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

In the matter of an appeal made in terms of Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

The Democratic Socialist Republic of Sri Lanka

CA Appeal No: CA/100/2016
High Court of Panadura
Case No.
HC 1705/2003

Complainant

Vs

1. Pahalage Don Lalith Ravindra Kumara
2. Kudamannage Premadasa
3. Kudamannage Kumaradasa

Accused

And Now Between

1. Pahalage Don Lalith Ravindra Kumara
2. Kudamannage Preamadasa
3. Kudamannage Kumaradasa

Accused-Appellants

Vs

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

Respondent

Before : **Achala Wengappuli,J**

Devika Abeyratne,J

Counsel : Anuja Premaratne, Pc with N.Rajapakse for the Accused-Appellants
A.De Silva,SSC, for the Respondent

Argument On : 10th of February 2020

Decided on : 24th of July 2020

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Devika Abeyratne,J

The accused appellants were indicted in the High Court of Panadura for committing the murder of *Saliya Jagath Ranaweera* on or about 1.12.1997, an offence punishable under section 296 of the Penal Code read with section 32.After trial, the three accused were convicted and sentenced to death on 10.2.2005, against which judgement the accused appellants had appealed and this Court by order dated 7.6.2011 has set aside the conviction and sentence and the case was remitted back to the High Court of Panadura for a trial *de novo*.

At the re-trial, the only eye witness to the incident *Kandanaarchchige Dharawathi* (PW 2) was dead and her evidence was led under section 33 of the Evidence Ordinance.

The other witnesses for the prosecution are PW 6 , the Judicial Medical Officer who stated that death was due to a firearm injury to the abdomen, multiple stab injuries, multiple cut injuries to the neck and limbs caused by a sharp cutting weapon, PW 7the chief investigating officer and PW 3 and PW 4 who have identified the body which was decapitated.(the head was never recovered)

The grounds of appeal were on various points on the facts of the case. The counsel for the appellants contended that the appellants did not have a fair trial on the basis, that the learned trial judge's several interventions, sometimes at crucial times and the interruptions when the witness is answering questions, may have prevented important evidence being elicited in favour of the appellants. Further, that the contradictions and the omissions in the evidence were brushed aside by the trial judge.

As stated above, the sole eye witness is *Dharawathie* who was dead at the re trial. She was 85 years of age when her evidence was recorded in the High Court and 64 years of age at the non summary inquiry.

Some of the important points that the counsel for the appellants relied on to discredit the evidence of PW 2 *Dharawathie* can be summarized as follows; her evidence that she saw the deceased falling face down and the injuries he has sustained does not reflect and support the injuries described in the post mortem report for example, if he fell face down the injuries to the chest is unexplained ; the evidence about the second accused removing the bracelet and the rings from the hand of the deceased and at one time stating it was the third accused *Kumara* who did it; in her evidence before the magistrate she is alleged to have stated that the fingers were cut off and the rings were removed but at the trial she has merely stated the rings were removed from his fingers; that she has contradicted herself that there was a crowd of people at the scene, then again has said it

was only the three accused who were there when the incident took place; no eye witness of stabbing when there are stab injuries and most importantly she has not mentioned either in the police statement or at the non summary inquiry about the beheading of the deceased and the head being carried away by the accused *Kumara,* although in evidence she has stated so.(However, it is noted that in the Police statement she has mentioned that the head has been severed, and in page 1050 at the non summary inquiry she has mentioned " එයාගේ බෙල්ල කපාගෙන ගියා".

It was also argued that there are contradictions in the evidence of PW 2 and that she has retracted from the original testimony given at the inquest and non summary inquiry and her statement to the police and therefore, a conviction based solely on the evidence of PW 2 is unsustainable.

There are 4 contradictions and 4 omissions which have been highlighted in the evidence of PW 2 and the learned trial judge in pages 398 to 403 of the brief has analysed and evaluated them and given cogent reasons why such contradictions and omissions would not affect the credibility of the evidence , which cannot be faulted in my opinion.

On a perusal of the contradictions it is seen that they are of a very trivial nature.

Contradiction marked as 2V1 in page 114 is, that in her evidence at the trial she has stated that the deceased is her sister's daughters son, when in the police statement it is stated that it is her sister's son.

In her evidence she has stated that when she heard the sound *"පටපට"* , the deceased fell down, but at the non summary she has stated she fell down hearing the sound. This discrepancy is 2V2 marked in page117.

2V 3 marked in Page 119, is that In evidence she has stated she shouted, but in the police statement it is recorded that she has stated that she heard someone shouting.

In Page 121 in evidence she has stated that she did not run away with the *pan mitiya* but in the statement to the police it is stated that she has run with the *pan mitiya* to the son' s house.

2 V 4 marked in Pg 127, in evidence she has said that the rings were removed from the fingers, whereas in the Magistrate's Court she has stated that the fingers were cut off by the 2nd accused.

(But it is to be noted that she has clearly stated in evidence that there was no cutting off of the fingers but only removal of the rings from the fingers.)

Thus, it is obvious that these are not material contradictions that go to the root of the evidence. Hence, it is apparent that the contradictions have not affected the credibility of the evidence of PW 2.

With regard to the Omissions, in page 122 the fact that PW 2 not stating in the statement to the police that she saw *Rala* the second accused taking away the beheaded head has been highlighted as an omission X1. She has emphatically answered that from the outset she has been saying about the head being taken away.

In Page 123 the fact that the PW 2 not saying she saw the second accused cutting the neck of the deceased has been marked as X 2 omission.

In page 128 the fact that it is not mentioned that PW 2 saw the second accused removing the rings in the police statement is marked as X 3 omission.

In page 129 that at the inquest, the rings being removed and taken away by *Rala* not being mentioned has been highlighted as X4.

In page 122 the learned trial judge has commented that at the appropriate stage it would be considered whether what was highlighted are really omissions.

However, with regard to X1, X2, X3 and X4 it is noted that in page 724 of the brief on 28.08.1998 before the learned Magistrate *Dharawathie* has evidenced as follows;

.....මේ විත්තී කුඩුවේ ඉන්න අය ආමි එකේ ඇදුම් ඇදගෙන සිටියා. ඒ අය අතේ යමක් තිබෙනවා මා දුටුවා. ඒ අය අතේ තිබුනේ මුලින්ම සිටින අය අත එනම් 1 වෙනි විත්තිකරු අතේ තුවක්කුවක් තිබුනා. 2 වෙනි විත්තිකරු අත කඩුවක් තිබුනා. 3 වෙනි විත්තිකරු අතත් කඩුවක් තිබුනා.....

.....එයාගේ බෙල්ල කපාගෙන ගියා. ඇගිලි දෙකේ මුදු දෙකත් වලල්ලත් අරගෙන ගියා. බෙල්ල කැපුවේ 2 වෙනි විත්තිකරු ඇගිලි කැපුවේත් 2 වෙනි විත්තිකරු ඇගිලි කපාගෙන මුදු අරන් ගියා.

In ***Queen Vs Muthubanda*** 73 NLR 8, Justice *Alles* has stated the right to mark omissions and proof of omissions and to the right of the Judge to use the Information Book to ensure that the interest of justice is satisfied. In the instant matter, the counsel has submitted that *Dharawathi* has failed to mention the facts that were highlighted as omissions. To ensure whether that it is the case, I have perused the proceedings that are part and parcel of the Brief in the interest of justice.

Therefore, it is apparent that the omissions marked as X 1 to X 4 have been mentioned by *Dharawathie*, in either her statement to the police or at the inquest or the non summary inquiry, prior to giving evidence at the trial, although they are not recorded in all the above instances.

In the impugned judgment the learned trial judge in pages 402 has addressed this issue with which conclusion, I fully agree.

It has been held in ***Sunil Vs Attorney General*** *[1993]3 Sri. L R 191 "that the testimony of witnesses must inspire confidence in a Court before such evidence could be acted upon and their testimony must be viewed with care and caution by all courts. Nevertheless, the court must not be unmindful of the fact that they are human witnesses and it is a hallmark of human testimony that such evidence is replete with mistakes, inaccuracies and misstatements'.*

Therefore, it is apparent that although there are some deficiencies and shortcomings in the evidence of the witness PW 2, these shortcomings have to be considered in the correct perspective.

In ***Attorney General vs Visuvalingam*** 47 NLR 286 Justice Cannon has emphasized that no prudent and wise judge would disregard testimony for the mere proof of a contradiction but that a wise judge should critically assess and evaluate the contradiction and that *"the judge must give his mind to the issues what contradictions are material in discrediting the testimony of the witness".*

When considered in the light of the above authorities it is clear that in the instant case, the contradictions and the so called omissions have not affected the creditworthiness of the only eye witness and this court is unable to agree with the submission of the counsel for the appellant that the contradictions and omissions highlighted by him created a doubt in regard to testimonial trustworthiness of PW 2.

It was also commented by the counsel for the appellants that the learned Judge has not seen the demeanor of PW 2. A perusal of the evidence of PW 2 discloses that her evidence is quite descriptive as is shown below. For a witness of 85 years, it appears to be very coherent and precise and there was no ambiguity in her evidence. Although she has stated that her eye sight was bad at the time of giving evidence she has been able to identify the accused from the witness stand.

Some answers have been clarified by her, as in page 103 of the brief. And describing certain incidents with animation, for instance, the manner she was carrying the stack of hay pages 86 and 115,the way the gun was pointed in page 101, how the gun was kept close to the body with the but pointing downwards in page 96, description how the rings were removed from the fingers in pages 96 and 104.

It is correct that the learned judge did not have the benefit of the demeanour and deportment of *Dharawathi*, however, as stated above, a close reading of evidence of *Dharawathie* gives a very clear picture of how she has testified in Court.

It appeared that at certain times, she has confused the name of the accused with the numbering of the accused, whether he was the 2nd or the third accused, but however, by pointing out to the relevant person she has identified the person she meant. Merely because she got the number of the accused wrong, it cannot for a moment be considered that she contradicted her evidence and it was prejudicial to the appellants.

The counsel for the appellants has commented that for an aunt forgetting the head of her relative being taken away goes to the creditworthiness of the witness. However, PW 2 has clearly addressed that position in her replies stating that from the outset she has been saying that the second accused took away the head of the deceased.

It is my opinion that she has given convincing and cogent evidence in regard to the material facts relating to the prosecution.

Counsel has also made a comment that the court did not allow a question with regard to the attire of the accused (the accused were described to be wearing army clothes) which fact is clearly stated in the Police statement of *Dharawathie*. It was suggested in Page 120 of the brief that the witness did not reveal what the assailants were wearing. This position is not correct, as PW2 has clearly stated in her evidence as well as in the statement to the police that the appellants were wearing army fatigues.

The learned state counsel submitted that the entire tenor of the evidence of PW 2 is genuine and candid and there was no issue of her testimonial trustworthiness, also that there was no evidence of animosity to implicate the appellants and that PW 2 has volunteered the information with spontaneity.

The defence at no stage has even suggested that there was animosity between PW 2 and the accused which has precipitated giving false or doctored evidence, her evidence has been consistent. When considering the totality of the evidence of PW 2, she has given cogent and credible evidence and her testimonial trustworthiness is not in doubt.

Therefore, I am of the view that the learned judge not seeing the demeanor and deportment of the witness would not have handicapped or prejudiced the appellants in any manner.

It can also be said that this Court is also in the position of the learned High Court Judge having to evaluate the evidence of *Dharmawathi* only by perusing the transcripts and we are in agreement with the High Court accepting *Dharmawathi's* evidence.

Another point raised by the counsel for the appellants was that the appellants did not have a fair trial on the basis of the learned judge's many interjections.

I will now consider some of the interjections referred to.In the examination in chief of PW 2 by the learned state counsel,in Page 89, the learned judge has queried to clarify the route PW 2 was taking when she witnessed the incident.

In Page 92, when an answer to a direct question by the learned State Counsel was confusing, the judge has interjected.

In pages 92 to 94 of the evidence PW 2 has clearly identified the accused committing the offence, which was not assailed in cross examination.

In page 99 when the judge has interjected, the answers given seem to be an extension of what PW 2 has replied to the State Counsel.

In cross examination, in page 102 also it seems to be for the purpose of clarification of the earlier answers.

In page 105, is also for clarification of the accused PW 2 identified by the name and in person.

In page 106 the answer to the judge's question has been answered before in page 96.

Therefore, It appears by the interjections new evidence has not been elucidated which would have been prejudicial to the appellants. The witness has reiterated and clarified what was stated by her previously in evidence.

The court observes that the learned judge was an active listener through the trial process. The question posed do not show that the learned judge has a personal interest in the case before him. The nature of the questioning adopted by the trial judge has not unfairly prejudiced the appellants. There is no material before Court that the judge was biased or that he was prejudiced and in favour of the prosecution depriving the accused of a fair and impartial trial. In these circumstances, the argument that the appellants were denied a fair trial because of the many interjections of the trial judge is not substantiated.

The prosecution has established a strong and incriminating cogent evidence against the accused. The learned trial judge has duly considered the Dock Statement of all 3 accused. After evaluating and

analysing the evidence before court, he has come to a finding that the prosecution has proved its case beyond reasonable doubt.

When considering the totality of the evidence, I am of the view that the prosecution has established beyond reasonable doubt the charges against the accused appellants. In the circumstances, we see no merit in the contentions advanced on behalf of the accused appellants. Accordingly, we dismiss the appeal.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI ,J

I Agree

JUDGE OF THE COURT OF APPEAL