IN THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 228/2014
SC (SPL) LA Application No. 78/2014
CA Appeal No. CA 205/2008
High Court Colombo No. 9698/98

Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

1. Iddagodage Sarath Kumara,
2. Walpita Pathiranage Prasanna Perera alias Alli

Accused

AND BETWEEN

Iddagodage Sarath Kumara

1st Accused - Appellant

-Vs-

The Hon. Attorney General,
Attorney General's Department
Colombo 2

Respondent

AND NOW BETWEEN

Iddagodage Sarath Kumara

Presently at

Welikada Prison

Base Line Road,

Borella.

1st Accused - Appellant - Appellant

-Vs-

Hon. Attorney General,

Attorney General's Department

Colombo 2

Complainant – Respondent - Respondent

Before: **P. Padman Surasena J**

Mahinda Samayawardhena J

Arjuna Obeyesekere J

Counsel:

Amila Palliyage with Sandeepani Wijesooriya and Anthony Gunawardane for the 1st Accused-Appellant-Appellant

Haripriya Jayasundara PC, ASG for Hon. Attorney General

Argued on: 11.02.2022

Decided on: 08.02.2023

P Padman Surasena J

Two accused namely, Iddagodage Sarath Kumara who is the 1st Accused - Appellant - Appellant (hereinafter sometimes referred to as the 1st Accused Appellant), and Walpita Pathiranage Prasanna Perera alias Alli (hereinafter sometimes referred to as the 2nd Accused), stood indicted in the High Court of Colombo. In the sole charge in the said indictment, the Attorney General had alleged that those two accused together with Patapilige Athula Devendra who was dead at the time of filing the indictment (he will hereinafter be sometimes referred to as the Dead Accused), had committed the murder of one Managamage Anura Wickramanayake, an offence punishable under section 296 read with section 32 of the Penal Code.

Both the said Accused, upon the charge in the indictment being read over and explained to them, had pleaded not guilty to the said charge. Thereafter, the learned High Court Judge having conducted the trial against them, by the judgment dated 11.01.2008, has convicted the 1st Accused Appellant for the charge in the indictment and acquitted the 2nd Accused. The learned High Court Judge had accordingly imposed death sentence on the 1st Accused Appellant as required under section 296 of the Penal Code.

Being aggrieved by this conviction, the 1st Accused Appellant had appealed to the Court of Appeal. The Court of Appeal after the argument of the case, by its judgment dated 04th April 2014, has affirmed the conviction and the sentence imposed on the 1st Accused Appellant by the High Court and dismissed the said appeal.

The incident leading to the death of the deceased Managamage Anura Wickramanayake had occurred while he was returning from Galle Face where he had spent the previous evening with a group which had included some of the relatives and their family members. At the trial the prosecution had led the evidence of seven witnesses namely, the wife of the deceased Ranwilage Ajantha Malkanthi, Ramani Sandhya Kumari, the daughter of the deceased Managamage Sudheera Himashi, Assistant Judicial Medical Officer-Colombo, Assistant Superintendent of Police Ratnayake Mudiyanselage Ajantha Lal Samarakoon, Inspector of Police Saman Pushpa Kumara Ariyadasa and the Interpreter Mudaliyar of Colombo High Court. Out of the above witnesses, three witnesses namely, the wife of the deceased Ranwilage Ajantha Malkanthi, the daughter of the deceased Managamage Sudheera Himashi and the lady by the name Ramani Sandhya Kumari had travelled along with the deceased at the time he faced the incident relevant to the offence in the indictment.

Having being called by the prosecution to give evidence first at the commencement of the trial, the wife of the deceased Ranwilage Ajantha Malkanthi had testified that she saw the Dead Accused being armed with a Kris knife. She had seen the 1st Accused - Appellant and the Dead Accused going towards her husband (the deceased). After a while, upon hearing Ramani Sandhya Kumari shouting "අනුර අයියා අනින්න එපා" (Anura, don't stab) and "Anura Anura", she had proceeded towards the commotion and noticed her husband fallen on the ground. She also had testified that she saw the Dead Accused near her fallen husband. She had then proceeded to dispatch the deceased to the hospital.

The prosecution then called Ramani Sandhya Kumari to give evidence. She had testified that the 1st Accused - Appellant and the dead Accused were armed with a *Manna knife* and a Kris knife respectively. According to this witness's testimony, while she (along with the deceased)

was looking for her children (who appeared to have gone missing at that time), the Dead Accused had started chasing the deceased. While being chased by the Dead Accused, the deceased had fallen on the ground. It was then that the Dead Accused had stabbed the deceased with the Kris knife several times. At this point she had seen the deceased profusely bleeding. She had further testified that after continuous struggle for life, the head of the deceased had bent down.

The prosecution then called the daughter of the deceased Managamage Sudheera Himashi to give evidence. She had witnessed the murder of her father (the deceased). She had seen the 1st Accused - Appellant initially attacking the deceased by dealing a blow on the head of the deceased with a knife. According to her testimony, following the attack by the 1st Accused – Appellant, the deceased had started running whereupon the Dead Accused had started chasing him. It was thereafter that the deceased had fallen on the ground. The witness along with the other daughter of the deceased, at this point had witnessed their father (the deceased) being continuously stabbed by the Dead Accused several times.

Police in the course of the investigations had recovered a knife from the scene and a *Manna knife* on the section 27 statement made by the Dead Accused (Athula Devendra). The Judicial Medical Officer had observed two types of injuries on the deceased which he had concluded are compatible being caused with a Kris knife and a *Manna knife*. At the trial the prosecution showed him and produced the two weapons (a Kris knife and a *Manna knife*), which in his opinion are capable of causing the injuries observed by him. Medical evidence was not challenged by the defence at the trial. Thus, the evidence of the two eye witnesses can be taken as having being corroborated by the medical evidence.

During the trial in the High Court of Colombo, among the other witnesses to the incident the daughter of the deceased Managamage Sudheera Himashi had testified that she saw the 1st Accused Appellant dealing a blow on the head of the deceased with a *'Manna Knife'* prior to the deceased being stabbed by the dead accused. In regard to the above testimony, the defence, during cross examination had relied on the fact that the said witness (Managamage Sudheera Himashi Nimashi) had not stated during the non-Summary inquiry the fact that she saw the 1st Accused Appellant dealing a blow on the head of the deceased with a *'Manna Knife'*. The defence had brought this to the attention of the learned High Court Judge pointing it out as a vital omission on the part of the said witness at the non-Summary inquiry.

Although the said omission was not proved by the defence, having considered that aspect, the learned High Court Judge had held: that it is not a material omission that goes to the root

of the case; given the age of the witness at the time she gave evidence and the shock that she was in, it was natural for her to have failed to refer to the weapon that was used by the 1st Accused Appellant at the Non-Summary Inquiry. In considering this aspect of the case, the learned trial Judge has applied the principles laid down in an Indian judgment, where their Lordships had held that no immediate relation would want to falsely implicate an innocent person and let go of the real criminal. Having considered the evidence of the said witness (Himashi) at length, the learned trial Judge has categorically stated that a single omission will not discredit the witness. He has further stated that as there was no previous enmity between the witness and the accused persons, the witness did not have any reason to falsely implicate the 1st Accused Appellant in this case. (The witness was only 10 years old at the time of the incident). Having considered that aspect, the learned High Court Judge had decided against the 1st Accused Appellant.

Being aggrieved by the judgment of the High Court, the 1st Accused Appellant had appealed to the Court of Appeal complaining *inter alia* on the failure on the part of the learned High Court Judge to consider in his favour, the vital omission relied upon by the defence on the evidence of the prosecution eyewitness in relation to her evidence at the non- summary inquiry.[1]

At the time of hearing the appeal in the Court of Appeal, the learned counsel for the 1st Accused Appellant had drawn the attention of their Lordships of the Court of Appeal to the said omission which was raised as a ground of appeal. It is in that context that their Lordships of the Court of Appeal perused the Non-Summary proceedings and the Information Book Extracts.

The learned Judges of the Court of Appeal upon perusal of the Police statements and the evidence in the non- summary inquiry, had dismissed the appeal of the 1st Accused Appellant by their judgement dated 04.04.2014 holding that such omission in the non- summary inquiry has not prejudiced the substantial rights of the 1st Accused Appellant.

Being aggrieved by the decision of the Court of Appeal, the 1st Accused Appellant by Petition dated 12.05.2014 sought Special Leave to Appeal from this Court. Accordingly, this Court by order dated 25.11.2014 granted Special Leave to Appeal on the following questions of law.[2]

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[1] Vide page 5 of the Petition of the Supreme Court dated 12.05.2014.
[2] Paragraphs 12 (v) and (vi) of the petition dated 12th May 2014 (reproduced in verbatim).

1. *Have their Lordships the judges of the Court of Appeal erred in law by perusing the Information book extracts, non-summary proceedings?*

2. *Is there a prejudice caused to the petitioner by perusing the Information book extracts, non-summary proceedings?*

The learned counsel for the 1st Accused-Appellant though did not seek to challenge the powers of Court to peruse the information book extracts in the exercise of its overall control of the proceedings and to use it as an aid at the trial, he complained before this Court that their Lordships of the Court of Appeal had wrongfully perused the information book extracts and arrived at a conclusion that there is no such omission as alleged by the defence. It was his submission that this had caused him an immense prejudice as the said conclusion has been contradictory to that of the trial judge. He took offence with the following paragraphs in the Court of Appeal judgment.

Paragraph 3, Page 8, CA Judgement dated 4th February 2014

> *I have perused the entirety of the Information Book extracts, non-summary and trial proceedings, the judgement of the learned trial Judge and finally the extensive written submissions and case law authorities submitted by both parties at the hearing of the appeal. It is now left to consider the several grounds of appeal urged on behalf of the appellant.*

Paragraph 2, Page 9, CA Judgement dated 4th February 2014

> *Further, in reviewing the veracity of a witness, the Appellate Court may employ certain rules and guidelines to elicit the truth as the Appellate Judges do not have the benefit of observing and questioning the witness first-hand. One such rule is to delve in to the police statement of the witness, not to use it as substantive evidence but to bolster a proper inference as to the credit-worthiness of a witness, as enunciated by F.N.D. Jayasuriya J in Keerthi Bandara vs Attorney General (2002) (2 SLR 245 at page 261). In the instant case a perusal of the police statement of witness Himashi clearly indicates that she had explicitly mentioned witnessing the appellant Sarath attacking her father with a weapon like a manna knife. A perusal of her evidence at the non-summary inquiry also indicate that she had testified that the appellant had attacked her father on the head while seated before the boutique which is consistent with her evidence at the trial, even though she had omitted to mention the use of a weapon like a manna knife. Evidence of Sandya Kumari (Page*

100 of the Record) corroborates the fact that the appellant was armed with a manna knife.

Paragraph 3, Page 10, CA Judgement dated 4th February 2014

In view of the above, the failure of the learned trial Judge to act on the purported omission in the evidence of Himashi at the non-summary inquiry has not prejudiced the substantial rights of the appellant. Accordingly, the main ground of appeal should fail.

I would commence the discourse relevant to the questions of law by first adverting to sub sections 3 and 4 of section 110 of the Code of Criminal Procedure Act No. 15 of 1979 which is as follows.

Section 110 (3) and (4) of the Code of Criminal Procedure Act.

(1) …..

(2) ……

(3) A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court;

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code.

(4) Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply:

> Provided that where a preliminary inquiry under Chapter XV is being held in respect of any offence, such statements of witnesses as have up to then been recorded shall, on the application of the accused, be made available to him for his perusal in open court during inquiry.

Thus, it can be seen from the above section that our law has not completely shut out any use of the statements recorded in a case under inquiry or trial. Moreover, it is mandatory under section 162 (2) of the Code of Criminal Procedure Act No. 15 of 1979 to attach to every indictment, the following documents:

> *(a) Where there was a preliminary inquiry under Chapter XV, a certified copy of the record of inquiry and of the documents and of the inquest proceedings if there had been an inquest;*
>
> *(b) Where there was no preliminary inquiry under Chapter XV, copies of statements to the police, if any, of the accused and the witnesses listed in the indictment;*

According to section 159 (2) of the Code of Criminal Procedure Act when the Magistrate commits the accused for trial he shall, forthwith transmit to the High Court-

> *i. the record of the inquiry together with all documents and things produced in evidence; and*
> *ii. a copy certified under his hand of such record and of such documents; and*
> *iii. one of the certified copies of the notes of investigation and of statements furnished by the officer in charge of the police station;*

Why have both the above sections insisted for those material to be transmitted to the trial Court? If it is completely prohibited for the trial judge even to touch them, they could have been completely kept away from the trial Judge. Our law does not envisage such a prohibition. This however should not be understood as giving a freehand for the trial Judge even to use such statements as evidence. The extent to which such statements can be used by trial judges was considered by His Lordship Ninian Jayasuriya J in Keerthi Bandara Vs. Attorney General.[3] Having considered the relevant provisions of law Jayasuriya J laid down the following principle:

> *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*

[3] 2002 (2) Sri. L. R. 245 at page 261.

> *or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction 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 the 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 the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point* [4].

Justice Ninian Jayasuriya while laying down the perusal of the statement recorded in the Information Book to interpret and determine the existence or non-existence of any omission, to be a personal duty of the trial Judge, also held that the Court of Appeal hearing the appeal of such case too has an undoubted right to do the same. It could be gathered by the following paragraph of the same judgment.

> *If the trial Judge has an undoubted right to do so, certainly the Judges in the Court of Appeal hearing an appeal would also have the undoubted right to peruse such statements for such limited purpose in the interest of justice and in determining whether there is an omission on a vital point or not. The Judges would in this exercise only be concerned with the issue of the credibility of the witness and they would not in that exercise be using the contents of the statement as substantive evidence to arrive at an adjudication on the main issues in the case. That is the significant distinction between the process indulged in by the High Court Judge in Sheela Sinharage's case and the issue that arises upon this appeal relating exclusively to the province of credibility* [5].

Although the learned counsel for the 1st Accused-Appellant had relied on Sheela Sinharage's case, as in Keerthi Bandara's case that case has no application to the instant case as the issues in this case too only revolve around some steps taken by the Judges of the Court of Appeal to peruse the information book extracts to consider the arguments advanced by the defence in relation to an omission which the defence had argued was vital for the credibility of the witness.

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[4] 2002 (2) Sri. L. R. 245 at page 258, Paragraph 2.
[5] 2002 (2) Sri. L. R. 245 at page 261, Paragraph 2.

The above principle laid down by the Court of Appeal in Keerthi Bandara's case has thereafter been consistently followed not only by the Court of Appeal but also by this Court in numerous judgments. It would suffice to cite two of such cases to wit, Kahandagamage Dharmasiri Vs The Republic of Sri Lanka SC. Appeal No.04/2009, decided on 03.02.2012 and Rathnasingham Janushan & Another Vs The Officer in Charge Headquarters Police Station Jaffna & Others SC (Spl) Appeal No. 07/2018, decided on 04.10.2019.

I observe that the learned Judge of the Court of Appeal has not only referred to Keerthi Bandara's case but also referred to the need to guard against using the contents of such statement recorded in the Information Book as evidence in the case before them. I am satisfied that their Lordships of the Court of Appeal had taken adequate measures to stay within their boundaries when examining the statements recorded in the Information Book and the Non-Summary inquiry record.

Thus, I am of the view that the contents of the above paragraphs of the Court of Appeal judgment which is impugned by the learned counsel for the 1st Accused-Appellant are paragraphs merely setting out how their Lordships of the Court of Appeal had exercised their undoubted right and the fervent duty to personally peruse the previous versions of the statements recorded at various stages of the case to interpret and determine the existence or non-existence of the omission alleged by the 1st Accused-Appellant. Their Lordships in the Court of Appeal just like the trial judges are under a duty to examine such previous statements when such complaint is made before them.

However, the sentence *"I have perused the entirety of the Information Book extracts, non-summary and trial proceedings, the judgement of the learned trial Judge and finally the extensive written submissions and case law authorities submitted by both parties at the hearing of the appeal"* in Paragraph 3 of Page 8 of the Court of Appeal judgment when taken in isolation, at once gives the reader, the impression that the learned judges of the Court of Appeal had considered the material mentioned therein in deciding the issues they had decided.

Lord Chief Justice Hewart's well-known dictum "Justice should not only be done, but should manifestly and undoubtedly be seen to be done" uttered nearly 100 years ago, still rings true and is widely accepted and followed particularly throughout the common law countries. The importance of adhering to this principle is underscored by the most fundamental requirement of maintaining the impartiality of the adjudicator in any process of administration of justice.

Thus, I cannot accept that the statements such as the kind quoted above, used by the learned Judge of the Court of Appeal are in the best interest in complying with the above dictum.

The learned counsel for the 1st Accused-Appellant also complained against the content in the middle paragraph of page 14 of the Court of Appeal Judgment. For easy reference the said judgment is reproduced below:

> *A minute perusal of the Information Book Extracts would have thrown further light of previous enmity and evidence of motive between the deceased and the perpetrators, which the prosecuting State Counsel had failed to grasp and lead at the trial, which would have perhaps answered the pertinent question why the assailants attacked the deceased.*

At the outset, it would be useful to mention here that the focus of the complaint made by the learned counsel for the 1st Accused-Appellant against the above paragraph was on the prejudice such perusal of such Information Book Extracts would have caused in their Lordships' minds. Admittedly, the prosecution had not adduced any evidence as to the presence of any motive on the part of the accused to commit this crime. However, the contents of the above paragraph shows that the learned Judge of the Court of Appeal had proceeded to form the view that there was evidence of motive which the prosecution should have led against the accused. It is clearly a conclusion arrived at using Information Book Extracts without any evidence being adduced in that regard. However, I have to note that the learned Judge of the Court of Appeal had stated that merely to highlight a lapse on the part of the prosecutor and not to conclude on that statement that there was a motive established by the prosecution. Be that as it may, in my view, the Court of Appeal should have been more careful when engaging in such exercises.

The learned Additional Solicitor General in the best interests / true spirit of the Attorney General's Department has conceded that the Court of Appeal should not have stated what it had stated in the above paragraph of their Lordships' judgment. However, she proceeded to argue that no prejudice has been caused to the 1st Accused Appellant in view of the presence of overwhelming evidence in the instant case against him. Let me now turn to that argument by reproducing below section 436 of the Code of Criminal Procedure Act No. 15 of 1979.

Section 436 of the Code of Criminal Procedure Act.

> (Finding or sentence when reversibly by reason of error or omission in charge or other proceedings.)

Subject to the provisions hereinbefore contained any judgement passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice.

As has already been stated before, the three witnesses namely, the wife of the deceased Ranwilage Ajantha Malkanthi, the daughter of the deceased Managamage Sudheera Himashi and the lady by the name Ramani Sandhya Kumari had been travelling along with the deceased when the unfortunate incident had happened. Their evidence clearly establishes guilt of the 1st Accused Appellant in the murder of the deceased Managamage Anura Wickramanayake. This evidence stands completely corroborated by the other witnesses called by the prosecution including the Assistant Judicial Medical Officer-Colombo. Thus, in any case, there is overwhelming evidence to affirm the conviction of the 1st Accused Appellant on the charge in the indictment. While the statement referred to above made by the Court of Appeal is undesirable, I am of the view that no prejudice has been caused to the rights of the 1st Accused Appellant.

I answer the questions of law in respect of which this Court has granted Special Leave to Appeal as follows.

1. Their Lordships the judges of the Court of Appeal have not erred in law by perusing the Information book extracts, non-summary proceedings.

2. No prejudice has been caused to the 1st Accused Appellant by mere reason that the Court of Appeal had perused the Information book extracts, non-summary proceedings.

I affirm the judgment dated 11.01.2008, pronounced by the learned High Court Judge which has convicted the 1st Accused Appellant for the charge in the indictment and also affirm the judgment dated 04th April 2014, pronounced by the Court of Appeal in so far as it has affirmed

the conviction and the sentence imposed on the 1st Accused Appellant by the High Court. I proceed to dismiss the instant appeal subject to the above observation.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena J

I agree,

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree,

JUDGE OF THE SUPREME COURT