

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

In the matter of an Appeal against
an order of the High Court under
Sec. 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

Velu Govindasamy,
Bogambara Prison,
Kandy.

Accused-Appellant

C. A. No : 32/2013

H. C. Badulla Case No : 56/1996

V.

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

Respondent

**BEFORE : H. N. J. Perera, J. &
K. K. Wickramasinghe, J**

COUNSEL : Sharon Seresinhe for the Accused-Appellant.
Wasantha Navaratne ASG., PC for the Attorney General.

ARGUED ON : 26th February 2015

DECIDED ON : 28th May 2015

K. K. WICKRAMASINGHE, J.

The accused appellant (Velu Govindasami) was indicted at the High Court of Badulla for having committed the death of Perumal Maradei, on or about 08.04.1995, thereby committing an offence punishable under Sec. 296 of the Penal Code. He was convicted of murder and sentenced to death on 12.02.2013. This case was tried by the judge without a jury.

This appeal is against the said conviction and the sentence.

According to the version of the prosecution, the incident happened as follows;

Perumal Maradei (the deceased) was a 'Kankani' living in the Haputale Estate, Haputale. Velu Govindasami (the accused appellant) was a labourer living next to the deceased's house in the same line of houses consisting seven adjoining houses ("leima"). Deceased's house was the first and the accused appellant's house was the second. Both the houses were separated by a single short wall and a wooden grill/ trellis.

In the previous night of the day before the incident the accused appellant was drunk and scolded the deceased's family loudly mentioning their cast (the deceased belonged to a lower cast). Although the deceased belonged to a lower cast, he was holding a higher rank than the accused appellant (Kankani). The accused appellant had asked them to come out.

However, none of the people in that set of houses had come out. Therefore, no quarrel occurred in that night.

On the following day morning, which was the day of the incident in question, the deceased advised the accused appellant saying not to scold them again in the way he did last night. After that both the deceased and the accused appellant went to work. In the afternoon, at about 12 or 12.30 pm the deceased and his wife Nallamma came home for lunch. Then the accused appellant came drunk and called the deceased. He was carrying a black colour club at that time the deceased, his wife, their son (Maradei Ravichandran) and the mother of the deceased were at home. Then the accused appellant assaulted the head of the deceased with the club. After receiving the blow, the deceased fell down. The accused appellant assaulted the hand of the deceased's wife with the same club. The accused appellant had fled from the scene with the gathering of the crowd.

The police, on their way to the place of incident arrested the accused appellant when he was on his way home, for assaulting the deceased. However, at the time of arrest the accused appellant also had bleeding injuries on both of his hands. The deceased, his injured wife, the injured accused appellant were taken to the hospital by the police. The deceased succumbed to his injuries on his way to the hospital.

The grounds for appeal urged by the learned counsel for the accused appellant are as follows:-

- I. The court has not properly evaluated the evidence of the prosecution witnesses when there were serious doubts caused of their credibility and has not properly considered the following strong contradictions and omissions when deciding the case;
 - a. The son of the deceased (Maradei Ravichandran) has given two versions of the incident- In the evidence-in-chief he stated that the deceased was having lunch in the kitchen when the accused appellant came and called him. He saw the accused appellant hitting/ giving a blow to the deceased's head. Then Nallamma shouted and came out from the kitchen.

In the cross-examination and in the High Court he has stated that after lunch the deceased was sleeping in his room. When the accused appellant shouted "Maradei come out", he came out and then he was hit on the head by the accused.

- b. The wife of the deceased in her evidence-in-chief stated that when she came from the kitchen to the house, the accused appellant was there and he hit her, she fell down and then the deceased came there. When the deceased came, the accused appellant gave a blow to his head with a club.
- c. The wife of the deceased stated that the accused appellant assaulted the deceased while the deceased was in the kitchen.
- d. The son of the deceased did not say that the accused appellant hit Nallamma.
- e. According to Nallamma the accused appellant hit her first and then the deceased came to the scene and then he hit him.
- f. Nallamma does not give a proper answer when questioned as to the motive for the alleged killing. She states that the Appellant was drunk. The independent/Medical evidence does not reveal that he was drunk etc.

When considering the contradictions pointed out, by the counsel for the accused appellant we have to consider whether these contradictions are material or not. These witnesses are lay witnesses who are uneducated, disturbed and they were giving evidence in the high court after 10yrs. Even at the police station their state of mind was disturbed and at a time where a death of the closest inmate had taken place. Therefore one cannot give evidence as if they were televising the incident. All these witnesses are human beings. As judges we must consider all these aspects. Further we must see whether these contradictions go to the root of the charge.

In the case of **Samaraweera V AG (CA 64/87 Decided on May 7, 1990)** it was held that *".....The maxim falsus in uno falsus in omnibus could not be applied in such circumstances. Furthermore all falsehood is not deliberate. Errors of memory, faulty observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim.....The credibility of witnesses cannot be treated as*

divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the truth."

Learned ASG has submitted in his written submissions and medical evidence in which it amply demonstrates the version of the prosecution witnesses. According to medical evidence, the deceased had received only one blow to the head, which amounts to a fatal injury. Witness Ravichandran had mentioned that the accused appellant dealt a blow to the head of the deceased only once. Ravichandran had identified the club with specifications (i.e. with spikes). Furthermore, the medical officer had categorically mentioned that the injury received by the deceased caused by the club produced as P1. The cause of death was due to shock and hemorrhage due to fracture of the skull. The P1 was taken into custody by the investigating officer who gave evidence stated that he had taken the above mentioned production into his custody from the house of the accused appellant.

The lay witness Saroja who was a neighbor of the deceased who had come out after hearing the noise had seen the deceased fallen on the ground and the accused appellant standing beside him with a club in his hand. Upon seeing the witness and others approaching the scene of incident the accused appellant had taken to his heels. This evidence of the independent witness has not been challenged by the defense. Her evidence corroborates the evidence of Ravichandran.

According to the evidence, the police also found stains of green paint on the club which was similar to the paint found on the roof of the house of the deceased. It also had stains similar to the colour of the broken tiles of the roof of the house of the deceased. The police had noticed a slight damage caused to the roof of the deceased.

Even though prosecution lay witnesses have not observed cut injuries on the fingers of both hands of the accused appellant the police officer had observed it.

When considering the evidence of the above mentioned lay witnesses, the rule set out in the case of **Siripala V AG (CA99/2005)** has to be born in mind, his lordship Justice Abery, observed that *"I state here that there is no rule in Criminal Law of Evidence that what was seen by one*

witness should be necessarily seen by other witness. I must state here that what one may see may not be seen by others". This view is supported by the decision in the case of **Bhoginbhai Vs State of Gujarat (AIR 1983 SC 753)** where as the Indian Supreme Court held this "by and or large a witness cannot be expected to possess a photographic memory and recall the details of an incident .It is not as if a video tape is replayed on the mental screen. The power of observation differs from person to person what one may notice another may not".

The contradictions marked do not run to the root of the case. It is stated in **Wickramasuriya V Dodalana** by Hon. Justice FND Jayasuriya in Case No **CA 172/84**. It was held that "if the contradiction is not of that character the court ought to accept the evidence of witnesses whose evidence is otherwise cogent having regard to the test of probability and having regard to his demeanor and deportment manifest by witnesses. Trivial contradictions which do not touch the core of a party's case should not be given much significance, "

The accused appellant had given a different version to the facts suggested to the prosecution witnesses in their cross examination. At this point it is important to note His Lordship Justice Abrew's citation of the observation of the Indian Supreme Court made in **Sarwan Singh Vs State of Punjab(AIR (2002) SC 3652)** in **Siripala Vs AG (CA 99/2005)**. "It is a rule of essential justice that whenever the opponent has decline 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" Court of Appeal held that the defense of alibi was an afterthought.

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For the above mentioned reasons we see no reason to interfere with the judgment of the learned High Court Judge. Therefore we affirm the conviction and the sentence of the accused appellant imposed by the High Court of Badulla dated 12.02.2013.

Hereby the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H N J Perera J

I agree

JUDGE OF THE COURT OF APPEAL