

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

1. Wijebandarage Illangasinghe
(deceased)
2. Ranbandage Sisira Illangasinghe

ACCUSED-APPELLANT

C.A. No 46/2011

H.C. Anuradhapura 51/2003

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
P.R. Walgama J.

COUNSEL: Kumuduni Wijesooriya for the Accused-Appellant
Dilan Ratnayake S.S.C. for the Complainant-Respondent

ARGUED ON: 20.11.2014

DECIDED ON: 30.01.2015

GOONERATNE J.

The two Accused-Appellants were indicted for the murder of one Punchibanda Senarath Basnayake on or about 13th December 1997. 1st Accused was reported dead (vide proceedings of 30.01.2007) and the trial proceeded against the 2nd Accused-Appellant in the High Court of Anuradhapura, from about 02.05.2011. This is about 14 years after the incident. At the trial learned State counsel moved court to lead the depositions of witness No. (1) & (5) made at the non-summary inquiry since both these witnesses were dead, by that time. The defence had no objection to admit the deposition, as per Section 33 of the Evidence Ordinance. The Accused-Appellant and the deceased Accused were brothers. The Accused party and the deceased were engaged in farming. I have also perused the judgment and at Pg. 3 (folio 107) the learned trial Judge refer to matters that need to be satisfied by the prosecution in an instance where deposition, in the non-summary inquiry had to be produced at the trial before the High Court. The three necessary conditions to be established are also embodied in the same folio, and in the judgment.

It is recorded in the judgment that the two main witnesses for the prosecution were reported dead by the relevant police. Defence had not objected for the report tendered to court, by the police pertaining to the death of witnesses. The depositions led as per Section 33 of the Evidence Ordinance reveal that the deceased witness Punchiband Basnayake was working in his paddy field and thereafter came on to the road. At that moment both the Accused persons also came to the same place. There was a boutique near that place and some people had gathered at the boutique. The time was about 7.00 p.m and there was sufficient moon light. A little later the witness's son had arrived at the scene of the crime and both Accused attacked the deceased with a sword (to the head of the deceased). Witness very clearly saw the incident and was able to identify the two Accused persons, who fled the scene of the crime. The other witness one Abeysinghe had stated that it was about 7.00 p.m. when he heard the deceased uttering the words “ කවුද මට ගහන්න එන්නේ”. He was able to identify the voice. Thereafter the witness realized that the deceased had been attacked.

Another witness one Ratnayake Mudiyanseelage Mahinda Bandara, before the High Court testified that the deceased witness (deceased's father) had told him when he went to the scene of the crime and that “පියා ගමනට කෙටුවා” . (Accused-Appellant attacked the deceased).

Court has to exercise power under Section 33 of the Evidence Ordinance with great caution and must insist on strict proof before holding that the witness is dead. The exercise of such a discretion is subject to review by the Appellate Court, 48 NLR at 25. However evidence that is admitted by Section 33 are received as substantive evidence of the testimony given in a formal Judicial Proceedings. It is intended to prove the truth of facts stated. The case in hand does not reveal that the dicta in Stephen Vs. Queen 67 CLW 48 had been violated. Further the Accused party had not objected to the deposition at the non-summary inquiry being led in the High Court.

The medical officer concerned also gave evidence and produced the Medico Legal Report marked P2. The Doctor describes four injuries. Inquiry No. (1) is fatal and No. (2) is grievous injury, and the other two injuries are non-grievous injuries. The sword which was recovered on a Section 27

statement, had been produced at the trial. The Doctor was shown the sword in question and he confirmed that injuries could have been caused by such a sword.

The learned counsel for the Accused-Appellant argued that his client did not share a murderous common intention. He also emphasized that the deceased had been drunk at the time of the incident. The Accused-Appellant did not have a sword or bring a sword, to the scene of the crime. Learned Senior State Counsel supported the prosecution case.

The deposition relied upon by the prosecution (P4) very clearly makes one understand that the deceased was attacked by both Accused persons by a sword. It struck the deceased head. P4 indicates that the witness was also cross-examined. The injuries caused by the sword is consistent with the injuries described in the Medico Legal Report. The learned trial Judge has given her mind to the aspect of being attacked by a sword by both Accused persons. Depositions are no doubt substantial evidence if correctly admitted by law. There is a duty cast on the deceased Accused person and the Accused-Appellant to have provided a reasonable explanation in the context and circumstances of this case. The Accused-Appellants mere dock statement does not in any event cast a reasonable doubt in the prosecution case and the

learned High Court Judge very correctly rejected the defence of the Accused-Appellant. There is also motive for the murder being a dispute over cultivation. This court is not so convinced of the argument put forward by the learned defence counsel. We are not inclined to interfere with the verdict of the learned High Court Judge. As such we affirm the conviction and sentence and proceed to dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama J.

I agree.

JUDGE OF THE COURT OF APPEAL