

SISIRATHUNGE
v.
ATTORNEY-GENERAL

COURT OF APPEAL.

GUNASEKERA, J. AND YAPA, J.

C.A. APPLICATION 190/93

H.C. GAMPAHA 16/90

MARCH 9, 1995

Evidence Ordinance – S(27) of the Evidence Ordinance – Murder – Evaluation of Evidence of an adverse witness – Misdirection.

The accused was indicted for having Committed Murder. The prosecution led the evidence of 5 witnesses, the accused-appellant made a statement from the dock denying the charge and stated that he was at Polonnaruwa at the relevant time. At the trial the wife of the deceased was treated as an adverse witness. The High Court convicted the accused for Murder and imposed a sentence of death.

Held:

(1) If the Evidence of a Witness on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point, his Evidence is worthless and cannot properly be taken into consideration at all for the purpose of deciding that issue.

(2) Evidence relating to the discovery of the murder weapon in consequence of a statement made under S27 has been wrongly admitted.

(3) The trial Judge had not given adequate directions regarding the Circumstantial Evidence led.

Case referred to:

1. *Queen v. Hethuhamy* 57 NLR 255.

AN APPEAL from the Provincial High Court of Gampaha.

Dr. Ranjith Fernando with Miss Yasanthi Kumari and Miss S. Seneviratne for accused-appellant.

D. P. Kumarasinghe D.S.G. with Buwaneka Aluvihara S.C. for the Attorney-General.

March 09 1995.

D. P. S. GUNAKEKERA, J.

In this case the accused-appellant Munasinghe Arachchige Sisirathunga was indicted with having committed murder by causing the death of Pediric Athukoralalage Jayasiri on 3rd March 1985. After trial before a Judge and jury he was convicted of the offence by an unanimous verdict of the jury and sentenced to death. The prosecution relied on the evidence of Premawathi, the widow of the deceased, William Perera, a friend of the deceased, Kamalasiri, a neighbour, Sub Inspector of Police Samaraweera and the medical evidence of Dr. Asoka Premaratne. At the end of the prosecution case the accused-appellant made a statement from the dock denying the charge and stated that he was at Polonnaruwa at the relevant time.

According to the prosecution case the deceased had been living with his wife Premawathi in his house at Mudungoda in a colony called Ratupaswela. At about 7.00 or 7.15 p.m. in the evening on 3rd March 1985, the deceased had been in his house along with his wife Premawathi when William Perera had come there with some medication for the deceased who had an eye ailment. When they were talking with a bottle lamp burning in the verandah, the accused had come into the house armed with a sword and threatened them not to shout. Apprehending fear that some hurt would be caused, William Perera had held the sword and dragged the accused out side and had run away from the scene. Premawathi had run into the house of their neighbour Kamalasiri through the rear door chased by the accused-appellant. According to Kamalasiri's evidence he had noticed Premawathie running into his house followed by the accused-appellant. Premawathi had shouted to Kamalasiri to save her. On hearing that Kamalsiri had got out of the house and spoken to the accused for 10 minutes and had persuaded him to leave. The body of the deceased had been found about 30 feet away from his house with cut injuries. According to the medical evidence there had been 4 cut injuries on the body of the deceased ranging from 4" to 5" on the head and neck. The cause of death according to the medical evidence was cardio respiratory failure due to shock and haemorrhage following cut injuries of the neck. It is to be noted that

at the trial Premawathi was treated as an adverse witness by the prosecution and had been cross-examined on the basis of the evidence she had given at the non-summary inquiry.

At the hearing of this appeal Dr. Ranjith Fernando relied on three grounds of appeal. **Firstly** that the Learned Trial Judge had erred in law by misdirecting the jury in regard to the manner in which they should evaluate the evidence of the adverse witness. **Secondly** that the Learned Trial Judge had erred in law by failing to direct the jury on the infirmities affecting the evidence led under section 27 of the Evidence Ordinance and **thirdly** that the Learned Trial Judge had erred in law by relating the items of circumstantial evidence to the facts and evidence to the facts and evidence in the case. In support of the 1st submission Learned Counsel relied on the case of *Queen v. Hethuhamy*⁽¹⁾ which held that " If the evidence of a witness on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point his evidence is worthless and cannot properly be taken into consideration at all for the purpose of deciding that issue. It is illogical to conclude in addition (1) that because his evidence cannot be acted upon the opposite of what he said represented the truth and (2) that as the opposite of what he said at the trial happens to be consistent with the version given by another witness the veracity of that other witness is thereby confirmed."

It appears from the charge that despite the fact that Premawathie was treated as a hostile witness by the prosecution and cross-examined, that the Learned Trial Judge had directed the jury that they were free to accept certain portions of Premawathi's evidence and find corroboration for this from the evidence of other prosecution witnesses. Having considered this misdirection in the charge we agree with the 1st submission of Learned Counsel.

In support of the 2nd submission Learned Counsel contended that the evidence relating to the discovery of a sword in consequence of a statement made under section 27 has been wrongly admitted. In this regard learned Counsel submitted that there were following infirmities:

- (a) Although the sword was found that it was not marked in evidence.

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- (b) the sword that is alleged to have been found was not shown to the witness William Perera and Kamalsiri.
- (c) that it was not shown to the medical officer who testified at the trial.
- (d) that the wording of the portion that was marked by the prosecution to wit "කඩුව සහවිජු තැන පෙන්නිය හැක" was gravely prejudicial to the accused-appellant as it was obnoxious to section 25 of the Evidence Ordinance.
- (e) that in any event having regard to the evidence led in the case that it appears that this sword was not discovered by the police officer but had been picked up by the accused and given to him. On this state of evidence it could not have been admitted under section 27 of the Evidence Ordinance.
- (f) In any event the police officer who was shown the sword in Court at the trial stated that what was shown was not the sword that had been recovered.

We have considered the second submission in relation to the ground urged by Learned Counsel and are in agreement with him. In regard to the 3rd submission it was Learned Counsel's contention that once Premawathie's evidence was rejected as being unacceptable the prosecution was left with the evidence of William Perera and Kamalasiri. Neither of these witnesses claimed to have seen the act that resulted in the injuries being caused to the deceased Jayasiri. That being so the prosecution was left with only certain items of circumstantial evidence, namely the evidence of William Perera that the accused came into the house of the deceased, he was armed with a sword and the evidence of Kamalsiri that the accused was seen with a sword chasing behind Premawathi. Taking these two items of evidence and the fact there is nothing to indicate that the accused-appellant had any enmity towards the deceased or that he uttered any threat to cause injury to him, one cannot come to the inevitable conclusion that the injuries on the deceased were caused by the accused. This being the state of

evidence the Learned trial Judge had given inadequate directions at page 180 in his charge on circumstantial evidence.

Mr. D. P. Kumarasinghe DSG who appeared for the Attorney-General conceded that evidence regarding the recovery of the sword had been wrongly admitted and the fact that Learned trial Judge had erred in directing the jury to consider the evidence of Premawathi notwithstanding the fact that she had been treated as a hostile witness. However Learned DSG contended that a re-trial should be ordered having regard to the items of circumstantial evidence in the evidence of William Perera and Kamalasiri.

We have carefully considered the evidence of William Perera and Kamalasiri and are of the view that these items of circumstantial evidence arising in their evidence is insufficient to order a re-trial. For the reasons stated above we uphold all three submissions urged on behalf of the accused-appellant by Learned Counsel and set aside the conviction for murder and the sentence of death imposed on the accused appellant and acquit him.

HECTOR YAPA, J. – I agree.

Accused acquitted.