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

In the matter of an Appeal in terms of section 331(1) of the Code of Criminal Procedure Act. No. 15 of 1979.

CA :109/2014

High Court of Anuradhapura:
HC 170/2011

The Democratic Socialist republic of Sri Lanka

Plaintiff

Vs.

Jayaratne Bandage Senaka Kumara Herath

Accused

AND NOW BETWEEN

Jayaratne Bandage Senaka Kumara Herath

Accused-Appellant

Vs.

Hon. The Attorney General,
Attorney General's Department,
Hulftsdorp, Colombo12

Plaintiff-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Dushantha Kularathne for the Accused-Appellant Dilan Ratnayake, DSG for the AG
ARGUED ON	:	14.11.2019
WRITTEN SUBMISSIONS	:	Final Written Submission Accused Appellant – On 07.01.2020 The Plaintiff-Respondent – On 17.10.2018
DECIDED ON	:	28.01.2020

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Anuradhapura dated 06.06.2014 in case No. HC 170/11.

The accused-appellant (hereinafter referred to as the 'appellant') was indicted upon two charges under Section 296 and 380 of the Penal Code in the High Court of Anuradhapura for committing the offence of Murder of Punchi Banda Prabath Indika Dissanayake and for the robbery of cash and gold jewellery belonging to the deceased. The appellant pleaded not guilty for the charges in the indictment and chose a non-jury trial. At the trial, witnesses were testified on behalf of the prosecution. The appellant made a dock statement. The Learned High Court Judge of Anuradhapura on 06.06.2014, convicted the appellant on both charges of the indictment imposing death penalty for the 1st charge and 7 years rigorous imprisonment with a fine of Rs. 30,000/= and a default sentence of 6 months imprisonment for the second charge of robbery.

Being aggrieved by the said judgment, the appellant preferred an appeal to this Court. The Counsel for the appellant submitted following grounds of appeal;

1. The failure of the prosecution to prove its case.

2. The benefit of the reasonable doubt should be given to the appellant.

3. The Learned High Court Judge erred in law.

Facts of the case:

The wife of the deceased (PW 5) H.M.R.S Wijeratne stated that on 28/12/2008 around 5.30 p.m her deceased husband who was a three-wheeler driver informed her over the phone that he was going to Nochchiyagama with a friend. She further stated that she was aware that on that day the deceased was wearing two gold chains, one bracelet and rings and was having Rs.25,000/= in cash. The Prosecution Witness No.1 (PW1) Mohoamed Casim, who is a lorry driver in his testimony stated, that he saw the deceased fallen out of the three wheeler. The witness had been driving the vehicle towards Nochchiyagama and he had seen the three-wheeler parked facing towards the Thambuttegama side. When PW1 offered himself to help the deceased, he had refused to get the help of the witness. The PW1 has thereafter informed the incident to a Policeman at the Junction and also informed the Nochchiyagama Police.

The Prosecution Witness No 2 (PW 2) Ranhamige Chaminda Ruwanpriya who was a friend and a relative of the deceased, has testified that on 28/12/2008 at about 6.45 p.m he met the deceased with a person who was later identified as the accused appellant, at the fuel station at Thambuttegama. The witness claimed that he identified the appellant who was seated at the back of the three wheeler and he was wearing a green colour t.shirt and had a mark on the right side of the face. Furthermore he has stated at that time the deceased was drunk. Thereafter he had seen the deceased fallen by the side of the three- wheeler and also identified the accused appellant who was under arrest who was inside the police jeep. Further he in fact identified the accused appellant in High Court as the same person seen before with the deceased at the petrol shed and in the police jeep. The Witness No 3 (PW3) who was a salesgirl at a shop has testified that on 28/12/2008 at around 5.00 p.m. a knife was purchased by the appellant and also mentioned that the particular person had a mark on the face and also gave a description about him.

The O.I.C of Nochchiyagama Police Sarath Kumarasinghe (PW10) has testified that the incident in question was reported on 28/12/2008 at 10.25 p.m and the body was recovered at 10.30 p.m. along with some pieces of a broken gold chain and a pendent. The appellant has been arrested in Lunuwewa area on 29/12/2008 around

5.45 a.m. and at the time of arrest, gold jewellery and a purse over Rs. 15,000 had been recovered from him. The knife was recovered by the police according to the section 27 of the evidence ordinance. Witness No.3, the sales girl identified the knife with specifications.

The first ground of appeal was based on the facts that there were no eye witnesses , no medical evidence was available to implicate the appellant in the incident directly and none of the witnesses who were testified on behalf of the prosecution were able to prove any of the counts beyond reasonable doubt.

It should be noted that this case is entirely based on circumstantial evidence and evidence of all witnesses have been led by the same trial judge. I wish to draw my attention to the elaboration of the first ground in relation to the testimonies of the witnesses for the prosecution.

The appellant has submitted that the appellant in the incident was not implicated by the testimony of the 1st witness. The Learned High Court Judge has correctly arrived at the conclusion, that the only fact proven before the court by the testimony of the 1st witness for the prosecution is that ,the witness has seen the deceased in a critical condition in a three wheeler facing Thambuttegama.

It has been submitted that the version of the Prosecution Witness No.2 that he identified the appellant who was seated at the back of the three-wheeler and he specifically noticed the birthmark on his face is not probable and hence his testimony also did not implicate the appellant in the incident in question. The appellant who was arrested by the police, the day after the incident early morning was shown by the police to the Prosecution Witness No.2 and the same witness could identify the appellant as the person with whom the deceased was last seen alive. The Learned High Court Judge has observed as follows.

"මේ අනුව මෙම සාක්ෂිකරු තමා එදින ෂෙඩ් එක ලඟදී මියගිය අකිල සමඟ ත්‍රීවිලර් එකේ සිටි මෙම නඩුවේ වුදිත බවට හඳුනාගෙන ඇති අතර, සිද්ධිය සිදුවී ඇති 28 වන දිනට පසු දින,ඉතා කෙටි කාලයකදී මෙලෙස හඳුනාගෙන ඇති බැවින්, සහ හඳුනාගත් බව ඔහු ඒ අවස්ථාවේදී පොලිසියට ප්‍රකාශ කර ඇති බැවින් වුදිත හඳුනා ගැනීම අභියෝගයක් ඇති වන බවක් නොපෙනේ."

The Prosecution Witness No.3 namely Iroshani who was a salesgirl at a shop named Kuliyapitiya Stores. She testified that the knife was purchased by the appellant on 28/12/2008 at about 5.00p.m, but no bill was issued by her. In

addition, the witness identified the appellant as the person to whom she sold the particular knifeThe Learned high court Judge has observed as follows.

"මෙම සාක්ෂිකාරිය කියා සිටින පරිදී ඇය 28 වන දින පිහියක් මෙම වුදිතට විකුණා ඇති බවත් 29 වන දින මෙලෙස තමා පිහිය විකිණුවේ වුදිතට බව පැහැදිලිව හඳුනාගෙන ඇති බව පෙනී යයි ."

During the cross examination the witness has stated as follows:

"ප්‍ර: තමාගෙන් පිහිය ලබා ගත්ත පුද්ගලයා ජීවිතයට කී අවස්ථාවක් දැකලා තියනවද

උ : ඉස්සරලාම දැක්කේ එදා"

The Learned High Court Judge analysing the testimony, has observed as follows.

"එමෙන්ම තමා නොහඳුනන අයෙකු තමා හඳුනන බවට කියා සිටීමේ අවශ්‍යතාවයක් මෙම සාක්ෂිකරියට තිබී ඇති බවක්ද නොපෙනේ."

Furthermore this witness who has given evidence of selling the knife to the accused appellant has correctly identified the Nickel bladed knife with a black handle as the knife she sold to the appellant.

I am of the view that this witness has given a very important piece of evidence where even the doctor has testified that the injuries caused by the deceased were compatible with the weapon recovered.

The wife of the deceased named Herath Mudiyanselage Renuka Susanthi Wijeratne has stated that her husband was a three-wheel driver and he informed her over the phone that he was going to Nochchiyagama with a friend. The witness has identified some gold jewellery belonged to the deceased and has stated about the money and other jewellery carried by the deceased on that day. The witness has stated the deceased husband was wearing two gold chains and was having Rs. 25,000/= in cash with him.

I wish to draw my attention to the testimony of Dr. Ajith Jayasena Consultant JMO who conducted the post mortem of the deceased concluded that the injuries caused to the throat of the deceased could have been caused by the knife marked as P1 by the prosecution. The defense has submitted that the tesimony of this witness was insufficient to even suggest any connection of the Appellant to the incident in question.

The OIC of Nohchiyagama Police Sarath Kumarasinghe who went to the scene has given evidence of arresting the appellant and it has been stated that at the time of

arrest some gold jewellery and a purse with Rs.Rs. 15,060/=. The written submission on behalf of the appellant has stated that no first information has been made or a tip has been given about the appellant, therefore it is doubtful as to how the appellant was arrested and this should be considered with the dock statement of the appellant who stated that he was arrested by one Pathiraja who had a personal animosity against him.

The Learned High Court Judge has stated in his judgement as folllows:

"හරස් ප්‍රශ්න වලට සහභාගී වූ මෙම සාක්ෂිකරු, චූදිත අත්අඩංගුවට ගන්නා ලද්දේ තමා විසින් බව කියා සිටි අතර, එය 2008.12.29 වන දින බවද කියා සිටින ලදී. පැය 5.45 ට ඔහු ඇත අඩංගුවට ගත් බවත්,මෙම අපරාධය සිදු කල එම ස්ථානය අසල මඩ සහිත ලියද්දක පුද්ගලයන් ගමන් ගත් ආදී සලකුණු නිරීක්ෂණය කල බවත් , ඒ අනුව මෙම අපරාධයට එක පුද්ගලයෙකු පමණක් සහභාගී වී ඇති බව තමාට ඇති පළපුරුද්ද අනුව තීරණය කල අතර, එලෙස කුඹුරට පැන එම ස්ථානයෙන් ගිය අයෙකුට ප්‍රධාන මාර්ගයට ඒමට ඇති සෑම ස්ථානයක් පිළිබඳව ම තමාට දැනුමක් තිබූ බැවින්, නිලධාරීන් යොදවා එම ප්‍රදේශය ආවරණය කල බවද කියා ඇත. ඒ අනුව සැකකාර පුද්ගලයෙකු සිටින බවට ලත් තොරතුර මත මෙම සැකකරු ඇත අඩංගුවට ගත බවත්, ඒ වන විට මෙම අපරාධය සිදුවී පැය 4ක් පමණ ගතවී තිබූ බවත් කියා සිටින ලදී."

It was further submitted by the counsel for the appellant that, the Prosecution Witness, Government Analyst could have only confirmed the blood stains found on the jewellery and on the knife are human blood. The blood has not been examined or identified as the deceased's blood since the blood samples have not been in the proper condition to do the examinations. I wish to draw my attention to the following evidence in cross examination.

"ප්‍ර: තම නිරීක්ෂණය කල පැ 1,2,4,7,8,9 භාණ්ඩ වල තිබූ රුධිර පැල්ලම් මරණකරුට අයත් ඒවාද කියා නිශ්චය කරන්න බැහැ කීවා ?

උ: ඔව්

ප්‍ර: ඒකට හේතුව මොකක්ද?

උ: කාණ්ඩ කිරීමේ පරීක්ෂණයක් මගින් යම්කිසි සැසඳීමක් කල හැකියි.නමුත් නිශ්චිත ප්‍රතිපල ලබා ගැනීමට නොහැකි තත්වයක එම සාම්පල පැවතියේ

ප්‍ර : අදාල රුධිරය සුදුසු තත්වයේ තිබුනේ නැද්ද?

උ: නැහැ"

The Learned High Court Judge has taken the testimony of the Government Analyst into consideration and concluded that the parts of the chain possessed by the accused and the parts of the chain recovered at the scene belonged to the deceased.

I wish to draw my attention to section 379 of Penal Code.

"In all robbery there is either theft or extortion.

Theft is "robbery", if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.

Extortion is " robbery ", if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by put-ting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted."

The Learned High Court Judge has observed in his judgement as follows,

"වර්තමාන නඩුවේ ඉදිරිපත් කරුණු අනුව මියගිය ප්‍රභාත් ඉන්දික සන්තකයේ තිබී ඇති රන් භාණ්ඩ මෙලෙස වූදීත අතට පත් වී ඇත්තේ ඔහු එම භාණ්ඩ ලබා ගන්නා අවස්ථාවේ මිය ගිය අයට මරණීය බයක් පමුණුවා බලෙන් ලබාගෙන තිබීමෙන් බව පැහැදිලිය."

Hence it has been concluded that the prosecution has proven the 2nd charge against accused appellant beyond reasonable doubt.

I wish to consider the second and third grounds of appeal together. It is contended that in the absence of any eye witness there is a reasonable doubt as to who has committed the crime in question and circumstantial evidence cannot be relied upon in convicting an accused.

In the case of **King v. Gunaratne 47 NLR 145** it has been stated as follows

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

The Appellant has stated that he was arrested by one Pathiraja who had a personal animosity against him and it has been stated that a doubt is raised by the dock statement about arresting the appellant on a personal animosity. This position was never put to the prosecution during the cross examination.

The Learned High Court Judge has made the following observation about the dock statement.

"පැමිණිල්ලේ නඩු විභාගය අවසානයේදී වුදිත විත්ති කුඩුවේ සිට ප්‍රකාශයක් පමණක් කර ඇති අතර, ඔහු කියා සිටියේ පතිරාජ යන නිලධාරියා තම සමඟ අමනාප බැවින් ඔහු තමාව අත් අඩංගුවට ගෙන ඇඳුම් පහර දී පසුව බලෙන් අත්සනක්ද ලබා ගත් බවයි. කෙසේ වෙනත් වුදිත කියා සිටින මෙම කරුණු නිසා පැමිණිල්ලේ සාක්ෂි මඟින් හෙළිදරවු වී ඇති මෙම අපරාධය සිදුවී ඇති ආකාරය සම්බන්ධයෙන් කිසිදු සැක සහිත තත්වයක් හට නොගනී."

In the case of **Don Shamantha Jude Anthony Jayamaha v Attorney General [CA 303/2006 and C.A.L.A. 321/06],** it was held that,

"Finally having considered the case for the prosecution as well as the dock statement it is only then the learned Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the prosecution. One cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether the dock statement is sufficient to create a doubt provided it is so obvious that the dock statement is only a bear denial or is irrational or palpably false, in which case it could be rejected without even considering the evidence for the prosecution...

Failure to evaluate a dock statement in the proper perspective shall not ipso facto vitiate a conviction if the dock statement is

a) A bare denial

b) Palpably false and unbelievable.

In **Simonge Ekanayake Vs The Attorney General C.A.129/2005 C.Anuradapura142/200** it was held that even though the Trial Judge has not considered the dock statement, if no miscarriage of justice had taken place due to the lapse of the Trial Judge and there is material to say that the dock statement is palpably false then the findings of the original court should not be overturned.

The Learned High Court Judge has observed as follows:

*"මෙම නඩුවේ පැමිණිල්ලෙන් ඇසු දුටු සාක්ෂි කිසිවකු කැඳවා නොමැති වුවත්, ඉදිරිපත් කල සාක්ෂිකරුවන් හෙලිදරවු කල කරුනුත් එකිනෙකට ගැලපෙන අතර, මියගිය අය සමඟ පැමිණි චුදිත විසින් මියගිය අයගේ බෙල්ලට පිහියකින් ඇනීමේ **ප්‍රතිඵලයක්** ලෙස මෙලෙස අකිල යන අයගේ මරණය සිදුවී ඇති බවත්, සාක්ෂි සැකයකින් තොරව ඉදිරිපත් වී ඇති අතර, ඊට වෙනස් අකාරයකට මෙම සිද්ධිය සිදුවී එති බවට විත්තියෙන් කිසිදු යෝජනාවක් හෝ සාක්ෂි කැඳවීමක් කර නොමැත."*

Most witnesses for the prosecution, being independent witnesses have not made contradictions *interse* and the circumstances have made a strong case beyond reasonable doubt. The Learned High Court Judge after observing and analysing all the witnesses has come to a conclusion that prosecution has proved the case beyond reasonable doubt and the defense has failed to create a reasonable doubt in the prosecution.

Considering above reasons, I am of the view that the Learned High Court Judge is not erred in law, and there is no merit in the contentions raised by the Learned counsel for the appellant. Accordingly the convictions and the sentences imposed by the Learned High Court Judge is affirmed and thereby the appeal is dismissed.

This appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

*"මෙම නඩුවේ පැමිණිල්ලෙන් ඇසු දුටු සාක්ෂි කිසිවකු කැඳවා නොමැති වුවත්, ඉදිරිපත් කල සාක්ෂිකරුවන් හෙලිදරවු කල කරුනුත් එකිනෙකට ගැලපෙන අතර, මියගිය අය සමඟ පැමිණි චුදිත විසින් මියගිය අයගේ බෙල්ලට පිහියකින් ඇනීමේ **ප්‍රතිඵලයක්** ලෙස මෙලෙස අකිල යන අයගේ මරණය සිදුවී ඇති බවත්, සාක්ෂි සැකයකින් තොරව ඉදිරිපත් වී ඇති අතර, ඊට වෙනස් අකාරයකට මෙම සිද්ධිය සිදුවී එති බවට විත්තියෙන් කිසිදු යෝජනාවක් හෝ සාක්ෂි කැඳවීමක් කර නොමැත."*

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