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

In the matter of an Appeal under and in terms of Article 138 (1) of the Constitution read with the Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:
HCC/287/18
HC Colombo Case No. 2401/05

1. Dasanayaka Mudiyanselage Amal Dhammika
2. Dharmaseelan Premakindan

Accused

AND NOW BETWEEN

1. Dassanayaka Mudiyanselage Amal Dhammika

Accused Appellant

v.

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

Complainant-Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Indica Mallawaratchy for the Accused-Appellant
Hiranjan Peries, SDSD for the Respondent.

Written Submissions: 28.04.2021 (by the Accused-Appellant)
02.10.2019(by the Respondent)
On

Argued On: 23.11.2023

Decided On: 14.12.2023

Sasi Mahendran, J.

The Accused Appellant, (hereinafter referred to as 'the Accused') and the 2nd Accused (Dharmasirilan Premakindan who has been absconding) along with two other unknown to the prosecution was indicted in the High Court of Colombo for committing the murder of Rathnasiri Geeganage alias Ralahami is an offence punishable under Section 296 read together with section 32 of the Penal Code

After the trial, the Learned High Court Judge convicted the Accused for the murder, and the death sentence was imposed.

Being aggrieved by the said conviction and sentence the Accused had preferred an appeal to this court.

The main ground urged by the counsel for the Accused was that the Learned High Court Judge had not evaluated the probability of the evidence of the PW02,

The following facts and circumstances are briefly summarised:

According to PW01, Preethi Shantha Geeganage the brother of the deceased stated that, after going to watch the 'Shaja Match' at their neighbor's place, he and his wife came home. Thereafter they went to bed and his brother(deceased) has been sleeping in the living area. At around 11 pm, there was a knock on the door, and he asked his wife to go and check who it was, in the meantime, he looked out through the window and saw four individuals standing. The windows did not have any grills. According to him, he had been away from the scene and had heard a gunshot on his way,

PW02 the wife of Pw01 opened the door and she recognized the 1st Accused Amal whom she had known for years. Along with him, two other individuals have barged in, and at the same time, another individual has jumped into the house through the window with a pistol in hand. In her evidence, she admitted she did not question his visit apart from the fact that she had told the individual who came in from the window not to trample the pillow.

She further mentioned that the 1st Accused had gotten the pistol from the other individual and shot the deceased.

The question before us is that according to PW01 he knew the 1st Accused and was a neighbor for the last 15 years. He mentioned that he had asked his wife to put on the light when they heard the noise. It was he who had asked the wife to open the door. There he has also seen the four individuals whom he has not recognized. Further, it was mentioned that another individual came through the window and he followed him.

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ප්‍ර : ශබ්දයක් ඇසුනාද?

උ : දොරට තට්ටු කළා. ලයිට් දමන්න කිව්වා.

ප්‍ර : කොහෙද ලයිට් දැම්මේ?

උ : ඉස්සරහ කෑල්ලේ ලයිට් දැම්මා.

ප්‍ර : මොනවද කිව්වේ ?

උ : දොර අරින්න කිව්වා.

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ප්‍ර : තමුන් දැක්කාද ?

උ : පවුලට දොර අරින්න කිව්වා. කට්ටියගෙන් එක්කෙනෙක් ඇතුලට ආවා.

ප්‍ර : කී දෙනෙක් සිටියාද?

උ : හතර දෙනෙක් සිටියා.

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ප්‍ර : ඒ ආපු අය මොකද්ද කලේ?

උ : එතකොට බිරිඳ දොර ඇරලා ඉවරයි. ජනේලයෙන් පැන්න එක්කෙනා මා ගාවින් ඉස්සරහට ගියා.

ප්‍ර : තමුන් මොකක්ද කලේ?

උ : මම ගිය අයගේ පිටු පස්සෙන් ගියා.

When we analyze the evidence of PW02 who is the wife of PW01. she stated that she had gone to watch a match at the neighbor's house and after coming back while they were sleeping, at 11 o'clock she heard a knock on the door. And through the window, she saw the 1st Accused and the other 3 individuals standing outside. Then she opened the door letting them inside, and in the meantime, the 2nd Accused whom she had identified at the identification parade came through the window carrying the pistol, this witness testified that her husband PW01 was present with her at that time. Further, in the cross-examination, she mentions that her husband has asked her to open the door. she also mentioned that she had seen the 1st Accused shooting the deceased.

When we peruse the judgment, the Learned High Court Judge has come to the conclusion that PW01 could have not identified the Accused as he was not present near the door when PW02 opened the door for the other Accused to come in. According to PW02 when she opened the door PW01 was there and even PW01 admitted that he had seen all four-unknown people outside his premises. He further admitted that he had seen the person who came through the window with the gun. It shows that PW01 was there at the time when all four came in. There is a possibility that he could have seen all four of them when they entered.

When we perused the judgment, in page 386 of the Appeal brief we observed the following reasons were given by the Learned High Court Judge to believe the story of PW01,

එවැනි අයෙකු පැ.සා. 01 ශාන්ත එදින නොදකීම හෝ හඳුනා නොගැනීම විය හැකිදැයි මා දැන් සලකා බලමි. මෙම සාක්ෂිකරුවන් දෙදෙනාගේ සාක්ෂියට අනුව ඔවුන් දෙදෙනාම නිවසේ ඇතුලත කාමරයක සිට ඇත. දොරට තට්ටු කරනවාත් සමඟ ඉදිරියට එනම් මරණකරු සිටි සාලය ප්‍රදේශයට පැමිණ ජනේලයෙන් බලා දොර ඇර ඇත්තේ මල්ලිකා යන පැ.සා. 02 වේ. ජනේලයෙන් බලපු අවස්ථාවේ දී මෙන්ම දොර අරියාන් පසුව

ඇය එතන සිටි අය දැක හඳුනා ගෙන ඇත. මෙසේ පැ.සා.02 ඉදිරියට ගොස් දොර අරින අතරතුරදී ශාන්ත කාමරයේ සිට ඇති අතර කාමරයේ ජනේලයෙන් එක අයෙක් අවියක්ද සමග පැන නිවසට ඇතුළු විය.

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මේ අවස්ථාවේදීද පැ.සා 02 එතනම සිට ඇත. එසේ වුවද මෙම කලබලයන් සමග පැ.සා. 01 ශාන්ත පිටුපසින් පැන අසල්වැසි නිවසකට දිව ගොස් ඇත……. එසේ වුවද 01 වන විත්තිකරු හෝ දැක හඳුනා ගෙන නැත. මෙම 01 වන විත්තිකරු වන පෙර සිට දන්නා හඳුනන අයෙක් එදින රාත්‍රියේ දැක හඳුනා නොගැනීම වියහැකිදැයි මා දැන් සලකා බලමි. ජනේලයෙන් නිවසට පනිනු ලබන්නේ මීට පෙර නොදැකපු අයෙකු වේ, 01 වන විත්තිකරු ඉදිරි දොරෙන් ඇතුළු වූ අයෙකු වේ.රාත්‍රියේදී මෙය සිදු වී ඇති අතර විදුලි ආලෝකය තිබුනේ වුවද පිටුපස දොරෙන් පැන ගිය 01 සාක්ෂිකරුට ශාන්ත පැමිණි අය සාධාරණ දුරක සිට දැක ගැනීමට අවස්තාවක් තිබී නැති බව පෙනේ.

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මෙය රාත්‍රියේදී සිදු වීමත් පිටුපස දොරෙන් පැන යාම හේතුකොට ගෙන පැ.සා 01 ට, 01 වන විත්තිකරු දැක හඳුනා ගැනීමට ආවස්තාව සහ අවකාශය තිබී නැති බව හෙළිදරව් වේ. ඒ අනුව 01 වන සාක්ෂිකරු ශාන්ත කිසිවෙකු හඳුනා නොගැනීම විය හැකි කරුණකි.

We hold that this is a misdirection of evidence. We are mindful of the dictum observed by **, Macdonnel CJ in King v. Gunaratne and Another, CLR V.14 page 144 held that:**

"This is an appeal mainly on facts from a Court which saw and heard the witnesses to a Court which has not seen or heard them, and in dealing with this judgment I have to apply the three tests, as they seem to be, which a Court of Appeal must apply to an appeal coming to it on questions of fact. Can we say that the verdict of the learned District Judge, namely, that these people are guilty, was unreasonably. against the, weight of the evidence adduced on both sides? Clearly it is not possible to say that. **Can we say that there has been any misdirection either on the law or on the evidence? (emphasis added)** Again I do not think it would be possible to say so. There was a point of law argued here that accused had no intention to cause loss in the end. I have dealt with that, and properly understood, I do not think it is a misdirection in law at all. I do not remember any other point that was seriously raised to this Court as a misdirection, Then there is the third ground of interference, that the Court of trial has drawn the wrong inferences from matter in evidence which is as much before this Court as. it. was before the Court of trial, for instance, documents. Again, I do not think it can be said that there has been any wrong inferences drawn by the Court of trial. On the contrary, the documents put in seem, rightly apprehended, to support the findings of fact arrived at by the learned District Judge."

Later **Justice Ranasinghe, J (as was then) in Jajathsena and Others v. G,D,D. Perera, Inspector,1992 (1) SLR 371**. Has relied on the above judgment and held that

"The principles laid down by the authorities, referred to above, make it clear: that, although the findings of a Magistrate on questions of fact are entitled to great weight, yet, it is the duty of the Appellate Court to test, both intrinsically and extrinsically the evidence led at the trial: that, if after a close and careful examination of such evidence, the Appellate Court entertains a strong doubt as to the guilt of the accused, the Appellate Court must give the accused the benefit of such doubt.

Therefore, we hold that there is a clear misdirection by the High Court Judge.

The next question arises, concerning the probability of evidence of PW02.

According to PW02, she has identified the 1st Accused through his voice and even when she saw him upon opening the door. PW01 is the person who asked PW02 to open the door. PW01 states that even though he has known the Accused for 15 years he couldn't identify him at the time of the incident. It is strange to note that although PW01 and PW02 were present at the incident only PW02 was able to identify him. Both witnesses were present at the time PW02 identified the Accused.

The Conduct of PW02 is not that which is expected of a prudent, reasonable person. In the position of PW02 who claims to have known the Accused for the last 15 years, at the least she could have asked the accused inquiring about the purpose for him to come that night with unknown individuals, or would have told her husband about the accused or when she saw the gun she should have shouted.

We are mindful that before the incident they had gone to a neighbor's house to watch the match. Because the 1st witness couldn't identify the 1st Accused whom he had known for about 15 years, where the PW02 states that she opened the door upon recognizing the Accused voice creates doubt.

Further, we observe the conduct of PW02, without informing her husband, and inquiring about the Accused creates doubt as to whether they were present at the time of that incident.

A similar incident was discussed in the following judgment;

Ismail, J in Wijepala v. The Attorney-General, 2001 (1) 46 in page 58,

"Learned President's Counsel for the appellant submitted, however, that the testimony of Senaratne was completely untrustworthy and of such poor quality that a conviction against the appellant cannot possibly be sustained in law. His testimonial trustworthiness on vital aspects relating to the incident was assailed in an attempt to cast a doubt even in regard to his presence at the time the deceased had received the fatal stab injury.

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Senaratne stated in his evidence that he took his injured son in a car to the hospital. The Gramasevaka Jayapala testified that he provided his car for the purpose and that he himself accompanied Senaratne and his injured son in the car to the hospital. Although the Gramasevaka testified that Senaratne was known to him, there is no evidence that Senaratne revealed the identity of the assailant to him that night or even thereafter. The failure of Senaratne to inform the Gramasevaka of the identity of the assailant therefore raises a serious doubt in regard to the presence of Senaratne at the scene of the incident and his claim to have identified the appellant as the assailant. Applying the test of spontaneity, his belatedness reduces the weight of his evidence and affects his credibility.

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The evidence of Senaratne who was the sole eyewitness to the incident is open to suspicion. The trial judge has failed to appreciate that his evidence in regard to the identity of the appellant has not been supported by any other item of evidence. There is therefore a strong doubt as to the guilt of the appellant and, as such, the benefit of the doubt should have been given to the appellant. The Court of Appeal has erred in affirming the conviction without adequately testing the evidence of Senaratne. For these reasons, I allow the appeal and set aside the judgment of the Court of Appeal. The conviction and sentence imposed on the appellant by the High Court are set aside and the appellant is acquitted.

Further Rohini Marasinghe J. in Kalansuriya Alias Raja v. Attorney General, 2015 (1) SLR 415,

"These facts are not corroborated by the witness's mother, his sister or by Piyal. In fact Ak's testimony was directly contradicted by the two of them.

In her testimony, the witness Gnawathie (widow) stated that she did not see AK before the stabbing She had seen the witness AK only at the time the deceased was taken

to hospital by AK. She also stated in her testimony that AK did not mention to her about the stabbing incident at any time during that period Strangely, the witness AK had remained silent with the name of the assailant and the entire incident of stabbing which he claimed to have witnessed that evening No reason had been advanced for this abnormal behavior of AK's silence In these circumstances only rational reasoning that could be given would be that AK had not seen the stabbing.

It is natural that the first question any reasonable person would ask in these circumstances would be 'who did this?' It is strange that none of the witnesses mentioned to each other the name of the assailant, when according to AK the name of the assailant was known According to these witnesses there was no animosity between the deceased and the appellant to cause harm to the deceased The witness Piyal does not state that he met AK at the time the deceased was walking drunk and abusing Thilina. The witness Piyal also denies that AK had mentioned the name of the assailant In fact his testimony at pages 129 and 130 of the Brief, was that AK had not mentioned the name of the assailant or that he saw the stabbing when AK got into the vehicle to take the deceased to hospital.

The trial court ought to have addressed its mind to all these supportive facts, before accepting those facts as proved and supportive evidence Therefore, the evidence of the sole witness AK, we find to be untrustworthy as it was discredited by the other witnesses The uncorroborated evidence is sufficient for a conviction if that evidence was not contradicted on material points by other witnesses who were material witnesses (Vide *Sumanasena v Attorney General*."

We mindful of the dictum of **Akbar J; in The King v. Fernando, 32 NLR 251 held that;**

"It has been held in the case of Milan Khan v. Sagai Bepari [23 I. L. R. Calcutta 347.] that the duty of the Appellate Court in a criminal case is not similar to that of an Appellate Court in a civil case. In a criminal case, if the Judge of the Appellate Court has any doubt that the conviction is a. right one, the accused should be discharged. In a civil case the appellate Court must be satisfied before setting aside the order of the lower Court that the order is wrong. Further, in a case reported in 17 Weekly Reporter (Criminal), page 59, it was held that an Appellate Court was bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically.

Using this test, a strong doubt, as I have stated, has been created in my mind that the conviction is right, and the benefit of this doubt must be reckoned in favour of the accused. The conviction is set aside and the accused acquitted."

Considering the evidence led by PW02 we note that she has failed to inform her husband who was with her at the time that she identified the first Accused. And also it is strange to note that PW01 who has known the 1st Accused sometimes could not identify the 1st Accused at that time. Therefore, this raises serious doubt regarding the presence of both witnesses at the scene of the incident.

Further, we observed that any reasonable person would ask in these circumstances at night, that is when a known person comes with an unknown person, what are you doing here? Why have you come? According to PW02 she never questioned the 1st Accused.

The Learned Trial Judge ought to have addressed to his mind all these improbable facts. I hold that the trial judge has failed to appreciate that the evidence of PW02 regarding identity with regards to the 1st Accused was improbable.

Therefore, we hold that the prosecution has failed to prove the guilt of the Accused beyond reasonable doubt.

For the above-mentioned reasons conviction and sentence imposed by the Learned High Court Judge is set aside. And Accused is Acquitted.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL