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.

Duwe Balage Dias,
Welikada Prison,
Colombo 9.

Accused-Appellant

C. A. No. : **CA 53/ 2014**

H. C. Matara Case No. : **HC 54/09**

V.

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

Respondent

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

COUNSEL : Kolitha Dharmawardana with Chamindi Diloka Mannakkara for the Accused-Appellant.

Hiranjan Pieris, SSC for the Attorney General.

ARGUED ON : 10th of June 2015

WRITTEN SUBMITIONS : 08th of July 2015

DECIDED ON : 29nd of September 2015

K. K. WICKREMASINGHE, J.

In this case, there were two accused. The accused namely, Hewa Maddumage Karunadasa and Duwa Balage Dias were indicted at the High Court of Matara for having committed the death of Nallapperuma Arachige Lional on 20.03.1998, thereby committing an offence punishable under sec. 296 of the Penal Code and for having committed grievous hurt on Liyana Arachige Indrani in the course of the same transaction, thereby committing an offence punishable under sec. 316 of the Penal Code.

The first accused was absconding and the learned Trial Judge decided to hold the trial in absentia after considering all the evidence to the fact that the first accused was absconding under sec. 241 of the Code of Criminal Procedure.

This case was tried by a Judge without a Jury upon the request of the second accused. At the conclusion of the trial on 25.02.2014 both accused were convicted by the learned High Court Judge for both the charges. The first accused was convicted in absentia as he was absconding to date.

Thereafter the first and the second accused were sentenced to death for the charge of murder and two years rigorous imprisonment had been imposed on them for the charge of grievous hurt.

This is an appeal by the second accused (herein after referred to as the 'appellant') against the said conviction and the sentence.

According to the evidence given by the legal wife of the deceased, the first witness for the prosecution, the injured party was the mistress of the deceased and the first accused was the husband of the injured. Six months prior to the incident the injured had come with the deceased to the house of the deceased and since then she had been living in the deceased's house.

On the day of the incident this witness had gone to her parents' residence with her children at about 8 pm. That house was about 1 and ½ miles away from the deceased's house. There were only the deceased and the injured left in the house of the deceased in that night. When this witness was in her parents' residence, one Piyadasa had come and informed her that the injured was beaten. Then she had gone to her husband's house and on her way to that house she had met the injured. The injured was coming towards her and she was crying. At that time the witness had noticed the fingers of the injured were cut and she had questioned the injured with regard to these injuries.

Then the witness had gone to the house of the deceased with the injured, there she had noticed that all the doors of the house were open and had seen the deceased lying on the floor, inside the house. According to her, the body of the deceased was covered with blood. Thereafter, the witness had taken the injured to the hospital.

However, according to the witness, she had never known the appellant before she came to the Magistrate's Court to give evidence. She had only known the name "Dias" before the case but not the appearance of the person (vide page 60 of the brief).

In the Trial Court, the JMO who conducted the post-mortem on the deceased, the doctor who inspected the injured and the police officers who conducted the inquiry had given evidence for the prosecution. However, according to all those evidence, the only fact that had been proved was the death of the deceased and nothing more than that. The police had recovered weapons [a sword, a 'keththa' (chopper/catty) and a 'manne' knife (machete/cleaver)] upon the direction of the appellant on a statement made to the police (under sec. 27 of the Evidence Ordinance). Those weapons were hidden under the bed of the first accused. According to the evidence given by the JMO who conducted the post-mortem on the deceased and the doctor who inspected the injured, the injuries that they found on the bodies of both the deceased and the injured were cut injuries, could have been caused by the weapons found by the police. According to the testimony of the JMO, the cause of death was due to "respiratory difficulties due separation of trachea following assault by sharp weapon". None of these evidence show a clear connection between the alleged offence and the appellant.

The Counsel for the appellant submits that the evidence led by the prosecution is totally inadequate to support a conviction. It is clear that, Indrani, the only eye witness of this case, had given evidence at the non-summary inquiry but had not given evidence at the trial. She was supposed to have been dead at the stage of the Trial. Even though the Court records reveal that the State Counsel had informed the Court that Indrani was dead and therefore he is willing to produce her evidence given at the non-summary inquiry under sec. 33 (1) of the Evidence Ordinance, it was only an application. Neither the death certificate nor other evidence had been produced to prove the death of the witness. No steps had been taken to produce the evidence given by this witness at the non-summary inquiry at the stage of the trial.

In the case of **Kekulkotuwage Don Anton Gratien v. The Attorney General (C.A. 226/2007)**, decided on 01.07.2010, no evidence was led before Court to establish the fact that the witness had gone abroad. Justice W. L. Ranjith Silva held in his judgment that *"The correct procedure would be for the prosecution to lead the evidence of the wife of the witness and the Grama Niladhari and provide an opportunity for the defence to cross examine the witness. It is after such inquiry,..., that a court should allow such application. The Trial Judge was duty bound to follow the established procedure before he arrived at his decision to adopt such a course"*. In that case, he also cited the case **Sajjan Singh v. Emperor (1925) 26 Cr.L.J. 1489** where the court held *"if the prosecution*

seeks to lead the deposition on the basis that the witness is dead then the death of the witness must be proved."

In the present case, the learned Senior State Counsel also submitted to the Court that he concedes the fact that no proper evidence had been led under section 33 of the Evidence Ordinance before the High Court. Furthermore, he agreed on the fact that the evidence led at the trial was insufficient to arrive at a finding of guilt against the appellant and did not support the conviction.

Then the learned Senior State Counsel moved that this case should be sent back for re-trial. However, the learned Counsel for the appellant submitted that this is not a fit and proper case which has to be ordered re-trial due to inadequate evidence.

The sec. 335 (2) (a) of the Code of Criminal Procedure provides that, *"In an appeal from a conviction by a Judge of the High Court at a trial without a jury the Court of Appeal may reverse the verdict and sentence and acquit or discharge the accused or order him to be re-tried."* In the case of **Warangoda Nandana Ratnasuriya v. The Hon. Attorney General (C.A. 58/2005)**, decided on 19.12.2008, Justice Sarath de Abrew held that according to this section *"a discretion is vested in the Court whether or not to order a re-trial in a fit case, which discretion should be exercised judiciary to satisfy the ends of justice..."*. **Accordingly, the decision to order a re-trial should very much depend upon to satisfy the ends of justice.** Furthermore he held four grounds that the Judge should consider when deciding whether a particular case should be sent for re-trial or not. Those grounds are;

1. *The nature of the evidence available.*
2. *The time duration since the date of the offence.*
3. *The period of incarceration the accused person had already suffered.*
4. *The trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime.*

In the case of ***Banda and Others v. Attorney General (1999) 3 SLR 168*** at page 171, Justice F. N. D. Jayasuriya held "The issue whether a re-trial should be ordered or not would depend on whether there is testimonially trustworthy and credible evidence given before the High Court."

In the present case, the appellant had been convicted by the learned Trial Judge for the offences on the basis of 'common intention'. However, as I have mentioned above, the evidence of the only eye witness to this incident had not been properly produced at the trial under sec. 33 of the Evidence Ordinance. As pointed out by the learned Counsel for the appellant, even if this Court ordered a re-trial it would only result in providing the State to find out whether that witness was dead or not and to take steps thereafter to adopt the evidence given by the witness at the non-summary inquiry. The appellant will have to languish in incarceration during this period which may be considerably long. Keeping the appellant in the prison for this whole period will worth at the end if the evidence given by this eye witness at the preliminary inquiry is strong enough to build a strong case against the appellant.

The death of the witness was not proved at the Trial. Therefore I am not aware whether the witness was in fact dead or not. Even if the death of this witness was properly proved at the re-trial and thereafter her evidence given at the non-summary inquiry were properly adopted; such evidence only reveals that 'the appellant was only present at the scene with others in a manner as if he came to the scene to keep company'. It doesn't even reveal that the appellant was armed with any type of a weapon or he was spying or remaining as a guard in order to aid the others' act and there was no participatory presence.

According to the Court Record the Appellant was first remanded on 28th August 1998 and had been in and out of remand until 2002. Since 2002 he has continued to be in remand for a total period of over 13 years to date. Furthermore, this is an incident occurred 17 year before (in 1998). In the case of **Warangoda Nandana Ratnasuriya v. The Hon. Attorney General (C.A. 58/2005)**, decided on 19.12.2008, Justice Sarath de Abrew has held that *"it must be noted that as the alleged offence has been committed on 07.02.99, almost 10 years have elapsed since the date of the offence. In a long line of case law authorities, our Court have consistently refused to exercise the discretion to order a retrial where the time duration is substantial."*

Therefore, I am of the view that this is not a fit and proper case to send for re-trial.

Based on all above, I set aside the conviction and the sentence with regard to the appellant and acquit the appellant. This judgment does not affect the conviction and the sentence imposed on the first accused, by the learned Trial Judge.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) **Kekulkotuwage Don Anton Gratien v. The Attorney General (C.A. 226/2007)**
2) **Sajjan Singh v. Emperor (1925) 26 Cr.L.J. 1489**
3) **Warangoda Nandana Ratnasuriya v. The Hon. Attorney General (C.A. 58/2005)**
4) **Banda and Others v. Attorney General (1999) 3 SLR 168**
5) **Keerthi Bandara v. Attorney-General (2) SLR 245**