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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/245/2009

H/C Colombo case No. 2549/2005

K.D. Nishantha Perera

ACCUSED

And,

K.D. Nishantha Perera

ACCUSED-APPELLANT

Vs,

Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

S. Devika de. L Tennakoon J

Counsel: Indika Mallawarachchi for the Accused-Appellant

Thusith Mudalige SSC, for the AG

Argued on: 10.12.2015

Written Submissions on: 29.02.2016

Judgment on: 24.06.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant who was indicted before the High Court of Colombo for committing the murder of one Ariyadasa Gamage on or about 10.03.2003, was convicted after trial before the High Court Judge without a jury and was sentenced to death. Being aggrieved by the said conviction and sentence the accused-appellant has preferred the present appeal.

During the arguments before this court the Learned Counsel for the accused-appellant had raised the following grounds of appeal.

a) Conviction which totally revolves around an ambiguous/ confusing dying declaration is wholly unsafe
b) Learned Trial Judge flawed by allowing the application of the prosecution to permit PW7 namely Chathura Dharshana to read his evidence given at the inquest in order to refresh his memory contravening section 159 of the Evidence Ordinance.
c) Learned Trial Judge misdirected herself on critical issues of facts thereby causing serious prejudice to the appellant.
d) Learned Trial Judge erred in law and in fact on the concept of 'corroboration'

This case referred to a case of stabbing took place in the morning hours at Badovita in the police area of Dehiwala. In the absence of any eye witnesses to the stabbing, the prosecution has mainly relied upon several items of circumstantial evidence along with a dying deposition made by the deceased few minutes after the stabbing took place.

Before considering the grounds of appeal raised by the Learned Counsel for the accused-appellant, this court will first analyze the case for the prosecution and defence since that will help this court to evaluate the grounds raised by the Learned Counsel during her submission.

According to the evidence of the wife of the deceased Damayanthi Edirisuriya, the deceased had gone to drop their two elder children to the bus in order to go to school. He came after a short while and fell at her feet saying "Dammi, Sumith stabbed me". The deceased addressed his wife "Dammi" and referred the accused as "Sumith." The deceased was rushed to the hospital but succumbed to his injuries at the hospital.

As said by the witness, the house of the accused-appellant was situated 30 feet away in the same row of houses and there was no other neighbor called Sumith other than the accused-appellant in that area.

This witness had referred to two previous incidents between the deceased and the accused-appellant in order to explain the motive. As submitted by the witness the parties were not in good terms on a dispute over a request for some cigarettes when the deceased was running a boutique about two months prior to the incident.

However the 2nd incident referred to by the witness had taken place day prior to the stabbing took place when the eldest daughter of the accused-appellant was playing with the other children of the neighborhood. The ball these children were playing with, came to the compound of the deceased more than one occasion. The deceased had requested them not to play in their compound but the children disregarded the said request and continued to play and when the ball struck on the youngest child of the deceased, he cut and destroyed the ball.

The next witness the prosecution had relied upon is one Chathura Dharshana who was around 10 years when the incident took place. As observed by this court witness Chathura Dharshana was a reluctant witness. When the witness was permitted to refresh his memory, the witness had said that he could

remember the deceased person whom he referred as "ගමගේ මාමා" fallen near his house and telling his wife who was inside her house "Dammi Sumith stab me".

Since the admissibility of the said evidence was challenged by the Learned Counsel for the accused-appellant I will deal with this evidence at a later stage of this judgment.

During the High Court Trial, evidence of two police officers were led in order to establish the investigations carried out by Dehiwala Police. According to the evidence Sub-Inspector Thushantha Perera, the first complaint into this incident was made by one Edussuriyage Damayanthi the wife of the deceased at 9.15 hours on 10.03.2003.

He had visited the scene thereafter and observed that the incident had taken place opposite houses 35 and 36 at Badovita on the main road under a king coconut tree. When he visited the scene around 9.30 am nobody was at the scene of crime except for one Kusumseeli, and he observed a patch of blood, a push cycle and a pair of slippers at the scene. In addition to the said blood patch he had further observed another patch opposite a coca cola shop in between the place of incident and the house of the deceased and another in front of his house i.e. house No.75. During the investigations he recorded a statement from a child by the name of Chathura Darshana who is said to have residing in house 74 who pointed out the place where the deceased had fallen in front of his house. In his evidence the witness has further stated that he looked for the accused Sumith alias Suminda since it was revealed that he was living in the house 74 Badovita (page 96) but could not arrest him on that day.

With regard to the arrest of the accused-appellant, the prosecution had relied on the evidence of Sub Inspector of Police Punchi Banda. According to this witness he had arrested the accused-appellant on 12.03.2003 around 23.00 hours at No. 173 stage 4 Badovita, got the statement of the accused recorded through PS 18595 and based on the said statement recorded, a pair of shorts and a T Shirt had been recovered from his mother's house in Nedimala Dehivala. He had observed stains like blood in the T Shirt he recovered. The statement helped him to recover the said items was marked at the trial.

Judicial Medical Officer Dr. Asela Mendis who performed the Post Mortem Inquiry had confirmed that the deceased had died of a stab injury which penetrated into the heart and said in his evidence that the said injury is sufficient to cause death in the ordinary cause of nature. In his evidence he referred to two other injuries found on the body but according to him those injuries were due to a surgery performed on the deceased.

When the prosecution closed its case and the court explained the rights of the accused, the accused opted to make a dock statement from the dock. In his dock statement the accused had denied any knowledge of this incident and submitted that there are several other "Sumith"s in their area.

Learned Counsel for the accused-appellant whilst attacking the dying deposition produced at the trial and submitted that there was an ambiguity with regard to the dying deposition produced through the wife of the deceased. Whilst referring to the evidence of witness the Learned Counsel submitted that under cross examination of this witness it was revealed that the witness had referred to the accused-appellant as "සුවින්ද" and not "සුමිත්" and the said contradiction was marked as "වි-1"

However we observe that the Leaned Trial Judge was mindful of this contradiction and had considered this in her judgment. As observed by this court, the trial judge had perused the Information Book and observed that it is not recorded as "සුවින්ද" but the person who recorded the statement had negligently written it as "සුමිත් ද" and concluded that there is no contradiction as referred to by the defence at the High Court Trial.

As observed by this court, Learned Trial Judge had not considered the contents of the Information Book as evidence in this case but only as permitted by the section 110 (4) of the Code of Criminal Procedure Act. "Not as evidence in the case, but to aid it in such inquiry or trial"

This position was discussed in the case of ***Keerthi Bandaras V. Attorney General 2002 (4) Sri LR 245 at 251*** as follows,

"We lay it down that it is the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial judge ought to personally peruse the statement recorded in the Information Book. Interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his directions on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial judge who should peruse the Information Book and decide on that issue...."

The next ground raised by the Learned Counsel was permitting the witness Chathura Dharshana to read his evidence given at the inquest in order to refresh his memory. The application to permit the witness to refresh his memory was made by the Learned State Counsel under Section 159 (2) of the Evidence Ordinance.

Section 159 (1) and (2) of the Evidence Ordinance reads as follows;

159 (1) A witness may while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon after wards that the court considers in likely that the transaction was at that time fresh in his memory.

(2) The witness may also refer to any such writing made by any other person, and read by the witness within the time afore said, if when he read it he knows it to be correct.

As observed by this court, section 159 of the Evidence has permitted a witness to refresh him memory using either his own notes or notes made by another where he had the opportunity to check its correctness to be used to refresh the memory. Even though section 159 does not refer to the use of a

deposition made by a witness to refresh his memory, I see no reason to reject such attempt if the witness had made the deposition within a reasonable time.

As the law provides in a non summary inquiry a witness is always given an opportunity to read the evidence given by a witness before he sign the evidence. This opportunity is always given to a witness for him to satisfy with the evidence given by him as accurate.

If the deposition is given within a reasonable time and it was admitted as correct by the witness, there can't be an objection for the use of such deposition under section 159 (2) to refresh the memory.

This position was considered as procedure accepted in the case of ***Queen V. Williams et al (1853) 6 Cox 343*** when the prosecution witness made a statement in examination in chief inconsistent with what he had previously sworn at the inquest before the corner, counsel for the crown was permitted to show him his deposition to refresh his memory, since it was made before the corner within 24 hours to 48 hours after the incident.

In the case in hand witness Chathura Dharshana was only 10 years when the incident happened and he too had given the evidence on 11.03.2003 and signed the proceeding. As observed the said evidence too was given within 24 hours from the incident, when the things were fresh in his memory and therefore this court see no reason to reject the evidence given by witness Chathura Dharshana at the High Court Trial.

In this regard the Learned Counsel for the accused-appellant had relied on the decision in ***The King V. Mohottihamy 42 NLR 121.*** In the said case the Court of Criminal Appeal had held that, "even if a witness may refresh his memory by referring to his deposition, the deposition cannot be read out to him nor can it be made evidence at the trial."

As observed by this court in the case in hand the deposition had not used as evidence in the High Court Trial nor it has been read out to the witness but he was only permitted to refresh his memory by referring to the deposition.

As observed by this court the prosecution has mainly relied on the dying depositions made by the deceased to his wife Damayanthi Edirisinghe.

In the case of ***Shudhakar V. State of M.P (2012) 7 SCC 569*** the term Dying declarations or Deposition was considered as follows;

> "Dying Declaration' is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations, courts attach intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up truth or falsely implicate a person, then courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where version given by deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for courts to doubt truthfulness of such dying declaration."

In the said circumstances what is important to consider is whether the prosecution has placed evidence to support and corroborate the dying deposition made by the deceased and the said material is taken together with the dying deposition is sufficient to convict the accused-appellant for murder of the deceased.

In this regard the Learned Counsel for the accused-appellant had alleged that the Learned High Court Judge had considered irrelevant facts as evidence in support of the prosecution and was erred in law and in fact on the concept of "corroboration"

In ***Director of Public Persecutions V. Hester, 1973 AC 296*** Lord Morris said;

> "The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and

satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible...."

As revealed by the evidence before the trial judge, the deceased Ariyadasa Gamage had made a dying deposition to his wife Damayanthi saying "Dammi Sumith stabbed me"

Witness Damayanthi Edirisuriya who is not an eye witness to the stabbing incident had made a prompt statement to police whilst making the 1st complainant just after admitting her husband to the hospital.

According to the evidence of Dr. Asela Mendis who performed the Post Mortem Inquiry had confirmed that he observed a stab inquiry on the body of the deceased.

The said evidence of the Judicial Medical Officer supports the evidence of witness Damayanthi Edirisuriya and we agree with contention of the Learned High Court Judge for considering the said evidence as corroborative evidence.

However as submitted by the Learned Counsel for the accused-appellant, the evidence of witness Chathura Dharshana, if that evidence is accepted had only confirmed the fact that the deceased made a dying deposition to the effect "Dammi Sumith stabbed me" to witness Damayanthi Edirisuriya and therefore this court is of the view that the Learned Trial Judge had misdirected herself when she concluded that the evidence of Damayanthi is corroborated by the evidence of witness Chathura Dharshana since the said evidence only confirms the making of the dying deposition.

As observed by this court, the case in hand is a case totally based on circumstantial evidence. In addition to the previous enmity between the parties, day prior to the incident an incident had taken place between the deceased and the accused-appellant's child. The incident of stabbing had take place closer to the house of the accused-appellant and this was confirmed from the recoveries made at the scene of Crime. Immediately thereafter the deceased had made a dying deposition to his wife Damayanthi.

The principles a Trial Judge should follow in a case of circumstantial evidence was discussed in the case of ***Don Sunny V. Attorney General 1998 (2) Sri LR 1*** as follows;

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

   On a consideration of all the evidence, the only inference that can be arrived at should be consistent with the guilt of the accused only.
2. If on a consideration of the items of circumstantial evidence if an inference can be drown which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence of the only inference that can be drawn is that the accused committed the offence then they can be found guilty.
4. The prosecution must prove that no one else than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

We further observe that the Learned Trial Judge erred in law when she failed to apply the above principles when analyzing the evidence of the case in hand. The Trial Judge had failed to give her mind to the fact that the present case is a case based on circumstantial evidence and evaluate the case based on the above principles but instead considered whether the dying deposition is corroborated by other evidence led at the trial in concluding the case. We are of the view that the Learned Trial Judge had misdirected on this point which warrants the conviction being set aside.

However as observed by this court the case in hand merits going through another trial when considering the nature of the evidence led at the trial. I therefore refrain from acquitting and discharging the accused-appellant from this case based on the misdirection's by the Learned Trial

Judge referred to above and decide to make order under section 335 (2) (a) of the Code of Criminal Procedure Act 15 of 1979 for a re-trial.

Accordingly I make order setting aside the conviction and the sentence, imposed on the accused-appellant by the High Court Judge of Colombo and order a re-trial.

Appeal partly allowed.

PRESIDENT OF THE COURT OF APPEAL

S. Devika de. L Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEAL