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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka

Complainant

C.A. No. 165/2018

HC Kegalle

Case No. 3439/2014

Vs.

1. Mailawagam Manojan.
2. Wellupilain Thyagaraja alias Shivaraja.

Accused

AND NOW BETWEEN

Wellupilain Thyagaraja alias Shivaraja.

2nd Accused –Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Thushara Dissanayake for the Accused-Appellant.

Maheshika Silva, D.S.G. for the State.

ARGUED ON : 13.02.2024

DECIDED ON : 12.03.2024

WICKUM A. KALUARACHCHI, J.

The 2nd accused-appellant was indicted in the High Court of Kegalle along with the 1st accused for committing the murder of one Arumugam Chandrasekeran on or about 07th February 2014 at Waharaka, Ruwanwella, an offence punishable under Section 296 of the Penal Code. After trial, the learned High Court Judge acquitted the 1st accused and convicted the 2nd accused-appellant of the charge of murder and imposed the death sentence on him. This appeal is preferred by the 2nd accused against the said conviction and sentence.

Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

In brief, the prosecution case is as follows:
On the day before the incident of murder, the appellant had come to the line rooms where the deceased lived and had thrown stones at the house of the deceased, and threatened the deceased that they would all be killed if they come outside. The accused-appellant had made further threats that the deceased would be killed before dawn. PW-1 had called and informed the police of this incident. Accordingly, the police had come to that place and remained until around 2 a.m. However, after

the police left, pelting of stones started again and continued until 4 a.m. in the morning of the date of the murder. The deceased, PW-1, PW-7 and PW-3 and some other persons have been getting ready to go to the police station in the morning to make a complaint about the incident that occurred on the previous day. According to PW-1, when the deceased and other witnesses were about to get into the three-wheeler, the appellant and the 1st accused came to the place of the incident and the 2nd accused-appellant stabbed the deceased on his chest while the 1st accused was holding the hands of the deceased. As an eyewitness, PW-3, the daughter of the deceased has also described the incident in the same way.

At the end of the prosecution case, the 1st accused and the 2nd accused-appellant have given evidence under oath. Two other witnesses have also given evidence on behalf of the defence. The 2nd accused-appellant, in his evidence, denied the charge against him as a false allegation. According to the 2nd accused-appellant, he was sleeping in his house at the time of the incident and only became aware of the incident around 8.20 a.m. when his wife informed him of it and made him wake up. Thereafter, the 2nd accused-appellant stated that he went in the direction of the scene of the murder and met with "Raja" (PW-11) who came with a knife. According to the appellant, "Raja" who is a relative of the 2nd accused-appellant confessed to him that he stabbed the deceased. The appellant had also seen at this instance that one Ranil Susantha arrived at the house of the deceased by his cab. When he proceeded towards the place of the incident, he heard cries of the people in the house of the deceased shouting that 'Sivaraja stabbed'. 'Sivaraja' is the 2nd accused-appellant.

The position maintained by the 2nd accused-appellant throughout the trial is that the people in the house of the deceased implicated him for the murder committed by 'Ramanadan Nadeshan alias Raja' being

tutored by Ranil Susantha; a man who controlled the people of the area with his rowdyism.

In the High Court, PW-1, PW-2, PW-3, PW-7, and PW-11 have given evidence regarding the incident. Other prosecution witnesses are the Judicial Medical Officer and Investigating Officers. According to the Judicial Medical officer, the cause of death was "hemo-pneumothorax due to a stab injury to the chest". According to the prosecution witnesses, the 1st accused held the hands of the deceased behind his back and the 2nd accused-appellant stabbed the deceased on his chest. The learned High Court Judge decided that the evidence that the 1st accused-appellant was holding the hands of the deceased cannot be believed and the evidence that the 2nd accused-appellant stabbed the deceased can be believed and acted upon. Accordingly, the learned Judge convicted the 2nd accused-appellant for the offence of murder and acquitted the 1st accused by his Judgment dated 09.08.2018.

At the hearing of this appeal, the learned Counsel for the appellant raised only one ground of appeal. He stated that contradictions and omissions were not properly considered by the learned High Court Judge. The learned Counsel pointed out the contradiction marked as V-1 in the evidence of PW-7 and two omissions in the evidence of PW-1. Pointing out the said contradiction and the two omissions, the learned Counsel for the appellant requested to set aside the judgment and the conviction of the learned High Court Judge. No other infirmity or shortcoming of the prosecution case or any error in evaluating the evidence was shown by the learned Counsel for the appellant.

The learned High Court Judge considered the two omissions pointed out by the learned Counsel for the appellant as vital omissions that go the root of the case (page 24 of the High Court Judgment) and accordingly, the learned Judge held that there is an issue regarding the reliability of PW-1's evidence. The learned High Court Judge has also

considered the contradiction V-1 as a vital contradiction and found that PW-7 is not a credible witness (page 26 of the High Court Judgment).

The learned Deputy Solicitor General appearing for the respondent also conceded that there are serious issues regarding the credibility of the evidence of PW-1 and PW-7. However, she contended that PW-2, PW-3, and PW-11 are credible witnesses and the charge against the appellant has been proved beyond a reasonable doubt on their evidence and the evidence of the Judicial Medical Officer and the Investigating Officers.

From these three witnesses, PW-2, PW-3, and PW-11, only PW-3 gave evidence regarding the entire incident. PW-2 did not witness the act of stabbing. PW-2 stated that the appellant was armed with a knife and she saw the deceased with bleeding injuries. PW-11 stated in the examination-in-chief that he did not see anything, the appellant did not give anything to him and he did not hand over a knife to the police. However, in the cross-examination, he admitted that he found a knife lying on the road and it was handed over to the police.

Although the learned Counsel for the appellant did not advance any argument regarding an error in evaluating the evidence of the case, unreliability of the prosecution witnesses, or the findings of the learned Trial Judge, it is the duty of this Court to examine in hearing an appeal, whether the learned Trial Judge has correctly evaluated the evidence of the case and has come to a correct conclusion.

Therefore, I proceed to consider whether the evaluation of the evidence of this case and the conclusion that the 2nd accused-appellant committed the offence of murder is correct. As it was held by the learned High Court Judge and conceded by the learned DSG, the evidence of PW-1 and PW-7 cannot be acted upon because they cannot be regarded as credible witnesses. Therefore, it must be considered whether the

appellant could be convicted for the murder on the testimony of PW-3, the only other witness who described the incident of murder.

In her testimony, PW-3 stated that she saw the 1st accused holding the hands of the deceased behind his back and the appellant stabbing the deceased once on his chest, then the appellant handing over the knife to PW-11 who is called "Raja" and running away.

In analyzing the evidence of PW-1, the learned Trial Judge found that his evidence that the 1st accused held the hands of the deceased behind his back cannot be believed. In other words, the learned Trial Judge found that the evidence that the 1st accused was holding the hands of the deceased behind his back is false. That is why the learned Judge has acquitted the 1st accused. PW-3 has also stated that the 1st accused was holding the hands of the deceased in the same way as described by PW-1. Therefore, PW-3's evidence must also be false in respect of the fact that the 1st accused was holding the hands of the deceased behind his back when the fatal stab injury was inflicted. So, the learned Judge excluded the evidence of PW-3 against the 1st accused as false and accepted her evidence against the 2nd accused-appellant as true.

The serious issue that arises from the said analysis of evidence is that when PW-3 stated the involvement of the appellant as well as the 1st accused at the same time in committing the murder, how the learned Trial Judge excludes the evidence regarding the involvement of the 1st accused for the crime and accepts the evidence regarding the involvement of the appellant. If the 1st accused had not held the hands of the deceased as decided by the learned Judge, the 2nd accused-appellant could not have stabbed the deceased in the manner described by PW-3.

The contention of the learned DSG was that the concept of "divisibility of credibility" applies in evaluating PW-3's evidence regarding this

point. The learned DSG submitted the case of ***Samaraweera V. Attorney General*** – (1990) 1 Sri L.R. 256 wherein, the concept of divisibility of credibility has been discussed. The crux of the aforesaid Court of Appeal Judgment is that to apply the concept of divisibility of credibility, it must be considered whether a part of the testimony of the witness that is found to be false taints the entirety of the evidence of the witness or whether the false can safely be separated from the truth.

The aforesaid Judgment of the Court of Appeal was delivered on 31st of May 1990. In the case of ***Siriwardena and another V. The Attorney General***, reported in (1998) 2 Sri L.R. 222, the Court of Appeal followed the decision in ***Baksh V. The Queen*** (1958) AC 167 (P.C.) and held that the credibility cannot be treated as divisible and accepted against one and rejected against the other. Anyhow, I do not intend to deal with the concept of divisibility of credibility at this juncture because precisely, the said concept has no applicability in determining the case at hand for the following reasons.

Describing the very moment of inflicting fatal injuries to the deceased, PW-3 has stated that when the 1st accused was holding the hands of the deceased behind his back, the appellant stabbed the deceased on the chest. What was held in ***Samaraweera V. Attorney General*** is that if the false can safely be separated from the truth that evidence can be relied upon. In the case at hand, there is no way to separate PW-3's evidence with regard to the very moment of inflicting the fatal injury to the deceased because according to PW-3, the appellant stabbed the deceased while the 1st accused was holding the hands of the deceased with common murderous intention. At that very moment, the 1st accused and the 2nd accused acted together with the common murderous intention to kill the deceased according to PW-3. In these circumstances, rejecting the evidence against the 1st accused as false and accepting the evidence against the 2nd accused as true is an erroneous conclusion arrived at through a completely wrong analysis of

the evidence. Therefore, I regret that under any circumstances, I am unable to agree with the contention of the learned DSG that the concept of divisibility of credibility would be applied here.

According to the testimony of PW-3, the initial act relating to the murder was committed by the 1st accused. The deceased was caught by the 1st accused when he got into the three-wheeler. Then, the deceased's hands were held behind his back by the 1st accused. According to PW-3, thereafter, the 2nd accused-appellant stabbed the deceased on the chest with a knife while the 1st accused was holding the hands of the deceased behind his back. If the 1st accused had not held hands of the deceased like that, as decided by the learned Trial Judge, the stabbing of the deceased should have been done in a different manner and not the manner that PW-3 described. Therefore, in view of the learned Judge's own finding that the 1st accused did not hold the hands of the deceased, the murder could not have taken place as described by PW-3. In the circumstances, it is apparent that the entire story narrated by PW-3 that the appellant stabbed the deceased while the 1st accused was holding the hands of the deceased cannot be believed according to the finding of the learned High Court Judge in respect of the 1st accused. Hence, PW-3's evidence cannot be considered as credible and cannot be acted upon.

In addition, explaining the incident, PW-3 stated that after the stabbing, the appellant handed over the knife to Raja (PW-11) and ran away. PW-11 was called in evidence by the prosecution to corroborate that part of PW-3's evidence. PW-11 stated in evidence in chief that he did not see any incident, no one handed over a knife to him and he did not hand over a knife to the police. But in cross-examination, he admitted that he found a knife lying on the road and handed over it to the police. However, PW-11 never stated that the appellant handed over a knife to him at the place of the incident or anywhere. Therefore, the evidence of PW-3 that the appellant handed over a knife to PW-11 soon after the

stabbing which is an important item of evidence that is directly relevant to determine the involvement of the appellant in this crime has been contradicted by the prosecution witness No.11 himself. When the prosecution witness No.11 stated that the knife (P-1) that he handed over to the police was found lying on the road, PW-3's testimony that the appellant stabbed the deceased and handed over the knife to PW-11 at the place of the incident would be false. The importance of this major contradiction is that PW-3's testimony has become false on the evidence of a witness called by the prosecution itself, namely the 11th witness.

As PW-3's evidence cannot be acted upon for the reasons stated above, there was no evidence to prove beyond a reasonable doubt that the 2nd accused-appellant committed the murder of the deceased. Under these circumstances, the only conclusion that the learned High Court Judge could have arrived at was that the charge has not been proved beyond a reasonable doubt against the 2nd accused-appellant as well. Hence, even without considering whether a reasonable doubt casts on the prosecution case as a result of the defence evidence, the learned Trial Judge could have proceeded to acquit the appellant.

The 1st accused, the 2nd accused and two other witnesses have given evidence on behalf of the defence. At the hearing of the appeal, the learned Counsel for the appellant did not utter even a word regarding the defence evidence and the position maintained by the appellant. For the purpose of completeness of this Judgment, I proceed to consider how the learned Trial Judge evaluated the evidence of the defence. As explained previously, the 2nd accused denied the allegation against him. His position was that PW-11 who was called "Raja" stabbed the deceased and committed this murder. The said position of the appellant has been suggested to PW-11 in cross-examination.

However, the learned High Court Judge did not accept the evidence given by the appellant. Two reasons have been stated by the learned Judge to reject the evidence of the appellant. One reason is that although there were disputes between the family members of the deceased and PW-11, a reasonable doubt would not arise that PW-11 had stabbed the deceased. The second reason is that the appellant admitted in his evidence that he was absconding after this incident and his explanation for absconding cannot be accepted as a reasonable explanation. If this is a reason to draw the inference of guilt of the appellant, the learned Judge had not realized that PW-11 had also been absconding the court. His evidence was taken when he was in remand after arresting.

In deciding that there was no possibility of committing this murder by PW-11, the learned High Court Judge stated that no prosecution witness had stated that PW-11 stabbed the deceased. I cannot think of any instance where in a murder case, prosecution witnesses have stated in their evidence that another prosecution witness committed the murder. So, this is another issue regarding the way of analyzing the evidence by the learned High Court Judge.

The appellant's position was that PW-11 committed the murder due to strong disputes the deceased had with PW-11's family. The learned Judge observed that there were several incidents between PW-11 and the family members of the deceased. PW-11 has admitted in his evidence that the wife of the deceased had assaulted him. He also admitted that the wife of the elder brother of the deceased, the daughter and son-in-law of the deceased had assaulted him. PW-11 stated that the son of the deceased had broken one of his legs and he filed a case against him for that incident. PW-11 has stated further that even at the time of giving evidence, he could not walk properly as a result of breaking his leg. Even after taking into consideration all these serious incidents, the learned Judge has decided that they are not incidents

that cause suspicion regarding the possibility of committing this murder by PW-11. According to my view, the aforesaid decision of the learned Judge is not reasonable because there are occasions that murders have been committed as a result of these kinds of reasons.

Another reason stated by the learned Judge to decide that there was no possibility for PW-11 to commit this murder is that the accused or the witnesses for the defence have never stated that PW-11 was present at the place of the incident when the incident occurred (පැ. සා. 11 එම සිද්ධිය සිදු වූ ස්ථානයේ සිටි බව චුදිතයන් හෝ විත්තිය වෙනුවෙන් සාක්ෂි දුන් සාක්ෂිකරු හෝ ඒ බවක් සඳහන් කලේ නැත. - page 31 of the High Court Judgment). The said observation of the learned High Court Judge clearly transpires that the learned Judge has completely failed to go through the evidence of the case carefully. PW-3 has clearly stated in his evidence that PW-11 was there at the place of the incident. That is why he stated that after the stabbing, the 2nd accused-appellant handed over the knife to PW-11 at the place of the incident. Therefore, the appellant or the witnesses called on behalf of the appellant need not establish that PW-11 was at the place of the incident because prosecution witness No.3 clearly stated that PW-1 was there when the incident took place. Therefore, the learned Trial Judge rejected the defence version without proper examination of the evidence presented in the Court.

When PW-11 was called in evidence by the prosecution, in the evidence in chief, he denied his presence at the scene. PW-11 also denied handing over a knife to the police as explained previously. However, in cross-examination, he admitted that he picked up a knife lying on the road, and the said knife was handed over to the police. PW-11 categorically denied handing over the knife by the appellant to him. In the circumstances, the learned Trial Judge should have focused his attention on the question of how PW-11 came into possession of the knife marked as P-1 and whether his story that he picked up the knife when it had fallen on the road is believable. If, he found the knife on

the road and handed it over to the police, why PW-11 was absconding from court until he was arrested and taken his evidence?

In the High Court, the 2nd accused-appellant has given evidence on oath. Two other witnesses for the defence also gave evidence on oath. The appellant was cross-examined but the prosecution failed to challenge the credibility of the evidence of the appellant or the credibility of the other two witnesses called on behalf of the defence. The 1st accused has also given evidence on oath and stated that he heard people shouting Raja (PW-11) had stabbed the deceased. The learned High Court Judge rejected the defence evidence on erroneous findings as explained previously and accepted the prosecution evidence with the aforesaid serious issues. The Supreme Court of India, held in the case of ***Dudh Nath Pandey V. The State of U.P***, decided on 11th February 1981, reported in 1981 AIR 911, 1981 SCR (2) 771 that "defence witnesses are entitled to equal treatment with those of the prosecution." In considering the entirety of these facts and circumstances, I am of the view that the evidence of the defence raises a reasonable doubt about the prosecution case in addition to the aforesaid serious weaknesses in the prosecution case.

If the learned Trial Judge had properly analyzed how PW-11 contradicted the evidence of PW-3 and the inability to separate the false part of PW-3's evidence from the other parts of his evidence with regard to the very moment of causing the fatal injury to the deceased, a reasonable doubt would have arisen reasonable doubt as to whether the incident happened as the appellant claimed. Anyhow, even if the defence case is disregarded, as explained above, the prosecution has failed to adduce acceptable and reliable evidence regarding the murder to conclude that the appellant and no one else committed this murder.

For the reasons stated above, I hold that the charge against the 2nd accused-appellant has not been proved beyond a reasonable doubt. The

learned High Court Judge has come to a wrong conclusion by wrongly analyzing the evidence of the case.

Accordingly, I set aside the Judgment dated 09.08.2018, the conviction, and the death sentence passed on the 2nd accused-appellant. The appellant is acquitted of the charge of murder.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J
I agree.

JUDGE OF THE COURT OF APPEAL