**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.*

**Court of Appeal No:**

**CA/HCC/426/2019**

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT**

**Vs.**

**High Court of Colombo**

**Case No:** 2968/2006

Sandun Dinusha Wanigasuriya

**ACCUSED**

**AND NOW BETWEEN**

Sandun Dinusha Wanigasuriya

**ACCUSED-APPELLANT**

**Vs.**

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

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| Before | : Sampath B. Abayakoon, J. |
| | : P. Kumararatnam, J. |
| Counsel | : Nipun Samaratunga for the Accused-Appellant |
| | : Madhawa Tennakoon, D.S.G. for the Respondent |
| Argued on | : 29-05-2024 |
| Written Submissions | : 24-01-2023 (By the Accused-Appellant) |
| Decided on | : 25-07-2024 |

**Sampath B. Abayakoon, J.**

This an appeal preferred by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Colombo.

The appellant was indicted before the High Court of Colombo for committing the following offences.

1. That he caused the death of one Harshika Damith Fonseka at Kaldamulla within the jurisdiction of the High Court of Colombo on or about 22-05-2002, and thereby committed the offence of murder, punishable in terms of section 296 of the Penal Code.
2. At the same time and at the same transaction, he committed the offence of robbery on one Lalani Fonseka by robbing her gold chain, and thereby committed an offence punishable in terms of section 382 of the Penal Code.

After trial without a jury, the learned High Court Judge of Colombo found the appellant guilty as charged of his judgment dated 26-06-2019.

Accordingly, he was sentenced to death in relation to the 1st count and was sentenced for a period of 12 years rigorous imprisonment in relation to the 2nd count.

In addition, he was ordered to pay Rs. 50,000/- with a default sentence of 2 years rigorous imprisonment.

He was also ordered to pay Rs. 25,000/- as compensation with a default sentence of 1 year rigorous imprisonment.

**The Facts in Brief**

PW-01 Lalani Fonseka, who was the victim in relation to the 2nd count preferred against the appellant, was the only eyewitness to this incident. She and her son, who was the deceased, has gone to the site of the partly built house belonging to them on the day of this incident in order to inspect the work done at the building site. They have gone there around 3.15 in the evening and it was not a day where the building construction was happening. During that time, there has been a notice exhibited in front of their building site informing that anyone who is interested can buy the satalin planks used for the construction of the house.

While they were on the site, the appellant to whom the witness has referred to as 'Sandun' in her evidence has come and inquired about the advertisement. The appellant, after inspecting the satalin planks stored on the ground outside of the house had informed her that the amount mentioned in the advertisement is not there. This has prompted the PW-01 to tell her son to go with him to the upper floor of the house and show him the balance satalin planks, which were stored on the upper floor.

Accordingly, the deceased and the appellant has gone upstairs, and after some time, she has seen the appellant running down the staircase and has also seen her son collapsed on the staircase with bleeding injuries. The appellant has come down with a blood-soaked knife in his hand, and has pressed the knife onto the neck of PW-01. He had demanded her to hand over the gold chain she was wearing. Through fear of death, she has not resisted. After grabbing the chain, the appellant has run away from the building site.

When she reached her son, she has seen him with bleeding injuries to the left side of his stomach and has seen him having in his hand the gold chain worn by him. When inquired, he has uttered the words that the chain was snatched.

After his admission to the hospital with the help of others, the deceased has succumbed to his injuries few hours after the incident.

PW-01 has failed to identify the knife used in the crime. When she was shown the gold chain marked P-01, she has stated that it was similar to the one she was wearing at the time of the incident, but she is unable to recognize it, as she cannot remember.

Subsequent to the incident, she has identified the appellant as the person who committed the crime in the identification parade held in that regard.

It is clear from the evidence of PW-01 that although she has referred to the appellant as Sandun in her evidence, when this incident occurred, he was unknown to her. It is clear that she has referred to the appellant as Sandun only after she came to know his name subsequently.

She has stated that she cannot exactly remember whether the appellant went to the upstairs of the house first and her son went later, or both of them went together. She has also stated that she made the police statement soon after the incident and could not remember much of it due to the tragedy of losing her son. The evidence also provides that the deceased had been a 19-year-old youth at the time of his death.

The neighbour who assisted the PW-01 to take the deceased to the hospital as well as the father of the deceased has given evidence. The father of the deceased has positively identified the gold chain marked P-01 as the chain his wife was wearing at the time of the incident.

According to the evidence of the Judicial Medical Officer (JMO) who conducted the post-mortem, the deceased has received a deep stab wound just below his right side armpit, which has penetrated the heart cavity and the lungs. Apart

from the main injury, several other injuries have been observed, those being cut and stab wounds. The cause of death had been due to the injuries suffered by the deceased as a result of the stabbing.

According to the evidence of the investigating officer and the other witnesses who had conducted investigations into the incident, it had been the PW-08 who has arrested the appellant as a suspect for committing the offence on 28-05-2022. After recording his statement, PW-08 has recovered a gold chain from a jewellery shop situated in Sea Street, Colombo. The relevant portion of the appellant's statement that led to the recovery of the gold chain has been marked as P-04 in terms of section 27 of the Evidence Ordinance. The knife alleged to have been used in the crime has also been recovered based on the statement. According to the evidence of PW-08, Police Inspector Weerakoon has led the investigations. The recoveries have been made while he assisted IP Weerakoon in that regard. The knife had been recovered under a banana tree situated behind the house of the appellant.

The jewellery shop owner to whom the appellant has allegedly sold the chain produced as P-01, has also given evidence at the trial and has stated that, the appellant came and sold a gold chain to him informing to him that it belongs to his grandmother.

He has identified the gold chain marked P-01 as the one similar to what was sold to him by the appellant. He has been categorical in his answers in cross-examination that although he issues receipts in obtaining gold as pawn jewellery, since the chain was sold to him in this instance, he did not issue a receipt.

The Police Inspector who was instrumental in the recoveries made along with PW-08, namely PW-07 Weerakoon, who was an Assistant Superintendent of Police by the time he gave evidence, has substantiated the evidence in relation to the recovery of the gold chain, the knife and other evidence relating to the investigations.

The identification parade notes held in relation to the appellant at the Magistrate's Court of Mount Lavinia have been marked as P-05. The said identification parade has been held on 26-06-2002. The said parade notes and the procedure adopted by the additional Magistrate's Court of Mount Lavinia in that regard had been admitted by the appellant in terms of section 420 of Code of Criminal Procedure Act.

At the conclusion of the prosecution case and when the appellant was called upon for a defence, he has decided to make a statement from the dock. Giving a lengthy dock statement, he has stated that on 23-05-2022, an officer of Mount Lavinia police had visited his house and had informed his mother that he should be present before the police to record a statement. It had been his position that, accordingly, he went to the police station, and he was arrested and kept in custody. He has claimed that on the 25th , two females came to the police station and he was shown to them. He has also claimed that he was tortured by the police and questioned about a gold chain and a knife, but informed the police that he was unaware of such a gold chain or a knife.

He has stated that the police took him to a jewellery shop in Sea Street and instructed him to show a shop and to say that he sold the chain to the said shop, for which he had to agree due to the torture suffered by him. He has claimed that the police went to a jewellery shop and forced the owner to hand over a gold chain and later recorded a statement from the owner of the shop. He has also claimed that one of the females to whom he was shown at the police station had participated in the identification parade and identified him without any hesitation.

**The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. Did the learned High Court Judge err in law by failing to consider contradictions and omissions in the prosecution case in favour of the defence.
2. Did the learned High Court Judge err in evaluating the evidence in relation to the identification of the appellant.
3. Did the learned High Court Judge err in failing to consider the discrepancies in the evidence of PW-01 in favour of the appellant.
4. Did the learned High Court Judge err in disregarding the dock statement of the appellant.

**The Consideration of the Grounds of Appeal**

I will now proceed to consider the grounds of appeal urged by the learned Counsel for the appellant together, as they are interrelated.

The 1st and the 3rd ground of appeal was on the premise that there were contradictions and omissions in the prosecution case and the learned High Court Judge has failed to consider them in favour of the appellant.

It is trite law that contradictions or omissions in the evidence given by a witness should be material contradictions that creates a doubt in such evidence. Irrelevant contractions cannot be considered in favour of an accused person in such a situation.

In the case of **State of Uttar Pradesh Vs. Anthony 1985 AIR SC 48,** the danger of disbelieving an otherwise truthful witness on account of trifling contradictions have been spotlighted. It has been stated that:

> *"The witness should not be disbelieved on account of trivial discrepancies, especially where it is established that there is a substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session Court and that minor variation in language used by witness should not justify the total rejection of his evidence."*

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

> *"While appreciating the evidence of a witness the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."*

The learned Counsel for the appellant made submissions about the evidence of PW-01, which relates to the fact that whether she told the police that the person who came and her son, went together to the upstairs of the house.

In her evidence before the trial Court, she has stated that the appellant went upstairs alone and her son followed him later. In her police statement, she has stated that her son and the other person went to the upper floor.

In my view, although it has been marked as a contradiction, that cannot be termed as a contradiction in that regard. She has clearly stated that both the appellant and her son went to the upper floor as the appellant wanted to see the balance of the satalin planks which were available for sale.

The omission spoken of relates to what the witness has stated that she also suffered an injury when the appellant came and held the knife to her neck before her gold chain was snatched. She has stated under cross-examination that she cannot exactly remember whether she said that to the police. Her evidence clearly shows that her statement had been recorded while her son was

undergoing treatment at the hospital. She has clearly spoken about her emotional state when she made the statement to the police. It is amply clear that after seeing her young son being brutally stabbed and her being robbed, no mother would be able to relate the intricate details of an incident so that she can answer all the questions put to her while being cross-examined in a Court of Law.

As considered above, what is relevant here is whether the alleged omissions or contradictions creates a reasonable doubt as to the totality of the evidence. I find no reason to consider as such under any circumstances.

Although it was claimed during the arguments of this appeal that the learned High Court Judge has failed to consider this matter in its correct perspective, the judgment of the learned High Court Judge shows otherwise. The learned High Court Judge has well considered the evidence of prosecution witnesses separately, and has considered whether their evidence was cogent enough to be believed. In that process, the learned High Court Judge has clearly considered whether the alleged contradictions and omissions or discrepancies as claimed, has created a reasonable doubt in the prosecution case.

It is abundantly clear that the learned High Court Judge has considered the evidence having in his mind a clear understanding as to the legal provisions that he should follow when considering the evidence in a criminal case. The learned High Court Judge has considered the prosecution evidence to come to a finding whether it has established a strong *prima facie* case, before proceeding to consider whether the defence taken up by the appellant has created a reasonable doubt or has provided a reasonable explanation as to the evidence against him, which in my view was the correct approach that should be adopted by a trial Judge.

Although it was contended that the learned High Court Judge has erred in evaluating the evidence relating to the identification of the accused by PW-01, I find no basis to agree with such a contention.

Although the appellant was unknown to PW-01 when he first came and inquired about the advertisement to sell satalin planks, it is very much clear that she and her deceased son has conversed with the appellant for a reasonable time regarding the advertisement to sell the satalin planks. Since the person who came has further inquired about the planks, she has informed him that there are additional planks placed on the upper floor. Her deceased son and the person have gone to the upper floor as a result. After some time, when she was about to inquire as to the delay of them returning, the same person has come down in a hurry with a blood-soaked knife in his hand and threatened her at knife point and has left after snatching her gold chain. This clearly shows that PW-01 had a reasonable time to remember the person who committed the crime.

The Turnbull Guidelines provided in the case of **Regina Vs. Turnbull (1977) QB 224** laid down important guidelines for Judges as to the manner in which they should assess evidence in relation to a situation where identity of an accused person comes into question. The said guidelines read as follows.

It requires a trial Judge to be mindful that;

- *Caution is required to avoid the risk of injustice.*
- *A witness who is honest may be wrong even if they are convinced, they are right.*
- *A witness who is convincing may still be wrong.*
- *More than one witness may be wrong.*
- *A witness who recognizes the defendant even when the witness knows the defendant well maybe wrong.*

Some of the circumstances a Judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- *The length of time the accused was observed by the witnesses.*
- *The distance the witness was from the accused.*
- *The state of the light.*

- *The length of time elapsed between the original observation and the subsequent identification.*

I find that this is not an instance where the PW-01 only had a fleeting glance at the person who committed this horrific crime. He has come and conversed for at least 5 to10 minutes with the PW-01 and her son, providing sufficient time for PW-01 to remember him well.

Although it has been claimed that he was shown to her at the police station, rather than being a general statement, she has not been confronted in any detail as to the manner the appellant claims that he was shown to her.

If the contention of the appellant was that he was shown to the PW-01 at the police station before the identification parade was held, the Officer-In-Charge of the Mount Lavinia police or other relevant officers who gave evidence in this action should have been confronted with the said allegation, so that they could have answered the same. When making his dock statement, the appellant has narrated a story to claim that he was arrested, kept for several days at the police station and was shown to two females by taking him to a glass covered room. However, such a position has not been put to PW-01 or the relevant police witnesses, which shows that the said allegation has no merit. Besides that, the identification parade held in this regard has been admitted in terms of section 420 of the Code of Criminal Procedure Act. When the parade was held, the appellant has failed to inform the learned Magistrate who conducted the parade that, he was previously shown to the witness.

I find that all these matters have been considered by the learned trial Judge in its correct perspective and had come to a correct finding that the PW-01 has positively identified the appellant as the perpetrator of the crime.

Another matter pointed out by the learned Counsel for the appellant was that the PW-01 has failed to identify the gold chain marked P-01 as the chain robbed from her possession, and the shop owner's (PW-05) evidence does not clearly

establish that it was the appellant who came and sold the chain to him or whether it was the same chain that he gave to the police.

Although PW-05 has stated that he did not issue a receipt for the purchase, he has explained as to the reasons why he did not issue such a receipt. However, he has clearly stated that it was the appellant who came and sold the chain to him. If the position of the appellant was that he never sold a chain to PW-05 and he was giving false evidence in that regard, such a position should have been put to him so that he could reply to such a contention. The only questions asked from him had been to the effect whether he issued a receipt when he purchased the chain and nothing else.

It is well-settled law that when a party to a criminal trial takes up a certain position or takes a particular line of defence, such defence or position should be put to the relevant witnesses when they give evidence in that regard so that they can reply to such a position.

In **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 36755, 3656,** it was observed;

> *"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."* This case was cited with approval in the case of **Boby Mathew Vs. State of Karnataka 2004 3 Cri. L. J.3003.**

**His Lordship Sisira de Abrew, J.** stated in **Pilippu Mandige Nalaka Krishantha Kumara Thisera Vs A.G CA 87/2005 decided on 17-05-2007** that;

> *"….I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

I find that no basis exists for the appellant to challenge the evidence of PW-05 after having failed to challenge his evidence at the appropriate time.

The other ground of appeal urged on behalf of the appellant was that, the learned High Court Judge has disregarded the dock statement made by the appellant.

As I have stated before, the learned High Court Judge, after coming to a firm finding that the prosecution has established a strong *prima facie* case, has proceeded to consider whether the defence taken up by the appellant has created a reasonable doubt or a reasonable explanation has been provided as to the charges against him. In this process, the learned High Court Judge has considered in detail his defence, and whether it can be accepted and whether it should be held in favour of him. The learned High Court Judge has given clear reasons as to why he is not in a position to accept the dock statement, which I find was the only conclusion that a trial Judge can reach when considering the evidence placed before the Court.

A dock statement made by an accused person when he was called upon for a defence in a criminal trial, although such a statement has some evidential value, needs to be considered on the basis that it was not evidence given on oath or subjected to the test of cross-examination. Our Superior Courts have consistently determined the value that can be attached to such a statement.

**E.R.S.R. Coomaraswamy** in his book, ***Law of Evidence*****, Volume II (Book 2) at page 528,** having referred to English cases on the subject of the value that can be attached to an unsworn statement before such statements from the dock was abolished in England by section 72 of the Criminal Justice Act of 1982 states;

> "The defendant who made an unsworn statement, instead of giving evidence enjoyed considerable advantages, such as:
>
> a. The absence of cross-examination;
> b. He was not liable to be prosecuted for perjury, since he was not sworn;

c. He could freely attack prosecution witnesses without any attack on his own character, convictions, and dispositions;
d. He could incriminate her co-defendant and damage him, since the latter could not give evidence in rebuttal, although the Jury would have been warned to ignore this against the co-defendant.

The English Judges sought to neutralize these advantages as follows:

a. They gave directions to Juries by asking them, "Why did the accused elect to make an unsworn statement? Could it be that he was reluctant to put his evidence to the test of cross-examination? If so, why? He has nothing to fear from unfair questions since he would be protected by his Counsel and by Court."
b. As will be seen, the Court even went to the extent of stating that the dock statement cannot prove facts not otherwise proved by the evidence and that it is not evidence.
c. They also said that it was not necessary to read out the unsworn statement in the summing-up, if the Jury was reminded of it, and that the Judge need not give the Jury a copy of the statement."

The position in Sri Lanka as to the value that can be attached to a dock statement by an accused was considered in the case of **Queen Vs. Kularathne (1968) 71 NLR 529.**

The Court referred to **King Vs. Vellayan Sittambaram (1918) 20 NLR 257** and **Queen Vs. Buddharakkita Thero (1962) 63 NLR 433** and expressed their agreement with the view taken in the latter case that the unsworn statement must be treated as evidence subject to its infirmity referred to therein. The Court held that the Jury must be directed that:

a. The statement must be looked upon as evidence, subject to the infirmity that the accused had deliberately refrained from giving testimony, and therefore, was not subject to an oath or cross-examination;

b. If they believe the unsworn statement, it must be acted upon;
c. If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed; and that it should not be used against another accused.

I find that the learned High Court Judge has well considered the dock statement in its correct perspective for which I find no reasons to disagree.

For the reasons as considered above, I find no merit in the grounds of appeal urged.

Accordingly, the appeal is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal