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

In the matter of an appeal under Section 331 of the Criminal Procedure Code
Athaudage Premadasa
Accused-Appellant

C.A. No. 17/2017
H.C. Tangalle No. H.C.13/2003

Vs.

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

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Neranjan Jayasinghe with Sachitra Harshana for the Accused-Appellant

H.I. Pieris D.S.G for the Respondent

ARGUED ON : 16th March 2018

DECIDED ON : 04th April 2018

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ACHALA WENGAPPULI, J.

This is an appeal by the accused-appellant against his conviction on a charge of murder and imposition of a sentence of death by the High Court at Tangalle.

There are no eye witnesses to the incident to which the deceased has sustained a stab injury on the upper abdomen. The prosecution relied on the evidence of one *Rotumba Arachchige Jasing* to establish that the deceased person was last seen in the company of the accused-appellant. This witness also testified to the fact that the deceased has made a dying declaration implicating the accused-appellant as the person who stabbed him. The prosecution also relied on the evidence of *Koggala Liyanage Ranjith* who also claimed that the deceased made a statement.

In support of the appeal, learned Counsel for the accused-appellant submitted that the trial Court was in error as;

i. it has acted on the evidence of an unreliable witness *Jasing*,
ii. it failed to note that the death of the deceased was not proved by the prosecution,
iii. it failed to note that the date of offence also was not proved by the prosecution,
iv. it has erroneously imposed an evidentiary burden on the accused appellant.

It was contended in relation to the 1st ground of appeal that the witness *Jasing* in his examination in chief said that the deceased did not name the person

who stabbed him and strangely after an adjournment of proceedings, and in resuming his evidence, he has claimed that one *Jayantha* has told him that the deceased made a statement that *"Uluwatte Punchi Aiya"* has stabbed him. He also claimed that the deceased repeated the accusation when he enquired from him as to the person who stabbed him.

The accused-appellant submitted that the prosecution did not call *Jayantha* and, in addition, an omission was marked on this claim that in his statement to the Police witness *Jasing* did not mention that *Jayantha* told him that *"Uluwatte Punchi Aiya"* has stabbed him. The learned Counsel also submitted that *Jasing* identified the accused-appellant as *"Uluwatte Punchi Malli"* and not as *"Uluwatte Punchi Aiya"*. The accused-appellant also marked a contradiction on the evidence of *Jasing* that the deceased left his chena with *"Punchi Mahatmaya"* at the non-summery proceedings as V1.

The accused-appellant contended that, in view of these infirmities and inconsistencies, the evidence of *Jasing* becomes unreliable and infirm.

In relation to the 2nd and 3rd grounds of appeal, it was contended by the learned Counsel for the accused-appellant that the evidence only relates to the death of a person called *"Munupura"* and there was no evidence placed before the trial Court by the prosecution to establish the fact that the post mortem report marked as P1 is in fact in relation to the deceased.

The 4th ground of appeal was based on the contention that the trial Court has shifted an evidentiary burden on the accused-appellant in holding that it was up to him to establish that the deceased was unable to make the alleged

utterances and also it was for him to establish the fact that the deceased was unable to speak due to the reason that he lost blood rapidly.

Learned Deputy Solicitor General who appeared for the respondent, contended that reference to *Jayantha* in the evidence of *Jasing* was in fact a reference to the 2nd prosecution witness *Kongala Liyanage Ranjith.* He further submitted that *Jasing* was a reluctant witness due to the threats and after the adjournment, he has decided to give a truthful account of the sequence of events. In relation to the identity of the deceased, it was submitted that there was ample evidence by which it could safely infer that the death of the deceased and his identity.

Considering the evidence of the prosecution and the several grounds of appeal raised by the accused-appellant, it is convenient to deal with them in consideration of the evidence of the prosecution in its totality.

Upon perusal of the evidence of witness *Jasing* it is clear that he was deliberately suppressing certain items of evidence even after the adjournment, which apparently reassured him of some protection. The witness provided an explanation for his reluctance to give evidence attributing it to fear he entertained due to threats by two unidentified persons. The alleged threatening occurred after about two months from the date of incident while the accused - appellant was still in remand. He claimed that although he was threatened by two unidentified persons, he did not lodge a complaint. Having admitted that he told the truth at the Magistrate's Court, he stated that he is still under the same apprehension even after 12 to 13 years. Then he claimed that he need not fear in giving evidence. In re-examination, the witness admitted that he has lied before

the Magistrate's Court as he was told not to reveal that it was *"Punchi Aiya"*. He further claimed that the deceased addressed the accused-appellant as *"Punchi Aiya"* but he would call him *"Punchi Malli"*.

It is also observed that although *Jasing* claims that it was PW2 who told him of the claim that *"Punchi Aiya"* stabbed the deceased, *Ranjith* in his evidence contradicted this claim. According to *Ranjith* the deceased made the statement on their way to the hospital in a three wheeler. *Ranjith* also claims there was a *"Podi Malli"* among the group of people who gathered after the incident near the place where the deceased lay fallen and the person known to him as *"Punchi Aiya"* who had been discharged from the hospital that very morning and subsequently died. He did not give any evidence connecting the accused-appellant with the incident.

In addition, *Jasing* maintained that he does not keep any illicit brew at his *chena*, but *Ranjith* contradicted him with his evidence that both *Jasing* and the deceased were engaged in the illicit liquor trade.

The claim of *Jasing* that PW2 told him of the statement made by the deceased is not a consistent assertion, in view of the omission highlighted by the accused-appellant on a very vital point, coupled with the fact that *Ranjith* was silent on this aspect in his evidence. Therefore, the claim that *Jasing* learnt from PW2 that *"Uluwatte Punchi Aiya"* has stabbed him becomes unreliable.

Then the other assertion of *Jasing* that the deceased told him that *"Uluwatte Punchi Aiya"* has stabbed him has to be examined for its truthfulness and reliability.

According to *Jasing* the deceased made this statement at the place where he lay fallen and the witness has no clear recollection whether the deceased did speak on his way to the hospital or not. This evidence is again contradicted by witness *Ranjith* who clearly states it was on their way to hospital the deceased has made the statement.

The contradiction marked as V1 adds another aspect. According to the contradiction, *Jasing* saw the deceased leaving his chena, with one *"Punchi Mahatmaya"* whereas his evidence before the trial Court was that he left with *"Uluwatte Punchi Malli"* and he would not address the accused-appellant as *"Punchi Mahatmaya"*. This is a vital contradiction on the evidence of this witness as it related to the identity of the person who accompanied the deceased that evening, but there was no effort was made to clarify this inconsistency by the prosecution.

In ***Ranasinghe v Attorney General*** (2007) 1 Sri L.R. 218, it was held that;

> *"When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge or the jury as the case may be must bear in mind following weaknesses.*
>
> *(a) The statement of the deceased person was not made under oath.*
>
> *(b) The statement of the deceased person has not been tested by cross examination; vide* ***King v Asirivadam Nadar*** *51 NLR 322 and* ***Justinpala v Queen*** *66 NLR 409.*

(c) *That the person who made the dying declaration is not a witness at the trial.*

In addition, the Court of Appeal further held that;

"As there are inherent weaknesses in a dying declaration ... the trial Judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters.

(a) Whether the deceased, in fact, made such a statement.

(b) Whether the statement made by the deceased was true and accurate.

(c) Whether the statement made by the deceased person could be accepted beyond reasonable doubt.

(d) Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt.

(e) Whether witness is telling the truth.

(f) Whether the deceased was able to speak at the time the alleged declaration was made."

Learned Counsel for the accused-appellant tendered the unreported judgment of C.A. 21/2003 of CAM 13.09.2005 where a similar view was adopted.

These six matters had to be considered by the trial Court, before it proceeds to evaluate the truthfulness and reliability of the "dying declaration" made by the deceased as per the three weaknesses of such statements as reproduced above.

When the infirmities of the evidence of *Jasing* referred to above paragraphs are considered in detail, in the light of the above considerations, it is clear that the submission of the accused-appellant that the trial Court has fallen into error when it acted on the unreliable evidence of the said witness had merit as it is clear his evidence is unworthy of any credit. If the evidence of *Jasing* becomes unreliable, then there is no connection established between the deceased and the accused-appellant by the prosecution. The prosecution had to establish *"the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt"*. The prosecution has clearly failed in this task.

This Court is mindful that credibility of a witness is clearly a question of fact and an appellate Court would be reluctant to interfere with a finding of fact by a trial Court, in view of the priceless advantage it had in observing the demeanour and deportment of the witnesses. In the judgment of ***Fradd v Brown & Co. Ltd.,*** (1915) 18 NLR 302 at 304, Wood Renton C.J. has held that;

> *"The House of Lords, in* ***Montgomery v. Wallace-James*** *[(1904) A. C. 73.], has pointed out the weight that is due in all matters affecting the credibility of witnesses to the decision of the tribunal which has had the advantage of seeing and hearing them, and there are innumerable-local judgments to the same effect. But it must be remembered that the law gives to litigants in this Colony a right of appeal, such cases as the present, against the finding of the court of first instance, even on questions of credibility, and in* ***Khee Sit Nob v. Lim Thean Teng*** *[(1912) A. C. 323.] the Privy Council, while affirming the general rule above mentioned, was careful to explain that it would not be applicable where, in deciding between witnesses, the, trial Judge had clearly failed on some point to take account of*

particular circumstances or probabilities material to an estimate of the evidence, or had given credence to testimony, perhaps plausibly put forward, which turned out on further analysis to be substantially inconsistent with itself or with indisputable facts. The Supreme Court of this Colony has repeatedly interfered on such grounds as these with the findings of courts of first instance on pure questions of fact, and even credibility."

This principle has consistently been followed in several other judgments including ***Mahawithana vs. Commissioner of Inland Revenue*** (1962) 64 N. L. R. 217 and ***De Silva & Others v Seneviratne & Another*** (1981) 2 Sri L.R. 7.

In the instant appeal, the learned High Court Judge who delivered the judgment had no opportunity of observing the demeanour of the two lay witnesses. She has considered their testimonial trustworthiness upon perusal of the transcript and therefore her determination on credibility could not be equated to a finding of fact made on the credibility of a witness based on demeanour and deportment.

In view of the above reasoning, I am of the considered view, that this is an instance where the learned High Court Judge has failed to properly evaluate the testimonial trustworthiness of witness *Jasing* and the conflicting nature of the circumstances under which the dying declaration was made.

The 2nd and 3rd grounds of appeal relates to the identity of the deceased and the dead body on which the post mortem examination was conducted as per the PMR marked P1.

It is noted that the indictment referred to the deceased as *Shantha* alias *Nishantha* alias *Munubura.* Both *Jasing* and *Ranjith* referred to a statement by a person called *Munubura* and none of these witnesses knew his actual name.

The PMR did not have any names of the persons who identified the dead body before the medical officer before she commenced the post mortem examination. The Prosecution has failed to fill this gap in their case by tracing the witnesses who did identify the dead body of *Munubura* before the medical officer, which they could easily have done upon perusal of the notes of investigation.

A similar situation was considered in ***Namaratne & Another v The State*** (2001) 1 Sri L.R. 274 and this Court has rejected the submissions of the accused - appellant on the basis that the PMR of the deceased contained the full name of the deceased. In this instance however, the name of the deceased as appearing in the PMR is *"Shantha/Wijetunga/Munupura"*. Only the names of *Shantha and Munupura* are common in the PMR and the indictment and it is not explained as to who provided the name *Wijetunga* to the medical officer. The submissions of the learned Deputy Solicitor General that an inference could be drawn from the established facts as to the identity of the dead body cannot be accepted as it was incumbent upon the prosecution to establish this fact beyond a reasonable doubt.

The 4th ground of appeal is in relation to the complaint of burden of proof erroneously imposed on the accused-appellant. The basis for this ground of appeal is the pronouncement made by the learned High Court Judge that it was for the accused-appellant to prove that the deceased was not in a position to

make a statement as to who stabbed him. The accused-appellant sought to challenge the claim of the prosecution that the deceased has made a dying declaration on the medical witness's opinion that he could have made a statement soon after the injury to his liver and added that the time period during which he could have make a statement depend on the severity of bleeding.

In her judgment, learned High Court Judge, citing Section 101 of the Evidence Ordinance, held that it was for the accused-appellant to establish what he asserted and he has failed to support his position as he did not place evidence as to the rate of bleeding of the deceased and the deceased had no ability to make a statement implicating the accused -appellant.

It is clear from the judgment of ***Ranasinghe v Attorney General*** (supra) that it was incumbent upon the prosecution to prove beyond a reasonable doubt that *"... the deceased was able to speak at the time the alleged declaration was made"*. In ***Ariyadasa v Queen*** 68 NLR 66, it was held that *"where in a prosecution for murder the accused gives evidence without seeking to bring himself within the benefit of a general of special exception in the Penal Code, the burden of proof does not shift on to him at any stage."* In this instance the accused-appellant in his statement from the dock merely stated a denial. Therefore, it is clear that he is relieved of any evidentiary burden as he did not claim the benefit of any general or special exception.

Therefore, the complaint that the accused-appellant was erroneously imposed an evidentiary burden by the trial Court and thereby depriving him of

a fair trial is a sufficient ground to vitiate the conviction that had been entered against him.

In his *allocutus* the accused-appellant merely pleaded for leniency in the sentence in allowing him to re-join his family. It is clear from the wording of the *allocutus,* that the accused- appellant made no admission of guilt.

Considering the several infirmities of the judgment of the learned High Court Judge, it is my firm conclusion that the appeal of the accused-appellant be allowed by setting aside the conviction entered against him and the sentence of death imposed.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL