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/255 - 256/2018
High Court of Chilaw
Case No. HC/14/14

Complainant

Vs.

1. Kok Nuwan Silwa Alias Rathuwa
2. Nammuni Arachchilage Kalana Wijemal Silva

Accused

AND NOW IN BETWEEN

1. Kok Nuwan Silwa Alias Rathuwa
2. Nammuni Arachchilage Kalana Wijemal Silva

Accused –Appellants

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Sahan Kulatunga for the 1st Accused-Appellant.
Sachithra Harshana for the 2nd Accused-Appellant.
Dileepa Pieris, S.D.S.G. for the Respondent.

ARGUED ON : 28.03.2024

DECIDED ON : 07.05.2024

WICKUM A. KALUARACHCHI, J.

The first and the second accused-appellants were indicted in the High Court of Chilaw for committing the murder of one Mihindukulasuriyalage Chaminda Saman Kumara on or about 15th November 2011 in Dunkannawa, Naththandiya, an offence punishable under Section 296 of the Penal Code. After trial, the learned High Court Judge convicted both accused-appellants for the offence of murder and imposed the death sentence on them. This appeal is preferred by the accused-appellants against the said convictions and sentences.

Prior to the hearing, written submissions were filed on behalf of all parties. At the hearing of the appeal, the learned Counsel for the first accused-appellant, the learned Counsel for the second accused-appellant and the learned Senior Deputy Solicitor General for the respondent made oral submissions.

In brief, the prosecution case is as follows:

At the time of the incident, the deceased Chaminda Saman Kumara resided in Dunkannawa village situated in Naththandiya. On the day of the incident, PW-4, a resident of the same area and a three-wheeler driver, was in the three-wheeler park at the time of the incident. He stated in his testimony that he saw the 1st accused-appellant beating the deceased while deceased was fallen down on the left side pavement of the Naththandiya - Kuliyapitiya road. Accordingly, PW-4 has witnessed the 1st accused beating the deceased using his hand (Page 67 of the appeal brief). Thereafter, PW-4 stated that he went behind and held the appellant when he attempted to strike the deceased using an iron rod (Page 69 of the appeal).

PW-3, was a businessman who was inside his shop at the time of the incident. He has seen an unusual road traffic and come to the road to enquire about it. Upon hearing about a quarrel, PW-3 rushed to the place of the incident where large number of people were gathered. At this moment, PW-3 has seen the 1st accused-appellant shouted saying something like "චන්ඩි ඕන එකෙකුට ගහනවා" (Page 86 of the appeal brief) while holding a pole and the 2nd accused-appellant trying to take the 1st accused-appellant away from the incident, asking him to go.

PW-10, one Priyangika who was inside her husband's retail business store which was situated in the other side of the road where the incident occurred has also given evidence and stated that she has seen the deceased and the two accused-appellants fighting near the petrol shed.

The two accused- appellants have been arrested by the police on 16th November 2011 whilst they were hiding in a forest near a cemetery situated in Maningala, Dunkannawa. Upon a statement made by the 1st accused-appellant to the police, an iron rod has been recovered by the police on the same day in an adjoining land to the petrol shed of

Dunkannawa which was situated close to the place of incident. The said item of evidence has been produced in terms of Section 27 of the Evidence Ordinance.

Prosecution has also led the evidence of a dying declaration made by the deceased to PW-2, one Ravindra Lakmal who took the deceased to the hospital in a three-wheeler.

After the prosecution case was closed and the defence was called, the accused-appellants made dock statements. The 1st accused has taken up the position that he and the 2nd accused- appellant went to the shed to fuel up their vehicle and saw people gathered near the place. They have seen a person who was beaten up and seemed dead. He stated that when they went to look at the scene, people at the place tied them with ropes. Thereafter, another group of people came and untied them and let them go.

The 2nd accused-appellant has also stated in his dock statement that both he and the 1st accused-appellant went to the shed to fuel up and they saw people gathered near the place. However, according to the 2nd accused-appellant, the 1st accused appellant has gone to beat a man who seemed dead and fallen on the road. Then, he told the 1st accused appellant to go away asking whether he is insane. At that moment, the 2nd accused-appellant also stated that several persons have beaten them and tied them and thereafter, another set of persons have come and untied them, allowing them to go.

At the hearing, the learned Counsel appearing for the 1st appellant and the learned Counsel appearing for the 2nd appellant contended that the learned Trial Judge has wrongly applied Section 159 (1) of the Evidence Ordinance in admitting the dying declaration. The learned Senior DSG conceded the fact that the application made under Section 159 (1) of the Evidence Ordinance to lead the evidence regarding the dying declaration is wrong.

When PW-2 was asked whether the deceased said something about the person who assaulted him when the deceased was being taken to the hospital, PW-2 stated that the deceased did not say anything. Then, the learned State Counsel who prosecuted the High Court trial made an application to allow PW-2 to refresh his memory by going through his statement made to the police. The learned Defence Counsel objected to the application but the learned Trial Judge allowed the application (page 52 of the appeal brief).

Section 159 (1) of the Evidence Ordinance reads as follows:

"A witness may, while under examination, refresh his memory by referring to any **writing made by himself at the time of the transaction** concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory." (Emphasis added)

In terms of Section 159 (1) of the Evidence Ordinance, a witness can refresh his or her memory by referring to any writing made by himself or herself at the time of the relevant transaction. A police officer who made notes regarding a raid carried out by them can refer to his own notes and refresh his memory in giving evidence under Section 159 (1). In addition, in terms of Section 159 (2) of the Evidence Ordinance, a police officer can also refer to any such writing made by some other police officer and refresh his memory in giving evidence, if he had read the other person's notes within the relevant time and knew that the said notes are correct. Not only a police officer but also any other witness who had made his own notes can refer and refresh his memory in giving evidence in accordance with Section 159 (1) and (2) of the Evidence Ordinance. However, in the case at hand, the learned Trial Judge erroneously allowed PW-2 to go through the statement made by him to the police in order to refresh his memory and give evidence. The learned Trial Judge could not realize that the statement given to the police is not a writing made by PW-2. The statement that PW-2 was allowed to

refer and refresh his memory is a statement recorded by a police officer and not a writing made by PW-2. Therefore, allowing to go through the statement made by PW-2 to the police is completely a wrong order which is not permitted by law.

If PW-2 was not allowed to go through his statement made to the police, PW-2's evidence was that the deceased did not say anything about the person assaulted him. Therefore, the evidence of PW-2 regarding the dying declaration cannot be accepted in determining this case. The learned Senior DSG correctly conceded to the said fact.

The learned Senior DSG conceded to another fact that the 2nd accused-appellant had no common intention with the 1st accused-appellant in committing the murder. The contention of the learned Counsel for the 2nd appellant was that not only the 2nd appellant did not have common intention to commit the murder but also he attempted to take the 1st appellant away from the crime scene.

According to the testimony of PW-3, the 2nd appellant held the 1st appellant and tried to take him away from the place of the incident (pages 86 and 92 of the appeal brief). Hence, it is apparent that the 2nd appellant had no participatory presence in the crime and the aforesaid items of the evidence clearly demonstrate that the 2nd appellant had no common intention with the 1st appellant to commit the murder. Therefore, I hold that the learned High Court Judge's decision to convict the 2nd accused-appellant for the murder is bad in law. The 2nd accused-appellant should be acquitted of the charge of murder.

Now, the only issue remained to be determined is whether the charge of murder has been proved beyond a reasonable doubt against the 1st accused-appellant. The learned Counsel for the 1st appellant contended that PW-3, PW-4 and PW-10 had not properly identified the 1st accused-appellant at the time of the incident and they identified him only by way of a dock identification. He contended further that several people

rushed to the place of the incident and there is a doubt regarding the identification.

In addition, the learned Counsel for the 1st appellant contended that there is no evidence against the 1st appellant apart from the evidence of PW-10 and PW-3's evidence that the 1st appellant shouted holding an iron rod. The learned Senior DSG pointed out that apart from the evidence of the PW-3 and PW-10, PW-4 has clearly described at pages 66 and 67 of the appeal brief, as to how the 1st appellant assaulted the deceased. In addition, the learned Senior DSG contended that the iron rod that was used to assault and kill the deceased was recovered by the police on the statement made by the 1st appellant. He contended further that the subsequent conduct of the 1st appellant, hiding in a cemetery after the incident, is also an important item of evidence that establishes the guilt of the 1st accused-appellant.

PW-3, in his statement stated that no one came to the place of the incident because of the fear but people came after he went there. Even in such a situation, PW-10 has made a statement to the police the very next day after the incident. According to the evidence of PW-10, she had seen three people grappling. One she identified as the deceased. Other two persons she identified as the 1st and 2nd appellants although she did not know the names. At the time PW-10 saw the appellants, they were not among the several other people who rushed to the place. When the appellants were identified, only the appellants and the deceased were at the place of the incident. Therefore, any other person's involvement other than the appellants can be clearly excluded. Hence, there was no room for misidentification and I regret that I am unable to agree with the argument that the 1st accused-appellant could not be identified properly as there were several people.

Apart from the evidence of PW-10 and PW-3, PW-4 has clearly stated as pointed out by the learned Senior DSG that he saw the 1st accused-

appellant striking the deceased. He stated that he saw the 1st appellant assaulting the deceased by using his fist. But later, when he saw that the 1st appellant tried to assault the deceased by using an iron rod, PW-4 has held the 1st appellant. He identified the iron rod which was marked as P-1 as the iron rod that the 1st appellant was holding and which was recovered by the police on the statement made by the 1st appellant. Corroborating the said items of evidence, PW-3 has also stated in his testimony that he saw the 1st appellant shouted holding a rod (page 85 of the appeal brief).

So, PW-4 has seen the 1st appellant assaulting the deceased. The prosecution has established that the death of the deceased occurred as a result of the said assault. When PW-4 was cross-examined, he stated that he did not know how the deceased fell on the ground. However, it is vital to note that no question was asked by the defence in cross-examination and challenged the evidence given by PW-4 regarding the way that the 1st appellant assaulted the deceased.

It was held in the case of ***Himachal Pradesh V. Thakur Dass*** (1983) 2 Cri. L.J. 1694 at 1701 V.D. Misra CJ held that, "whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed". Also, it was held in ***Motilal V. State of Madhya Pradesh*** (1990) Criminal Law Journal NOC 125 MP that "Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact."

In the circumstances, a dying declaration is not necessary to prove the murder charge against the 1st accused-appellant because, mainly on the evidence of PW-4 and on the evidence of other witnesses for the prosecution, it is clearly established that the 1st accused-appellant committed this murder with the murderous intention.

When considering whether the dock statement of the 1st accused-appellant creates a reasonable doubt on the prosecution case, it is apparent that the position taken up from the dock has never been put to the prosecution witnesses. It was held in the Indian Judgment of ***Sarvan Singh V. State of Punjab*** (2002 AIR SC (iii) 3652) pages 3655 and 3656 which was cited in the case of ***Ratnayake Mudiyanselage Premachandra V. The Hon. Attorney General*** – C.A. Case No. 79/2011, decided on 04.04.2017 that "It is a rule of essential justice that whenever the opponent has declined 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." Therefore, the learned High Court Judge is correct in rejecting the dock statement of the 1st appellant and deciding that the prosecution has proved the charge against the 1st accused-appellant beyond a reasonable doubt.

Accordingly, the conviction and the sentence of the 1st accused-appellant are affirmed.

The conviction and the sentence of the 2nd accused-appellant are set aside. The 2nd accused-appellant is acquitted of the charge of murder.

The appeal of the 1st accused-appellant is dismissed.
The appeal of the 2nd accused-appellant is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J
I agree.

JUDGE OF THE COURT OF APPEAL