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

In the matter of an Appeal in terms of Article 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:
CA/HCC/0241/2023

Hon. Attorney General
Attorney General Department,
Colombo 12.

High Court of Matara
Case No: HC/110/15

Complainant

Vs.

Samarawickrama Liyanage Nandasena

Accused

AND NOW BETWEEN

Samarawickrama Liyanage Nandasena

Accused – Appellant

Vs.

1. Hon. Attorney General,
   Attorney General Department,
   Colombo 12.
2. Officer in Charge of Police,
   Police Station,
   Akuressa.

Complainant-Respondents

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Sarath Jayamanne, P.C with Vineshka Mendis, Prashan Wickramaratne, Sajeewa Meegahawaththa. Dakshin Abeykoon and Dinidu Rathnayake for the Accused-Appellant.

Anoopa De Silva, DSG for the Respondent.

Argued on : 17.07.2024

Decided on : 01.08.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 18-10-2023 of the High court of Matara. The accused-appellant hereinafter referred to as the "appellant", has been indicted for committing the murder of his brother, on 13-04-2010. The appellant has pleaded not guilty and the prosecution has led the evidence of PW-01, police evidence and the evidence of the doctor. The accused-appellant had made a statement from the dock and called two defence witnesses. At the conclusion of the trial, the trial judge had found the appellant guilty of the charge in the indictment.

The accused-appellant being aggrieved by the said sentence and conviction had filed the instant appeal.

The grounds of appeal raised by the learned President's Counsel for the appellant are as follows,

1. The prosecution had placed the evidence of PW-01, who had been the only lay witness, concluding that the entirety of the prosecution's case is based on circumstantial evidence, but the learned President's Counsel averred that the prosecution has failed to place before court a vital witness namely **"Sarath"**, and he relied on the presumption under Section 114 of the Evidence ordinance.
2. Section 27(1) statement not being properly analysed by the trial judge.
3. The statement made prior to the purported first statement on 16-04-2010, not being given to the accused and thereby denying him a fair trial.
4. The accused being unreasonably burdened to prove his innocence by the trial judge.

The sole and the only lay witness of the prosecution namely, Priyanthika, PW-01, who is the wife of the deceased, had been led in evidence by the prosecution to say that on the day of the incident, which is the day before the new year, around 1pm, a friend by the name **Sarath** had visited the deceased. The deceased and **Sarath** had been talking outside and PW-01 had been cooking in the kitchen, when she had heard **Sarath** shouting "Nandasena aiya assaulted". The witness had gone out to see the deceased fallen and the accused running away with a mammoty and **Sarath** had been standing nearby. The accused is the brother of the deceased, who had lived nearby and they had shared a well in the garden. Thereafter the deceased had been rushed to hospital, where he had succumbed to his injuries on the 23rd of April 2010. In the examination in chief, she had said that she made the first complaint on 16-04-2010, but in cross examination she had admitted that there was a statement made before the 16th, when the police had visited the house (pg 69). Therefore, there had been two statements made by the witness and the statement made on 16-04-2010 is not really the first statement. The prosecution has failed to provide this statement made prior to the 16th, to the defence and they have also failed to question the police witnesses regarding this matter. It is a well-accepted principle that the first information received by the police should always be made available to the defence to formulate their case. This has been dealt very lengthily in the decided case submitted by the learned President's Counsel for the appellant, which is **Wijepala v The Attorney General** (2000) 1 Sri L. R. 46 at 51, decided by Justice Mark Fernando states that, *"The failure to disclose to an accused the existence and contents of the first information.... May well result in a miscarriage of justice. Rule 52 of the Supreme Court rules 1988, requires an Attorney at law appearing for the prosecution to bring to the notice of court any matter, which if with held will lead to the miscarriage of justice. That is a professional obligation founded on a constitutional right to a fair trial. I hold that if Senarathna had made a statement at 9.30pm, that statement should've been brought to the notice of the court and the defence, and the failure to do so was a violation of article 13(3), by which all courts are bound."*

Therefore, it was the duty of the prosecuting counsel to have brought to the notice of court that there were two statements made by this witness and if the counsel was not aware of it beforehand it is his or her duty to question the police thereafter during the trial, which has not been done in the instant matter. Therefore, as submitted by the learned President Counsel, there is a great miscarriage of justice caused to the appellant, which has denied him a fair trial.

The witness has been cross examined further and she had been questioned on a very fundamental omission in her statement to police made on 16-04-2010

(pg 80), where she had not mentioned at all about **Sarath**, shouting that the accused assaulted the deceased. Furthermore, contradiction marked as V1 has been marked where she had said to the police that there was a dispute between the two brothers over the well (pg 74) however in court, she had not said so. This contradiction and omission, the trial judge has concluded, has not affected the truthfulness of the witness, which this court is surprised to observe because the statements have been made soon after the incident, therefore if she had been truthful it would've been the best opportunity for her to have implicated the accused. Therefore, there is a very serious omission with regard to the presence of the accused at the scene, which is only spoken to by the witness in the prosecution. It is shocking to observe that PW-01, being the only witness for the prosecution, speaks of the presence of another person named **Sarath** at the scene, who had not been called as a witness and neither a statement being recorded from him. If the prosecution was to rely on circumstantial evidence, as they have tried to, the presence of **Sarath** at the scene is an important and vital link to prove beyond a reasonable doubt that it was only the accused and none other, who committed the murder of the deceased. Therefore, the evidence of **Sarath** not being available in the case for the prosecution leaves a very obvious lacuna in the case for the prosecution and also leaves a great doubt regarding the culpability of the accused.

On this point, the learned counsel for the prosecution relied on section 114(f) of the Evidence ordinance. The learned counsel cited the case of **Walimunige John and another v The State**, 76 NLR 488, decided by G.P.A Silva S.P.J, where it has been held that, *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the case for the prosecution and where the reasonable inference to be drawn from the omission to call the witness is that, if called would not have supported the prosecution."*

Therefore, the non-availability of **Sarath** in the evidence of the prosecution creates a reasonable doubt with regards to the culpability of the accused because **Sarath's** possible involvement has not been excluded by the prosecution and in addition, if **Sarath** had been called in evidence, he could have explained how the incident occurred, as according to Priyanthika's evidence, **Sarath** was with the deceased at the time of the incident.

The prosecution has proceeded to call the evidence of the police officers but as stated above has not probed into the fact of PW-01 making two statements to the police and as to why at least a statement was not recorded from **Sarath**.

The other very glaring ground raised by the counsel for the appellant is the recovery, which the police are supposed to have made on the statement of the

accused-appellant on 25-04-2010. According to the evidence of PW-01at pg 84 of the appeal brief, the alleged mammoty had been recovered among the tea bushes by P.C Karunaratne on 16-04-2010 and not on 25-04-2010. This is the evidence of the sole lay witness for the prosecution, therefore it clearly shows a very serious doubt with regard to the recovery of this weapon. But the defence has challenged the recovery of the weapon vehemently. The learned trial judge, as alleged by the counsel for the appellant, has wrongfully considered the impact of Section 27 recovery and has gone on to comment on the exclusive possession of the weapon by the accused. It is fundamental that when a fact is discovered subsequent to a statement of an accused, that only the knowledge of the whereabouts of the said fact should be attributed to the accused and nothing else. It has been held so in the case of **Etin Singho and another v The Queen** 69 NLR 353.

The appellant had made statement from the dock denying the incident, but the trial judge has held that "the mere denial" by the accused does not create a reasonable doubt in the case of the prosecution which places an undue burden on the appellant and is a clear violation of the presumption of innocence of an accused until he or she is proven otherwise.

Therefore, in the instant matter, the prosecution has violated its fundamental prosecutorial duties such as not providing the first information to the appellant, and not placing the evidence of **Sarath** before court or at least not taking steps to explain to court as to why he was not called as a witness.

It is a cardinal principle in the criminal justice system in Sri Lanka that when a criminal charge is preferred against an accused, the prosecution must prove its case beyond a reasonable doubt. But in the instant case, the prosecution has failed to do so. The prosecution has not proved on circumstantial evidence that no one else, other than the accused, had the opportunity of committing the murder.

On perusal of the judgement by the learned trial judge, it has to be said with much surprise that the trial judge has failed to consider the basic principles with regard to the evaluation of circumstantial evidence, the importance of the appellant being given all material against him to formulate his defence, the applicability of Section 114(f) of the Evidence ordinance, with regard to the non-availability of **Sarath's** evidence in the case, the misdirection with regards to the recovery made under Section 27(1) of the Evidence ordinance, the appellant being unreasonably given a burden to prove his innocence in the dock statement and lastly his scant disregard to the vital omission in the evidence of PW-01.

All these lapses on the part of the trial judge, have denied a fair trial to the appellant, which is enshrined in our constitution. It has been held in the case

of **Veerasamy Sivathasan v Honourable Attorney General, SC Appeal 208/2012**, Justice Yasantha Kodagoda has stated the following,

"In a criminal trial conducted before a judge sitting without a jury, testimony and evidence related functions to be performed by the presiding judge, which I wish to refer to as the primary functions of the trial judge to be performed after the recording of evidence, are the following:

1. *Assessment and determination of 'credibility' of witnesses.*
2. *Determination of 'testimonial trustworthiness' of the testimonies given by witnesses.*
3. *Analysis of the evidence.*
4. *Determination of the 'probative value' (weight) to be attached to evidence and the 'sufficiency' of evidence to prove the charges.*
5. *Determination of whether the prosecution has 'proven the ingredients of the offence(s)' the accused stands charged.*
6. *If the defence has relied on a 'general or special exception to criminal liability', whether the defence has proven such exception.*
7. *Determination of whether the prosecution has proven its case 'beyond reasonable doubt', and contra wise, whether the defence has raised a 'reasonable doubt' regarding the case for the prosecution.*

It is to be noted that the performance of these evidence related functions would require application of certain legal principles and therefore a correct appreciation and application of such legal principles would be necessary for the lawful performance of these functions. A methodical and rational approach to discharging each of these functions is necessary. However, it must be appreciated that performing each of these functions individually, separately from each other (as if in watertight compartments), and incrementally adopting a segmented or phased-out approach, (in the manner scientific experiments are conducted), may not be practically feasible. That is mainly due to the inter-relationship and interdependency of these functions and in view of the nature of the material to be taken into consideration. The adjudication of every criminal trial, must necessarily be founded upon inter-alia the performance of these critical functions. If a verdict of 'guilt' of an accused is arrived at without performing these functions in a lawful manner, indeed, as rightly pointed out by the learned President's Counsel for the Appellant, the accused can rightfully claim that he was deprived of a fair trial. A judgment of a criminal trial Court which does not reflect that these functions have been carried out by the learned trial judge in a lawful and sufficient manner, cannot be relied upon to satisfy an appellate Court that the accused had received a fair trial, and that he had been found 'guilty' in a lawful manner. However, a determination of whether or not the accused has been deprived of the constitutional right (in terms of Article 13(3) of the Constitution) to a fair trial should be founded upon not only whether or not

the trial judge has correctly performed the above-mentioned functions, but also on a careful consideration of the totality of testimonies given by witnesses and the evidence of the case. However, it is important to note that a verdict arrived at without the proper performance of the afore-stated testimony and evidence related functions would be unlawful and hence should be vacated in appeal, only if such failure on the part of the trial judge had prejudiced the substantial rights of the accused or occasioned a failure of justice."

Therefore, it is the opinion of this court that there is merit worthy consideration in the grounds of appeal raised by the learned President's Counsel for the appellant and those submission have convinced this court that the accused-appellant, in the instant matter, has been denied of a fair trial, which vitiates the conviction and the sentence entered by trial judge against the appellant.

As such the instant appeal is allowed and the accused-appellant is acquitted of the charge in the indictment.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal