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

R. M. S. Priyantha Rathnayake

ACCUSED-APPELLANT

C.A 41/2012
H.C. Kurunegala 144/2006

Vs.

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

RESPONDENT

BEFORE: Anil Gooneratne J. &
P.W.D.C. Jayathilake J.

COUNSEL: Indika Mallawarachchi for the Accused-Appellant

A. Jinasena D.S.G. for the Attorney General

ARGUED ON: 26.03.2014 & 27.03.2014

DECIDED ON: 30.05.2014

GOONERATNE J.

The Accused-Appellant was indicted for murder of one Ratnayake. M.Wimalaratne who was known as Madawala Mahaththaya, as described in the indictment. Accused was convicted of culpable homicide not amount to murder (Section 297) and sentenced to 15 years rigorous imprisonment and a fine of Rs. 1000/- which carried a default sentence of 6 months. Further to above, the learned High Court Judge has directed that based on a previous conviction where the sentence had been suspended (H.C. Anuradhapura 102/2005) and that the sentence of imprison of 2 years be imposed by the High Court of Anuradhapura, to be implemented. I would state the prosecution case as follows.

Witness No. 6 who gave evidence as regards the incident testified that both the Accused and Deceased fought and had given blows to each other by using a mamotty and blunt weapon, but as to who struck the first blow was not consistent as regards his evidence. The witness had been ploughing the paddy field of the deceased and the Accused had come to the spot with a

mamotty and both of them started to fight. Witness No. 7 was also involved in ploughing the paddy filed and in his evidence stated that the first blow was struck by the Accused and it was done so by the mamotty which was brought by the Accused. Several blows had been dealt until the deceased fell. The eye witnesses are known to both parties.

At this point of this judgment I would refer to the order made by the learned High Court Judge on 29.3.2011 (pg. 51) whilst the trial was proceeding. In that order the trial Judge had observed that witness No. 6 is giving evidence on compulsion (බල පෑම් මත) and had recorded that further recording of evidence should be halted and such compulsions need to be removed and for such purpose had remanded witness No. 6 for a period of 2 week, and thereafter his evidence was recorded after the period of 2 weeks. In the judgment at pg. 188 the trial Judge also state that since witness No. 6 failed to provide evidence according to the police statement he was remanded and his evidence was recorded subsequently. In the judgment trial Judge also stated (pg. 188) that by excluding the evidence of the witness, there is no doubt that the Accused attacked the Deceased. It is also important to refer pg. 187 of the judgment where it is recorded by the trial Judge that in perusing the

police statement as provided by Section 110(4) of the Criminal Procedure Code and having read such statement the position of the Accused attacking the deceased could be verified. This portion of the judgment had been recorded by the trial Judge when witness No. 7 was cross 0examined by the defence as regard the question of Accused giving the first blow to the Deceased not being said so in the statement by the witness.

It should also be noted that at pg. 190 trial Judge observes that witness No. 5 & 7 seems to be giving evidence not according to their free will and that they appeared to be scared.

The learned counsel for the Appellant inter alia urged the following matters:

1. Violation of Section 110(3) of the Criminal Procedure Code. The trial Judge had perused the statement to verify Accused attacking the Deceased. It is nothing but to corroborate the prosecution case.
2. Rejection of the plea of private defence untenable. Learned High Court Jude has misdirected on this point.
3. Reliance on the evidence of witness No. 7. It is self contradictory, evidence. Attention drawn to the evidence led at pgs. 74, 76, 77, 78 & 79 of brief. Items of omissions.
4. Failure to consider the evidence of interference of witness and remanding the witness, by the learned High Court Judge.

We also had the benefit of hearing submissions of learned Deputy Solicitor General who supported the case of the prosecution case. She drew the attention of court to very many factual matters and items of evidence supporting the version of the prosecution, case. I am somewhat inclined to accept learned Deputy Solicitor General's contention, if not for the misdirection and errors done by the learned High Court Judge.

This court observes and note that the trial Judge, whilst the case had been proceeding in the High Court, by his order of 29.3.2011 (pg. 51) remanded witness No. 6. In the said order the trial Judge observes that the witness is giving evidence due to compulsion (බල පෑම් මත), and as such the witness is prevented from giving evidence to court. As such the learned High Court Judge remanded the witness to allow him to get over such attitude. Further in the Judgment at pg. 188 trial Judge states that since the witness failed to give evidence as per the statement to the police the witness was remanded. මෙහිදී පැ. සා. 6 පොලිස් ප්‍රකාශ ද අනුව සාක්ෂි ඉදිරිපත් නොකල හේතුවෙන් ඔහු රක්ෂණ භාරයට පත් කොට ඉන්පසුව ඔහුගේ සක්ෂි ගෙන ඇත.

It is the view of this court that it is irregular and it amounts to a miscarriage of justice for the witness to be remanded for the reasons adduced as above by the trial Judge. This act of remanding would have a serious impact

not only on witness No. 6 but on all other prosecution witnesses who gave evidence subsequently at the trial. On this aspect the trial Judge at pg. 190 also observes that witness Nos. 5 & 7 appears to be giving evidence not according to their free will and they appear to be scared. This is more than sufficient material enable me to address my mind that a fair trial had not been conducted and that it amounts to a miscarriage of justice. The evidence led and admitted in the trial court would on one hand caused prejudice to the Accused-Appellant and on the other hand whatever evidence transpired subsequent to witness No. 6 being remanded would be tainted with bias and questionable position of each party before court. Merely because the trial Judge rejected the version of witness No. 6 by his judgment would not suffice since by that point of time the damage had occurred, and left room, for a witness to tell the truth or untruth under oath due to the earlier act of court in remanding a witness, and as such a signal to the witness to give evidence according to the police statement, through fear of being remanded (like witness No. 6).

Witness of the prosecution would be called upon one by one to give evidence. Such a fearful impressions should never disturb the minds of witnesses. i.e if evidence is not given according to the police statement there is

a possibility of being remanded. (as observed by the trial Judge at pg. 188 as regards witness No. 6).

The judgment at pg. 187 and beginning from pg. 186 witness No. 7 had been questioned and culminated in the position as to who dealt the first blow. Trial Judge states there is a suggestion that the Accused dealt the blow to the deceased is not reflected in the police statement. 'ඉස්සර වෙලා සුසිරි මඩවල මහතාට ගැසූ" බවට ..... . Thereafter the trial Judge states in terms of Section 110(4) having perused the statement it was evident for the trial Judge that Accused attacked the Deceased. It is important to record that portion for purposes of clarity as follows:

නමුත් අපරාධ නඩු විධාන සංග්‍රහයේ 110(4) වගන්තිය අනුව (සාක්ෂි වසන්කොට) එකී ප්‍රකාශය කියවා බැලිමේදි විත්තිකරු මරණකරුට පහර දුන් පදනම පැහැදිලි ලෙසම සාක්ෂිකරු තම ප්‍රකාශයේ සඳහන් කර ඇති ආකාරය පෙනී යයි.

මෙහිදි පැ.සා. 6 පොලිස් ප්‍රකාශ අනුව සාක්ෂි ඉදිරිපත් නොකළ හේතුවෙන් ඔහු රක්ෂණ භාරයෙට පත් කොට ඉන්පසුව ඔහුගේ සාක්ෂි ගෙන ඇත.

ඔහුගේ සක්ෂි සම්පුර්ණයෙන්ම නොසලකා හැර පැ.සා. 6 ගේ සාක්ෂි තනිව ගෙන බලද්දි මරණකරුට විත්තිකරු පහරදීම පිළිබඳව කිසිදු සැකයක් ඇති නොවේ.

The words used as 'සාක්ෂි වසන් සොට' at the beginning of the sentence does not support the conclusion of that sentence and creates a doubt as to whether the Judge used the statement merely to aid? It seems not so because he is of the view having perused the statement the attack by Accused to Deceased is apparent and thereby support the prosecution case.

In King Vs. Soysa 26 NLR 324 His Lordship Justice Jayawardene held: "A Judge is not entitled to use statements, made to the police and entered in the Information Book, for the purpose of corroborating the evidence of the prosecution."

In Paulis Appu Vs. Don Davit 32 NLR 335 "Where at the close of a case, the Police Magistrate reserved judgment, noting that he wished to peruse the Information Book, - Held, that the use of the Information Book for the purpose of arriving at a decision was irregular."

In Wickremesinghe Vs. Fernando 29 NLR 403 "Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement by him to the Police, - Held, that the use of the Police Information Book was irregular."

In Inspector of Police, Gampaha Vs. Perera 33 NLR 69 "Where, after examining the complainant and his witnesses, the Magistrate cited the Police to produce extracts from the Information Book for his perusal, before issuing process, - Held, that the use of Information Book was irregular."

In Perera Vs. Eliyathamby 44 NLR 207 It was held that entries in a Police Information Book cannot be used as evidence for the purpose of testing the credibility of a witness.

Therefore I hold that trial Judge has erred and misdirected himself, which result in a serious and a substantive miscarriage of justice. In the circumstances and in the best interest of justice we hold that this is a fit case to order a fresh trial since the court is of the opinion, that the witnesses should have been allowed to give evidence in a freer way. We set aside the conviction and sentence and send the case back for retrial. The trial Judge's order as regards H.C. Anuradhapura 102/2005 is also hereby set aside.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilake J.

I agree.

JUDGE OF THE COURT OF APPEAL