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

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant

V.

Court of Appeal Case No. CA HCC 0140/14

1. Dewapaksha Pedige Salin Mayura Dewapaksha

High Court Gampaha Case No. 49/2003

Accused

AND NOW BETWEEN

1. Dewapaksha Pedige Salin Mayura Dewapaksha

Accused - Appellant

V.

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

Complainant - Respondent

BEFORE : **ACHALA WENGAPPULI, J**

K. PRIYANTHA FERNANDO, J

COUNSEL:		Anil Silva PC with Dileep Bhanu for the Accused - Appellant. Haripriya Jayasundara SDSG for the Respondent
ARGUED ON	:	03.09.2020
WRITTEN SUBMISSIONS FILED ON	:	25.09.2017 by the Accused - Appellant 29.09.2017 by the Complainant - Respondent
JUDGMENT ON	:	16.10.2020

K. PRIYANTHA FERNANDO, J.

1. The accused-appellant (hereinafter referred to as the appellant) was indicted in the High Court of Gampaha on two counts, for committing murder of *Neegal Pedige Ranathunga*, punishable under section 296 of the Penal Code, and for causing hurt on *Neegal Pedige Cyril Jayawardene,* punishable in terms of section 315 of the Penal Code. After trial, the appellant was convicted on count No.1 and was sentenced to death. He was acquitted on count No.2.

2. Being aggrieved by the said conviction for murder and the consequential death sentence, the appellant preferred the instant appeal. The Learned President's Counsel appearing for the appellant, at the argument stage, urged the following grounds of appeal;

1. The non-calling of certain eye witnesses by the prosecution has an impact on fair trial procedures guaranteed by the constitution
2. The learned High Court Judge did not consider the defence position adequately.
3. The prosecution has not proved the case beyond reasonable doubt.

Facts in brief

3. The prosecution had called one eye witness to the incident. This was Keegal Pedige Cyril Jayawardena (PW1) who was the alleged victim in count No.2. According to his testimony, the appellant, the deceased and the witness had been neighbours living in the same village. On the fateful day villagers had been involved in preparing the place for a *Dan Sela* to be held for *Poson Full Moon Poya* at the premises of a rice mill at about 10.30 pm. It had been two days before the *Poson Full Moon Poya* day. The appellant came and assaulted the deceased with a sword. PW1 was also injured the course of the struggle when he tried to prevent the attack on the deceased by the appellant. He then ran away. It was evident that both the appellant and the deceased were cousins of PW1.

4. The position taken by the appellant at the trial had been that he was not involved in the attack. He had been at home. The appellant testified that he ran away when the police came to arrest him the same night due to fear of arrest, but he surrendered the following day. It was also evident that there had been a case pending against the deceased for using criminal force on the appellant's mother with intent to outrage her modesty.

5. Learned President's Counsel for the appellant argued that PW1 is the sole eye witness called by the prosecution and therefore, the learned High Court Judge should have considered his evidence with more care. Further it was submitted that PW1 was an interested witness.

6. The learned Senior Deputy Solicitor General appearing for the respondent submitted that PW1 is not an interested witness, but a cousin of both the appellant as well as the deceased. Learned DSG further submitted that the mother of the appellant had corroborated the evidence of PW1 and that the appellant's motive to attack the deceased was established by the appellant and the mother of the appellant in their evidence.

7. The learned High Court Judge in her judgment has given careful consideration to the evidence of the sole eye witness PW1. As the learned High Court Judge has rightly mentioned in her judgment, Section 134 of the Evidence Ordinance provides that no particular number of witnesses shall in any case be required for the proof of any fact.

8. In the case of ***Wijepala V. Attorney General*** **SC Appeal No. 104/99, SC /Spl/La 238/99,** the Court observed;

> *"Senaratne who was the sole eye witness has thus been cross- examined on vital aspects relating to the incident and doubts have been raised in regard to his presence at the scene. Section 134 of the Evidence Ordinance lays down a specific rule that no particular number of witnesses shall in any case be required for the proof of any fact, thus attaching more importance to the quality of evidence rather than the quantity. The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by cross-examination or otherwise, then corroboration may be necessary"*

9. In the case of ***Sumanasena V. Attorney General [1999] 3 Sri LR 137,*** it was held that evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law.

10. Hence, a conviction may be based on the sole testimony of a single witness, if believed and if the testimony is found to be credible and trustworthy.

11. In the instant case the learned High Court judge in her judgment carefully analyzed the evidence of the eye witness PW1 and found it to be credible and capable of being acted upon. The contradiction marked in his evidence and the omissions brought to the notice of the Court would not go to the root of the matter and would not affect the credibility of PW1. The trial Judge had also given careful consideration of the evidence adduced by the defence and had rightly rejected the same giving sufficient reasons.

12. It is the Trial Judge who has the opportunity to see the demeanor and deportment to assess the credibility of a witness. In the case of ***Fradd V. Brown & company Ltd. (20 N.L.R. Page 282)*** the Privy Council held:

> *"It is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in question of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance"*

13. Upon careful consideration of the evidence of PW1 with the medical evidence and also the evidence adduced by the defence, this Court has no reason to interfere with the decision of the learned High Court Judge to act upon the evidence of PW1. PW1 has testified as to how the appellant cut the deceased with a sword several times even after the deceased fell on the ground. The medical officer who conducted the autopsy on the body of the deceased has observed 14 injuries including 12 cut injuries.

14. The learned President's Counsel for the appellant also submitted that PW1 falls into the category of an interested witness. It was the contention of the learned DSG for the respondent that PW1 cannot be considered as an interested witness.

15. In the case of ***Karthik Malhar V. State of Bihar[1996] 1 SCC 614 (620)***, it was held that a close relative who is a natural witness cannot be regarded as an interested witness. The term *interested* postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason. The same view was expressed in case of ***State of Andhra Pradesh V. S. Rayappa, [2006] 4 SCC.***

16. A similar view was taken by the Supreme Court of India in ***Ram Bharosey V. State of U.P. AIR [1954] SC 704***, where the Court stated that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing a conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice.

17. The Supreme Court of India in the case of ***Raju Alias Balachandran V. State of Tamil Nadu (2012) 12 SCC 701*** held that;

> " *For the time being, we are concerned with four categories of witnesses a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the*

evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required."

18. The Supreme Court of Sri Lanka in the case of ***The Attorney General V. Sandanam Pitchi Mary Theresa [2011] 2 SLR 298*** held;

"A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness (Vide, Hasker v. Summers (1884) 10 V.L.R. (Eq.) 204 – Australia; Leefunteum v. Beaudoin (1897)28 S.C.R. 89) - Canada)."

19. However, in the instant case, it was evident that PW1 had no enmity with the appellant, nor had he a special reason to lie in court against the appellant. Both the appellant as well as the deceased are his cousins. As testified by PW1, he received injuries, when he tried to prevent the appellant attacking the deceased with the sword. PW1 did not even say that the appellant deliberately caused injuries to him. Considering that evidence, the learned Trial Judge found the appellant not guilty of count No.2, where it was alleged that the appellant caused injuries to PW1 by

hitting him with a sword. In the above premise, the learned High Court Judge has rightly found PW1 to be credible and his testimony could be acted upon.

20. The learned President's Counsel submitted that the failure by the prosecution to call other eye witnesses, who were there at the crime scene, has an impact on the fair trial procedures guaranteed by the constitution.

21. In the case of ***R. V. Russel Jones [1995] 1 Cr. App. R. 538***, the Court observed that the prosecution enjoys a discretion whether to call, or tender, any witness they require to attend, but the discretion is not unfettered. The discretion must be exercised in the interest of justice. The prosecutor must direct his mind to his overall duty of fairness.

22. The Courts in England have also held that, in the event the prosecution is reluctant to call a particular witness, the defence may call him if they so wish. ***(R.V. Thompson (1876) 13 COX 181, R. V. Oliva49 Cr. App. R 298)***

23. This principle was also adopted in Sri Lanka in several cases by this Court. In the case of ***Sinnathamby Ganeshan and Another V. Republic of Sri Lanka C.A. Appeal No. 57-58/2003*** the Court referred to what was held in case of ***Walimunige John V. The State 76 N.L.R 488;***

> *"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross examination. Further it is not incumbent on the trial judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114(f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all"*
>
> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative that is withheld by the*

prosecution and the failure to call such a witness constitutes a vital missing link in the prosecution case and where a reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be mere repetition of the narrative."

24. The above principle in the case of ***Walimunige John*** was also followed in ***Kumara de Silva V. A.G. [2010] 2 S.L.R. 169*** and ***Ajith Fernando alias Konda Ajith and others V. A.G. [2004] 1 S.L.R. 288.***

25. In the instant case there is no vital missing link in the case for the prosecution. The statements of all listed witnesses had been disclosed to the defence with the indictment. The defence had the opportunity to call them if they so wished and also no application had been made to Court before the Trial Judge to call them by Court. There had been no prejudice caused, nor was the appellant deprived of a fair trial by the prosecution not calling all or some of the witnesses listed in the indictment.

26. The learned President's Counsel also contended that the sole eye witness called by the prosecution (PW1) had been a belated witness. It is evident that PW1 after running away from the crime scene had come back to the crime scene when he was informed that the police had come. However, when he came, the police had left. The incident had taken place at about 10.30 in the night. Therefore, he had made his statement to the police the following day. In the circumstances, the delay in making the statement till the following day would not affect his credibility.

27. The learned President's Counsel for the appellant submitted that the learned High Court Judge has failed to consider the defence evidence. In her judgment from pages 21 to 26 the learned Trial Judge has sufficiently discussed the evidence adduced, the position taken by the defence and the reasons for rejecting the

defence. As submitted by the learned SDSG, the evidence adduced by the defence had been more on the motive for the appellant to attack the deceased.

28. In the above premise, I find the grounds of appeal urged by the appellant are devoid of merit and should fail.

29. Hence, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL