

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

In the matter of an Appeal made under Section 138 of the Constitution of the Democratic Republic of Sri Lanka read with Section 331 of the Criminal Procedure Code.

**C.A. Case No: 130/2015**  
**H.C. Polonnaruwa Case No:**  
**41/2010**

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

**Complainant**

**-Vs-**

Puwakgolle Basnayake Mudiyansele  
Wickramasinghe alias "Deiya"

**Accused**

**-And-**

Puwakgolle Basnayake Mudiyansele  
Wickramasinghe alias "Deiya"

**Accused-Appellant**

**-Vs-**

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

**Complainant-Respondent**

**Before : A.L. Shiran Gooneratne J.**

**&**

**K. Priyantha Fernando J.**

**Counsel :** Tenny Fernando for the Accused-Appellant.

Chethiya Goonesekera, DSG for the Respondent.

**Written Submissions of the Accused-Appellant filed on:** 26/02/2018

**Written Submissions of the Complainant-Respondent filed on:** 15/03/2018

**Argued on :** 22/02/2019

**Judgment on :** 27/03/2019

**A.L. Shiran Gooneratne J.**

The Accused-Appellant, (hereinafter referred to as the Appellant) was indicted in the High Court of Polonnaruwa, under Section 296 of the Penal Code for causing the death of Herath Mudiyanseelage Premadasa (hereinafter referred to as the deceased) and upon conviction the Appellant was sentenced to death.

The entirety of the prosecution case is based on the evidence of an alleged confession made by the Appellant to Rajapakse Dewayalage Wijepala (PW3).

The case for the prosecution is that the Appellant, has admitted killing the deceased in a confession made to PW3, after 7 months from the date of recovery of the body of the deceased.

The principles enunciated by Lord Roche, in *Bhojraj v Sita Ram A.I.R. (1936) P. C. 60*, are very pertinent in assessing credibility of the evidence of PW3. Lord Roche, observed the following;

*"How consistent is the story with itself? (Consistency per se) How does it stand the test of cross-examination? (Stability under cross-examination) How far does it fit in with the rest of the evidence and the circumstances of the case (consistency inter se)."*

On perusal of evidence, significant contradictions *per se* and *inter se* are observed in the testimony given by PW3.

PW3 in his evidence states that soon after the recovery of the body, the police had alerted him to keep an eye and to be vigilant about statements uttered by the Appellant. At the commencement of his evidence PW3 states that he cannot remember what the Appellant (also known as Deiya) told him.

(ප්‍ර: ප්‍රේමදාස මියගොස් සිටින බව කොහොමද දැනගත්තේ කියා විස්තරාලව මතකද?

උ: මතක නැහැ.)

In examination-in-chief at page 119, PW3 states;

“ප්‍ර: තමාට මතක තිබෙනවාද මේ මරණය සම්බන්ධයෙන් දෙයියා තමාට කියූ දේ?”

උ: මතක තිබුණා ටික කාලයක් දැන් මතක නැහැ.”

However, the witness re-calls that the Appellant had stated that he attacked the deceased with a club, which inflicted injury to the head of the deceased and thereafter, had dumped the body under the culvert. During cross-examination, the witness takes up the positions that the Appellant had wrapped a piece of cloth around the face of the deceased and had dumped the body under the culvert. We further observe that PW3 relates to certain incidents, as described by the Appellant, which are clearly hearsay and therefore inadmissible.

“ප්‍ර: ප්‍රේමදාසගේ මරණය ගැන තමාට මොනවද කිව්වේ?”

උ: ප්‍රේමදාස මෙහෙන් යනවා කියා ගිහිං තිබෙනවා. එයාගේ ගම ආණමඩුවේ. ඊට පස්සේ ප්‍රේමදාසගේ ගෙදරට අල්ලපු ගෙදර බඩු තියා තිබෙනවා. ඒ වේලාවේ වික්‍රමසිංහට ප්‍රේමදාස ඒක අනුලාවකි අතින් කියනවා ඇසී තිබෙනවා. දුවේ මම හෙට ගමට යනවා කියා. එතකොට වික්‍රමසිංහ එතන කොට්ට ගහක් තිබෙනවා. එතනට ගිහින් ප්‍රේමදාස යන වේලාවේ රැකලා පොල්ලකින් ගහලා බෝක්කුවේ කටේ දාලා සල්ලි අරන් තිබෙනවා.”

PW3 makes no reference to a date or time period as to when the Appellant admitted guilt nor explain the delay in making a statement to the police.

Apart from the above observations, we note that the medical evidence does not speak of any injury caused to the head of the deceased, which contradicts the evidence given by PW3. The Judicial Medical Officer (JMO) observes that, there were no injuries sustained by the deceased except a ligature strangulation. IP Sarathchandra (PW9), who visited the crime scene had observed a towel and two ropes strongly tied around the neck of the deceased.

“ප්‍ර: එහිදී නිරීක්ෂණය වුනේ මොනවාද?”

උ: බෙල්ල තුළායකින් සහ රෙදි පටි දෙකකින් තදින් බැඳ තිබුණා. එය නිරීක්ෂණය කිරීමේදී බෙල්ල සිර කිරීමට බැඳ ඇති බව පෙනුණා. රෙදි පටි දෙකකින් බෙල්ල සිර කර තිබුණ අතර, එයට යටින් සාලුවකින් බෙල්ල ගැටගසා තිබුණා.”

It is noted that, PW3 in his evidence made reference to 1 piece of cloth wrapped around the face of the deceased.

The investigating officer had recovered the identity card belonging to the deceased using a part of the statement made by the Appellant, in terms of Section 27 of the Evidence Ordinance. The relevant part of the statement relating to the discovery of the object states, “*an identity card and the notes inside the bag*”. However, the evidence of the investigating officer was that, he recovered an

identity card and a yellow colour cover which was covered with mud and sand lying 30 meters away from the dead body.

The Chief investigating officer (PW10), had commenced further investigations to this incident, on 05/05/2003, 7 months after the recovery of the body. The Appellant was arrested on 06/05/2003, a day after further investigations commenced and the discovery of items, in terms of Section 27 of the Evidence Ordinance was made on the 07/05/2003.

The investigation to this case which was dormant for 7 months, came to an end, as a result of a further investigation carried out in a single day, resulting in the arrest of the Appellant, creates a reasonable doubt in the credibility of the investigation. It is highly improbable that the items recovered by the investigator, which were discovered 30 meters away from the dead body, would be left un-interfered, for almost 7 months from the date of the incident. The medical evidence does not support the observations made by the investigating officer who visited the crime scene nor with the evidence of PW3. We also observe that PW3 has failed to explain the belatedness of the statement given to the police.

In *Martin Fernando V. Inspector of police, Minuwangoda* 46 NLR 210, *Wijewardene J*, observed that;

*"An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a magistrate on questions of fact based on demeanor and credibility of*

*witnesses carries great weight" where "a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."*

In the circumstances, the confession alleged to have been made to PW3, is unsafe to act upon to base a conviction against the accused.

Accordingly, the conviction and sentence are set aside and we acquit the Appellant.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

**K. Priyantha Fernando, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**