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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal No:
CA/HCC/ 0062/2016

Thuiya Handilage Sadun Nishanka de Silva

High Court of Negombo
Case No. HC/ 517/2013

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Gayan Perera with Prabha Perera and Panchali Ekanayake for the Appellant.**
Wasantha Perera, DSG for the Respondent.

ARGUED ON : **02/06/2022**

DECIDED ON : **19/07/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing the offence as mentioned below.

On or about the 07th February 2011 in Minuwangoda the accused-Appellant committed the murder of Alawaladewage Nalin Pushpa Kumara which is an offence punishable under Section 296 of Penal Code.

As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led five witnesses and marked production P1-8 and closed the case. Although the defence had made an application to act under section 200(1) of the Code of criminal Procedure Act No.15 of 1979, the Learned High Court Judge having satisfied that evidence presented by the prosecution warrant a case to answer, called for the defence and explained the rights of the accused. Having selected the right to make a statement from the dock, the Appellant had proceeded to deny the charge by way of his dock statement.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 30/03/2016.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing the Appellant was connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. The Learned High Court Judge has not properly evaluated the evidence given by the sole eye witness PW2.
2. The identity of the Appellant has not been proved beyond reasonable doubt.
3. Recovery under section 27(1) of the Evidence Ordinance has not been proved beyond reasonable doubt.
4. The Learned High Court Judge has used the Non-Summary Inquiry proceedings as substantive evidence when writing the Judgment and thereby denied a fair trial to the Appellant.

The background of the case *albeit* **briefly is as follows:**

According to the eye witness PW2 Chithrangani, she had been living in a rented house at Nilpanagoda along with her husband, his mother and her son at the day of the incident. During that time, she was employed as a Machine Operator at an establishment called C.C.L and her husband had lent out a lorry on hire to the deceased. The incident had happened on the portico of the house and only her mother, son and herself had been at home on that day. In her evidence she had clearly mentioned both the geographical surrounding and the structure of the house, where the incident had taken place.

On the date of the incident around 8.35 p.m., having returned home from work, she had been watching T.V. in her bathing attire when she heard a person calling out “sister, sister” in Sinhala. She had asked her mother-in-

law to check who it was. When her mother in-law went out to check, she had heard her scream. At the same time, she had heard a banging sound as well. When PW2 went to the portico of the house she had seen a tall, dark and stout person with a long knife attacking the person who had come to make the lorry hire payment. At that time the deceased was lying on the floor in a worshiping position and his little daughter was running around shouting that her father is being killed. PW2 had received a clear view of the person who attacked the deceased with a knife under the bright light that was switched on in the portico. She had identified the Appellant at the identification parade subsequently. She had seen the Appellant dealt the blows on to the back of the deceased's body, specifically, on to the back of his neck.

When PW2 shouted at the appellant, the Appellant had frowned at her and she had run out from rear side of the house taking her child and her mother-in-law out of fear.

When she returned home after some time, she had seen that the deceased was lying on the ground in a pool of blood.

Officers from the Minuwangada Police Station had conducted investigations, arrested the accused on the following day and recovered a knife based upon his statement under Section 27(1) of the Evidence Ordinance.

In the first ground of appeal the appellant contends that the Learned High Court Judge has not properly evaluated the evidence given by the sole eye witness PW2.

The Learned High Court Judge in her judgment at page 266 of the brief very extensively analysed the evidence of PW2 who is the sole eye witness in this case. She had no connection whatsoever with the Appellant up to the time of the incident. This witness had clearly witnessed the attack carried on the deceased by the appellant using a long knife. She had

witnessed the incident from close proximity in a condition of very good lighting. When the Appellant attacked the deceased, he was wearing only a sarong and has been bare bodied.

She also noted the appellant's physical appearance and described it to the police when she gave her statement.

The Learned High Court Judge had observed the demeanour and the deportment of PW2 when she gave evidence recalling the gruesome ordeal she had encountered.

Hence, it is incorrect to say that the Learned High court Judge had not properly evaluated the evidence given by the eye witness. The evidence given by PW2 is not tainted with uncertainty or ambiguity and it certainly passes the probability test.

In the case of **Wickremasuriya v. Dedoleena and others** 1996 [2] SLR 95 Jayasuriya J held that;

> *"A judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate"*

Guided by the judgment cited above and the evidence given by PW2, I conclude that the appellant is not successful in his first ground of appeal.

The Appellant in his second ground of appeal contends that the identity of the Appellant has not been proved beyond reasonable doubt.

PW2 had moved to the house where the deceased was murdered only 5 - 6 months prior to the incident. She had admitted that she had seen the Appellant going past this house several times. Further, she had recognised

the Appellant on the day of the incident with the bright light condition. Also, she had described the physique of the Appellant when she made a statement to the police.

PW2 had vehemently denied the query posted by the defence to the effect that the Appellant was shown to her at the police station and that she was shown his photograph before the identification parade. The witness endorsed the fact that she had clearly identified the Appellant when he attacked the deceased with a long knife without any contradictions or omissions.

At the identification parade two persons had been paraded but PW2 had properly identified the Appellant as the perpetrator of the crime. It is pertinent to note that PW2 had told the police that she could identify the person if she sees him again. This too proves that PW2 had correctly identified the Appellant at the crime scene.

The Learned High Court Judge had accurately discussed the circumstances upon which PW2 had identified the Appellant. She had very correctly disregarded the one and only contradiction marked on the evidence given by PW2, stating that the said contradiction is not forceful enough create a doubt about the identity of the Appellant.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 held that,

> *"Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter."*

Due to aforesaid reasons this ground of appeal is also sans any merit.

In the third ground of appeal the Appellant contends that the recovery made under section 27(1) of the Evidence Ordinance has not been proved beyond reasonable doubt.

Following the arrest of the Appellant in this case, a knife was recovered based upon his statement to the police and the same was identified by PW2 as the knife that was used to kill the deceased.

The admissibility of the recovery evidence under Section 27(1) of the Evidence Ordinance had been discussed in several cases decided by the Superior Courts of our country.

The Section 27 of the Evidence Ordinance states that,

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."*

PW2, although she had stated that she saw the Appellant cut the deceased with a long knife, she could not confirm the same when P1 was shown to her. According to her she was terrified after seeing the incident which she never expected. Hence, her position was that she saw a long knife but due to the fear she was experiencing at that moment she could not remember other characteristics of the knife.

The incident happened on 07/02/2011 and she gave evidence regarding the knife on 09/02/2016, after about 05 years of the incident. As the memory of a person fades with the lapse of time, recalling each and every minute detail of a gruesome incident that which happened suddenly and unexpectedly is humanely impossible.

In the case of **Bhoginbhai Hirjibhai v. State of Gujarat** [1983] AIR SC 753 the court held that:

> *"Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

Therefore, it is incorrect to say that the prosecution had failed to prove the recovery evidence under Section 27(1) of Evidence Ordinance. PW8 who had recovered the knife upon the statement of the Appellant correctly identified the knife at the trial. In the absence of the information provided by the Appellant, according to PW8, the knife could not have been recovered.

Hence, this ground of appeal is also without any merits.

In the final ground of appeal, the Appellant contends that the Learned High Court Judge has used the Non-Summary Inquiry proceedings as substantive evidence when writing the Judgment and thereby denied a fair trial to the Appellant.

When the deceased was attacked by the Appellant with a knife, the deceased's 07-year-old daughter (PW4) also had come with him. When PW2 had come to the spot, the deceased's little daughter was shouting and had been holding the hand of the Appellant pleading him not to harm her father. She had been named as PW4 in the indictment.

The Learned High Court Judge in her judgment had commented as to why PW4 was not called in to give evidence in this case. The comment directly relates to the child's welfare. Although she had referred to the report filed in the non-Summary brief pertaining to the child's mental state, referring it has not caused any prejudice to the Appellant as the Learned High Court Judge had used the report only to justify the absence of PW4. This has not affected the fair trial to the Appellant, as the Learned High Court Judge had come to the conclusion after considering all the evidence presented by both the prosecution and the defence. Hence this appeal ground is also devoid of any merit.

In this case, PW2 had vividly explained how the helpless deceased was positioned when he was brutally attacked. When PW2 looked at the deceased at the time of the assault, he was in a worshiping position, but this was not considered by the Appellant. Further, this gruesome murder had been evidenced by the deceased's daughter.

When the evidence presented against the Appellant is considered, I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellant and thereby established the charge beyond reasonable doubt.

As such, I conclude, that this is not an appropriate case in which to interfere with the findings of the Learned High Court Judge of Negombo dated 30/03/2016. Hence, I dismiss the Appeal.

Appeal dismissed.

The Registrar is directed to send a copy of this judgment to the High Court of Negombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL