

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

Wickremesinghe Raigamage
Ranjith Alias Lokka

Accused Appellant

V.

CA 256/2017
HC (Embilipitiya)
Case No. 30/2013

Attorney General,
Attorney General's Department,
Colombo-12

Respondent

Before A.L.Shiran Gooneratne, J
K.Priyantha Fernando, J
Counsel Indica Mallawaratchy with K.Kugaraja for the
Accused-Appellant.
Sudarshana de Silva, SSC for the Respondent.

Argued on 25.02.2019

Written submissions

Filed on 02.05.2018-Accused-Appellant

26.09.2018-Respondent

Judgment on 01.04.2019

K. PRIYANtha FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Embilipitiya on one count of murder punishable under section 296 of the Penal Code. After trial learned High Court Judge convicted the Appellant and sentenced him to death. Being aggrieved by the conviction, the Appellant appealed against the said conviction on the following grounds.

Grounds of appeal

1. P.W.1 namely Anura Kumari and P.W.2 namely Ranathunga have testified with regard to 2 wholly conflicting versions, rendering the conviction factually untenable.
2. Following closely on the heels of ground 1, a serious doubt arises as to whether P.W.1 was an eye witness to the incident as opposed to her evidence being purely circumstantial.
3. Tagging along with ground No.2, the incident being based on circumstantial evidence, prosecution has failed to eliminate the possibility of the 3rd party namely Bandara being the perpetrator of the crime.
4. Learned Trial Judge's finding that the P.W.2 wholly corroborates the evidence of P.W.1 is totally fallacious and contrary to the evidence led at the trial.

5. Prosecution failed to lead the evidence of Bandara (P.W.1) who was present at the crime scene thereby entitling Court to draw an adverse presumption in terms of section 114 (f) of the Evidence Ordinance.
02. In considering the above grounds of appeal, we carefully scrutinized the evidence adduced at the trial, judgment of the learned Trial Judge, written submissions filed on behalf of the parties to this appeal and the submissions made by Counsel for both parties at the hearing.

Case for the prosecution

03. P.W.1 Anura Kumari is the main witness for the prosecution. Deceased is her husband. According to her evidence, Amarawathie had been the domestic aid who looked after her grandmother namely Sopi Nona. On the day in question, the Appellant had come to their house at about 7 pm with one Bandara and had assaulted Amarawathie (Siriya) asking Amarawathie to go away from their house. When her father (P.W.2) tried to intervene to settle, Appellant had assaulted P.W. 2 as well. When leaving, Appellant had said to P.W.2 that he would come again in the night and kill P.W.2. Amarawathie had received injuries and had gone and complained to the Police.
04. After about 1 hour, deceased had come home after work and she had told the deceased about what happened. Deceased had then left the house to bring bread. Witness had seen the Appellant and Bandara near the mango tree about 50 meters ahead of their house and she also had followed the deceased. While going, the deceased had asked the Appellant as to why they quarreled with the father. Then the Appellant had assaulted the deceased. Deceased had asked "Why are you hitting me". Deceased had fallen and when he got up, the Appellant had stabbed the deceased on the chest and the abdomen with a knife. When the deceased was falling, she had tried to hold him, but both of them had fallen. She said that the Appellant after stabbing got on to the bicycle and left.

05. She had then screamed for help and her brother-in-law and father had come. Deceased had been bleeding from his stomach and chest. Deceased was taken to hospital by the brother (P.W.3), and had died on the way. She had made a complaint to the Police the same night. The knife that was there at the scene after stabbing, she had handed over to the Police.
06. According to the evidence of P.W.2, after he heard about the assault on Siriya, he had called Sudhi (Siriya's daughter) to inquire as to why Siriya was assaulted. Then the Appellant had threatened him saying that he would come in 5 minutes and look after him. Then in about 5 minutes Appellant had come with Bandara and had assaulted him. P.W.1 had been inside the house. Deceased had not been at home. After Appellant left with Bandara, when the deceased came, P.W.1 had told the deceased about the incident. Then he had seen the deceased going towards where the Appellant went. He had followed the deceased. He had heard the cries of the P.W.1 and when he went there, had seen the deceased lying fallen. P.W.1 had told him that the Appellant stabbed the deceased. He had seen Appellant running and Bandara had been on the bicycle. P.W.3 had taken the deceased to the hospital.
07. Evidence of the P.W.3 was that on hearing the cries, he had gone towards the scene. He had seen Appellant running away towards the shed. He had seen the deceased lying fallen. P.W.1 and P.W.2 had been there. P.W.1 had been crying and P.W.2 had told him that the Appellant stabbed the deceased and ran. He had taken the deceased to the hospital. Same night he had given a statement to Police.

Defence case

08. Appellant had given sworn evidence. He had admitted going to the deceased's house and pushing Sudhi's mother, Siriya on 30th October, 2008. However, he had denied being at the crime scene. According to him, when he went to the deceased's house (P.W.2's house), it had been about 3.00–3.30 PM. After pushing Siriya, on the following day (31st October, 2008), early morning at about 4 AM, he had gone to Tangalle for work where he had been doing paint work. He had come back home at about 8.30 – 9.00 PM the same day. Although his wife had told him that the Police had come in search of him, he had thought that it was because he pushed Siriya. Same night (31st October, 2008), he had gone to P.W.2's house. P.W.2 had not been there. Neighbours have told him that the deceased had been killed by stabbing. The deceased body had not been brought home yet.
09. On the way from the deceased's house at about 11 AM, at the crime scene he had seen blood stains near the culvert. As the Police were looking for him, thinking that it was because he quarreled with Sudhi's mother, he had gone to the Police on the 1st October, 2008 morning at about 8.30. In the afternoon, Police have brought Bandara. Police had assaulted him, kept him till the 3rd October. On the 3rd October, his statement had been recorded and produced him in Court on the 4th of October.
10. Witnesses Wasanthi Kumari (Siriya's daughter), Anulawathi (mother-in-law of the Appellant), Isanka Dilrukshi (wife of the Appellant), H. L. Sandamali (Clerk from the High Court, Embilipitiya), and Kapila Edirisinghe (Surveyor) also had testified for defence.
11. Prosecution had called Ranbandara Jayasundara (Examiner of questioned documents from the Government Analyst Department), and H.M. Ranbanda (Deputy Principal of Embilipitiya Janadipathi Vidyalaya) as evidence in rebuttal.

Grounds of Appeal number 1, 2, and 3

12. As the above grounds 1, 2, 3 are interconnected, they will be dealt together. Counsel for the appellant submitted that P.W.1 and P.W.2 have given contradictory evidence with regard to the incident. In that, it is submitted that although P.W.2 says that the incident on the deceased had taken place immediately after the Appellant had left the house followed by the deceased, P.W.1 had said that the incident had taken place one hour after the Appellant had left. It is also submitted that on the evidence of P.W.1 and P.W.2, when P.W.2 went to the scene, the deceased had been lying fallen, and he had seen the Appellant running away, and therefore, evidence of P.W.2 is circumstantial in nature.
13. According to the testimony of P.W.1, she had followed her husband the deceased, as she saw the Appellant and Bandara near the Mango tree. When the deceased questioned the Appellant as to why he quarreled with the father, the Appellant had kicked the deceased first, and then the deceased had fallen. When the deceased got up, the Appellant had stabbed him twice and had run away. She had been consistent in her evidence on that incident. It is observed that most of the contradictions marked between her evidence and the police statement had been on the previous incidents that had taken place in the house between the Appellant, Siriya, and then P.W.2. Contradictions marked P7, P8 and P9 were on the question whether the deceased went after the Appellant and Bandara to ask them why they assaulted her father. However, on the evidence of P.W.1 the fact remains that the deceased had asked the Appellant why he quarreled with the father.
14. P.W.1 had made the complaint immediately to the police on the same night. The complaint being recent and prompt, enhances her credibility. The learned Trial Judge has considered her evidence clearly on the basis that she was an eye witness to the crime. The evidence of these witnesses was taken before the Trial Judge, and the Trial Judge is the best person to observe the demeanor and deportment and to assess the credibility of the witnesses.

15. In case of *Fradd V. Brown & company Ltd.* (20 N.L.R. Page 282) 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'

16. P.W.2 in his evidence had clearly stated that when he also followed the deceased, he saw the deceased lying fallen with injuries. P.W.1 who had been there, had told him that the Appellant stabbed the victim. P.W.3 also testified that, when he went to scene of crime on hearing the cries, P.W.1 and P.W.2 had been there, where the deceased was lying fallen. He also had seen the Appellant running. On the above evidence we find that P.W.1 and P.W.2 has not given conflicting evidence. Therefore, we find that the learned Trial Judge had rightly acted upon the evidence of P.W.1, and was entitled to treat her as an eye witness. The learned Trial Judge also had taken into consideration the contradictions marked and the omissions that were brought to the notice of the court when he assessed the testimony of P.W.2. Hence, grounds of appeal 1, 2, 3 should necessarily fail.

Ground number 4

17. Counsel for the Appellant submitted that the learned Trial Judge's finding that the evidence of P.W.2 wholly corroborates the evidence of P.W.1, is contrary to the evidence led at the trial. The learned Trial Judge at page 46 of his judgment, in analyzing the evidence has said that, the evidence of

P.W.2 wholly corroborates the evidence of P.W.1 as to how the incident happened.

18. On the evidence adduced at the trial the only eye witness to the stabbing of the deceased by the Appellant is P.W.1. It is clear that immediately after the stabbing, on hearing the cries of P.W.1, P.W.2 had reached the scene of crime. He also had seen the deceased lying fallen injured and the Appellant running. Therefore, that sentence in the judgment has to be understood in that context. Other than the fact that P.W.2 did not see the stabbing committed on the deceased, P.W.2 has corroborated the evidence of P.W.1 on the incident where the deceased was injured. Therefore, there was no prejudice caused to the Appellant when the learned Judge used the word 'Wholly corroborates'. As to how the incident took place, both witnesses had given consistent evidence.

Ground No 5

19. Athula Bandara alias Bike Bandara had been a witness who was named by the prosecution as witness No.11 in the indictment. However, prosecution had not called him to give evidence. Counsel for the defence contended that the trial Court was entitled to draw an adverse presumption against the prosecution for not calling Bandara, under section 114 (f) of the Evidence Ordinance.
20. The said Bandara had been listed as a witness for the prosecution. Therefore, his statement to the Police had been disclosed to the defence. Bandara had been present at the crime scene according to the evidence adduced by the prosecution. He had come with the Appellant and Appellant had fled the scene on Bandara's bicycle. In *case of R. V. Russel Jones [1995] 1 Cr.App.R. 538* the issue of witnesses the prosecution choose not to call was discussed at length. In *Russel* (supra) 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. Prosecutor must direct his mind to his overall duty of fairness.

21. Court also observed that the prosecutor is the primary Judge of whether or not a witness for the material events is incredible, or unworthy of belief.
22. Courts in England have also held that in the event the prosecution is reluctant to call a particular witness, if so wish defence may call him. (*R V. Thompson (1876) 13 COX 181, R. V. Oliva 49 Cr. App. R 298*)
23. This principle was also adopted in Sri Lanka in several cases in this Court. In the case of *Sinnathamby Ganeshan and another V. Republic of Sri Lanka C.A.Appeal No. 57-58/2003* 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, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."

24. The above principle in 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 the defence has not even requested the Trial Court to order the prosecution to call Bandara as a witness. It was also open for the defence to call the witness if they so wished.
26. Therefore, in the above circumstances we are of the view that it was not incumbent upon the Trial Judge to draw an adverse presumption against the prosecution in terms section 114 (f) of the Evidence Ordinance.

Thus, the conviction of the Appellant is affirmed. Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL