DHARMASIRI VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
BASNAYAKE, J.
CA 17/04
HC HAMBANTOTA 44/99
JUNE 17, 2008

Penal Code - Section 296 - Murder - Identification of accused beyond reasonable doubt? Information Book - Is it for the Judge to peruse same? In what circumstances? - Credibility of a witness - Matter for trial Judge - Belated witness - Could the Court act on a belated witness?

Three accused were indicted for murder. After trial the 1st and 2nd accused were convicted of the offence of murder. The 3rd was acquitted.

In appeal it was contended that the identity of the accused-appellant was not proved beyond reasonable doubt and it was further contended that witness M was a unreliable witness, and invited Court to compare his evidence with his statement made to the Police and to reject his evidence on the basis of certain omissions which had not been brought to the notice of Court.

Held

(1) The Appellate Court has no authority to peruse statement of witness recorded by the Police in the course of their investigation (statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise Section 122 (3) of the Criminal Procedure Code which enables such statements to be sent for to aid a Court is applicable only to Court of Inquiry or trial.

Per Sisira de Abrew, J.

"Court of Appeal has power to peruse the Information Book only when contradiction or omission was brought to the notice of the trial Court, and this power too should be exercised in order to

check the correctness of the omission of contradiction marked at the trial and not to come to a conclusion with regard to his credibility upon the contents of this statement made to the Police."

(2) Credibility of a witness is mainly a matter for the trial Judge, Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the credibility of a witness unless such findings of trial Judge are manifestly wrong.

(3) Because the witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of the belated witness.

APPEAL from a judgment of the High Court of Hambantota.

Cases referred to :-

1. *Keerthi Bandara vs. Attorney General* – 2000 – 2 Sri LA 249 at 258
2. *Muniratne and others vs. The State 2001* – 2 Sri LR 382
3. *Punchi Mahathaya vs. The State* 76 NLR 567 (SC)
4. *Fradd vs. Brown & Company Ltd* – 20 NLR 282
5. *Alwis vs. Piyasena Fernando* – 1993 – 1 Sri LR 119
6. *Sumarasena vs. A. G.* - 1999 - 3 SLR 137

Ranjith Abeysuriya PC with Thanuja Rodrigo for accused-appellant.
Gihan Kularatne SSC for respondent.

June 17th 2008

SISIRA DE ABREW J.

Three accused were indicted for the murder of a woman named Arabuda Gamage Nandawathie and after trial the 3rd accused was acquitted of the charge but the 1st and 2nd accused were convicted of the offence of murder. The 2nd accused died in prison. The present appeal is in respect of the appeal filed by the 1st accused.

The facts of this case may be briefly summarized as follows:-

On the day of the incident around 9.00 p.m. when the deceased, her son Maduranga, her mother Kusumawathe and another relation were at home, the 1st accused, 2nd accused and another person entered the house of the deceased and the 2nd accused fired a shot at the deceased and thereafter the 1st accused fired another shot at the deceased. This incident was witnessed by Kusumawathe and Maduranga.

Learned President's Counsel on behalf of the 1st accused-appellant submitted that the identity of the accused-appellant has not been proved beyond reasonable doubt. Learned President's Counsel submitted that Maduranga was an unreliable witness. He invites this court to compare Maduranga's evidence with his statement made to the police and to reject Maduranga's evidence on the basis of certain omissions which had not been brought to the notice of the trial Court. In support of his argument he cites the case of *Keerthi Bandara vs. the Attorney General* [1] at 258 His Lordship Justice Jayasuriya observed thus:

"We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence Counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is vital omission or not and his discretion on the law in this respect is binding on the members of the jury. Thus

when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether illegal and inadmissible opinion expressed orally by police officer (who are not experts but lay witnesses) in the witness box on this point".

It is therefore seen from the said judgment that the trial Court is given power to read the contents of the statements recorded in the Information Book only when a contradiction or omission is brought to the notice of Court. If an omission or contradiction was marked at the trial then, the Court of Appeal, according to the said judgment, will have the same power to read the contents of the statements recorded in the Police Information Book. This power has been given to the trial Court, according to the said judgment, in order to test the correctness of the contradiction or omission that was brought to the notice of court. Therefore if no contradiction or no omission was marked, according to the said judgment, Court of Appeal will not be entitled to peruse the Information Book.

Learned President's Counsel in the course of his submission also brought to the notice of court the judgment of *Muniratne and others vs. The State* [(2)]. He also brought to the notice of Court page 395 and contended that the Court of Appeal has the right to examine the police information book.

When we consider the argument of the learned President's Counsel, it is also relevant to cite the judgment in the case of *Punchimahaththaya vs. The State*[3], His Lordship Justice Fernando (Samarawickrama, J. and Siva Supramaniam J. agreeing but Sirimane, J. dissenting) held thus:

> "That the Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statement of witnesses recorded by the police in the course of their investigation (i.e. statement in the information book) other than those properly admitted in evidence by way of contradiction or otherwise. Section 122 (3) Criminal Procedure Code which enables such statements to be sent for to aid a Court is applicable only to Court of Inquiry or trial."

This judgment was not brought to the notice of their Lordships who decided the above two cases. We consider *Punchimahaththaya's case (Supra)* to be binding on us.

Considering these judicial decisions, I hold that the Court of Appeal has power to peruse the information book only when contradiction or omission was brought to the trial Court, and this power too should be exercised in order to check the correctness of the omission or contradiction marked at the trial and not to come to a conclusion with regard to his credibility upon the contents of his statement made to the police.

Learned President's Counsel invites this court to compare the evidence of witness Maduranga with his statement made to the police and decide his credibility. In short he invites this Court to come to an adverse finding against the witness by adopting the said procedure. Learned President's

counsel contends that there are omissions between his evidence and his statement made to the police, but he too admits that these omissions were not brought to the notice of the trial court. In my view it is unfair for this Court to adopt the above procedure and come to an adverse finding against the credibility of the witness since the witness had not been given an opportunity to explain the purported omissions.

Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness. This view is strengthened by the following judicial decisions.

In *Fraad vs. Brown & Company Limited*[4] Privy Counsel stated thus:

> "It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because the Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over rule a Judge of first instance."

In *Alwis vs. Piyasena Fernando*[5]. His Lordship Justice G.P.S. de Silva C.J. stated thus:

> "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

Considering all these matters I hold that the Court of Appeal should not decide the credibility of a witness on the basis of omission or contradictions not marked at the trial. Thus, the invitation of the learned President's Counsel to peruse the Police Information Book to test the credibility of the witness Maduranga is untenable. For the above reasons, I reject the contention of the learned President's Counsel.

Learned President's Counsel contends that the trial Judge should have rejected Maduranga's evidence on the ground of delay. Maduranga made a statement to the police three weeks after the incident. He therefore contends Maduranga is not a reliable witness. Should the evidence of the witness be rejected on the ground of delay?

It this connection I would like to consider the judgment in the case *Sumanasena vs. Attorney General*[6], wherein His Lordship Justice Jayasuriya stated thus:

> "just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the belated witness."

On a consideration of the principles laid down in the above judicial decision, I hold that the evidence of the witness should not be rejected on the ground of delay <u>itself</u> if the delay has been reasonably explained.

I must consider in the present case whether the delay has been reasonably explained. Kusumawathie, at page 51 of the brief, says that after both accused shot the deceased, the 1st accused aimed the gun at Kusumawathie and threatened to kill her if she would divulge the incident to the police.

At page 58 of the brief Kusumawathie says after the incident Maduranga kept his ears closed until 8.00 a.m. on the following day. He was apparently traumatized for witnessing the tragic death of his mother. His father was killed in 1989. Maduranga was at that time a nine year old boy. Considering all these matters, I hold the delay in making a statement to the police by Maduranga has been well explained. I therefore hold that the.Maduranga's evidence cannot be rejected on the ground of delay. For the above reasons I reject the argument of the learned President's Counsel. I have gone through the evidence of the Maduranga and I see no reasons to reject Maduranga's evidence. In my view, the conviction of the 1st accused-appellant can be affirmed only on the evidence of Maduranga.

Learned President's Counsel contends that Kusumawatie is an unreliable witness. He contends that the identification parade, in this case, was held 410 days after the incident.

The 1st accused-appellant according to Kusumawathie was living in her neighbourhood and as such she knew the accused-appellant prior to the incident. Therefore, in my view, there was no necessity to hold an identification parade in this case. Learned President's Counsel contends that witness Kusumawathie failed to mention the 1st accused-appellant's name in the statement. She also failed to mention that second shot being fired at the deceased. In these circumstances he contends Kusumawathie to be an unreliable witness. I shall now consider why she failed to mention the 1st accused-appellant's name in the statement. As I pointed out earlier, at page 51 of the brief, Kusumawathie says that 1st accused aimed his gun and told her not to divulge the incident to the police. At page 55 of the brief, again

Kusumawathie says that the 1st accused-appellant aimed the gun at her and threatened to kill her if she would divulge the incident to the police. The deceased's husband had earlier been killed on 2nd of July 1989. Vide page 42 of the brief. After she made a statement to the police she left the village. Vide page 81 of the brief. Considering all these matters, it appears that Kusumawathie entertained fear of death instilled by the 1st accused-appellant. Considering all these matters, failure to mention the 1st accused's name in her statement is, in my view, justified. Learned President's Counsel contends that Kusumawathie did not tell the names of the assailants to Ranjanie who went to the police station in that night. He therefore contends that Kusumawathie had not seen the incident. At page 76 Kusumawathie said Ranjani was a school going child at that time. At page 53 of the brief, she says that the person who went to the police station with Ranjani was killed prior to the commencement of the trial. Thus, failure on the part of Kusumawathie to mention assailant's name to Ranjani who was a school going child at that time is understandable. She failed to mention the second shot being fired. This failure will not rander her evidence unreliable in view of the fact that her evidence was corroborated by Maduranga.

Learned President's Counsel drawing our attention to page 148 of the brief (the doctor's evidence) contends that only one shot was fired. But when we consider the evidence in page 141 and 149, it is very clear that the doctor categorically stated that two shots had been fired at the deceased. When I consider the evidence of the doctor and the post mortem report it is clear that two shots had been fired. I therefore reject the said contention of the learned President's Counsel. Learned President's Counsel also contends that learned

Trial Judge, at page 225 of the brief, came to the conclusion that the accused-appellant was absconding in this case. This appears to be a mistake. The incident in this case took place on 31st March 1993. The 1st accused-appellant surrendered to the police on 1st of August 1994. Vide page 154 of the brief. Conviction of the 1st accused-appellant was not based on this point. It was based on the evidence led at the trial. Considering all these matters the mistake made by the learned trial Judge has not caused any prejudice to the 1st accused-appellant. Learned President's Counsel also brought to the notice of Court the observation made by the learned trial Judge at page 215 of the judgment. Learned trial Judge came to the conclusion that Nuegegawa Lokumahaththaya (නුගේගාව ලොකු මහත්තයා) is the 1st accused in this case. This appears to be a mistake Nugegawa Lokumahaththaya (නුගේගාව ලොකු මහත්තයා) is the 2nd accused in this case. This mistake is apparent from the observation again made by the learned trial Judge at the same page. Learned trial at page 215 (last two lines) observed that Nugegawa Lokumahaththaya (නුගේගාව ලොකු මහත්තයා) is the 2nd accused in this case. I therefore hold that this mistake has not caused any prejudice to the 1st accused-appellant. Considering all these matters I am unable to agree with the submissions made by the learned President's Counsel and I proceed to reject the said submissions.

For the reasons stated above, I find that the trial Court, after due consideration of the evidence led at the trial, has rightly found the 1st accused-appellant guilty of the charge of murder and hence I dismiss the appeal as devoid of merits.

ERIC BASNAYAKE, J. - I agree.

Appeal dismissed.