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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
HCC/0125/23

Complainant

High Court of Matara
Case No. 46/2015

Vs.

Pahalage Mahesh Kumara alias Sudda.

Accused

AND NOW BETWEEN

Pahalage Mahesh Kumara alias Sudda.

Accused-Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka.

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Kavithri Ubeysekara for the Accused-Appellant.

Hiranjan Pieris, S.D.S.G. for the Respondent

ARGUED ON : 21.02.2024

DECIDED ON : 21.03.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Matara for the murder of Maduppuli Hewage Susantha, thereby committing the offence punishable under Section 296 of the Penal Code. The cause of death according to the Judicial Medical Officer was fatal firearm injuries on the chest. After trial, the learned High Court Judge convicted the accused-appellant for the murder by the Judgment dated 28.02.2023 and sentenced him to death. This appeal has been preferred against the said Judgment.

Prior to the hearing of the appeal, written submissions had been filed on behalf of both parties. At the hearing, the learned Counsel for the appellant and the learned Senior Deputy Solicitor General for the respondent made oral submissions.

In the High Court, PW-1 and PW-2 had given evidence regarding the incident. PW-1 was the wife of the deceased. PW-2 was the sister-in-law of the deceased. PW-4, the mother of PW-1 had not seen the incident and seen only the deceased lying on the ground after being shot. Other witnesses for the prosecution are the Judicial Medical Officer and Investigating Officers.

The grounds of appeal are as follows:

i. The learned High Court Judge gravely misdirected himself as he failed to consider/evaluate the first information which is the 119-emergency call.
ii. The identity of the appellant has not been proved beyond a reasonable doubt.
iii. The learned High Court Judge had failed to consider/evaluate that the prosecution has not established the lighting condition at the time of the incident to prove a positive identification.
iv. The learned High Court Judge had erred in law in failing to evaluate the evidence under the legal principles governing circumstantial evidence and had rather acted on suspicious circumstances.
v. The learned High Court Judge failed to provide the benefit of Section 114(f) of the Evidence Ordinance for the appellant.
vi. The learned High Court Judge had been influenced by facts and circumstances not elicited during the trial.
vii. The learned High Court Judge has misdirected himself on the infirmities in prosecution evidence.
viii. The conviction and sentence are bad in law.

Two main issues to be considered in this appeal is the identification of the accused-appellant and some observations made by the learned Trial Judge in evaluating the prosecution evidence.

After evaluating the evidence of the prosecution witnesses, the learned High Court Judge has stated in his judgment that it can be concluded after evaluating the entirety of the prosecution evidence that strong circumstantial evidence has been presented by the prosecution to prove beyond a reasonable doubt the fact that the accused-appellant shot the deceased (Page 36 of the High Court Judgment).

Again, the learned High Court Judge has expressed the following view in his Judgment:

"ඉහත කී පරිදි පැමිණිල්ලේ සාක්ෂි විශ්ලේෂණය කර සලකා බැලීමේදී පැමිණිල්ල විසින් චෝදනාව චූදිතට එරෙහිව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමට ප්‍රමාණවත් ප්‍රබල සාක්ෂි මෙහෙයවා ඇති බවට නිගමනය කළ හැකිය. පැමිණිල්ල විසින් චූදිතට එරෙහිව ප්‍රබල නඩුවක් ගොඩනගන තෙක් චූදිතයෙකු නිර්දෝෂිභාවයේ පූර්ව නිගමනයෙන් ආරක්ෂා වුවද, පැමිණිල්ල ප්‍රබල සාක්ෂි මෙහෙයවා ඇති විට චූදිත නිර්දෝෂි වන්නේ නම් තම නිර්දෝෂිභාවය පැහැදිලි කළ යුතුය." (Page 39 of the High Court Judgment)

Following the aforesaid observations, the learned Judge considered the statement made by the accused-appellant from the dock and rejected. It is apparent from the aforesaid observations that the learned High Court Judge was of the view that the presumption of innocence of an accused is operative only up to the point where the prosecution builds a strong case.

I regret to state that this is a completely wrong view regarding the presumption of innocence of an accused and the above observations are contrary to the correct legal position that the learned High Court Judge is obliged to follow. It was held in the case of ***Anthony Michael Morril V. Attorney General*** – Court of Appeal Case No. CA 26/06, decided on 25.05.2010 as follows: "The learned trial judge has come to the conclusion that the prosecution has proved the case beyond reasonable doubt before considering the defence evidence which rendered subsequent consideration of the defence evidence. It is cardinal rule in our criminal law that every person charged with an offence is entitled to a fair trial and shall be presumed innocent until he is proved guilty. (Article 13(3) and 13(5) of the constitution). This presumption of innocence should be operative until the learned trial judge perused and analyzed the entirety of the evidence led in the case, that of the prosecution as well as that of the defence".

Therefore, the learned Judge's observation that "පැමිණිල්ල විසින් චූදිතට එරෙහිව ප්‍රබල නඩුවක් ගොඩනගන තෙක් චූදිතයෙකු නිර්දෝෂිභාවයේ පූර්ව නිගමනයෙන්

ආරක්ෂා වුවද, පැමිණිල්ල ප්‍රබල සාක්ෂි මෙහෙයවා ඇති විට චූදිත නිර්දෝෂි වන්නේ නම් තම නිර්දෝෂිභාවය පැහැදිලි කළ යුතුය" is wrong. The learned Trial Judge in this case analyzed the defence case on the basis that the presumption of innocence is operative only up to the point where the prosecution builds a strong case. Therefore, the learned Trial Judge had done a grave error in evaluating the evidence of the case.

Be that as it may, I proceed to deal with the other vital issue of the identification of the accused-appellant. The learned Counsel for the appellant contended that when the identity of the shooter was the main issue of the entire case and the first information disclosed about unidentified shooters, it was very unreasonable on the part of the prosecution for not acting on the first information.

The learned Senior DSG for the respondent contended that an information obtained through a 119 call cannot be reduced to writing as stipulated in Section 109 of the Code of Criminal Procedure Act but no prejudice has been caused to the appellant by considering the 119 call as the first information.

The issue in this case is not that the first information was not reduced to writing. As submitted by the learned Counsel for the appellant, according to the first information received through a 119 call, unidentified persons had shot the deceased. At page 273 of the Appeal Brief, the first information received through a 119 call had been recorded as an admission in terms of Section 420 of the Code of Criminal Procedure Act. Again, at pages 284 and 285 the said admission has been recorded.

From the said admission, two clear points have been established. Firstly, the wife of the deceased, PW-1 had given this first information. Secondly, PW-1 had stated that unidentified persons had shot her husband, the deceased. However, the learned High Court Judge

misdirected himself in stating in his Judgment (Page 27 of the High Court Judgment) that the first information was an anonymous call because it is clear from the aforesaid admission recorded that PW-1, the wife of the deceased gave the first information. The learned Senior DSG admitted that the said observation of the learned Judge is wrong.

The serious issues arising from the said first information are the credibility of PW-1 and the identity of the accused-appellant. In giving evidence, PW-1 stated that she saw Mahesh, the accused-appellant running towards the river on the western side with something like a black pipe in his hand. She also stated that the appellant was a neighbour and was known to her from his childhood. If the appellant was a well-known neighbour and if PW-1 saw him running, soon after the incident, a serious issue arises as to why she informed the police through 119 call that unidentified people shot at her husband. If PW-1 saw the appellant running soon after the shooting, definitely she would not inform the police that unidentified people shot at her husband. Therefore, her evidence in the High Court that she saw the appellant running immediately after the shooting cannot be believed. Even the learned Senior DSG admitted that PW-1 is not a credible witness and her evidence cannot be relied upon.

However, the learned Senior DSG contended that PW-2 is a truthful witness and her evidence can be acted upon. Therefore, it has to be considered whether the identification of the appellant is proved beyond a reasonable doubt only on the evidence of PW-2 because no other witness identified the appellant at the scene. PW-2 had stated in her evidence that the appellant was a neighbour and he was known to her from his childhood. As stated previously, PW-1 had also stated that she knew the appellant from childhood. However, when PW-1 gave the first information to the police through a 119 call, she informed that unknown people shot at her husband. The question arises if PW-2 saw the appellant fleeing from the place of the incident soon after the

shooting, why PW-1 informed the police that unknown people shot the deceased. Didn't PW-2 told PW-1 (the wife of the brother of her husband) that I saw Mahesh running with something like a pipe in his hand, immediately after the shooting? In these circumstances, a reasonable doubt arises whether PW-2 in fact identified the appellant.

The learned Counsel for the appellant also contended that the prosecution has not established that there was sufficient lighting condition at the time of the incident to identify the appellant. The learned Senior DSG contended that PW-1 and PW-9, the investigating officer affirmed that bulbs were illuminated around the house. PW-9 stated in his evidence that the lighting condition could be seen by looking at the photographs taken at the scene. However, no such photographs have been marked in evidence. In addition, an admission has been recorded that no notes were made in the information book in respect of the lighting condition (Pages 242 and 243 of the appeal brief). Apart from that, PW-9 stated in his evidence that they were searching the place of the incident using a torch (Pages 255 and 256 of the appeal brief). According to the aforementioned items of evidence, it is not established whether there was sufficient light at the scene to identify a person because, according to PW-1, the incident occurred between 10.00 and 10.30 at night.

Apart from the aforesaid infirmities in identifying the appellant, the most important point to be considered in identifying the appellant is that PW-2 identified the appellant not by seeing his face but by seeing the back of the person. It is apparent from the following question and answer that PW-2 did not see the face and only saw the back of the person running and she stated that the said person was identified as the appellant.

ප්‍ර: ඒ අවස්ථාවේ තමා මහේෂ් කුමාරගේ මුහුණ දැක්කාද?

උ: එයා පිටුපාලා යනවා දැක්කේ, ඒ වුනාට මට එයා අදුනගන්න පුලුවන් වුනා පොඩි කාලේ ඉදන් එයාව දන්න නිසා. (Page 138 of the appeal brief).

Therefore, PW-2 had only seen a person running, turning his back. PW-2 stated that even then, she identified that person as the appellant. Even though PW-2 saw a person running, identifying a person when running, turning his back, without seeing his face, is not an identification that can be accepted beyond a reasonable doubt. Therefore, in this case, there is no evidence regarding the identification of the accused-appellant that can be accepted without a reasonable doubt. For the foregoing reasons, I hold that the charge of murder against the accused-appellant has not been proved beyond a reasonable doubt. Hence, the decision of the learned High Court Judge to convict the accused-appellant for the charge of murder is erred in law.

Accordingly, the Judgment dated 28.02.2023, the conviction and the death sentence passed on the appellant are set aside. The accused-appellant is acquitted of the charge of murder.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL