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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0066/2018

Complainant

High Court of Colombo
Case No. HC/6098/2012

Vs.

Liyanthanthrigamage Nalin Chaminda.

Accused

AND NOW BETWEEN

Liyanthanthrigamage Nalin Chaminda.

Accused-Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J

K.M.G.H. KULATUNGA, J

COUNSEL : Kaneel Maddumage with Praveen Premathilake and Narthana Wevita for the Accused-Appellant.

Disna Warnakula, DSG for the Respondent.

ARGUED ON : 08.10.2024

DECIDED ON : 03.12.2024

K.M.G.H. KULATUNGA, J.

1) The appellant in this case was indicted on a charge of murder by causing the death of one Mohotti Arachchilage Sugathapala alleged to have been committed on the 13th of May 2008 at Grandpass Colombo. The trial court mainly on the basis of the evidence held that the testimony of PW-1 Makolage Seelawathie is credible and trustworthy with regard to the guilt of the appellant and convicted the Appellant of the offence of murder as charged and sentenced him to death. This appeal is preferred against the said judgement dated 13th May 2008 of the High Court Judge of Colombo.

Background Information

2) The main evidence emanated from PW1 Seelawathie the deceased's widow who was known and related to the accused-appellant. The witness and appellant lived in the same congested tenements at Weligoda in the Grandpass area. According to Seelawathie her husband was killed on the night of 13th of May 2008. This incident was preceded by another incident between the accused-appellant and the daughter in law of the witness. A

son of PW-1 was married to a daughter of the appellant's grandmother. The 1st witness identifies (in an uncertain manner) that her daughter-in-law's name is Somawathi and refers to her as 'Sudu.' When the events in question occurred, the witness's son was dead.

3) The accused-appellant and Seelawathie appears to have resided in houses close to each other. The accused-appellant had got into an argument with his mother on the 12th of May 2008, and once more on the 13th of May, when the deceased had intervened and told the accused-appellant not to come to his house and create trouble, following which, there had been an exchange of words between the deceased and the accused-appellant.

4) Then around 8 p.m., the accused-appellant had attacked PW-1's daughter-in-law, causing an injury to her hand. The Deceased had intervened to stop this attack. PW-1's daughter-in-law has then been taken to the Colombo General Hospital by her mother. Somawathie also states that the accused-appellant also did go to the hospital to treat an injury to him but she was not sure as to how the injury was sustained. However, during cross-examination, it was said that the injuries were due to an attack from a cleaver ("manna knife") by the accused-appellant's brother.

5) Then around 10:15 p.m, when Somawathie happened to be taking to a friend named "Reeta Amma" near the gate of Reeta Amma's house, she had seen the accused-appellant run towards their house with a club in his hands. Somawathie had then shouted out to her husband to run; her husband then ran towards a tea boutique along the road and PW-l Somawathie ran through the gardens of the houses in the same direction. Then at one-point Somawathie had seen the accused-appellant dealing

one blow on her husband with a club. It was also submitted that there was sufficient light at the place of the incident and no one except the accused-appellant assaulted the deceased.

6) According to the evidence of PW-04 the police witness, on 13.02.2010, a club was recovered at the house of the accused-appellant, and it was hidden under the roof of a toilet. The recovery was made on the statement given by the accused-appellant.

7) The accused-appellant made a dock statement denying that he committed the murder of the deceased and concluded the case for the defence on 07.07.2017 (vide page 267 of the appeal brief).

8) According to the accused-appellant, the deceased was a known drug dealer in the shanty where he was residing, two sons out of three sons of the deceased had been killed due to their association with an underworld leader.

9) It was stated that the two deceased sons had a dispute with a person called Anil residing in that area. Since the accused-appellant was associating Anil, they have falsely implicated the accused-appellant in this case.

10) One of the sons was known to have been closely associating an underworld leader called "Prince Colamn," and they had a dispute with the aforesaid Anil. They were charged by Grandpass Police for attacking the house of the aforesaid Anil with a hand grenade. The accused-appellant was subject to threats due to his association with Anil.

11) The High Court Judge of Colombo delivered the judgment on 27.04.2018, convicted the Appellant for murder under section

296 of the Penal Code and imposed on the Appellant the death penalty.

Grounds of Appeal

12) The following are the grounds of appeal raised in the written submissions of the accused-appellant;

1. Whether the High Court has: Failed to consider the material contradictions (contradictions per se) and omissions in PW-1's evidence regarding
    i. the time of the brawl; 10:00 – 11:00 PM (evidence-in-chief), 8:00 PM (evidence-in-chief) and 5:30 PM (during cross examination).
    ii. the weapon used to allegedly assault PW-1's daughter-in-law; it was a club (evidence-in-chief) and a cleaver (kathy knife) (during cross examination)
    iii. where she was when the Appellant was seen running towards the Deceased; Near Reeta Amma's residence (evidence-in-chief) and Near Nizar's tea boutique (during cross examination).
    iv. Omissions in PW-1's evidence.

2. Failed to consider that PW-1 is not a credible witness, and therefore it was unsafe to convict the appellant solely on her evidence
3. Failed to consider that the prosecution has not called key witnesses (this ground was abandoned and not pursued with)
4. Failed to consider the failure to identify the alleged weapon.
5. Failed to consider the Appellant's dock statement.

Of the above grounds 1 and 2 will be considered together**.**

Grounds 1 and 2

Failure to consider the material contradictions (contradictions *per se*) and omissions and the credibility of PW1

13) This case is based entirely on the evidence of witness No. 01 Seelawathie the wife of the deceased. She is the sole eye witness to the incident. The learned Trial Judge has accepted the evidence of this witness as being credible, truthful and reliable. Credibility of a witness is a question of fact and not of law. The acceptance or the rejection of the evidence of a witness is a question of fact to be determine by the trial Judge. (**Kumara De Silva V. Attorney General**, 2010 (2) SriLR 169).

14) The Trial Judge who delivered the judgment of course did not have the benefit of seeing the demeaner and deportment of PW-1, Seelawathie. In such circumstances, the Trial Judge had to apply and rely on the other tests in deciding the credibility and the reliability of this witness Seelawathie. The main ground of appeal is that the Trial Judge failed to consider that PW-1 Seelawathie is not a credible witness and therefore, it was unsafe to convict the Appellant solely on her evidence. To assail the evidence of Seelawathie, the Appellant's Counsel relies on the contradictions and omissions which the defence raised at the trial. As correctly observed by the learned trial judge, the defence failed and did not prove the said contradictions and omissions. When the attention of a witness is drawn to a contradictory position in a previous statement made by such witness in writing such relevant portion should be brought to his attention as required by section 145 of the Evidence Ordinance. Then, if the witness does not admit the previous statement, the cross-examining party is required to prove such previous statement (such portion). This requirement was adverted to in **Gamini Sugathsena v. the State** (1998) 1 Sri LLR 405 as follows;

> *"Although several contradictions were marked when the accused gave evidence, the proper procedure had not been followed. When a witness is to be contradicted, the proper procedure is set out in section 145 of the Evidence Ordinance. This section contemplates that when a witness is to be contradicted his attention must be first drawn to the fact of having made a previous statement, and thereafter, more specifically, to the parts of the statement which are to be used for the purpose of contradicting him. It, is only after that, the actual writing with which the witness was contradicted with,* ***can be proved."*** (emphasis added).

15) Therefore, when a contradiction is brought to the attention or an omission raised unless the witness admits the law requires the proof of such omissions and contradictions. In the absence or the failure to prove as aforesaid will render the same as not proved which then cannot be considered by a trial Judge. In the present matter, the learned trial judge whilst correctly observing the failure of the defence to prove and the absence of any admission, nonetheless has considered. the omissions and contradictions and then opted to disregard the same. Now let's consider if this finding is reasonable and correct.

16) As elicited in evidence the fatal incident was preceded by another fight and dispute between the accused-appellant, his brother and the daughter-in-law of the deceased. In narrating this previous incident, the witness has given contradictory evidence as to the time of the said incident. It ranges between 5.30pm and 10.00pm. Also, there was some uncertainty as to the weapon used by the Accused to cause the injury to the daughter of the witness during the said previous incident. (if it was a club or Kathy). The learned Trial Judge has considered this and come to the conclusion that it was in respect

of the previous incident and minor which in any event does not go the root of the evidence. This previous incident involved several persons and PW-1 has observed this somewhat drawn out and protracted fracas five years prior to giving evidence. In such circumstances, the human frailties and memory lapses due to lapse of time naturally causes such discrepancies. It is settled law that *the court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.* (**Appabhai vs. State of Gujarat**; 1998 Supp SCC 241).

17) The learned Counsel for the Appellant also strongly submitted that there is a serious contradiction as to the place from which the witness claims to have first seen the incident; if it was near *Reeta Amma's house or Nizar's boutique*. Considering this contradiction the witness had been extensively questioned on the location and the setting of the locality. It is apparent that the incident had taken place in a highly populated shanti dwelling area in the city. Reeta Amma's residence is in close proximity to Nizar's boutique. It is clear that she had seen her husband the deceased coming from towards the Nizar's boutique when she also observed the Accused charging with a pole

or club. It is when she shouted and warned the deceased to run. According to the description, both these places are situated in close proximity and in fact, there is no contradiction but a description of the same thing in relation to the premises situated at close proximity and the witness, the deceased as well as the accused-appellant have all been mobile and moving fast within this area. Therefore, when recalling and narrating such an incident the locations change with the mobility of the individual. Therefore, I see no contradiction in PW 1 Somawathie's evidence on this point.

18) Finally, the witness claims to have warned the deceased and asked him to run, when she saw the accused-appellant coming with a pole which the defence has drawn the attention to as an omission in her statement to the Police. Neither does Somawathie distinctly admit this omission, nor, is it proved. Be that as it may, as observed by the trial Judge, there is no omission as to the fact of seeing the Accused armed with a pole; chasing behind the deceased or as to the subsequent assault on the head of the deceased. The said statement had been made promptly soon after the incident. In narrating this complicated series of happenings, it is quite possible to have not mentioned an incidental matter of this nature. Accordingly, the learned Trial Judge has considered these omission and contradictions and arrived at a reasonable and a correct decision to disregard the same. In the above premises I am satisfied that the learned Trial Judge's decision to disregard the said contradictions and omission is reasonable correct.

Ground 4

Failure to the identify the weapon

19) As to the failure to identify the weapon P-2, the Appellant submits that the witness had at the inquiry and the Police statement described the weapon and even identified it at the non-summary inquiry. (these contradictory positions have not been proved). However, the witness

was not able to positively identify when it was shown at the High Court Trial. Under cross-examination, the witness clearly and consistently said that though she saw a weapon, she cannot now clearly identify if it was P-2. Is this inability to identify the same is indicative of being untruthful or if not being forgetful? According to Somawathie, she happens to see the accused-appellant pursuing her husband with the pole and at one point observes a blow being delt then the accused-appellant almost immediately gives chase to her when she runs for her dear life. This is late at night. No doubt, there were light bulbs and a street lamp in and around that area. In these circumstances, is it not possible for a person to have not observed in detail as to the exact nature and the form of the pole? The fact that she after five years saying that she cannot positively identify is to my mind, is nothing but being truthful and telling what she actually remembers. If she was untruthful or if in fact, she has not witnessed this incident and is seeking to falsely implicate the accused-appellant as alleged by the defence one would expect the witness to simply identify whatever the weapon shown in the Court. The very fact that she upon examining the weapon being hesitant is consistent with a witness truthfully narrating what she has witnessed and remembers. Accordingly, the learned trial Judge accepting the evidence cannot be assail in anyway. Further, the learned Trial Judge has not considered the evidence of the weapon or the section 27 recovery as it was not properly identified.

Ground 5

The dock statement was not considered

20) Final round of appeal is the failure to consider the dock statement. The learned Trial Judge has specially considered the dock statement and rejected the same on the basis of failing to explain the alleged absconding for two years since the incident. Is this a valid basis to reject a dock statement? An Accused tough is a competent witness is not a compellable witness. However, an Accused is entitled to give

evidence on his behalf. Similarly, a right of an Accused to make an unsworn statement from the dock is permitted and accepted within our jurisdiction along with the right of an Accused to remain silent. Therefore, an Accused has the option of giving sworn evidence, calling witnesses, making a statement from the dock or remaining silent. In the case of the **Queen v. Buddharakkita Thero** [63 NLR 442.], Basnayake, C.J., has opined that, "*The right of an accused person to make an unsworn statement from the dock is recognised in our law. (King v. Vallayan).*"

21) If the accused opted to exercise his common law right to remain silent no adverse inference may be drawn. However, if he opts otherwise and gives evidence or makes a dock statement he then voluntarily and of his own volition abandons his right to silence and the concomitant privileges and attributes attached to such right. Further elaborating on the right to make a dock statement Basnayake, C.J., in the case of the **Queen v. Buddharakkita Thero** (Supra), at page 442) held that,

> "*That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination.*"

Hence, if a dock statement is treated as any other evidence the regular tests applicable to determine the credibility and reliability of oral testimony will equally be applicable and relevant. Thus, when a dock statement is made and it is incomplete or fails to explain certain incriminating circumstances such dock statement will incomplete and deficient. (**Ajit Samarakoon v The Republic** (Kobaigane Murder Case) (Jayasuriya, J.) [2004] 2 Sri L R 209).

22) The learned Trial Judge has summarized and considered the credibility of the dock statement (at page 21 of the judgement). Then, upon evaluating, has rejected the same (at page 30 of the judgement). The

failure of the accused-appellant to explain his absence for two years and the improbability of making a false allegation due to his association with a person named Anil were the primary reasons for the rejection of the dock statement. Apart from this, I also observe that to evaluate the veracity of a dock statement, the same should be considered holistically along with the totality of the evidence of such case. One cannot consider the dock statement in isolation, in a compartmentalised form. In **Sarath vs Attorney General** (2006) 3 Sri L R. 96 Eric Basnayake J, on this issue opined that;

> *"One must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?"*

23) As a matter of further comment, when there is uncontradicted and cogent evidence that the accused-appellant since this incident was absconding for almost two years it becomes relevant for the reason that the police have been on the lookout for him and facts have been so reported to the magistrate almost immediately after the incident. On the other hand, the deceased happens to be related to the accused-appellant and in the normal course of events the accused-appellant should certainly have got to know of this death and the fact that he is wanted for the same. Therefore, the stark silence and the deliberate avoidance to state his position clearly renders the dock statement highly deficient. [**Ajit Samarakoon v The Republic** (Kobaigane Murder Case) [2004] 2 Sri LR 209].

24) Then as to the assertion of fabrication and false implication due to accused-appellant's association with one Nimal; it is alleged that a person named Nimal and the Deceased's family were enemies and there was a

family feud involving killings. To my mind if the enmity was with Nimal in the normal course, one would if at all expect Nimal to be falsely implicated and not Nimal's friend the accused-appellant. Thus, this is highly improbable. Further there is no mention or suggestion of Nimal during cross examination. It is in the dock statement that Nimal is mentioned for the first time. This savours of being an afterthought. Thus, the rejection of the Dock statement cannot be assailed. Accordingly, I see no reason in law or otherwise to interfere with the finding of facts of the learned Trial Judge in rejecting the dock statement and there is no merit in this argument advanced on behalf of the Appellant.

25) The Appellant abandoned the third ground of appeal and did not pursue with the same.

Is PW-1 Somawathie is an interested witness?

26) It was also argued that PW-1 being the widow of the deceased is an interested witness as such her evidence is not reliable. She no doubt happens to be the widow of the deceased and to that extent she naturally will have a familial affinity. However, this does not make her an unreliable witness or non-competent on that score alone. More often than not in incidents of this nature, family members and associates happen to witness such incidents. Thus, if their affinity *per se* results in the rejection of evidence proving of crimes would be greatly affected. Apart from exercising a caution in evaluating such evidence there is no such principle of law that prevents the consideration of the evidence of such witnesses.

27) The argument advanced is that PW1 being the widow of the deceased being an *interested witness*, her evidence alone is not sufficient to bring home a conviction for murder. As I see, familial relationships *per se* will not inherently compromise a witness's reliability in the absence of direct animus or malice. A conviction can certainly be recorded on the basis of the statement of a single eye witness who happens to be a close relative provided his credibility is not shaken by any adverse circumstances appearing on the

record against him and the Court, at the same time, is convinced that the witness is a truthful witness. As to the argument raised on behalf of the accused-appellant that the witness was the widow of the deceased and was, therefore, highly interested and her evidence be discarded, and not relied upon to my mind a close relative who is a natural witness may have an interest but this alone will not suffice to regard such witness 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.

28) The law of evidence requires credibility of witness and the evidence against the accused to be unimpeachable so as to convict the accused. In this scenario often the evidence is discredited on the ground that the witness is interested i.e. there are reasons extraneous to the trail for the witness to lead in this evidence and the evidence so tendered may not be free from bias. However, in **Myladimmal Surendran v. State of Kerala** [AIR 2010 Supreme Court 3281, 2010 AIR SCW 5248] the Supreme Court of India held that, "*the mere fact that the person giving the evidence is the wife of the deceased it not sufficient to hold that the witness is an 'interested witness' to as to reduce the credibility of the evidence.*"

29) Then in the case of **State of Rajasthan Vs. Smt. Kalki and Another** [(1981) 2 SCC 752] it was opined that: -

"True, it is she is the wife of the deceased, but she cannot be called an `interested' witness. She is related to the deceased. `Related' is not equivalent to `interested'. A witness may be called `interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said

to be `interested' in the instant case PW1 had no interest in protecting the real culprit, and falsely implicating the respondents."

In the above circumstance, this submission lacks merit and is misconceived.

Conclusion

30) It is not the function of the Court of Appeal to retry a prosecution on the facts and indulge in a re-appraisal of the facts. The jurisdiction of the Court of Appeal in hearing an appeal preferred by an accused-appellant is to examine the evidence in the case in order to satisfy ourselves that there is evidence upon which the Jury or judge could have reached the verdict which they came to and also similarly to examine the charge to the jury or the reasons to satisfy ourselves that there has not been any mis-direction or non-direction. (K v Endoris - 46 NLR 498 2. Ebert Silva v K - 52 NLR 505).

31) For the reasons enumerated above I see no merit in this appeal and the evaluation of evidence, the findings and the conviction, reached and imposed respectively by learned trial Judge is justified and lawful. Accordingly, we proceed to dismiss the appeal of the accused-appellant. The conviction and sentence are accordingly affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL