Evidence Ordinance is an exception to the hearsay rule and substantive evidence. Vide Leelawathi Manike Pallethenna and Another Vs. A.G. C.A. 178/1999 decided on 13.6.2008; pg. 488 vol. (1) ERSR Coomaraswamy on Evidence.

I need not elaborate on the requirements contained in the proviso to the said section, (a) (b) & (c) of the proviso has been, no doubt considered by the learned High Court Judge. What is relevant and important is that the adverse party in the first proceedings need to have had the right and or opportunity to cross-examine. If that right and or opportunity was denied by the legislature in the statute itself, there cannot be an application as per Section 33. I have to observe that the trial Judge has given his mind to all above and admitted deposition X. As observed by learned Deputy Solicitor General the defence did not object to add the Registrar of the court as a witness, to produce and mark deposition X.

I do not intend to make this judgment an academic exercise, as I have carefully studied the submissions of both counsel, and I am in agreement with the submissions of learned Deputy Solicitor General on this issue. However I wish to note the following case law on the point.

Subramaniam Vs. Inspector of Police, Kankesanthurai – 71 NLR 204/205 – This case deals with the right of the Accused to be represented by counsel at a non-summary inquiry before the Magistrate and the right of the Accused to cross-examine the prosecution witness.

At pg. 205..

Held, that, in the circumstances, the Magistrate's refusal to permit the witness Kandasamy to be cross-examined by counsel was in effect a denial to the accused of his fundamental right of representation by a pleader. The fact that the accused questioned the witness in terms of sections 189 and 157(3) of the Criminal Procedure Code could not result in a forfeiture of his right to be defended by a pleader, for circumstances did not permit him on his own to retain a lawyer previously. Moreover, the reasons given by the Magistrate in support of his refusal to permit cross-examination were clearly not sustainable.

I agree that even if the right and opportunity have not been used, the requisites of Section 33 would be satisfied.

I have also been invited to consider the provisions of the Indian Evidence Act. It is similar to Section 33 of our Evidence Ordinance. In Ta Fix Pramanicts V. Emperor. Held Deposition of the Sub-Inspector was admissible under Section 33 of the Evidence Act. The defence had an opportunity of cross examining him though they did not avail themselves of it.

In view of the above and prevailing circumstances of the case in hand, there is no prohibition in law to admit the deposition X, in evidence that was led before the High Court. Material placed before the High Court confirm due compliance with the provisions contained in Section 33 of the Evidence Ordinance. The proceedings no doubt was between the same parties. In the

non summary proceedings the Accused had the opportunity to cross-examine the prosecution witness though he failed to avail himself of this opportunity and cross-examine witness Pushparani. Accused had been at that time enlarged on bail and could have retained counsel. He was never deprived of his right to be defended. If he so desired Accused himself could have cross-examined witness Pushparani. In any event Pushparani was not an eye-witness. If at all her deposition support other material evidence. The question in issue no doubt substantially and in all respects the same in both proceedings. The explanation provided for in Section 33 fortify the position to admit deposition X.

The delay of recording the child witness's statement had been highlighted, on behalf of the Accused party. The law does not encourage and tolerate such delays. The reasons for delays may be of many varieties and of many kind. Delays could contribute to weaken the prosecution case. Delay might result in a witnesses being influenced, and also prevent the witness from expressing the truth, and possibility of coaching the witness to deviate from the truth. On the other hand children could be easily taught stories and make them believe and live in an imaginary world. Nevertheless there are instances and cases where delay is inevitable, as the case in hand. The police

evidence suggests that it was not possible to record the statement of the child witness, due to his age and mental condition. At a very tender small age he saw brutal killings of his own kith and kin. He lost the closest companions who gave all the love and affection to him. There is no need for a doctor or a medical practitioner to satisfy the mental condition and the mental trauma of this child witness. As such time has been the best healer?

To get back to the evidence testified by the child witness, he was a little more mature when called upon to give evidence in the High Court. Trial Judge observed the demeanor and deportment of the witness, and considered him to be a truthful witness. He testified of sufficient light, i.e a ray from the Kovil and the bottle lamp. Further to weapons used to commit the crime, (P1 & P2), some motive and previous conduct of Accused being a habitual drunkard, which resulted in constant quarrels, in the household. He also testified to the tolerance of the mother, awaiting the arrival of the husband even at midnight to serve dinner. The act of killing of three persons, conduct of Accused subsequent to the attack and some description of the scene of the crime, are all matters testified. I agree with the trial Judge's reasoning at folios 357, 358 & 359 of the record and we see no basis to intervene and interfere. Defence

had not succeeded in making any breakthrough in the evidence of the child witness to favour the defence case. Only contradiction and the omission suggested does not take the defence case to any acceptable position. In any event no material contradiction surfaced at the trial. As such much importance cannot be placed on such minor discrepancies. The suggested discrepancies do not go to the root of the matter and not capable of shaking the basic version of the prosecution case. In all the circumstances and in the context of this case, this court observes that the delay is justified, and the material placed before court has proved the prosecution case beyond reasonable doubt. Medical evidence support the prosecution case. An opinion as regards P1 & P2 had been expressed by the Doctor. It suggest that the several injuries to the deceased persons could have been caused by P1 & P2.

There is direct as well as circumstantial evidence placed before the trial court. Police evidence too support the prosecution case in very many respects from the point of receiving the 1st complaint to the arrest of the Accused-Appellant. Accused had been absconding even for a short period and when the police party came in search of him to arrest him the Accused attempted to flee and escape. The trial Judge very correctly has analysed the

case of the Accused-Appellant. It is a total denial of the incident by Accused-Appellant who made a dock statement (328). Further he states he came home at 8.00 p.m. he saw blood stains. He saw the dead bodies, and there were no other persons at that place. He shouted but there was no response and he went to his brother-in-law's house, but doors were closed. Thereafter he went and slept in the jungle. The following morning he went to the Badreliya police where he was assaulted and sent to Bulathsinhala Police. He was told by the police to touch P1 & P2.

The above statement obviously is no proper explanation. Trial Judge's view is that Lord Ellenbarough dictum even if cannot be applied, by normal reasoning one could logically infer guilt.

In criminal cases the burden of proof remains the same . Even if the Accused remains silent or has given evidence on oath or a dock statement will not alter the burden of proof for the prosecution. In the case in hand there is overwhelming evidence both direct and circumstantial, which takes the prosecution case beyond reasonable doubt. The test of spontaneity and the test of contemporaneity/ promptness are important tests to be applied in criminal cases, but it is the duty of the trial Judge to give serious thought to

the question of delay, in a witness making a statement to court. In the instant case the delay of the child witness to make a statement is justified. In *Dayananda Lokugalappaththi & Eight others (Embilipitiya murder case) Vs. State 2003(3) SLR 362..*

at 363..

Per Kulatilaka, J.

> "In applying the test of spontaneity and test of contemporaneity and the test of promptness Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."

I have also fortified my views expressed above, and the *'Kobaigane murder case' (2004 (2) SLR 209)* is another valuable authority which considers a variety of legal aspects pertaining to promptness, Spontaneity, belated statement etc.

At pg. 220 it is stated:

> 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. Vide in this context the pertinent observations of Justice T.S. Fernando in Pauling de Cross v The Queen (4) at 180 Vide also Narapal Singh v The State of Hariyana.

In view of all the facts and circumstances enumerated above, we hold that the prosecution case had been proved beyond reasonable doubt and there is absolutely no basis to fault the trial Judge's reasoning which is wholly justified and legal. As such we affirm the conviction and sentence and proceed to dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL