170

180

KARUNARATNE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 162/01
H.C. AMPARA 156/96
MAY 8th, 9th, 25th 2007

Penal Code – Section 296 – Criminal Procedure Code – Section 414(1) – Bad Character of deceased wrongfully attributed to accused? – Mistake made by Court by a wrong reference to the accused– Miscarriage of justice? Evidence insufficient? – Fire Arms Ordinance – Section 2(9) – Evidence Ordinance – Section 54, Section 114 – "Ellenborough dictum".

The accused-appellant was indicted for murder; after trial sentenced to death. In appeal, it was contended that the bad character of the decreased was wrongly attributed to the accused, when the character was not at all relevant, and that the evidence was insufficient to prove the charge and that the trial Judge wrongly applied the *"Ellenborough dictum"*.

Held:

(i) Bad character of the deceased generally is irrelevant.

Per Ranjith Silva, J.,

> "This is only a practice hardened to a rule but there is no provision in the Evidence Ordinance or any other enactment which precludes evidence of bad character of the deceased being led."

(ii) A mistake made by the Trial Judge by a wrong reference to the accused has not resulted in either causing any prejudice to the accused or a miscarriage of justice and is manifestly clear that the Trial Judge did not make any mistake as to who he was referring to.

(iii) *Ellenborough principle* would apply only where there is a 'strong *prima facie*' evidence already existing against the accused and not to augment or strengthen a weak case and to convert it to a strong *prima facie* case.

(iv) The prosecution has made out a strong *prima facie* case against the accused. The accused failed to explain away the highly incriminating circumstances against the accused.

APPEAL from the Judgment of the High Court of Ampara.

Cases referred to:

(1) *Parkes* v *The Queen* – 1976 3 All ER 380-383

(2) *R* v *Mitchel* – 1892 – 17 Cox CL 503 at 508

(3) *R* v *Raviraj* – 85 Cr. App. P.93

(4) *Sarwan Singh* v *State of Punjab* – 2002 AER SC 111, 3652 at 3655, 3656

(4a) *Boby Mathew* v *State of Karnataka* – 2004 – 3 Cri LJ 3003

(5) *Himachal Pradesh* v *Thakur Dass* – 1983 – 2Cri LJ 1694 at 1983

(6) *Motilal* v *State of Madya Pradesh* – 1990 Cri LJ No. C 125 M.P.

(7) *Phillipu Mandige Nalaka Krishantha Kumara Thisera* v *Attorney-General* – CA 87/2005 – CAM 17.5.2007

(8) *Illangathilake* v *The Republic of Sri Lanka* – 1984 Sri LR 38

(9) *Ajith Samarakoon* v *The Republic of Sri Lanka* (Kobaigane Murder) 2 – SLR at p. 209

(10) *R.* v *Cochrane* – Guruneys Report 479

(11) *R* v *Burdette* – 1820 4B Alderman Reports 95 at 120

(12) *Inspector Arendstz* v *Wilfred Peiris* – 10 CLW 121

(13) *R* v *Seeder Silva* – 41 NLR 337

(14) *K* v *Wickremasinghe* – 42 NLR 313

(15) *K* v *Pieris Appuhamy* – 43 NLR 410

(16) *K* v *Endoris* – 46 NLR 490

Mohan Pieris P.C. with *Widura Ratnayake* for the appellant
Shavindra Fernando, D.S.G. for the respondent.

Cur.adv.vult.

July 2, 2007

RANJITH SILVA, J.

The accused-appellant Kammalpitiya Gethara Karunaratne alias Suranimala (accused) was indicted in the High Court of Ampara for the murder of Jayasinghe Arachchilage Somapala at No. 16 Colony on 19.07.1990, an offence punishable under section 296 of the Penal Code.

The prosecution led the evidence of seven witnesses including the evidence of the medical officer and two police officers. At the conclusion of the evidence for the prosecution the Learned High Court Judge called for a defence and the accused opted to remain silent. After trial the learned Judge on 22.11.2001, found the accused guilty of murder and sentenced the accused to death.

The accused, aggrieved by the aforesaid, conclusions, findings, judgment and the sentences has preferred this appeal to this Court praying *inter alia* that the said conviction and sentence be set aside.

The Learned Counsel for the accused argued the appeal on the following grounds. (as understood by me)

(a) That the bad character of the deceased was wrongly attributed to the accused, when the character of the accused was not at all relevant causing substantial prejudice to the accused.

(b) The evidence led before the High Court was insufficient to prove the charge levelled against the accused beyond reasonable doubt. Especially with regard to the identity of productions, in that the prosecution failed to establish the nexus between the evidence regarding the gun, alleged to have been used by the accused and the gun which was produced in Court.

(3) The Trial Judge wrongly applied the *Ellenborough Dictum* against the accused in the absence of a strong *prima facie* case against him.

The Facts

In the morning on the day of the incident that is on 19.07.1990 witness George Perera who happened to be a principal of a school at the relevant time left his house in order to tie his cattle for the purpose of grazing. On his way he had to go passing the premises of the deceased and the deceased who met the witness near his premises requested the witness to help him fill the house holders list. The witness having acceded to the request informed the deceased that he would be back soon after attending to his cattle and would help the deceased. When the witness was returning home having tied his cattle, after about 30 minutes, close to his house he heard a report of a gun from the direction of his house. At that time the witness was approaching his house and within about a minute he came to the turn off to his house from where he saw the deceased fallen on the ground and the accused standing with a gun in his hand in his compound. Upon seeing this, witness confronted the accused and questioned the accused as to what he had done assuming that the accused had shot the deceased. "අයියේ නිමල් කරුණාරත්න මොකක්ද කළේ" . From the tone and tenor of the words used by the witness it is seen that the question was undoubtedly an accusation levelled against the accused lamenting the cruel act of the accused. Accused had simply gaped at him without replying. According to the evidence (*Vide*. The evidence of W.M. Somawathie at page 57 of the brief) it appears that the witness had grappled with the accused and taken the gun away from the accused although witness George Perera does not say so in so many words but merely says that the gun came to his hands suggestive of some sort of effort on the part of the witness to snatch the gun from the accused. After the gun was taken away from the accused the accused had walked away from the premises of the witness without a protest and the witness handed over the gun to witness Somawathie, the wife of the Chief Gramarakshaka who happened to be there at the scene. Somawathie had witness only the scuffle between George Perera and the accused when witness George Perera grappled with the accused for the gun. Witness Somawathie kept the gun at her place

till the police took the gun into their custody later. The Police officer who took the gun into his custody from the chief gramarakshaka's house had noted the number of the gun and the same gun bearing No. 8882171 was marked in evidence at the trial in the High Court. I cannot see a break in the chain. It was the same gun that George Perera took from the accused that was handed over to witness Somawathie and the same gun was handed over to the police by Somawathie which was sent to the Government Analyst and later produced in Court at the trial. The PR number according to the evidence was 189 whereas when it was marked in evidence at the trial the PR number was 152/97. There is a discrepancy with regard to the PR number of the gun yet the number of the gun was the same and therefore the discrepancy which according to the police witness was 'unexplainable' looses its significance. In fairness to the accused it must be noted that there is no evidence to show that the investigating officers carried out any test such as searching for traces of gun powder or testing for the smell of gun powder, to ascertain whether a shot had been fired from the gun recently. In fact the police officers who carried out investigations failed to observe the empty cartridge in the barrel of the gun which they claimed to have been discovered in courts, later. What is strange here is that the police were unable to find any wads, at least one of them that are normally found at a scene when a cartridge is discharged from a gun.

The son of the deceased Jayasinghe in his evidence stated that the deceased and the accused were friends but had a dispute about a week before the incident and that after the dispute the accused did not visit the deceased.

The medical evidence was that the death was due to a gun shot injury fired from a distance of about 20-25 yards.

The prosecution did not lead the evidence of the government analyst but simply led in evidence what was stated in his report dated 13.06.1991 marked P3. Document P3 has been received in evidence without any objections from the defence. (Vide page 111 of the brief) According to this report, the government analyst has stated that the gun could be classified as a gun as defined in S.2(a) of the Fire Arms Ordinance and that the empty cartridge had been fired from the gun, both of which were sent to the Government Analyst for examination and report.

S.414(1) of the Criminal Procedure Code reads thus; (only the relevant portions are reproduced below).

'Any document purporting to be a report under the hand of the Government Analyst ..... upon any person matter or thing duly submitted to him for examination or analysis and report ..... may be used as evidence in any inquiry, trial or proceeding under this code although such officer is not called as a witness.'

The identity and the regularity of the report of the Government Analyst could be presumed under section 114 of the Evidence Ordinance.

I find on a perusal of the evidence that the evidence of the witnesses for the prosecution especially with regard to the main issues, had gone virtually unchallenged. The credibility of the witnesses including the 1st witness George Perera was never challenged or doubted. With regard to the credibility of witnesses I shall be dealing with later in this Judgment.

First Ground of Appeal

The Counsel for the accused vigorously contended that the trial Judge started the evaluation of evidence by committing a fundamental error by attributing the evidence of bad character of the deceased to the accused. He argued that firstly, the Trial Judge could not have taken the bad character of the accused into consideration and secondly, the Trial Judge wrongly attributed the bad character of the deceased to the accused and thereby misdirected himself on the facts to the detriment of the accused. I find that the Counsel for the accused during the cross-examination of witness George Perera had asked a number of questions in order to show that the deceased was a bad egg in the area who walked about carrying a gun, that he was a person who had a murder case against him and that many people in the village were not on good terms with the deceased. (vide. pages 58, 59 and 60). At the end of the cross-examination of witness George Perera, the trial Judge questioned the witness in further clarification of the questions asked in cross-examination. The bad character of the deceased generally is irrelevant (**Vide. Bench Book, Law of Evidence page 139**), and the Trial Judge should not have allowed such evidence to go in as the character of the deceased was not in issue in this case. This is only a practice

hardened into a rule but there is no provision in the Evidence Ordinance or any other enactment which precludes evidence of bad character of the deceased being led. Even if it is assumed that the trial Judge was not aware of this principle, yet it is inconceivable that the Learned Judge, as a person trained in law, with a legal back ground and experience was not aware that the bad character of the accused was irrelevant. In fact on a perusal of the evidence of the witnesses clearly show that evidence of bad character of the accused had not been led.

S.54 of the Evidence Ordinance

"In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character.'

Explanation 1 – This section does not apply to cases in which the bad character of any person's itself a fact in issue.

I have no doubt that the Learned Judge was aware of this basic legal principle and certainly would not have allowed any evidence of bad character to go in as evidence let alone considering such evidence of bad character of the accused in the evaluation of evidence in arriving at a decision. Reading through the Judgment of the Learned Judge one could arrive at but one conclusion and that is that the learned Judge has used the word 'accused' instead of 'deceased' by an oversight. (Vide. pages 58, 59 and 60 of the brief.) I arrive at this conclusion as I find that at page 3rd, 4th and 5th lines of the Judgment (page 120 of the brief) the learned Judge has stated referring to the evidence of George Perera concerning Somapala the deceased that the witness had stated in evidence that he did not see the deceased carrying a gun when he saw the deceased on the day of the incident. In the Judgment from pages 118 to 123 the Learned Judge has narrated the evidence in reference to the evidence in cross-examination given by witness George Perera. It is certain on a reading of the entire paragraph (1st paragraph page 3 of the judgment - page 120 of the brief) that the learned judge was referring to the deceased and not the accused. For the reasons I have stated above I hold that the mistake made by the Trial Judge by a wrong reference to the accused has not resulted in either causing any prejudice to the accused or a miscarriage of justice and is manifestly

clear that the learned High Court Judge did not make any mistake as to who he was referring to. On the other hand after reading through the judgment carefully, I find that the learned Trial Judge had not relied on the evidence of bad character in favour or against the accused, in arriving at his decision although he had just referred to that evidence in his judgment.

Second Ground of Appeal

The main thrust of the defence was that there was no direct evidence to prove that it was the accused that fired the fatal shot. The prosecution had to depend on circumstantial evidence in order to bring home the charge against the accused and that the evidence led by the prosecution fell short of proving the case against the accused beyond reasonable doubt. The learned Counsel for the accused further contended that the trial Judge committed a fundamental error in law by applying '*Ellenborough' Dictum* when there wasn't a strong *prima facie* case made out against the accused by the prosecution.

The learned Deputy Solicitor General contended citing the judgment of Lord Diplock in *Parkes* v *The Queen*[1] that the silence on the part of the accused together with his conduct, in the face of the accusation levelled against him by witness George Perera shortly after the incident amounted to an admission that he shot the deceased.

The facts of that case were, a mother of a girl who was found with stab wounds asked the appellant why he had stabbed her. The appellant made no reply, but when the mother threatened to hold him until the police arrived he drew a knife and tried to stab her. It was held in that case that the appellant's silence coupled with his subsequent conduct, was a matter from which it could be inferred that the appellant accepted the truth of the accusation.

Lord Diplock in *Parkes* v *The Queen (supra)* observed as follows. I quote "Now the whole admissibility of statement of this kind rests upon the consideration that if a charge is made against a person in that persons presence it is reasonable to express that he or she will immediately deny it, and that the absence of such denial is some evidence of an admission on the part of the person charged and of the truth of the charge. Undoubtedly when persons are speaking on even terms, and a charge is made, and the person

charged says nothing, and express no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

My efforts, to find more authorities pertaining to this subject, were not in vain. It was held in the case of *R* v *Mitchel*[2] at 508 by Cave, J. "Undoubtedly when persons are speaking on even terms, and a charge is made, the accused person ought to reply, and if he does not, it is some evidence to show that he admits the charge to be true."

In *R* v *Raviraj* [3] C.A. Stocker, L.J. observed as follows "Guilt may be inferred from unreasonable behaviour of a defendant when confronted with facts which seems to accuse him." (*Vide*. The book titled Criminal Pleadings, Evidence and Practice 15/390 Archibald 1997).

The learned Judge has observed that the accused had neither challenged the evidence led by the prosecution nor the credibility of the prosecution witnesses. The evidence of the first witness George Perera has gone virtually unchallenged.

In *Sarwan Singh* v *State of Punjab*[4] "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted." This case was cited with approval in the case of *Boby Mathew* v *State of Karnataka*[4a].

In *Himachal Pradesh* v *Thakur Dass* [5] at 1983 V.D. Misra CJ held: "Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."

"Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact." *Motilal* v *State of Madya Pradesh*[6].

For a recent case I would like to refer to the Judgment of His Lordship Sisira de Abrew, J in *Pilippu Mandige Nalaka Krishantha Kumara Thisera* v *A.G.*[7] I quote "....I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not

disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."

The learned Trial Judge has analyzed the evidence against the accused and observed that the accused had not challenged the evidence of the witnesses for the prosecution on the facts or with regard to their credibility. He had cautioned himself that the silence of the accused alone would not be sufficient to prove the case against the accused and concluded citing *Illangathilake* v *The Republic of Sri Lanka* (8) that the prosecution had established a strong case against the accused that warranted the application of the *Ellenborough* *Dictum.*

In this regard I quote Lord Ellenborough "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless, if he refused to do so where a strong *prima facie* case had been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

In *Ajith Samarakoon* v *The Republic*(9) at 209 it was held: *Per* Jayasuriya, J. "The principle laid down in *R* v *Cochrane*(10) *and R* v *Burdette*(11) at120 do not place a legal or persuasive burden on the accused to prove his innocence or to prove that he committed no offence but these two decisions on proof of a *prima facie* case and on proof of highly incriminating circumstances shift the evidential burden to the accused to explain away the highly incriminating circumstances when he had both the power and the opportunity to do so". (See also; *Inspector Arendstz* v *Wilfred Peiris* (12), *R* v *Seeder Silva*(13), *King* v *Wickramasinghe*(14), *King* v *Peiris Appuhamy*(15), King v Endoris(16).

Thus it is seen that "*Ellenborough principle*" would apply only where there is 'strong *prima facie* evidence already existing the accused and not to augment or strengthen a weak case and to convert in into a strong *prima facie* case. On a careful analysis of the evidence in the instant case I find that the evidence is sufficient to establish the following facts.

(1) The fact that witness George Perera saw the accused with a gun in his hands and the deceased fallen on the ground, a few yards away, with gun shot injuries in the compound of the witness.

(2) The fact that witness George Perera heard the report of a gun near the turn off to his house one minute immediately prior to his arrival at the scene.

(3) The fact that there was only the accused and no body else at the scene at the relevant time.

(4) The fact that the accused maintained complete silence when he was questioned by the witness George Perera in an accusing tone. (to wit. Ayse Karunaratne what have you done?)

(5) The fact that the accused walked away after his gun was snatched away from him and did not make a complaint against witness George Perera for having forcibly taken his gun.

(6) The fact that a week prior to the incident the accused had a dispute with the deceased.

(7) The fact that the Government Analyst had expressed his opinion that the empty shell that was found inside the barrel of the gun had been fired from that gun. Both these items were sent to him for examination and report. (P2 has been fired from P1).

The prosecution in the instant case has made out a strong *prima facie* case against the accused. The accused failed to explain away the highly incriminating circumstances against the accused. The evidence in this case, in my opinion is sufficient to warrant the application of the *Ellenborough Dictum.*

For the reasons I have adumbrated on the facts and the law I find no justification to interfere with the findings, conclusions or the adjudications of the learned Trial Judge. Accordingly I affirm the conviction and the sentence and dismiss this appeal

SISIRA DE ABREW, J. I agree.

Appeal dismissed.