WIJEPALA

v.

THE ATTORNEY-GENERAL

SUPREME COURT
FERNANDO, J.
WADUGODAPITIYA, J. AND
ISMAIL, J.
SC APPEAL NO. 104/99
SC (SPL) LA NO. 238/99
CA NO. 80/95
HC PANADURA NO. 534/99
3RD OCTOBER, 2000

Criminal Law - Conviction for culpable homicide not amounting to murder - Credibility of the evidence of the sole eye witness - Reasonable doubt - Failure to produce the first information - Denial of fair trial - Article 13(3) of the Constitution.

The appellant and his brother Carolis were indicted with the murder of the deceased before the High Court. Carolis was acquitted and the appellant was convicted of culpable homicide not amounting to murder. The sole eye witness was Senaratne the father of the deceased. He said that at about 7.30 p.m. on the day of the incident he set out with the deceased to visit one Thomas Singho to obtain some money to purchase fertilizer. On the way they met the accused and five others. One of them inquired whether the witness and his son had come to spy on the kassippu business the accused were carrying on. The deceased replied in the negative. The appellant had a knife and Carolis had a katty. In the course of the incident that ensued the appellant stabbed the deceased which the witness observed with the aid of a torch light. The witness escaped the scene through fear and remained in hiding until it was safe to return. He then returned to the scene and removed the deceased to the hospital with the assistance of the Gramasevaka, Jayapala. The witness said that he made a statement to the hospital police at about 9.30 p.m.

The stab injury caused the death of the deceased. The statement said to have been made by witness Senaratne at 9.30 p.m. was not produced. But the witness had in fact made a statement to the Anguruwatota Police at 11.30 p.m. in which he had stated that both accused had pointed knives. The Gramasevaka testified that he provided his car and accompanied witness Senaratne and the deceased to the hospital. However, there was no evidence that Senaratne revealed the identity of the assailant to him that night or even thereafter. Witness Thomas Singho gave evidence but did not confirm having requested Senaratne to call over

that night to obtain a loan. A witness named Siripala who claimed that he visited the scene soon after the stabbing testified that Senaratne came a few minutes later and lifted up the deceased saying "Son, who has done this to you?"

Held :

1. The evidence of the sole eye witness raised a strong doubt as to the guilt of the appellant and the court should have given the benefit of that doubt to the appellant.

Per Ismail, J.

"The evidence of Senaratne who was the sole eye witness to the incident is open to suspicion. The trial judge had failed to appreciate that his evidence in regard to the identity of the appellant has not been supported by any other item of evidence."

2. If Senaratne had made a statement at 9.30 p.m. that statement should have been brought to the notice of the court and the defence and the failure to do so impaired the right of the appellant to a fair trial which was his fundamental right under Article 13(3) of the Constitution.

Per Fernando, J.

"If indeed the 11.30 p.m. statement was the first information, then obviously Senaratne had not made an earlier statement at the police post; if so, his evidence on that point was not credible;

On the other hand, if Senaratne was truthful in claiming that he had made a statement at 9.30 p.m. then that statement would have been the first information. Whether in that statement Senaratne had claimed that he had seen the stabbing, and had identified the appellant as the assailant would have been of very great importance"

Cases referred to :

1. *Phato v. A.G.* (1994) 3 Law Reports of the Commonwealth 506
2. *R. v. Stinchombe* (1992) Law Reports of the Commonwealth (Crim) 68
3. *State v. Botha* (1994) 4 SA 799
4. *King v. Endoris* 46 NLR 498
5. *Jagathsena and Others v. G.D.D. Perera, Inspector - Criminal Investigation Department and Mrs. Bandaranaike* (1992) 1 SRI LR 371 at 380

APPEAL from the judgment of the Court of Appeal.

Ranjit Abeysuriya, P.C. with *Ms. D. Mirihana* for accused-appellant.
Dappula de Livera Senior State Counsel for Attorney - General.

Cur. adv. vult.

December 05, 2000.

FERNANDO, J.

I entirely agree with the judgment and order of Ismail, J. and wish to draw attention to a matter of fundamental importance, which is another ground for allowing this appeal.

One of the questions which arose at the trial was whether Senaratne, the father of the deceased, actually saw the deceased being stabbed. A witness named Siripala, who claimed that he came to the scene soon after the stabbing, testified that Senaratne came a few minutes later and lifted up the deceased, saying "Son, who has done this to you?". The Gramasevaka took Senaratne and his son to hospital in his car, but Senaratne did not disclose the identity of the assailant to him. In his evidence, Senaratne claimed that at 9.30 p.m. he made a statement at the police post at the hospital, and it is that statement which gives rise to a serious question. Admittedly, Senaratne made a statement to the Anguruwathota police at 11.30 p.m, and it was that statement which the prosecution sought to produce as being the first information. That was disallowed, for reasons which are not relevant to the question which now arises.

If indeed the 11.30 p.m. statement was the first information, then obviously Senaratne had *not* made an earlier statement at the police post, if so, his evidence on that point was not credible; and the finding of the Court of Appeal that he did make such a statement was erroneous.

On the other hand, if Senaratne was truthful in claiming that he had made a statement at 9.30 p.m., then that statement would have been the first information. Whether in that statement Senaratne had claimed that he had seen the

stabbing, and had identified the Appellant as the assailant, would have been of very great importance.

An examination of the High Court record reveals, however, that such a statement was neither among the documents listed in the indictment nor included in the statements furnished in terms of sections 147 and 159 of the Code of Criminal Procedure Act, No. 15 of 1979. Section 147 provides that the officer in charge of the relevant police station shall at the commencement of the non-summary inquiry furnish to the Magistrate *two* certified copies of the notes of investigation and of all statements recorded in the course of the investigation. When the Magistrate commits the accused for trial, section 159(2) requires him to send *one* of those copies to the High Court and the other to the Attorney-General. The prosecution has throughout gone on the basis that there had been no 9.30 p.m. statement.

Either Senaratne made a statement at the police post, or he did not. If he did not, his credibility was seriously in question. If, on the other hand, he *had* made that statement, then a very serious irregularity had occurred at the trial: the first information had neither been disclosed nor furnished to the accused and to the Court. Quite apart from that being a failure to make such disclosure as the statutory provisions require, the non-disclosure of that statement to the defence and to the Court resulted - for the reasons I set out below - in the impairment of the right of the Appellant to a fair trial which was his fundamental right under Article 13(3). That Article not only entitles an accused to a right to legal representation at a trial before a competent Court, but also to a fair trial, and that includes anything and everything necessary for a fair trial. That would include copies of statements made to the police by material witnesses.

In *Phato v. A.G.*[1] dealing with "the right to information . . . required for the exercise or protection of [one's] rights", read with "the right to a fair trial", the Supreme Court of South

Africa (Eastern Cape Division) held that an accused had the right to information in the police docket, namely statements made by witnesses, in order to prepare properly for trial. The fact that in South Africa there is an independent right to *information*, makes little difference, because in my view the right to a fair trial recognized by Article 13(3) necessarily includes, *inter alia*, the ancillary right to information necessary for a fair trial (subject, of course, to exceptions such as privilege).

The judgment in *Phato* referred to *R. v. Stinchcombe*[2] (a decision of the Supreme Court of Canada) which is even more in point. There, at a preliminary inquiry, a secretary employed by the accused gave evidence apparently favourable to the accused. Thereafter, the police interviewed the secretary, before the trial, and took a tape-recorded statement, and again, during the trial, got a written statement from her. The prosecution informed the defence of the *existence* but not of the *contents* of those statements. During the course of the trial the prosecutor told defence counsel that he would not call the secretary as a witness because he considered that she was not creditworthy. Because defence counsel did not know what the witness had said to the police, he was unwilling to call her for the defence. His application that the court should order that the contents of the statements be disclosed was refused. The accused was convicted. The Alberta Court of Appeal dismissed his appeal. On appeal the Supreme Court of Canada ordered a new trial at which the statements were to be produced.

In *State v. Botha*[3] Le Roux, J. analysed *Stinchcombe*, and extracted six principles, which have been summarized, thus in the judgment in *Phato*:

> The first of the six principles which Le Roux, J. extracts from *Stinchcombe* is that the information in the police docket belongs not to the police or the prosecution but to the public, not to secure a conviction but to see that justice

is done. The second principle is that there is no duty on the accused to assist the prosecutor, who as far as he is concerned is his adversary. The third is that there is a general duty on the state to disclose to the defence all information which it intends adducing and also all information which it does not intend to use and which could assist the accused in his defence. This is not an absolute duty, but one which is subject to the discretion by the state to withhold privileged information and to delay disclosure if the investigation is not yet complete. Fourthly, the exercise of the state's discretion is reviewable by the trial court on application by the defence. Fifthly, initial disclosure must take place before the accused is called upon to plead. This is a continuing duty. If further facts come to light, the state is obliged to furnish them to the defence as soon as possible. The sixth and final principle is that the statements of all witnesses must be made available to the defence, whether or not they are to be called. If there is no complete statement but only notes, the notes must be made available and, if there was an oral consultation, a summary of the evidence must be prepared and provided to the defence." (at pg 529)

These principles are, by and large, implicit in the right to a fair trial recognized by Article 13(3). Not only is no derogation permitted, but the Code of Criminal Procedure Act contains no inconsistent provision.

The failure to disclose to an accused the existence and contents of the first information - which might have cast serious doubt on the informant's credibility - may well result in a miscarriage of justice. Rule 52 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988, requires an Attorney-at-Law appearing for the prosecution to bring to the notice of the Court "any matter which if withheld may lead to a miscarriage of justice". That is a professional obligation founded on a constitutional right to a fair trial.

I hold that if Senaratne had made a statement at 9.30 p.m., that statement should have been brought to the notice of the Court and the defence, and the failure to do so was a violation of Article 13(3), by which all Courts are bound.

ISMAIL, J.

The appellant Wijeypala and his brother Carolis who were named as the 1st and 2nd accused respectively were charged on indictment with the murder of Don Sarath Srilal on 8th June 1988 at Batagoda. At the trial before the High Court Judge, Panadura, sitting without a jury, N.D. Senaratne, the father of the deceased, was the sole eyewitness who claimed to have seen the attack on his son that night shortly after 7.30 p.m. with the aid of a torchlight. The deceased had received a single penetrating 1" long stab injury on the back of the left side of the abdomen which had cut a major blood vessel resulting in death due to shock and intense haemorrhage. The trial judge accepted the evidence of N.D. Senaratne and at the conclusion of the trial on 20. 06. 95, the 1st accused - appellant was convicted of the lesser offence of culpable homicide not amounting to murder and was sentenced to a term of 10 years rigorous imprisonment. The 2nd accused was acquitted. The appeal of the 1st accused - appellant to the Court of Appeal was dismissed by its judgment, dated 16. 09. 99. This appeal is against the said judgment of the Court of Appeal affirming the conviction and sentence.

The Court of Appeal has in its judgment summarized the evidence of Senaratne as follows: "The main eyewitness who gave incriminating evidence against the accused - appellant was Nahalage Don Senaratne who was the father of the deceased. In his testimony, he asserted that on 8th June 1988 at about 7.30 p.m. that he set out with the deceased, his son intending to proceed along Pelpola Road to reach Galketiya to obtain some money from Uswatte Liyanage Thomas Singho to purchase one hundred weight of fertilizer. When they were

proceeding along this road and when they were nearing the 1st accused's house, he has stated that he had seen the 1st accused, Carolis and five others on the road and these persons were standing beside a can of Kasippu which had been placed on the road. At that stage these persons had addressed the deceased thus in Sinhala "adath tho oththu balannada awe kiya mage puthagen ahuwa" whereupon the deceased has stated "I have not come for any such purpose but I am proceeding on a journey". Thereafter the deceased proceeded passing these persons. Witness Senaratne who was following his son had heard footsteps behind them and when he flashed his torch towards his rear, he has stated that he saw Wijeypala and Carolis proceeding towards his son with knives in their hands. According to the witness, the 1st accused Wijeypala passed him and stabbed his son who was proceeding ahead of him and at that point, the deceased Srilal had shouted out "Budu ammo, I have been stabbed" and had proceeded after receiving the injury for a short distance. At that stage, Carolis the 2nd accused had shouted out - "Do not let this fellow escape too" and had approached witness Senaratne to stab him. Whereupon the witness had changed his course and fled towards the rubber estate and had proceeded towards the extremity of the rubber estate to a point 200 yards away and had concealed himself. After hiding himself for about 20-25 minutes in the thicket of the rubber estate, and on observing that there was no apprehension of danger to himself at that stage he had proceeded towards the road and thereafter approached the point at which his son lay fallen beside a pool of blood near a drain close to the Co-operative sales outlet".

The trial judge had arrived at a favourable finding in regard to the testimonial trustworthiness and credibility of the witness Senaratne. The Court of Appeal, while affirming the said judgment, has observed that it was unable to conclude that the trial judge had misdirected himself in the evaluation of the evidence of Senaratne.

Learned President's Counsel for the appellant submitted, however, that the testimony of Senaratne was completely untrustworthy and of such poor quality that a conviction against the appellant cannot possibly be sustained in law. His testimonial trustworthiness on vital aspects relating to the incident was assailed in an attempt to cast a doubt even in regard to his presence at the time the deceased had received the fatal stab injury.

Senaratne stated in his evidence that when his deceased son and himself were proceeding along the road to reach Galketiya that he saw the appellant, his brother Carolis and five others on the road beside a can of Kasippu. One of them had addressed the deceased and asked him in Sinhala "Adath tho oththu balannada awe?" to which the deceased had replied in the negative and said that he was proceeding on a journey. Nevertheless, the High Court Judge had noted down erroneously in his judgment that this question was asked by the appellant. It was submitted that this misdirection by the trial judge on an item of evidence relating to the same transaction wrongly imputing the question as having been asked by the appellant could have largely contributed to his conviction. The Court of Appeal has not dealt with this vital misdirection on a crucial factual matter considering the possibility that any one of the other six persons who posed the question could have inflicted the fatal injury.

Further, Senaratne appears to have sought to buttress his claim to having been present at the scene with his son when he was fatally injured, by stating in evidence that his son had exclaimed "Budu Thaathe mata pihiyen anna". It was established at the trial that the witness had omitted to mention this fact in his statement to the police, that he had omitted to state so at the inquest proceedings and that he had not revealed this in his evidence even at the non-summary proceedings in the Magistrate's Court. The trial judge has taken the view that this omission did not affect the credibility

of the witness as these words have been uttered after the incident. It was submitted that, on the other hand, the High Court Judge had erred in failing to consider that as these words were allegedly uttered immediately after the deceased was stabbed, this fact itself raised a grave doubt as to the actual presence of the witness at the time of the incident. The Court of Appeal having erroneously set out that the words uttered were "Budu amme, I have been stabbed", has also failed to attach any significance to this omission as raising a possible doubt as to the actual presence of Senaratne at the scene, thus affecting his trustworthiness as a witness.

Senaratne stated in his evidence that he took his injured son in a car to the hospital. The Gramasevaka Jayapala testified that he provided his car for the purpose and that he himself accompanied Senaratne and his injured son in the car to the hospital. Although the Gramasevaka testified that Senaratne was known to him, there is no evidence that Senaratne revealed the identity of the assailant to him that night or even thereafter. The failure of Senaratne to inform the Gramasevaka of the identity of the assailant therefore raises a serious doubt in regard to the presence of Senaratne at the scene of the incident and his claim to have identified the appellant as the assailant. Applying the test of spontaneity, his belatedness reduces the weight of his evidence and affects his credibility.

Senaratne made a bare unsupported assertion that he made a statement to the Horana hospital post at 9.30 p.m. that night although according to Jayapala, they reached the hospital at about 9.45 or 10 p.m. There was no evidence that the statement claimed to have been made at the hospital post was the first information to the police regarding this incident or in regard to the identity of any of the suspects. Although two police officers IP Dharmasena and PC Jayaratne gave evidence at the trial, there was no evidence elicited from either of them

that Senaratne had made a statement to the hospital post at any time that night. It was submitted therefore that the Court of Appeal erred in its finding that Senaratne had made a statement at the earliest opportunity that presented itself. The Court of Appeal appears to have formed the impression that Senaratne had been thereby prompt in revealing also the identity of the suspects.

Senaratne was cross-examined in a further attempt to assail his testimony that he was eyewitness to the incident. He testified that he was on his way to the house of one Thomas Singho together with his son that night to obtain a loan from him for the purchase of some fertilizer. It was established that he had made no reference in his complaint to the police to the fact that he was on his way to the house of Thomas Singho or that he had sought a loan from him. Thomas Singho himself gave evidence but he did not confirm either that he requested Senaratne to call over at his house or to call over that particular night to obtain the loan from him. While the Court of Appeal has erred in stating that there was such evidence from Thomas Singho, both the trial judge and the Court of Appeal did not attach any significance to this omission for the reason that Senaratne had mentioned to the police that he was proceeding to the village called Galketiya that night where it transpired that Thomas Singho resided.

Senaratne testified further that while he was proceeding with his deceased son that night, he heard footsteps behind him and that when he flashed his torch towards the rear he saw the appellant armed with a knife and his brother Carolis with a sickle like katty. However, in his statement to the police he had stated that both accused had pointed knives. The trial judge did not attach any significance to this contradiction as the position of the witness was that both accused were armed with weapons and the Court of Appeal too has found that the contradiction has been sufficiently explained and that it did not affect the credibility of the witness.

Senaratne who was the sole eyewitness has thus been cross-examined on vital aspects relating to the incident and doubts have been raised in regard to his presence at the scene. Section 134 of the Evidence Ordinance lays down a specific rule that no particular number of witnesses shall in any case be required for the proof of any fact, thus attaching more importance to the quality of evidence rather than the quantity. The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, then corroboration may be necessary. The established rule of practice in such circumstances is to look for corroboration in material particulars by reliable testimony, direct or circumstantial. In this instance the prosecution has not led any other evidence, which even barely supported Senaratne in regard to the infliction of the injury by the appellant.

The Court of Appeal was, in these circumstances, not justified in holding that the testimonial trustworthiness and credibility of the witness has been established before the trial judge. The Court of Appeal has circumscribed its jurisdiction and limited it to ascertaining if there was any vital misdirection or non-direction and if there was admissible evidence to support the finding of the trial judge. The Court of Appeal has declined to interfere with the finding of the trial judge and has stated that it is not entitled to indulge in a re-appraisal and re-trial on questions of fact, which came up before the judge in his capacity as the "trier of facts". The Court of Appeal has been guided in following such an approach by the principles set out by Soertsz, ACJ in *King v. Endoris*[4], that its function in hearing an appeal, "as laid down by the Court of Criminal Appeal Ordinance, is to examine the evidence in the case in order to satisfy ourselves with the assistance of counsel that there is evidence upon which the jury could have reached the verdict to which they came, and also, similarly, to examine

the charge of the trial judge to satisfy ourselves that there has not been any substantial misdirection or non-direction". These guidelines are appropriate for an appellate court considering a charge to a jury. However, in a trial before a judge sitting alone, while his decision on questions of fact based on the demeanour and credibility of witnesses carry great weight, an appellate court has a duty to test the evidence by a careful and close scrutiny and if it entertains a strong doubt as to the guilt of the accused, the Court must give the benefit of that doubt to him. The Court of Appeal has erred in failing to subject the evidence of Senaratne to a close scrutiny, but had it done so, it would certainly have entertained a doubt as to the guilt of the appellant on such weak and unsupported testimony. As Ranasinghe, J. as he then was, after a review of the earlier authorities, in *Jagathsena and others v. G.D.D. Perera, Inspector, Criminal Investigation Department and Mrs. Bandaranaike*[5], said ". . . although the findings of a Magistrate on questions of fact are entitled to great weight, yet, it is a duty of the Appellate Court to test, both intrinsically and extrinsically the evidence led at the trial: that, if after a close and careful examination of such evidence, the Appellate Court entertains a strong doubt as to the guilt of the accused, the Appellate Court must give the accused the benefit of such doubt".

The evidence of Senaratne who was the sole eyewitness to the incident is open to suspicion. The trial judge has failed to appreciate that his evidence in regard to the identity of the appellant has not been supported by any other item of evidence. There is therefore a strong doubt as to the guilt of the appellant and, as such, the benefit of the doubt should have been given to the appellant. The Court of Appeal has erred in affirming the conviction without adequately testing the evidence of Senaratne. For these reasons, I allow the appeal and set aside the judgment of the Court of Appeal. The conviction and sentence imposed on the appellant by the High Court are set aside and the appellant is acquitted.

I agree with the reasons set out by Fernando, J. in his judgment allowing the appeal on an additional ground.

WADUGODAPITIYA, J.

I agree with the reasons set out by Fernando, J. and Ismail, J. and allow the appeal.

Appeal allowed.