NISSANKA

v.

THE STATE

COURT OF APPEAL
HECTOR YAPA, J. (P/CA)
KULATILAKA, J.
C.A. NO. 72/98
H.C. GAMPAHA 6/96
JULY 13TH, 17TH, 18TH, 2000

Penal Code - S. 296, S. 380 - Judicature Act S. 14(b) - S. 331, 364 Code of Criminal Procedure Act 15 of 1979 - Right of Appeal - Appeal out of time - Exercising Revisionary Jurisdiction - exceptional circumstances - Evidence Ordinance S. 27

The Accused Appellant and another were indicted on two counts viz: under S. 296 and S. 380 of the Penal Code and at the trial both accused were convicted for murder and were sentenced to death on Count one and in respect of the 2nd count to a term of seven years R.I.

The first accused did not appeal, the petition of appeal of the 2nd accused was out of time.

The 2nd Accused Appellant invited Court to act by way of Revision.

Held :

(i) The power of Revision can be exercised for any of the following purposes viz:

  (i) to satisfy the Appellate Court as to the legality of any sentence/ order.

  (ii) to satisfy the Appellate Court as to the propriety of any sentence/ order.

  (iii) to satisfy the Appellate Court as to the regularity of the proceedings of such Court.

(ii) Revisionary jurisdiction is not fettered by the fact that the Accused Appellant has not availed of the right of appeal within the specified time.

It was contended that (i) the trial Judge has relied upon a dock identification which was not warranted (ii) that the trial Judge erred in law by implying guilt relying solely on information led in evidence relating to the discovery of certain facts in terms of S. 27 Evidence Ordinance (iii) that the trial Judge failed to consider the concepts applicable to charges based on common intention and circumstancial evidence.

Held further:

1. The facts elicited from the testimony of C - who identified the accused at the trial, manifest that at the point of identification there was no congregation of a multitude of persons in a crowd but only the two accused, the deceased and the witness had been present and this happened in broad day light. Hence there cannot be any doubt.

2. The attendant circumstances of this case S. 27 statements, consequent to which productions were discovered not only embrace the knowledge of the first accused and accused appellant as to these items, being hidden in the places from which they were detected but that it was evidence connecting them with the murder.

Per Kulatilake, J.

> "If it appears that the trial Judge has applied the law in arriving at his conclusions the Court of Appeal would not interfere simply because he has failed to set out the law that he has applied in express terms."

APPLICATION in Revision from the Order of the High Court of Gampaha.

Cases referred to :

1. *Attorney-General v. Ranasinghe and others* - 1993 2 SLR 81.
2. *Regina v. Turn Bull* - 1977 QB 224 at 230.
3. *Pershadi v. State of Uttar Pradesh* - AIR 1957 - SC 211.
4. *Chuin Pong Shiek v. Attorney General* - 1999 - 2 SLR 277 at 285.
5. *Rex v. Cockraine* - Gurneys Reports 479.
6. *Misnagollage Sriyawathie v. Attorney General* - CA 156/95 - HC Avissawella 72/92. CAM 8. 9. 1999.
7. *King v. Seeder de Silva* - 41 NLR 337.
8. *Queen v. Seetin* - 68 NLR 316 at 321.
9. *Prematilake v. The Republic* - 75 NLR 506 at 519.

Dr. Ranjith Fernando with *Ms Anoja Jayaratne* and *Ms Sandamali Munasinghe* for Accused Appellant.

Yasantha Kodagoda, S. S. C for Attorney General.

Cur. adv. vult.

December 06, 2000.
KULATILAKA, J.

In this prosecution the first accused and the second accused were indicted in the High Court of Gampaha on two counts: namely

(1) that on or about 18. 11. 1991 they did commit the murder of Gladicia Perera Wijeratne an Offence punishable under Section 296 of the Penal Code.

(2) that at the same time and place and in the course of the same transaction they did commit robbery of cash in a sum of Rs. 10,000/- and jewellery worth Rs. 10,000/- from the possession of Piyasiri Jayawardena an offence punishable under Section 380 of the Penal Code.

At the trial both accused were convicted for murder and were sentenced to death on count one and in respect of count two they were found guilty and were sentenced to a term of seven years rigorous imprisonment. The first accused did not appeal against his conviction and sentence imposed on him. But the second accused had tendered a petition of appeal which in the face of it is out of time.

The learned Senior State Counsel submitted that the accused-appellant had failed to exercise the right of appeal provided in terms of Section 14(b) of the Judicature Act read with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979. The learned High Court Judge had pronounced his judgment on the 19 January 1998 and the petition of appeal was filed on 11 June 1998 after a lapse of 4 months and 22 days. Thus the petition of appeal is clearly out of time. The learned counsel who appeared for the accused - appellant conceded that the appeal was out of time but pleaded with Court to treat it as a revision application. He submitted that the first accused had opted to accept the verdict of guilty and the sentence imposed on him. Although the accused - appellant

had conveyed his intention to appeal against the conviction and sentence owing to a lapse on the part of the assigned counsel who appeared for him at the trial the petition of appeal was not filed within the time specified by law. Anyway there is no material before us to accept this submission. The learned counsel further submitted that since the accused - appellant has been convicted for murder and sentenced to death, in the interests of justice Court should treat his case as a revision application and give him a hearing. It was submitted by the learned Senior State Counsel that even if the accused - appellant were to invoke the revisionary jurisdiction there was unreasonable delay since a period of nearly 5 months has elapsed since the pronouncement of the judgment. We have carefully considered the submissions tendered by both counsel.

The fact that the accused - appellant has not exercised his right of appeal within the specified time by itself does not preclude him from inviting the Court to exercise its revisionary jurisdiction in terms of Section 364 of the Code of Criminal Procedure Act No. 15 of 1979. Under that Section the Court of Appeal is vested with the power to call for and examine the record of any case whether already tried or pending in the High Court or the Magistrate Court. This power can be exercised for any of the following purposes; namely

(1) to satisfy this Court as to the legality of any sentence or order passed by the High Court or Magistrate Court.

(2) to satisfy this Court as to the propriety of any sentence or order passed by such Court.

(3) to satisfy this Court as to the regularity of the proceedings of such Court.

Hence the revisionary jurisdiction of this Court is wide and specially directed at vesting the jurisidction in this Court to satisfy itself as to the legality or propriety of any sentence or order made by the High Court or Magistrate Court. It gives this Court wide

powers of review in revision. This jurisdiction is not fettered by the fact that the accused - appellant has not availed of the right of appeal within the specified time. (Vide the judgment of S. N. Silva, J (as he was then) in *Attorney-General v. Ranasinghe and others*[1]. In that case a delay of 6 months was not considered unreasonable. Hence we have decided to convert this appeal to one of revision.

The house where this gruesome murder had taken place was located in Rammutugala 2 1/2 kilo meters away from the Kadawatha police station. The deceased in this case Gladicia Perera Wijeratne, her husband Piyasiri Peiris Jayawardena, their son and daughter and the domestic help Chandrakanthi Gajanayake were living there in that house. On 18. 11. 91, around 8 o'clock in the morning, the deceased Gladicia Perera was alone in the house. By then her husband had left for work, her daughter for school. Chandrakanthi had accompanied the deceased's son in order to help him to get on board the school bus. When Chandrakanthi came back home she found her mistress Gladicia Perera missing and when she went inside the house she found their wardrobes ransacked. Immediately she had complained to Piyasiri Jayawardena's elder brother who was living closeby. The police being informed had come to the house of the deceased and commenced investigations. They found the body of the deceased inside a well about 40 yards away from the house. The body was identified by Piyasiri Jayawardena as that of his wife Gladicia Perera.

Having recorded Chandrakanthi's statement the police went in search of the 1st accused and the accused respondent (hereinafter referred to as the accused - appellant). By then they had run away from the village. In her evidence at the trial Chandrakanthi Gajanayake had recounted how the 1st accused and the accused - appellant had come to their house some days prior to the killing on the pretext of plucking king coconuts and also she recounted their behaviour and conduct on that occasion. The first accused had surrendered to the Pusselawa police station on 07. 12. 91 and consequent to a statement made by him, Sergeant Ranatunga had recovered a gold chain, wrist watch and a red box belonging to the deceased. The

accused - appellant had been arrested at Tundeniya, Gampola and consequent to a statement made by him, Sergeant Ranatunga had recovered a purse and two keys belonging to the deceased and her household. The prosecution has relied upon circumstantial evidence in order to secure a conviction.

The learned counsel for the accused - appellant in his endeavour to impugn the judgment of the learned High Court Judge urged the following grounds:

(1) that the learned trial Judge has relied upon a dock identification which is not warranted in the circumstances of this case.

(2) that the learned trial judge has erred in law by imputing guilt relying solely on information led in evidence relating to the discovery of certain facts in terms of Section 27 of the Evidence Ordinance.

(3) that the learned trial Judge has failed to consider the concepts applicable to charges based on common intention and circumstantial evidence.

The learned Counsel asserted that evidence of identification in regard to the accused - appellant was wholly unsatisfactory. Evidence of identification pertaining to an incident which took place two weeks prior to the killing comes mainly from Chandrakanthi Gajanayake. She was a domestic help of the household of the deceased. She testified that the first accused and the accused - appellant had come to the house of the deceased two weeks previous to the killing. They were looking for king coconuts. By that time she knew the first accused because he was working for the deceased's husband's brother who was living close by. She did not know the accused appellant at that point of time. Chandrakanthi and her mistress the deceased had been there when the first accused and the accused - appellant came to the house. It was the accused appellant who had climbed the king coconut trees. When he was on the tree in front of the house, the deceased had told the first accused to be careful because the bunch of king coconuts

might fall. Inspite of that warning the accused - appellant had dropped the bunch from the tree. Thereafter the first accused had asked for ambarella fruits. The deceased had refused. As the first accused persisted in his demand the deceased had obliged. Thereupon they asked for lime but was refused by the deceased. The two of them then left the house saying that they would come back later to take away the king coconuts. Around 12. 30 p. m. witness had noticed the first accused and the accused - appellant near the lavatory peeping into the house. When she called them they had again asked for lime but was refused by the deceased. Thereupon the first accused had made the following utterance:

"වැඩිකල් බත් කන්න දෙන්නෙ නැහැ"

Which colloquially means that she will not be allowed to live long. When all this was happening Chandrakanthi was present along with the deceased Gladicia Perera. At the trial witness Chandrakanthi recognized the accused - appellant as the person who accompanied the first accused on that occasion.

The principles laid down in *Regina v. Turn Bull*[2] at 230 are a statement of the law pertaining to situations where the identification is made under difficult situations and upon fleeting occasions. The facts elicited from the testimony of Chandrakanthi manifest that at the point of identification there was no congregation of a multitude of persons in a crowd but only the first accused and the accused - appellant, the deceased and the witness had been present and this particular episode happened in broad day - light. Hence on that occasion Chandrakanthi had unrestricted means an opportunity for identification of the accused - appellant. Further this item of evidence was not challenged either in cross - examination of Chandrakanthi or by the accused - appellant's dock statement. Further witness Piyasiri Jayawardena testified that this incident was brought to his notice previous to his wife's death. Hence there cannot be any doubt that the accused - appellant was the person who accompanied the first accused to the deceased's house and plucked king coconuts two weeks previous to the killing of Gladicia Perera Wijeratne.

The learned Counsel for the accused - appellant contended that Section 27 statements had not been properly admitted in evidence. He was referring to P6, P7 and P9. The first accused and the accused-appellant had been represented by counsel at the trial and when the learned prosecuting State Counsel made an application to mark in evidence these portions of the statements in consequence of which certain items had been discovered by the police, no objection had been raised by counsel. Anyway we have carefully looked into the evidence pertaining to the recording of the statements of the first accused and the accused-appellant by the police and the discovery of items, namely gold chain (said to have been worn by the deceased at the time of her death) marked as P4 the wrist watch belonging to the deceased marked P3, purse belonging to the deceased marked P1 (which had contained certain documents) and two keys (which were usually found in a key hole) marked P5. Of these items P1 and P5 were discovered consequent upon the statement "I buried the two keys and the purse containing documents in my compound. I can show the place". (vide P9)

Evidence pertaining to the discovery of these items was deposed to by Police Sergeant Mahadurage Ranatunga who had arrested both accused. Further the husband of the deceased Piyasiri Peiris Jayawardena in his evidence has identified each of these items and also stated to Court that he had gone to the police station soon after the police had discovered these items and identified them. The learned Counsel tried to make out a point that the police had recorded the statements of the first accused and the accused-appellant after they had discovered the productions. On a careful perusal and examination of the evidence led in the case pertaining to the recording of the statements of the 1st accused and the accused-appellant and the discovery of these items, we are satisfied that the police had discovered the productions consequent to the statements made by the first accused and the accused-appellant. Therefore we do not see any merit and substance in the submission advanced by the learned Counsel on this point.

The evidence adduced at the trial by the prosecution demolishes the learned Counsel's proposition that the learned trial Judge had imputed guilt on the accused - appellant solely on the evidence relating to the facts discovered consequent to a Section 27 statement. On a close examination of the evidence in the case and the judgment, we find that it is not the correct factual position. The prosecution has established the guilt of the 1st accused and the accused-appellant beyond reasonable doubt. In this regard we refer to the following facts namely,

(i) that the first accused and the accused-appellant were always seen moving together in the village. (Vide Piyasiri Peiris Jayawardena's evidence at pages 45 and 46 of the record).

(ii) that the accused-appellant was in the company of the first accused when the first accused threatened the deceased saying that she will not be allowed to live long (made two weeks previous to the crime).

(iii) that both accused had run away from Rammutugala, Kadawatha and were arrested more than 100 miles away from the crime scene (first accused was arrested at Pussellawa whereas the accused - appellant was arrested at Tundeniya, Gampola).

(iv) that the police had recovered a radio from the possession of the first accused with the receipt issued from a shop at Gampola (place where the accused-appellant was arrested).

In addition the solid linking factor namely the discovery of the productions (wrist watch P3, gold chain P4) consequent to a statement made by the first accused and purse P1, two keys P5 discovered consequent to a statement made by the accused - appellant and such information P9 as relates distinctly to the discovery of productions P1 and P5. (Sec. 27 Evidence Ordinance) complete the chain of events and bring to light the murderers responsible for the death of Gladicia Perera. It is to

be observed that the gold chain was worn by the deceased at the time of her death. The two keys were used to lock the front door and the door that separates the main house from the kitchen. Hence in the attendant circumstances of this case Section 27 statements P6, P7 and P9 consequent to which productions marked P3, P4, P5, and P1 were discovered not only embrace the knowledge of the first accused and accused-appellant as to these items, being hidden in the places from which they were detected but that it was evidence connecting them with the murder of Gladicia Perera. Vide *Pershadi v. State of Uttar Pradesh*[3] .

We have already observed that the prosectuion has proved the fact that the two vital productions namely purse marked P1 and two keys marked P5 were discovered consequent to Section 27 statement marked P9 which is to the effect;

" I have buried the two keys and the purse which contain documents in the compound. I can show the place" and thereby established that the accused-respondent had guilty knowledge. This factor by itself would cast an evidential burden on the accused-appellant to explain away as to how he had acquired that knowledge. Vide the judgment of Justice Fernando in *Chuin Pong Shiek v. The Attorney - General*[4] at 285. The learned Senior State Counsel made meaningful submissions relating to certain circumstances that surfaced from the prosecution evidence. He referred to the following facts namely,

(i) that the medical evidence established that Gladicia Perera Wijeratne's death was due to cranio cerebral injuries and drowning.

(ii) that according to the post mortem report she wore a dark blue printed house -coat and a printed night dress at the time the body was recovered, and that she was a well nourished person.

(iii) that an avacado pole with blood stains and some hair, was found close to the well where the body was found.

(iv) that three wardrobes in three separate rooms of the deceased's house had been ransacked and items and cash robbed.

The learned Senior State Counsel contended that the inference that one could safely arrive at from these items of evidence would be that there was participation of at least two persons in committing this crime.

The question arises on an evaluation and analysis of the dock statement whether the accused-appellant did attempt to explain away the highly and cogent incriminating circumstances elicited against him and the prima facie case established by the prosecution. In his dock statement the accused-appellant has merely said that he had no connection to the crime. This is a bare and deficient dock statement. In view of the deficiency in the dock statement the trial Court would be justified in drawing an adverse inference of guilt against the accused-appellant in the circumstances of the case. Vide the speeches of Lord Ellenborough in *Rex v. Cockraine*[5] and also Justice Jayasuriya's judgment in *Misnagollage Siriyawathie v. Attorney-General*[6]. The accused-appellant adduced no evidence and offered no explanation of the items of evidence that incriminated him on the assumption that he was innocent of the charges levelled against him. He alone was in a position to tell Court the circumstances in which he had the guilty knowledge of the facts discovered consequent to the statements made by him and the fact of running away from Rammutugala village soon after the crime. Vide the decisions in *King v. Seeder de Silva*[7] *Queen v. Seetin*[8] at 321; *Prematilaka v. The Republic*[9] at 519.

The learned trial Judge has correctly observed at the opening paragraph of his judgment that the prosecution in this

case has relied upon circumstantial evidence in order to secure a conviction. Thereafter he had examined the evidence led in the case in its totality and had come to the conclusion that the prosecution has proved its case beyond reasonable doubt. We have ourselves given our earnest consideration to each of the circumstances that had arisen from the prosecution case and we are of the considered view that items of circumstantial evidence adduced against the accused-appellant are highly incriminating and unequivocally point to his guilt and inconsistent with any reasonable hypothesis of his innocence. Vide *King v. Seeder de Silva (Supra).*

Furthermore, learned counsel for the accused-appellant complained that in dealing with the ingredient of common intention the learned trial Judge has failed to look into the case of the accused-appellant separately even though he has done so in respect of the first accused. On a perusal of the judgment we find at page 113 of the record that the learned trial Judge has considered the liability of the first accused and thereafter we find that in the next sentence there is a repetition of the contents of the earlier sentence. If you read between the lines it is crystal clear that by an oversight or mistake the learned judge has referred to the first accused whereas in fact the reference has to be to the accused-appellant. This becomes still more evident when we read the rest of the judgment that follows.

Further it is observed that the trial was conducted before the Judge of the High Court without a jury. Hence the Judge was the trier of evidence. On a plain reading of his judgment if it appears that he has applied the law in arriving at his conclusions the Court of Appeal would not interfere simply because he has failed to set out the law that he has applied in express terms. We must not forget the fact that a High Court Judge is a judicial officer with a trained legal mind.

It is only when there are exceptional circumstances that this Court would exercise its revisionary powers and interfere with the findings and such a situation would be an exception

rather than the rule. As we have already observed the attendant circumstances of this case would not in any way warrant us to exercise our discretion in favour of the accused-appellant. Hence we dismiss the appeal of the accused-appellant and affirm the conviction and the sentence imposed by the learned High Court Judge.

The learned Counsel who appeared for the accused appellant submitted that the accused-appellant is a youthful offender, hence this Court should order a respite. We are of the view that it is a matter for the relevant authorities for consideration in terms of Section 286 of the Code of Criminal Procedure Act No, 15 of 1979.

HECTOR YAPA, J. (P / CA) - I agree.

Appeal dismissed.