

CHUTIMALLI AND ANOTHER VS. STATE

COURT OF APPEAL
SISIRA DE ABREW. J
ABEYRATNE. J
CA 100/2005
H.C. HAMBANTOTA 66/2001

Penal Code - Murder - Convicted - Contradictions marked - Is the prosecution or defence entitled in re-examination to mark the other portions of the statement to remove wrong impression? Reasonable doubt as to identity?

The two accused - appellant were convicted of the murder of one D and were sentenced to death.

In appeal it was contended that the wife of the deceased failed to identify the two accused.

Held

- (1) Where, however a witness has been contradicted by certain parts of his former statement the prosecution or the defence as the case may be is entitled in re-examination to put to him other portions of his statement which have not been put to him, in order to rebut the inferences likely to be drawn and thereby indirectly to corroborate him.
- (2) Contradiction gives the impression that the witness has not mentioned the names of two accused persons in her statement made to the Police, if the witness has mentioned the names of the two accused persons in a statement prosecuting Counsel becomes entitled to mark the said portion of the statement when the above contradiction is marked - when V3 is considered it creates a reasonable doubt in the identity of the accused-appellant.

APPLICATION from the judgment of the High Court of Hambantota.

Cases referred to:-

1. *Fox vs. General Medical Council* – 1960 1 WLR 1017 at 1025
2. *R vs. Roberts* -1942 - 28 Cr. A.R. 102
3. *R. vs. Bengamin* - 1918 - 8 Cr. A.R. 146

Ranil Samarasuriya for 1st accused-appellant.

Chatura Galena for 2nd accused-appellant.

S. Thurairajah DSG for AG.

December 04th 2008

SISIRA DE ABREW, J.

Heard both Counsel in support of their respective cases.

The two accused-appellants were convicted of the murder of a man named Kodituwakku Kankanamlage Dharmasena and were sentenced to death.

Both Counsel for the accused-appellants take-up the position that the identity of the both accused-appellants has not been established beyond reasonable doubt. In substantiating the arguments they draw our attention to contradiction marked 'V3' at page 92 where, Indrani, the wife of the deceased, had told the Police that, at the time of the incident, two people ran away from the scene of offence.

According to the prosecution case two accused-appellants came near the bed of the deceased and attacked the deceased with weapons and thereafter they ran away from the bed room of the deceased.

Learned Counsel for the 1st accused-appellant, harping on the said contradiction, is trying to contend that the witness Indrani, the wife of the deceased, failed to identify the

two accused. Although the learned defence counsel marked the said contradiction he has failed to mark an omission that witness Indrani failed to mention the two names of the accused-appellants in her statement made to the Police. This suggests that the two names had been mentioned by witness Indrani in her statement. But, unfortunately learned prosecuting State Counsel, failed to draw the attention of the trial Court to the other parts of her statement. Contradiction V3 gives the impression that the witness has not mentioned the names of two accused persons in her statement made to the Police. If the witness has mentioned the names of the two accused persons in her statement, prosecuting State Counsel becomes entitled to make the said portions of the statement when the above contradiction is marked.

This view is supported by the following legal literature. "Where, however, a witness has been contradicted by certain parts of his former statement, the prosecution or the defence as the case may be, is entitled in re-examination to put to him other portions of his statement which have not been put to him, in order to rebut the inferences likely to be drawn and thereby indirectly to corroborate him. This represents the invariable practice of our Courts and is based of fair play and justice, since the contradictions only paint a part of the true picture". See *Fox vs. General Medical Counsel*⁽¹⁾ at 1025, *Rex vs. Roberts*⁽²⁾ and Law of Evidence by E.R.S.R. Coomaraswamy volume 2 book 2 page 773.

Applying the principles laid down in the above legal literature, I hold that when a contradiction is marked with a former statement of a witness, the prosecution or the defence as the case may be, is entitled in re-examination to mark the other portions of his statement to remove the wrong impression created by the contradiction. But the prosecution

or the defence can't adopt this procedure to corroborate the witness with his former statement.

Considering all these matters, I am of the view that the learned Prosecuting State Counsel should have marked the order portions of the statement to remove the wrong impression created by the contradiction.

In my opinion, there is evidence that should be considered by a trial Court. However, the Prosecuting State Counsel has failed to do his duty as stated above. When 'V3' is considered, it creates a reasonable doubt in the identity of the accused-appellants. Therefore, we are unable to permit the conviction to stand.

In these circumstances, we set aside the conviction and the death sentence and order a re-trial.

Since the offence is alleged to have been committed in the year of 1998, we direct the learned High Court Judge of Hambantota to expeditiously hear and conclude this case.

UPALY ABEYRATHNE, J. - I agree.

appeal allowed.

Trial de Novo ordered.