PREMARATNE
v
REPUBLIC OF SRI LANKA

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 15/2000
HC GALLE 1709
JANUARY 24, 28, 29, 2008

Murder – failure to consider principles governing cases of circumstantial evidence – Fatal? Should the trial Judge state the principles governing circumstantial evidence in the judgment? Dock statement – importance? Common intention? Criminal Procedure Code – S217, S229, S245.

The 1st and 2nd accused were indicted for committing the murder of Y and C – and were convicted for both offences and sentenced to death.

In appeal it was contended that

(1) The trial Judge treated the case as a case based on direct eye witness account where in fact this was a case based on circumstantial evidence.

(2) That the trial Judge has not laid down all the principles of law in his judgment.
(3) That, the rejection of the dock statement was bad in law.
(4) That the accused did not share the common murderous intention.

Held

(1) The learned trial Judge had observed that the evidence of the witness in this case can be categorized as eye witness account and not based on circumstantial evidence, but the learned trial Judge had also observed that the prosecution had led circumstantial evidence. The above observation had not caused prejudice to the accused.

Per Sisira de Abrew. J.
"In a trial by a judge without a jury, the judge cannot be expected to lay down all the principles of law in his judgment but this does not mean that the trial judge can ignore the legal principles relevant. If the appellate Court is of the opinion that the case had been proved beyond reasonable doubt the appellate Court will not set aside the conviction on the ground that the judge failed to lay down the principles of law in the judgment".

(2) In a trial by a judge of the High Court without a jury it is significant that there are no such provisions similar to S217. There is no requirement similar to S229 that he should lay down the law which he is to be guided. The reason being that the law takes far granted that a Judge with a trained legal mind is well possessed of the principles of law he would apply.
(3) A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence without compartmentalizing and ask himself whether as a prudent man in the circumstances of the particular case, he believes the accused guilty or not guilty.
(4) In considering all the matters before Court, it is seen that, the both accused had committed the murder of the two deceased persons – there was common murderous intention.

APPEAL from the judgment of the High Court of Galle.

Cases referred to:

(1) *Dayananda Lokugalappathy* v *State* – 2003 3 Sri LR 362 at 392
(2) *James Silva* v *The Republic of Sri Lanka* 1980 2 Sri LR 167 at 176.

Dr. Ranjith Fernando for appellant.
Kapila Widyaratne DSC for the Republic of Sri Lanka.

February 29, 2008
SISIRA DE ABREW, J.

A.J.M. Rathnasiri Jayasundara alias Bandara, the 1st accused and K.M. Premarathne, the 2nd accused appellant were indicted in the High Court of Badulla for committing the murder of Yasarathne and the murder of Chandrasena who was a grade six student. The 1st accused was tried in absentia while the 2nd accused was defended by a lawyer. After trial the learned trial judge convicted both accused for both offences and sentenced to death. This appeal, by the 2nd accused appellant, is against the said conviction and the said sentence. The facts of the case may be briefly summarized as follows.

The unfortunate incident in this case took place on 1st of December 1988 which was a curfew day declared by the Janatha Vimukthi Peramuna (JVP). Around 6.30 p.m. on the fateful day both the 1st accused and 2nd accused appellant came to the house of Kirihathana and consumed one bottle of toddy which was with Kirihathana. The 2nd accused appellant, at this time apparently addressing Kirihathana told that he kept a gun on the pile of timber stacked in one of the rooms of Kirihathana's house. After they left, Kirihathana heard somebody shouting in the following language; "Ammo Ammo I am finished." When Kirihathana went to see what it was, the 1st accused, armed with a gun, threatened him in the following language: "If you tell anybody your entire family would be killed." At this time the 2nd accused appellant was seen in the company of the 1st accused. Then both accused chased after Kirihathana preventing him from proceeding further in the direction that he heard the cries of distress. As a result of this behaviour of both accused, Kirihathana who could not see what was happening or what has happened went and locked himself up inside his house. Following morning when he came with the police he saw two dead bodies about 75 yards away from the place where the two accused threatened him in the previous evening. Kirihathana had never seen the deceased persons prior to this incident.

On hearing a wailing cry of a human being around 6.30 p.m. on the fateful day Raman Wijendran (hereinafter referred to as Raman) stepped out of his house to make inquiries about the said

human voice i.e. "do not assault me." He then, saw two male persons lying fallen at the edge of the Village Council Road (VC Road) and the two accused standing near the fallen men. The distance between the two accused was 3 to 4 feet. When he was inquiringly looking what was happening, the 1st accused, who was armed with a gun, using filthy language, questioned as to why he came and threatened to kill him and to set fire to his house. Following morning Raman saw tow dead bodies at the afore-mentioned place i.e. the edge of the VC Road.

Around 7.00 to 7.30 p.m. on the fateful day Jamis, who was living about 1/2 mile away from the place where the two dead bodies were found in the following morning, opened the door as somebody was knocking on the door. Both accused then entered the house. When the 1st accused requested his gun, he gave an iron pipe. Following morning he saw two dead bodies about 1/2 mile away from his house.

On behalf of the 2nd accused appellant following grounds were urged as militating against the maintenance of the conviction.

1. Learned trial Judge erred by considering the matter as a case based on direct eye witnesses account when in fact it was a case based on circumstantial evidence.
2. There was no judicial evaluation of the circumstantial evidence .
3. Learned trial Judge erred by failing to consider the effect of the dock statement.
4. The 2nd accused appellant did not share common murderous intention with the 1st accused and as such the conviction of the 2nd accused appellant cannot be permitted to stand.

I shall now advert to these grounds. Learned Counsel for the appellant drew our attention to page 107 of the brief and contended that the learned trial judge had treated the case as a case based on eye witnesses account when in fact this was a case based on circumstantial evidence. The learned trial judge at page 107 of the brief observed that the evidence of the witnesses in this case can be categorized as eye witnesses' account and not as circumstantial

evidence. But the learned trial judge, at the same page, observed that the prosecution had led circumstantial evidence. He further observed that the witnesses in this case were almost witnesses. Raman stated, in his evidence, that he could see the scene of murder when he opened his door. He opened the door since he heard somebody shouting 'do not assault me.' When he stepped out he saw two people lying fallen and the two accused standing near the fallen people. Thus it appears if Raman stepped out of his house one or two seconds before he heard the said cries of distress he would have witnessed the deceased persons being assaulted. In view of these matters, the aforementioned observations of the learned trial judge have not caused prejudice to the accused. Therefore, we are unable to agree with the first ground urged by the learned Counsel.

I shall now advert to the second ground urged by the learned Counsel for the 2nd accused appellant. Learned Counsel contended that the conviction of the 2nd accused appellant could not be sustained as the learned trial judge had failed to consider the principles governing cases of circumstantial evidence. It is true that the learned trial judge failed to observe the principles governing cases of circumstantial evidence. Should the trial judge always state the said principles in his judgment? In considering this question, I must not forget the fact this was a trial by a judge and not by a jury. In a trial by a jury, at the commencement of the trial, the judge has to inform the members of the jury of their duties. At that stage the judge also directs them briefly on the presumption of innocence, the burden of proof and other principles of law as may be relevant to the case. Vide section 217 of the Criminal Procedure Code (CPC). This is because jurors are ordinary laymen. It is noteworthy to mention here that Attorney-at-law cannot serve as jurors. Vide Section 245 of the CPC. Thus the law presumes that jurors do not possess knowledge in law. This appears to be the reason that the judge is expected to direct the jurors on the relevant principles of law in both his opening address and in summing up. The judge who has a trained legal mind cannot be equated to a juror. In this connection I would like to quote a passage from the judgment of Justice Kulathilake in the case of *Dayananda Lokugalappathy* v *The State*[1] at 392: "In a trial by a Judge of the

High Court without a jury it is significant that there are no such provisions similar to section 217 of the Act, for example to set forth the basic principles of criminal law, i.e. the presumption of innocence, the burden of proof etc. We do not see any requirement similar to section 229 that he should lay down the law which he is to be guided. The reason being that the law takes for granted that a Judge with a trained legal mind is well possessed of the principles of law, he would apply." Considering all these matters I hold the view that in a trial by a judge without a jury, judge cannot be expected to lay down all the principles of law in his judgment. But this does not mean that the trial judge can ignore the legal principles relevant to the case in deciding the issue before him. If the appellate court is of the opinion that the case had been proved beyond reasonable doubt, the appellate court will not set aside the conviction on the ground that the judge had failed to lay down the principles of law in his judgment. If a conviction is set aside on the said ground such a course would lead to deterioration of administration of justice. Considering all these matters, I reject the 2nd ground urged by the learned Counsel as there is no merit in the said ground.

Learned Counsel for the 2nd accused appellant contended before us that the learned trial judge erred by failing to consider the effect of the dock statement. Contention of the learned Counsel was that the rejection of the dock statement by the learned trial judge was wrong. He further contended that the learned trial judge had compared the dock statement with the prosecution evidence. In order to find out whether the accused is guilty of the offence or not, can the trial Judge consider the dock statement in isolation? In a straight forward case of murder by shooting where the case is based on several items of evidence such as the evidence of eye witnesses; the evidence of the police officer to whom the gun was handed over by the accused; the evidence of the Government Analyst who confirms that the empty cartridge found at the scene of offence had been discharged from the gun handed over by the accused to the Police and corroborates the eye witnesses regarding the distance between the accused and the deceased at the time of firing; and the medical evidence which confirms the deceased died of gun shot injuries, can the trial Judge ignore the prosecution evidence and acquit the accused when he denies the

incident from the dock? In such a case can the trial judge consider the dock statement in isolation, accept the same and reject the prosecution case? If Court adopts such a course, will it not lead to mockery of justice instead of administration of justice? In my view, in considering the question whether the dock statement should be accepted or rejected the proper course is to consider the both prosecution and defence evidence. This view is supported by the opinion expressed by Justice Rodrigo in the case of *James Silva* v *The Republic of Sri Lanka*(2) at 176 wherein His Lordship remarked thus: "A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty." Considering all these matters, I reject the contention of the learned Counsel as there is no merit in it.

Learned Counsel further contended that the 2nd accused appellant did not share common murderous intention with the 1st accused and therefore the conviction of the 2nd accused appellant could not be sustained. I now turn to this contention. Soon before the crises of distress heard by Kirihathana, both accused came to Kirihathana's house and the 2nd accused appellant told that he kept the gun on the pile of timber. Soon after the said cries of distress Kirihathana saw both accused together and the 1st accused was armed with a gun. There was no any other person present at this time. Both accused chased away Kirihathana preventing him from proceeding further in the direction that he heard the cries of distress. Following morning Kirihathana saw two dead bodies 75 yards away from the place where the two accused were standing in the previous evening. When Raman opened his door on hearing a wailing cry of a human being i.e. "do not assault me" he saw both accused standing there and two persons lying fallen near them. Raman was chased away by the two accused when he was looking at the place where two men were lying fallen. Following morning he saw two dead bodies at this place. Around 7.00 to 7.30 p.m. on the fateful day both accused came to Jamis's house and demanded his gun. Considering all these matters I hold

the view that both accused had committed the murder of two deceased persons. I am therefore unable to agree with the contention of the learned Counsel for the 2nd accused appellant that the 2nd accused appellant did not share common murderous 190
intention. When the evidence led at the trial is considered I hold the view that the prosecution had proved the case beyond reasonable doubt. For the above reasons I affirm the conviction and the sentence of the 2nd accused appellant and dismiss this appeal.

SILVA, J. – I agree.

Appeal dismissed.