

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

*In the matter of an appeal under and in
terms of Section 331(1) of the Code of
Criminal Procedure Act No. 15 of 1979.*

The Attorney General of the
Democratic Socialist Republic of
Sri Lanka.

Complainant

**Court of Appeal
Case No. CA 114/2015**

-Vs-

1. Thunthiri Pitiyalage Dayapala Subasinghe
2. Wahumpurage Wasantha

Accused

And Now Between

2. Wahumpurage Wasantha

Accused-Appellant

**High Court of Kegalle
Case No. HC 3269/2013**

-Vs-

The Attorney General

Respondent

Before: A.L. Shiran Gooneratne J.

&

K. Priyantha Fernando J.

Counsel : Neranjan Jayasinghe for the Accused-Appellant.

Suharshi Herath, SSC for the Respondent.

Written Submissions of the Accused-Appellant filed on: 05/02/2018

Written Submissions of the Respondent filed on: 11/05/2018

Argument on: 24/01/2019

Judgment on : 21/02/2019

A.L. Shiran Gooneratne J.

The Accused-Appellant (2nd Accused, hereinafter referred to as the Appellant) was indicted together with the 1st Accused, in the High Court of Kegalle in terms of Section 296 to be read with Section 32 of the Penal Code for causing the death of Hewayalage Alice alias Nandawathi (hereinafter referred to as the deceased). At the conclusion of the trial before a jury, the 1st Accused was acquitted from the said charge. The Appellant was convicted on a majority verdict and was sentenced to death.

At the outset of the argument, the counsel for the Appellant raised a preliminary issue stating that there is a serious misdirection of the jury by the learned High Court Judge which amounts to a substantial miscarriage of justice in terms of Section 243 of the Code of Criminal Procedure Act, (CCPA)

Section 243 of the CCPA states that;

“when the case for the defence and the prosecuting counsel’s reply (if any) are concluded the judge shall charge the jury summing up the evidence and laying down the law by which the jury are to be guided.”

The conviction against the Appellant which is based on circumstantial evidence is that;

- a) soon after the incident, the Appellant armed with a knife had threatened Batuwanaage Sirisena (PW4).
- b) the Appellant was wearing a blood-stained shirt at the time of arrest.

The Appellant submits that, PW4 failed to disclose to the police in his statement or at the non-summery inquiry, that the Appellant was armed at the time he was identified nor has it been corroborated by any other witness and therefore, contends, that the said omission should have been taken into consideration. Even though the said omission had been brought to the notice of Court, the learned trial judge has failed to charge the jury to consider whether this omission amounted to a failure of justice.

According to the investigating officer, the Appellant had been arrested 4 hours after the incident. The investigating officer has stated that the Appellant was wearing a blood stained shirt at the time of arrest.

The counsel for the Appellant submits that, it is highly improbable that the Appellant would have been wearing a blood stained shirt, 4 hours after the incident and contends that the said fact does not pass the test of probability and has invited Court to consider whether such non-direction of the jury to this important issue of choosing between the more likely probability would amount to a miscarriage of justice.

As held in, ***R vs. Pinhamy 57 NLR 169***, the weight to be attached to the testimony of a witness is a matter for the jury.

When dealing with circumstantial evidence, it is paramount that the learned trial judge gives proper directions to the jury. It is observed that in the summing up, the trial judge has failed to give guidance on evaluating circumstantial evidence arising out of the prosecution case.

In ***King Vs. Abeywickrama 44 NLR 254***, ***Soertsz J.*** stated that;

“in order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence”.

In the case of *Mahmood v. State of U.P (1976) 1 SCC 542*, it was held that, “in a case dependent wholly on circumstantial evidence the Court must be satisfied;

- a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond the shadow of doubt;
- a) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and
- b) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

The Counsel for the Appellant has submitted the case of *W.A. Albert Singho Vs. The Queen 74 NLR 368*, where the court held that;

“A judge must not, in the course of his summing up, use language the culminative effect of which would remove from the consideration of the jury what are essentially questions of fact for their determination”.

The counsel for the Appellant also contends that in his charge, the learned High Court Judge has misdirected the jury by giving the impression that a defence had been called since the prosecution has proved its case beyond reasonable doubt. At Pages 336 to 339 of the brief, the trial judge in his charge to the jury has stated that when the prosecution has proved its case, the defence is required to explain its

position, whereby in effect the trial judge has shifted the burden of proof to the defence. The trial judge has also failed to give guidance to the jury when evaluating the dock statement.

In *Kamal Addaraaarachchi Vs. The State 2002 1 SLR 312*, the Court held that;

"it was a grave error for a trial judge to direct himself that he should examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence"

In *CA/26/06 decided on 25/05/2010, Sarath De Abrew, J.* held that;

"in adopting this strange "cart before the horse" procedure, the learned trial judge had committed the following cardinal errors which should necessarily be construed as a denial of a fair trial and also denial of the right to be presumed innocent until the final drama is enacted and the curtain falls.

(a) In holding that the case is proved beyond reasonable doubt after analyzing only the prosecution evidence, the trial judge in effect is shutting out the right of the accused person to have the defence evidence too considered in totality with that of the prosecution evidence in order to ascertain whether a reasonable doubt is created.

(b) -----"

It is observed that in the summing up the learned trial judge erred when he charged the jury on questions of fact to be decided by the jury. The law as regards to evaluation of circumstantial evidence, and the dock statement, arising on evidence led in this case and also the burden of proof and the presumption of innocence, has not been explained to the jury.

It is to be noted that in such glaring circumstances of non-direction and mis-direction arising out of the summing up of the jury, the Senior State Counsel appearing for the Respondent vehemently defended the conviction and sentence and did not concede to any of the said infirmities discussed above.

In all the above circumstances, we find that the misdirection of the jury by the learned trial judge has caused a substantial miscarriage of justice which warrants an acquittal of the Appellant.

Therefore, we set aside the conviction and 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