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

In the matter of an Appeal against conviction under Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979

C.A. Case No: 238-239/2013

H.C. Kegalle Case No: 2438/2006

Hon. Attorney General

Complainant

-Vs-

1. Poththegodage Anula Chandralatha
2. Andawalage Nimal Sarath Kumara

Accused

-And Now-

1. Poththegodage Anula Chandralatha
2. Andawalage Nimal Sarath Kumara

Accused-Appellants

-Vs-

Hon. Attorney General

Complainant-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Tenney Fernando for the 1st Accused-Appellant

Srinath Perera, PC for the 2nd Accused-Appellant

Azard Navavi, DSG for the Respondent

Written Submissions: By the 1st Accused-Appellant on 15/03/2018

By the 2nd Accused-Appellant on 16/03/2018

By the Complainant-Respondent on 29/08/2018

Argued on : 13/03/2019 and 15/03/2019

Judgment on : **10/05/2019**

A.L. Shiran Gooneratne J.

The Accused-Appellants, (hereinafter referred to as the 1st and 2nd Appellants) were indicted in the High Court of Kegalle, under Section 296 of the Penal Code to be read with Section 32 of the Penal Code, for causing the death of A.K. Ruwan Kumara, (hereinafter referred to as the deceased), and upon conviction the Appellants were sentenced to death.

Learned counsel for the 1st Accused-Appellant raised the following grounds of appeal for consideration.

(1) The learned High Court Judge misdirected herself when admitting the evidence under Section 27 of the Evidence Ordinance.

(2) The evaluation of the evidence given by PW1 is bad in law.

(3) The Learned trial judge misdirected herself by anticipating a reasonable explanation from the said Appellant when the prosecution had failed to establish a prima facia case against the 1st Accused-Appellant.

(4) Learned trial judge failed to evaluate the medical evidence against the sole eye witness testimony.

The learned counsel for the 2nd Appellant raised an additional ground of appeal.

(5) Has the learned trial judge properly considered and evaluated the evidence against the 2nd Accused-Appellant.

The facts of the case briefly are as follows,

Thilakaratne (PW1), is not an eye witness to the murder, however, had witnessed the Appellants disposing the dead body. On the date in question Thilakaratne, had visited the house of the 1st Appellant around 6.30 PM to consume illicit liquor, (kasippu) and had seen the deceased, the husband of the 1st Appellant, fallen on a partly built wall within close proximity to their house. When the witness had inquired about the deceased, the 1st Appellant had told him to mind his own business. The witness also re-calls the presence of the 2nd Appellant a few feet away from the 1st Appellant and states that both the Appellants had told him not to leave the premises. Around 9-9.30 PM, PW1 had seen the 2nd Appellant

carrying the deceased, closely followed by the 1st Appellant and dumping the dead body inside the toilet pit. Thereafter, the 2nd Appellant had placed a few timber planks and also had laid fertilizer bags on top of the pit. The witness had been warned and threatened by both Appellants with death, if any information of this incident was divulged.

According to the evidence of the investigating officer, J. R. Seneviratne (PW9), on 28/04/1999, 12 days after the date of the incident, the 1st Appellant had made a complaint to the police that her husband had disappeared and thereafter, on 3 occasions, the 1st Appellant had met the witness and had inquired about her complaint. The formal investigation to the incident had commenced on 03/05/1999. The witness states that on information received by informants and persons who visited the town, the property belonging to the 1st Appellant was searched and had made observations regarding a toilet pit which was situated in the vicinity of the house of the 1st Appellant. He had observed a toilet pit covered with planks and fertilizer bags stacked on top of it. Thereafter, having recorded a statement from the 1st Appellant, he had discovered the body of the deceased inside the said toilet pit. The portion of the statement, which led to the recovery of the body is marked P1.

The investigating officer, (PW9) in his evidence states that he commenced investigations regarding a toilet pit in the compound of the house where the deceased and the 1st Appellant lived. It is observed that on information received,

the attention of the investigating officer was directed to a specific location and place, where the dead body was discovered. The part of the statement, which led to the discovery of the dead body marked by the prosecution is dated 05/04/1999. The said date cannot be correct in view of the fact that the investigation to the incident had commenced on 03/05/1999. According to the evidence of the investigating officer, soon after the 1st Appellant was arrested on 03/05/1999, the discovery of the body of the deceased was made on a statement given by the 1st Appellant.

According to the evidence of S.I. Thilakaratne Nissanka (PW14), a stone had been discovered in terms of Section 27 of the Evidence Ordinance, on information given by the 2nd Appellant. However, the recovered object has not been produced in evidence.

We observe from the evidence led in this case that the investigating officer was put on notice by the informants regarding the dead body, the object of disclosure, prior to the discovery and therefore, the said object was not discovered in consequence to a statement made by the 1st Appellant. There cannot be a discovery of the dead body on information given, since there is no connection between the information received from the 1st Appellant and the discovery of the dead body.

In ***Somaratne Rajapakse and Others Vs. Hon. Attorney General (2010) 2 SLR 113, Dr. Shirani Bandaranayake, J*** (as she was then), held,

"a vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact".

Therefore, on the 1st ground of appeal, we find that the evidence under Section 27 of the Evidence Ordinance is unsafe to act upon.

Since the 2nd, 3rd, 4th and 5th grounds of appeal deals with the credibility of evidence of PW1, the said grounds of appeal are discussed together.

Credibility of evidence given by PW1, is challenged based on 3 contradictions marked on the previous statement made by the said witness, that;

- PW1 had visited the house of the 1st Appellant the following day of the incident to purchase kasippu,
- PW1 had seen the 2nd Appellant 20 minutes after he arrived at the house of the 1st Appellant,
- the 1st Appellant carried the dead body together with the 2nd Appellant when it was taken near the toilet pit.

The learned High Court Judge has placed heavy reliance on the evidence of PW1, to hold the Appellants guilty, as charged. We observe that PW1 has had no formal education and is unable to read or write. According to the evidence of the

investigating officer, PW1 was initially named a suspect in this case. There is no evidence as to the circumstances which led to his arrest or the reason to refrain from making him an accused. Based on the evidence led, the learned High Court Judge has quite rightly concluded that PW1 cannot be considered as an accomplice. The said conclusion is not in dispute.

On the issue of credibility, the learned counsel for the Appellants question the belatedness of the statement given to the police by PW1.

In ***Sumanasena v. Attorney General (1999) 3 SLR 137, Jayasuriya J,*** held that,

> *"Just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness."*

It is noted that not a single question has been put to this witness on the belatedness of making the said statement. PW1 in his evidence has explained the reason, why he was unable to make a statement to the police soon after the incident stating repeatedly that the Appellants had warned and threatened him to refrain from giving any information about this incident.

The President's counsel for the 2nd Appellant submits that given the injuries sustained by the deceased, it is highly improbable that Thilakaratne presumed that the deceased was sleeping on the half wall adjoining the house. PW1 states that he

identified the deceased at that moment from a bottle lamp burning close to the entrance to the house. This could well be a reason for the witness not to have identified the injuries on the deceased clearly. After consuming kasippu, the Appellants had compelled PW1 to stay and not to leave the premises. The witness was permitted to leave the house only after the body of the deceased was dumped into the toilet pit. The fact that PW1 had seen the toilet pit covered by planks and fertilizer bags, has been corroborated by the evidence given by the investigating officer.

PW1 has seen the Appellants at the crime scene at or about the time the crime was committed. He had the opportunity of observing the subsequent events he testified to in evidence. His attention was drawn to the particular circumstances, where the dead body was held by the 2nd Appellant closely followed by the 1st and dumped into the toilet pit. PW1 stood by his position through out, both in examination-in-chief as well as in cross-examination. There is no motive led in evidence for PW1 to implicate the Appellants to this crime.

The Privy Council in the case of ***Bhoj Raj Vs. Sita Ram A.I.R. 1936 P.C 60*** held that;

> *"the real tests for either accepting or rejecting evidence are how consistent is the story with itself, how it stands the test of cross-examination, how far it fits in with the rest of the evidence and the circumstances of the case."*

Having evaluated the strong circumstantial and direct evidence against the Appellants, the learned High Court Judge has come to a finding that the evidence against the Appellants are cogent and reliable to establish the guilt of the Appellants. In all the above circumstances, there is no reason to disagree with the said findings.

In ***Attorney General Vs. Mohamed Saheeb Mohamed Ismath CA. 87/97, decided on 13/17/99, Jayasuriya J.*** held that *"evidence should be evaluated and weighed and not counted"*. The said principle is embodied in Section 134 of the Evidence Ordinance.

We see no inconsistency or lack of credibility with regards to the evidence given by PW1 and therefore, the learned High Court Judge was correct in accepting the said evidence. We have no reason to doubt the evidence of PW1 and therefore, we uphold the conviction of the Learned High Court Judge.

Accordingly, the conviction and the sentence affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL