**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 0002/2020**
**High Court of Puttalam**
**Case No. HC/ 31/2019**

Mohomed Habibulla Mohomed Nazeer alias Nazar

**ACCUSED-APPELLANT**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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

**P. Kumararatnam, J.**

**COUNSEL** : **Harishka Samaranayake for the Appellant.**

**Anoopa De Silva, DSG for the Respondent.**

**ARGUED ON** : **30/10/2023**

**DECIDED ON** : **04/03/2024**

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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 murder of Mumthaj Begam on or about 21/09/2014 which is an offence punishable under Section 296 of Penal Code.

After a non-jury trial, the Learned Trial Judge convicted the Appellant on the count of murder and sentenced him to death on 05/02/2020.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court seeking to set aside the conviction and sentence imposed on him. Deceased was a work mate of the Appellant and was responsible for paying salary to the workers employed by the Appellant.

The Learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via zoom from prison.

On behalf of the Appellant following Grounds of Appeal are raised.

1. Did the Learned trial Judge fail to properly evaluate the evidence of the prosecution and the defence?
2. Did the Learned Trial Judge fail in considering whether complying with Section 109 (1) (2) and (3) of the Code of Criminal Procedure Act No.15 of 1979 by the prosecution amounts to an unfair trial for the accused?

3. Did the Learned Trial Judge failed to appreciate and give the benefit of the prosecution's failure not calling the fingerprint on the Kerosene oil bottle marked P2 as stated by PW7, as it creates a reasonable doubt of prosecution's case as to whether the deceased herself set fire on her?

**Back ground of the case**

On the day of the incident witness PW1, 3rd son of the deceased, who was only 9 years old at that time, was at home when the incident had taken place. He has two brothers who had gone to play on the date of incident. The Appellant who is a frequent visitor had come to his house at about 3.00pm and had chat with his mother for about 15 minutes inside the 1st room of the house. As he was having his food in the hall, he had no idea as to what they spoke about. When the deceased stepped out of the room after the conversation, the Appellant had dealt a blow on her cheek. Then the deceased had moved into the 2nd room and the witness watched inside of the room through a window. The witness had seen the Appellant taking a kerosene oil can from the corner of the 2nd room and placing the same next to the window of the 2nd room. Thereafter he had seen the Appellant pouring kerosene oil over the deceased and setting fire on the deceased. At that time, he had cried for help. Then the deceased stepped out of the house, but the Appellant was seeing merely seated inside the 2nd room. PW1 had gone to the next door and informed the neighbour about the incident and when he came with the neighbour, the villagers had gathered there and doused the fire. The deceased was taken to hospital in the three-wheeler of PW5. The Appellant also went in the three-wheeler. The deceased had passed away while receiving treatment in the hospital. Due to serious burn injuries this witness could not speak to his mother. After the incident the Appellant never came to his house.

PW5, Imran was a three-wheeler driver by profession lived within the walking distance of the deceased's house. After receiving the information, he had

gone to deceased's house with his three-wheeler and taken the deceased to the hospital. When he went to the deceased's house, he had seen the deceased was seated with burn injuries.

PW13 JMO Wijewardena had conducted the post-mortem examination and confirmed that the deceased had suffered 95% burn injuries on her body surface area caused by short lasted intense flame burn due to oxidative and ignition of clothing of victim. The JMO further opined that there is medical evidence of pre-mortem violence, upright posture of the victim and upward trend of the flames and defence movements against the rising flames. Back of the trunk was more affected than the front.

As there was a case to answer, the Learned High Court Judge had called for the defence and the Appellant made a dock statement and took up the position that he was unaware as to how the deceased got burnt. The Appellant further said that he worked with the deceased at salt reservoir, and he entrusted the deceased to pay salaries to other workers. He was a frequent visitor of the deceased's house and deceased used to prepare food for him. The village mosque had furthermore advised the Appellant not to visit the deceased's house. His brothers also warned him not to visit the deceased. When he told this to the deceased and left the house, he had seen the deceased was engulfed with flames. According to him, he had surrendered to the police.

In the first ground of Appeal the Learned Counsel contended that the Learned High Court had failed to evaluate the evidence of the prosecution and the defence.

In this case PW1 was 09 years old when he witnessed the gruesome incident. When he gave evidence in the High Court, he was 14 years old.

In **Ranjeet Kumar Ram v. State of Bihar** [2015] SCC Online SC 500 the court held that:

> *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".*

Learned High Court Judge in his judgment considered the age of PW1 and discussed how he is going to analyse his evidence in his judgment. The relevant portion is re-produced below:

Page 240 of the brief.

මෙම නඩුවේ පැමිණිලිකාර පක්ෂය වෙනුවෙන් කැඳවන ලද පළමු සාක්ෂිකරු (මින් මතුවට පැ. සා. 01 ලෙසට හඳුන්වනු ලැබේ.) සාක්ෂි ලබා දෙන දිනය වන විට ඔහු අවුරුදු 14ක ළමයෙකි. ඔහුට පිළිගත හැකි විශ්වාසනීය සාක්ෂියක් ලබා දීමට හැකියාවක් තිබේ නම් සහ ඔහු සුදුසු සාක්ෂිකරුවෙකු වන්නේ නම් ඔහුගේ වයස් ප්‍රමාණය ඔහු විසින් ලබා දෙන ලද සාක්ෂිය විශ්ලේෂණය කිරීමට බාධාවක් නොවිය යුතු අතර එකම ඇසදුටු සාක්ෂිකරු ලෙසට හඳුන්වා පැමිණිල්ල වෙනුවෙන් ඉදිරිපත් කර ඇති මෙම සාක්ෂිකරු විසින් ලබා දෙන ලද සාක්ෂිය පිළිබඳව විශ්වාසය තබා කටයුතු කළ හැකි නම් එකී සාක්ෂිය චූදිතට එරෙහි ප්‍රබල සාක්ෂියක් ලෙසට සැළකිය හැක. මෙවැනි අනපේක්ෂිත සහ "සිත කිරි ගැහෙන" සිද්ධියක් දැක ඇති බවට ප්‍රකාශ කරන මෙම ළමා සාක්ෂිකරුගේ සාක්ෂිය විශ්ලේෂණය කිරීමේ දී සාක්ෂි රීතීන් දැඩිව අනුගහනය නොකළ යුතුව සේව චූදිතයෙකුට ඇති සාධාරණ නඩු විභාගයකට පෙනී සිටීමට ඇති අයිතිවාසිකමට ඉන් හානියක් නොවිය යුතුය.

In this case, PW1 is an eye witness. Hence, admissibility of the evidence of an eye witness needs to be discussed very clearly.

Eyewitness testimony is one of the most important kinds of criminal evidence. In criminal cases, the judges regularly face the difficult but crucial task of evaluating eyewitness's testimony. This sometimes means checking whether the witness's story fits with other established facts of the case. However, the veracity of such a story cannot always be verified or falsified directly. In such cases, judges will have to look at whether the statement comes from a reliable source.

Further, an eyewitness's testimony is probably the most persuasive form of evidence presented in court, but in many cases, its accuracy is dubious. There is also evidence that mistaken eyewitness evidence can lead to wrongful conviction—sending people to prison for years or decades, even to death row, for crimes they did not commit.

In considering the evidence of an eye witness, the Court should look at the demeanour of the witness, the inherent probability of the account, any internal inconsistencies in the account, whether the account is consistent with previous statements by the witness, whether the witness has any bias against the accused or any family or group to which the accused belongs, whether the evidence at the crime scene supports the account, and whether the witness's testimony is supported by the testimony of other witnesses. These factors are very important as the burden of proof is on the prosecution in all criminal cases.

In **The Queen v. K.A. Santin Singho 65 NLR 447** the court held that:

> *"It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.*

The credibility of the witness does not stand impeached merely by proving contradictions on record. It is required for the defence side to show that prosecution witnesses may deliberately depose change or improve their original statement in order to cause prejudice to the accused. Similarly, minor omission or discrepancy in evidence is not enough to hold the accused not guilty.

The Learned High Court Judge had very extensively analysed the evidence of PW1 and considered the contradictions and omission and decided to accept his evidence as true in this case. The relevant portion of the judgment is re-produced below:

Page 246 of the brief.

පැ. සා. 01 ගේ සාක්ෂියේ දක්නට ලැබෙන ඉහත සඳහන් කරුණු සියල්ල සළකා බැලීමේ දී, විශ්වාස කළ හැකි සාක්ෂියක් වන පැ. සා. 1ගේ සාක්ෂිය මගින් ඔහුගේ මව වන මරණකාරියගේ ඇඟට භූමිතෙල් දමා ගිනි තැබීම චූදිත විසින් සිදු කරන ලද්දක් බව පැහැදිලිව පෙනී යයි.

Learned High Court in his judgment had extensively considered the dock statement of the Appellant and given his reasons as to why he rejected the dock statement and accepted the evidence given by PW1.

Therefore, it is incorrect to say that the Learned High Court Judge had not considered evidence presented by both parties. Hence, the 1st ground urged by the Appellant is devoid any merit.

In the second ground of appeal the Counsel contended that the Learned Trial Judge failed to consider whether not complying with Section 109 (1) (2) and (3) of the Code of Criminal Procedure Act No.15 of 1979 by the prosecution amount to an unfair trial for the accused.

Section 109 (1) (2) and (3) states as follows:

> (1) Every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer.
>
> (2) If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant; Provided that if it is not possible for the officer or inquirer to record the information in the language in which it is given the officer or inquirer shall request that the information be given in writing. If the informant is unable to give it in writing, the officer or inquirer shall record the information in one of the national languages after recording the reasons for doing so and shall read over the record to the informant or interpret it in the language he understands.
>
> (3) Every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it and such information

or a copy thereof as is feasible shall be entered without delay by such police officer or inquirer in a book hereinafter referred to as " the Information Book " to be kept by the officer in charge of the police station at his police station or by the inquirer as the case may be. Such Information Book shall be in such form as the Minister may provide by regulations made in that behalf;

Provided that until the Minister by regulations provides the form of the Information Book, the form, or forms in use on the day immediately preceding the appointed date shall continue to be valid for use.

PW10, Jayatilaka had recorded the statements of the eye witness PW1 and PW2 who is the brother of PW1. As both were unable to speak Sinhala language, their statements had been recorded in Sinhala after being translated to Tamil to Sinhala by one of the uncles of the witnesses namely Davud Salma. PW10 had correctly followed the Section 109 (1) (2) and (3) of the Code of Criminal Procedure Act No.15 of 1979.

The Court also provided a translator to the witnesses when they gave evidence during the trial. Therefore, the Appellant had not been subjected to an unfair trial in this case. Hence, this ground is also devoid of any merit.

In the third ground of appeal, the Appellant contends that the Learned Trial Judge failed to appreciate and give the benefit of the prosecution's failure no calling the fingerprint on the Kerosene oil bottle marked P2 as stated by PW7, as it creates a reasonable doubt in the prosecution's case as to whether the deceased, herself set fire on her.

PW1 had clearly seen the incident that the Appellant had poured kerosene oil on the deceased and set fire to her. His evidence is clear, believable and unambiguous. Hence, not taking finger print on the kerosene oil bottle will not cause any doubt in the prosecution case. Therefore, this ground also has no merit.

As this case solely relies on the evidence of the eye witness and other circumstantial evidence, I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellant and thereby established a strong prima-facie case against him. As such we conclude that this is not an appropriate case in which to interfere with the findings of the Learned High Court Judge of Puttalam dated 05/02/2020. Hence, we dismiss the Appeal.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree

**JUDGE OF THE COURT OF APPEAL**