

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

*In the matter of an appeal in terms of Section
331 of the Code of Criminal Procedure Act No.
15 of 1979 and in terms of Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka*

C.A. Case No: 235/2014
H.C. Tangalle Case No:
18/2003

The Republic of Sri Lanka

Complainant

-Vs-

Geegana Gamage Amarasiri

Accused

-And Now-

Geegana Gamage Amarasiri

Accused-Appellant

-Vs-

Hon. Attorney General

Respondent

Before : A.L. Shiran Gooneratne J.

&

K. Priyantha Fernando J.

Counsel : Saliya Pieris, PC with Susil Wanigapura for the Accused-Appellant.

Lakmali Karunanayake, DSG for the Respondent.

Written Submissions of the Accused-Appellant filed on: 08/09/2017

Written Submissions of the Respondent filed on: 21/11/2017

Argued on : 28/02/2019

Judgment on : 02/04/2019

A.L. Shiran Gooneratne J.

The Accused-Appellant, (hereinafter referred to as the Appellant) was indicted in the High Court of Tangalle, under Section 300 of the Penal Code for the offence of attempted murder of Shanthige Keerthipala, (hereinafter referred to as the injured) and upon conviction the Appellant was sentenced to 12 years rigorous imprisonment, a fine and compensation to be paid to the injured.

The prosecution relied on the evidence of the injured (PW2) and one other eye witness.

According to the injured (PW2), this incident took place around 7.30 PM, on a moonlit night, in the compound of the house of eye witness Liyanarachchige Siripala (PW7). The injured was near the well, when he heard a gunshot fire, and realized, that he had sustained an injury below his knee. At this moment he had turned back and had seen the Appellant filling gun powder to a barrel of a gun he was carrying and soon thereafter had taken to his heels. According to PW7, as soon as he heard the gunshot fire, he had recognized the Appellant from the posterior, running away from the scene of the crime. The Appellant had been around 50 feet away from the witness. Both eye witnesses had recognized the Appellant from the moonlight. According to PW2, the gunshot injury was on the knee of his right leg.

At the commencement of the argument, the learned counsel for the Appellant invited the attention of Court to consider the belated statement by the injured and to reject his testimony on belatedness alone.

The injured giving evidence stated that, 3 days after the incident, he made a statement to the Matara Hospital Police Post. The prosecution admitted that such a statement was made to the police post, however, was unable to trace the said statement. According to S.I. Premathilake (PW10), the injured was recalled on 15/11/1999, and a further statement was recorded on the same date. He also stated that the said statement was recorded in order to commence investigations. This was followed by a further statement recorded on 06/12/99, from the eye witness

PW7. It is observed that from the date of incident up to the date the statement of the injured was recorded, there was no investigation carried out by the police regarding this incident. Not a single question has been posed by the prosecution to this witness, seeking to explain the delay of 1 year 6 months to re-commence the said investigation. It is the responsibility of the prosecutor to sufficiently explain to Court through the investigating officer, the reason for the long delay caused to the investigation in order to justify the acceptance of the testimony of the injured and that of the eye witness.

The Counsel for the Appellant, heavily relied on the judgement of *Fernando J, in Wijepala Vs. Attorney General (2001) 1 SLR 46*, to demonstrate the importance of the failure to disclose to an accused the existence and/ or contents of the first information, where it was held that;

"Either Senaratne made a statement at the police post, or he did not. If he did not, his credibility was seriously in question. If, on the other hand, he had made that statement, then a very serious irregularity had occurred at the trial: the first information had neither been disclosed nor furnished to the accused and to the Court. Quite apart from that being a failure to make such disclosure as the statutory provisions require, the non-disclosure of that statement to the defence and to the Court resulted - for the reasons I set out below - in the impairment of the right of the Appellant to a fair trial which was his fundamental right

under Article 13(3). That Article not only entitles an accused to a right to legal representation at a trial before a competent Court, but also to a fair trial, and that includes anything and everything necessary for a fair trial. That would include copies of statements made to the police by material witnesses."

There is no denial by the prosecution that the injured made a statement to the police 3 days after the incident. Counsel for the Respondent in the written submissions contends that, *"it is evident that the delay in making the 2nd statement was not due to any lapse or reluctance of the victim but was due to the inability of the police to find the 1st complaint"*.

The long delay in carrying out investigations has not only prolonged justice to the victim, but also impaired the Appellant of necessary information, which would have assisted him in his defence. The cause for the delay is not explained by the investigating officer, PW10.

In *Wijepala V. The Attorney General (Supra)*, Fernando J. further observed;

"the failure to disclose to an accused the existence and contents of the first information - which might have cast serious doubt on the informant's credibility - may well result in a miscarriage of justice."

It is observed that the learned trial judge, when evaluating evidence has not considered the belatedness of the statement made by the injured, the eye witness (PW7) or the reasons for the delayed investigation. He has failed to appreciate that, non disclosure of all information available to the prosecution would adversely affect the defence case and would cause prejudice to the accused. The said failure on the part of the prosecution is a clear violation of the accused entitlement under Article 13(3) of the constitution, which has denied him the right to a fair trial. Therefore, on this ground alone, the Appeal should be allowed.

The counsel for the Appellant has also raised an issue on the non-availability of the Medico Legal Report (MLR), which the prosecution has failed to produce in evidence. The medical evidence given by PW11 and PW12, confirms that, the injured was admitted to Karapitiya Hospital and thereafter, to the Matara Hospital. The evidence suggests that the bed head ticket regarding the admission of the injured was destroyed due to the expiry of 5 years.

The learned counsel for the Appellant contends that the non availability of the MLR, which should be in the possession of the Judicial Medical Officer, (JMO) has deprived the accused of vital information regarding the history of the incident given by the injured to the Judicial Medical Officer (JMO). The prosecution did not lead any evidence as to the whereabouts of the MLR. The learned trial judge has made no reference to the said MLR in his evaluation of evidence.

In C.A. No. 161/2006 decided on 05/03/2009, *Sisira de Abrew J. cited with approval a judicial decision of the Indian Supreme Court in Lakshami Singh Vs. State of Bihar AIR 1976 SC 2263*, where it was held;

"In a murder case the non explanation of the injuries sustained by the accused at about the time of occurrence or in the course of the altercation is a very important circumstance from which the court can draw the following inferences: (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version; (2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying in a most material point and therefore their evidence is unreliable; (3) That in a case there is a defence version, which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on the prosecution case. The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution case."

The Appellant while denying any involvement to the incident, in his testimony under oath, stated that the injured, (PW2) suffered injury to his leg as a result of a trap gun fire, which was placed to kill wild boar. The defence version to

this incident is unchallenged. PW2, in his evidence stated that he was injured in his left leg below the knee. In the absence of a MLR, the injuries on the person of the injured creates a reasonable doubt as to whether, such injury was caused as stated by the injured or as a result of a trap gun fire. Therefore, the omission on the part of the prosecution to explain the injuries on the person of the injured assumes much greater significance, since the unchallenged evidence of the defence gives a probable version to the incident, to that of the prosecution version of events. The doubt created would render the conviction unsafe to sustain.

Accordingly, for all the above reasons, we set aside the conviction and the corresponding sentence and acquit the Appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL