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.

C.A.No. HCC 22-23/2012

H.C. Avissawella No.HC 41/2003

01. Wickramasinghe Ratnathilaka alias Thilak
02. Kankanampathirage Vipulasena alias Sena

Accused-Appellants

Vs.

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

Complainant- Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

DEVIKA ABEYRATNE, J.

COUNSEL : Srinath Perera P.C with K.R.Probodhini for the 1st Accused-Appellant.

Tenny Fernando for the 2nd Accused-Appellant

Suharshi Herath S.S.C. for the Attorney General.

ARGUED ON : 17th February, 2020

DECIDED ON : 11th September, 2020

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ACHALA WENGAPPULI, J.

The 1st and 2nd accused-appellants (hereinafter referred to as the 1st and 2nd Appellants respectively) were indicted before the High Court of *Avissavella* for murder of *Malambi Arachchige Don Anthony Joseph* on 15.09.1995 at *Hanwella*. The 1st and 2nd Appellants have opted for a trial without a jury and at its conclusion, the trial Court found them guilty as charged and sentenced to death.

Being aggrieved by the said conviction and sentence, the 1st and 2nd Appellants sought to set it aside on the several grounds of appeal they have urged before this Court.

Learned President's Counsel for the 1st Appellant raised following grounds of appeal;

a. the non-adoption of evidence by the learned trial Judge who convicted the 1st Appellant is fatal to the conviction,

b. the trial Court had failed to properly consider the infirmities of the solitary eye witness,
c. the trial Court had failed to consider that the 1st Appellant had no motive to commit the alleged murder,
d. the prosecution failed to present sufficient evidence before the trial Court which could sustain a conviction.

The ground of appeal that was relied upon by the learned Counsel for the 2nd Appellant, in addition to the one already raised by the 1st Appellant under Section 48 of the Judicature Act, was that the trial Court had failed to properly evaluate the evidence presented by the prosecution in convicting the 2nd Appellant on common murderous intention.

It is evident from the above grounds of appeal, except to the one that there was no proper adoption of evidence under Section 48 of the Judicature Act, other grounds of appeal relate to the primary issue whether there was proper evaluation of the prosecution evidence by the trial Court which could be considered in the backdrop of the evidence led before the trial Court and of its reasoning.

The contention advanced by the learned President's Counsel in support of the claim there was no adoption of evidence is that, the trial against the Appellants had commenced on 02.03.2005 and with the change of the presiding Judge on three occasions, the parties have adopted proceedings before two of those succeeding Judges, but not before the Judge who finally delivered the judgment in convicting the Appellants. Since this is a clear violation of the statutory provisions contained in Section 48 of the Judicature Act as amended, it was submitted that the conviction of the Appellants should be quashed.

Section 48 of the Judicature Act No. 2 of 1978 was amended by Section 2 of the Act No. 27 of 1999, by effectively taking away the entitlement of the prosecution to "... *demand that the witnesses be re-summoned and re-heard*" by deletion of the word "either party" from the said Section, resulting in a position that only the accused will have the alternative to have his trial "*commenced afresh*". The words used by the Legislature, in conferring that entitlement on the accused by amending the proviso to Section 48 of the said Act, are as follows; "... *the accused may demand that the witnesses be re-summoned and re-heard*". This entitlement accrues to an accused only in the event of any Judge before whom a prosecution is pending (as in this instance) which had to be continued before the successor of such Judge.

Section 48 confers power on the succeeding Judge to "act on the evidence already recorded or partly recoded by his predecessor, in addition conferment of power to such succeeding Judge to re-summon the witness and commence the proceeding afresh, if he thinks it fit.

The statutory provisions of Section 48 contemplates two situations. The first situation as contemplated by the section is that the succeeding Judge, must decide whether he should re-summon the witness and commence the proceeding afresh at the point he presides over a trial already commenced by his predecessor. The second situation is where, if the succeeding Judge decides to "act on the evidence already recorded or partly recorded by his predecessor". Only, then it triggers the application of the proviso to the Section 48, where the accused could make a demand to re-summon and re-hear a witness. If the succeeding Judge decided *ex mere motu* to re-summon the witness and commence the proceeding afresh, neither the prosecution nor the accused will have a choice

over that decision, but to comply with the order of Court and a question of demand does not arise.

In this instant appeal, opportunity for the Appellants to make the demand as per the proviso to Section 48 arose when the Judge before whom the prosecution was pending is succeeded by his successor on 27.04.2005. The evidence of prosecution witnesses *Konara Mudiyanselage Nishantha, Liyanage Sunil, Pindeniyage Wimalasiri, Munagamage Pemawathie, Morris Chrostopher* and *Arthur Robert* were concluded as at that stage. The Appellants have adopted the evidence of these witnesses before the 1st succeeding Judge on 27.04.2005. Evidence of Dr. *Dayananda* was recorded by the succeeding Judge. At that stage the 1st succeeding Judge was succeeded by his successor, the 2nd succeeding Judge, on 07.01.2007. The Appellants have consented to adopt the evidence led up to that point of time before the 2nd succeeding Judge as well. However, no evidence was recorded by the 2nd succeeding Judge, who was then succeeded by the 3rd succeeding Judge, before whom the evidence of witness PS 11453 *Gunasiri* and the Registrar of Court were called by the prosecution and closed its case.

The 1st Appellant gave evidence under oath before the said 3rd succeeding Judge while the 2nd Appellant made a statement from the dock. The impugned judgment was accordingly delivered by the 3rd succeeding Judge but no formal recording was made as to whether the Appellants demanded that the witness be re-summoned.

It is this factor that had been highlighted by the learned President's Counsel as well as the learned Counsel for the 2nd Appellant who submits that the conviction entered against the Appellants is therefore vitiated.

In view of these submissions, this Court will consider the question whether the failure to record that the proceedings are adopted by the 3rd succeeding Judge vitiates the conviction of the Appellants.

There is no record in the proceedings that when the 3rd succeeding Judge presided over their trial, the Appellants have made the demand to re-summon and re-hear the witnesses and commence the trial afresh. On the contrary the Appellants have consented before the 2nd succeeding Judge to adopt proceedings. That is effectively adopting all the evidence thus far recorded by the two of his predecessors. In between the 2nd and 3rd succeeding Judges, no evidence was recorded. In effect, the 3rd succeeding Judge is in the identical position as the 2nd succeeding Judge in relation to Section 48, since no witness gave evidence in between their tenure of office as trial Judges in that particular Court. Even the Appellants, by their conduct have accepted that position as they presented their respective cases before him after the transition.

There is nothing in the wording in Section 48 indicating the consequences of a failure to comply with the provision of that Section. It confers power on the succeeding Judge to continue with the prosecution, unless, he himself decides or upon the "demand" made by the accused, that the witnesses are re-summoned and re-heard. Section 48 clearly provided for a prosecution "*... be continued before the successor of such Judge who shall have the power to act on the evidence already recorded by his predecessor ...*".

HNG Fernando J (as he was then) in ***Mahawasala v Inspector of Police, Kuhuwela*** 67 NLR 161, having referred to Section 123 of the Criminal Procedure Code, Section 88 of Courts Ordinance and the judgment of *Windham* J in ***Perera v Inspector of Police, Maharagama*** 51 NLR 10, and states;

"... a new Magistrate had without recording a decision under Section 152 (3) proceeded to try a case fixed for trial by his predecessor after the assumption of jurisdiction. In dealing with the question referred Windham J. (at page 13) held that the Section in the light of which section 152 (3) should be interpreted is section 88 of the Courts Ordinance and he thus explains the scope and effect of that section :-" The section provides that such prosecution may be ' continued before the successor of such judge'. It seems to me that this provision necessarily implies that the new judge shall step into the shoes of the original judge and may carry on from the point where he left off."

That precedence referred to an instance where the succeeding Judge had to assume jurisdiction to continue with a prosecution and the then Supreme Court was of the view *"that the new judge shall step into the shoes of the original judge and may carry on from the point where he left off"*. Section 48 does not speak of assumption of jurisdiction, but as noted earlier on, states that, subject to two qualifications, a succeeding judge could continue with a prosecution commenced before his predecessor.

If the submission of the learned President's Counsel is accepted as the one reflecting the correct legal position, then that would mean the Appellants could opt to adopt proceedings before Judge A and not before Judge B, since there was no adoption of proceedings made before Judge B, who is placed at the same position as Judge A, in relation to the statutory provisions contained in Section 48.

In view of the above reasoning, this Court is of the considered view that there was in fact a proper adoption of proceeding before the learned High Court

Judge, who delivered his judgment convicting the 1st and 2nd Appellants as far as Section 48 of the Judicature Act is concerned, and therefore the contention that there was no proper adoption of evidence had taken place before him, cannot succeed.

The remaining grounds of appeal, as raised by the 1st and 2nd Appellants are based on the trial Court's acceptance of the prosecution evidence. It is therefore incumbent upon this Court to consider the whole body of evidence presented before the trial Court by the prosecution *albeit* briefly. There was no contention by the Appellants that their evidence was rejected erroneously

It is clear from the proceedings that the prosecution primarily relies on the eye witness account of witness *Nishantha,* in order to prove its allegation of murder against the two Appellants.

Nishantha was employed as a sand miner by *Sunil* who operated a sand depot along the banks of *kelani* river in *Hanwella* area. Referring to the events that took place on the day of the incident, the witness said that due to high water levels, sand mining could not take place and he decided to visit his brother residing in *Avissavella* in the morning. In order to report to work on the following morning he had returned to his temporary shelter at *Hanwella* in the same evening. On his way to *Sunil's* house, he saw the deceased chatting with the two Appellants at the sand depot owned by one *Devendra.* Seeing three of his fellow sand miners chatting away, the witness too had joined them. He noted that the deceased was already under the influence of alcohol. The way the three of them sat on the bench prompted the deceased to query the Appellants whether they are trying to murder him.

Initially, the witness was talking to three of his friends, whilst standing and as their conversation is continued, the witness sat on the grass patch. With this act, realising the witness would not leave them in a hurry, the 1st Appellant told him to go away since they had some business to attend.

The witness became suspicious with the behaviour of the three and decided to watch them from a distance after hiding himself. He saw the 1st Appellant pulling down the deceased and hitting him with kicks and punches. He also saw the 2nd Appellant going into his house, which was standing near the sand depot, and returning with "some weapon" and attacked the deceased. The time was about 7.00 or 7.30 p.m. and witness had seen the attack on the deceased with twilight. The Appellants have thereafter dragged the deceased by holding on to deceased's legs towards the swollen river. He heard a sound of something dropped into water. The witness was scared after what he saw and went to Sunil's house.

While waiting at Sunil's house the 1st Appellant came to see the witness to convey the message that 2nd Appellant wanted to see him. When the witness indicated his reluctance, to see him the 1st Appellant told him " අපි ඇන්ටනී මැරුව. දන්නෙ උඹ විතරයි. අරන්වි වුනොත් උඹෙන් තමයි". At that point of time *Sunil* joined them. The witness, having excused himself, proceeded to *Hanwella* town and thereafter to *Avissawella.* He then shifted his employment to a sand depot located about 4 miles from *Sunil's* due to fear of life.

After about a week since the incident, *Sunil* and another came in search of the witness and told him that the Police wanted to question him over the death of the deceased. *Sunil* also said that "those two" had told that the witness too

was "there". Later he learnt that the deceased's body was recovered from the river.

Witness *Sunil* knew both Appellants as sand miners and claimed that it was he who trained the 1st Appellant to mine sand from river bed, although he had left his employer subsequently. The 2nd Appellant met him one morning and pleaded with the witness to save him by paying Rs. 5000.00 as he had killed the deceased and put him to the river. *Sunil* informed the 2nd Appellant's former employer *Wimalasiri Mudalali* of the confession immediately and, on the latter's suggestion, inspected the scene for tell-tale marks. At that point of time both Appellants were employed under the witness.

Sunil suspected this confession could be a joke and had questioned the 1st Appellant whether this is true. By this time *Wimalasiri* and *Devendra* have informed *Hanwella* Police about the murder. The Police took the three of them along the river bank but found no trace of the deceased.

The Police arrested the 1st Appellant and when questioned admitted that the deceased was killed and put to the river. The 2nd Appellant was also arrested thereafter who confessed in the presence of the 1st Appellant of his complicity.

Later *Devendra* and another had identified the body of the deceased at *Ragama* Hospital.

Wimalasiri in his evidence confirmed that *Sunil* told him that 2nd Appellant confessed to the murder at *Devendra's* sand depot. It was not unusual for a sand miner to seek employment elsewhere if the river is swollen and the witness did not take notice that deceased did not report to work. Then he learned from *Sunil* as to the fate of the deceased.

Dr.*Dayananda* had conducted the post mortem examination on the body of the deceased. The body was putrefied when retrieved from water and was disfigured with animal bites. The deceased had two significant injuries. His maxilla was separated from the skull due to a fracture, in addition to a stab injury on his chest by which the left ventricle was penetrated. The witness noted there were other injuries caused by a blunt weapon. His death was due to the stab injury.

The body of the deceased was identified by his relatives due to an old scar on the head, which is confirmed by the medical witness who noted a healed triangular shaped depressed fracture on left parietal bone.

In the light of above summary, the contention by both Appellants that the trial Court had failed to adequately consider the evidence for the prosecution should be considered at this stage. The remaining grounds of appeal could therefore be considered simultaneously since they are related to each other in content.

It was contended by the learned President's Counsel for the 1st Appellant that belatedness of the solitary eye witness, and he was influenced by *Sunil,* who harboured a grudge against the 1st Appellant for leaving him, to falsely implicate, and the omission to mention the utterance attributed to the deceased and the prosecution's failure to explain the stab injury all add up to make the witness's evidence unreliable.

Perusal of the impugned judgment reveals that the trial Court had in fact considered all these aspects in its evaluation of the prosecution evidence. It is noted that the delay in making a statement was due to fear of life and relocating

himself, which is a probable conduct of a person, if placed under the circumstances as the witness was placed at that point of time. The fact that witness relocated himself after the incident is confirmed by *Sunil* who located him after several days to convey that the Police wanted to question him.

Referring to the tenor of cross-examination, the trial Court considered the suggestion put to witness *Sunil* and rightly concluded that the confessions were not disputed by the 1st Appellant, except denying making it. There is no contradiction or an omission marked by the 1st Appellant over making the confession on the witness's evidence indicating that it was mentioned on the first available opportunity and thereafter consistently made by the witness. When the witness denied the suggestion that due to prior animosity the 1st Appellant was implicated, he did not probe any further by suggesting other instances where he had acted with such animosity.

The contradiction 1V1 is in relation to the eye witness's claim that it was he who spoke to the two Appellants when seated together with the deceased, whereas he told Police that he could not identify the Appellants, until they who shouted at him " කවුද යමෙක්". Clearly this was due to the limitation of the witness to express himself describing what took place. He merely said in evidence that the three were there. Only during cross-examination, it was elicited how he identified them clearly.

As to the omission marked in relation to the utterance attributed to the deceased, it was elicited by the 1st Appellant that he made a statement to Police as well as gave evidence before the Magistrate's Court. The omission was marked only in relation to his testimony before the Magistrate's Court, justifying an inference that the witness did mention it in his statement to Police, which was

made few days after the incident. When considered in that light, he made that claim at the earliest opportunity and was inconsistent. Certainly the witness had not invented this utterance and not mentioned for the first time during the trial. The conclusion reached by the trial Court that his evidence is truthful and reliable **is** therefore could not be assailed.

In relation to the absence of evidence as to the stab injury, it is noted that witness *Nishantha* maintained that the 1st Appellant had only punched and kicked the deceased while the 2nd Appellant attacked the deceased who was fallen on the ground with some kind of weapon, brought from his home. The witness saw the incident from a distance and with the onset of darkness. He also said that after the 2nd Appellant's attack on the deceased with that "weapon", the deceased was dragged by his feet and dropped in the river. The death was due to the single stab injury and the medical witness of the opinion that the deceased was already dead when he was put to water. This evidence clearly indicate that the death was due to the injury caused by the 2nd Appellant's "weapon", which was not clearly identified by the witness due to poor visibility. Hence, there was evidence presented by the prosecution establishing as to the injury which caused the death of the deceased and who inflicted that injury. Even if there was no evidence of attack by the 2nd Appellant using a "weapon", mere throwing a man, who was under the influence of liquor and subdued by continued physical attack, into a swollen river, is sufficient to impute criminal liability under Section 32 of the Penal Code as he was joined by the 1st Appellant.

The 2nd Appellant's contention that the trial Court had failed to properly evaluate the evidence presented by the prosecution on common murderous intention is therefore clearly without merit, in view of the reasoning contained in the preceding paragraphs of this judgment.

It is unfortunate that the learned prosecutor had presented irrelevant evidence before the trial Court in relation to the confessions made by the two Appellants in the presence of the Police officers, which is in direct violation of the prohibition contained in Section 25 of the Evidence Ordinance. This Court finds no indication that the trial Court considered the said items of irrelevant evidence or at least was influenced by it in any manner. If the trial against the Appellants was taken before a jury, the admission of irrelevant evidence of this nature by an irresponsible prosecutor, alone is sufficient to vitiate the conviction.

This Court is of the considered view that the Appellants were properly convicted, in spite of the above referred infirmity which caused no miscarriage of justice. The conviction of the 1st and 2nd Appellants and the sentence of death is affirmed.

The appeals of the 1st and 2nd Appellants are accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL