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

In the matter of an Application for Special Leave to Appeal from the Judgment of the Court of Appeal in Case No: C.A 17/2004 dated 17.06.2008, under and in terms of Article 128 of the Constitution

SC. Appeal No.04/2009

SC.SPL.LA No.165/2008

C.A. Application No.17/2004

HC Hambantota Case No.44/99

Kahandagamage Dharmasiri
Bogahahena
Godawela, Nihiluwa

(Presently at the Welikada Prison)

1st Accused-Appellant-Petitioner

Vs.

The Republic of Sri Lanka

Respondent-Respondent

BEFORE : **TILAKAWARDANE J,**
MARSOOF J, &
IMAM J.

COUNSEL : **Saliya Pieris with Upul Kumarapperuma and Suranga Munasinghe for Accused-Appellant**
G. Kulatunga, SSC for Respondent-Respondent

ARGUED ON : 19th July, 2011

DECIDED ON : 03rd February 2012

Ms Shiranee Tilakawardane J.

The Appellant has sought Leave to Appeal from the decision of the Court of Appeal dated 17th June 2008 whereby the Court of Appeal upheld the Judgment of the High Court of Hambantota. This Court granted Special Leave to Appeal on 28th January 2009 on the following two questions of law.

i. Have the Courts failed to consider the serious and material omissions in the main witness evidence?
ii. Have the Lordships of the Court of Appeal failed to scrutinize the information book of the police officers to determine whether in fact valid omissions subsist?

Parties filed their written submissions in terms of the Supreme Court Rules. Parties were represented by Counsel and their submissions were heard. The Court has considered the written submissions, oral submissions and the pleadings that have been tendered to this Court.

The death of Arabada Gamage Nandawathie occurred due to an incident that took place on 31st March 1993, at her residence in the district of Hambantota. At the trial the Prosecution (hereinafter referred to as the Respondent) led the evidence of two eye witnesses namely Kusumawathie, mother of the deceased and Maduranga the son of deceased. The Accused – Appellant- Petitioner (hereinafter referred to as the Appellant) along with two others stood trial without a jury in the High Court of Hambantota.

The Appellant (the 1st accused in the case) and the 2nd accused were found guilty and sentenced to death whilst the 3rd accused was acquitted on 29th June 2004. The 2nd accused died pending the hearing of the appeal in the Court of Appeal.

The incident that led to the murder of Arabada Gamage Nandawathie is not disputed. The District Medical officer evidence concludes that the deceased was shot twice. She was first shot in the chest and subsequently shot in the head with both having been in close proximity.

The first question of law is based on Appellant's assertion that the evidence of the main witnesses has serious and material omissions insomuch as the first eyewitness, Kusumawathie had revealed the names of the 2nd and 3rd accused but failed to mention the Appellant in her statement to the police whilst the second eyewitness, Maduranga's statement was recorded three weeks after the incident.

As it stands, the major question of law is pertinent to the failure or tardiness of the 1st witness, in plausibly establishing the identity of the Appellant, as there was no reference whatsoever provided in the contemporaneous first statement made by her. This was never marked or produced as an omission at the trial.

This Court accepts that the statement of the 1st witness did not reflect the identity of the 1st appellant, though he was known to her and the statement of the 2nd witness was recorded belatedly. When considering the belated evidence or a belated statement, one cannot neglect the basis for such delay which transpired in the evidence. The Courts must look at the broader spectrum and must take into account the holistic picture of the occurrences that the family had been affected by, not forgetting the civil unrest and political tension in the country during 1980's to early1990's during which the JVP (Janatha Vimukthi Peramuna, a Marxist Sinhalese Political Party) insurrection took place accounting to a large number of killings[Gunaratna, R. (1990), *'Sri Lanka, a lost revolution?: The inside story of the JVP',* Institute of Fundamental Studies, Sri Lanka].The famous Embilipitiya abduction and murder case, Dayananda Lokugalappaththi and eight others v. The

state [2003] 3 Sri.L.R362, illustrates the dark and bleak time period that brought consternation and struck an almost unshakable fear into the hearts of the people of Sri Lanka.

It was in the backdrop of such times, that the husband of the deceased was murdered in 1989 and four years later, in this particular incident, the deceased was murdered at her residence, in front of her mother and her 9 year old son, who were the main eyewitnesses at the trial in the High Court.

The first witness, the mother of the deceased, conceded at the trial that she had not disclosed the identity of the appellant in her first statement as the Appellant had instilled the fear of death into her, when, after shooting the deceased, he had aimed the same gun at her and threatened them with death if she informed or divulged his identity or his complicity to the police. The witness avers that she was so terrified, that even though she knew the identity of this assailant, she did not disclose his identity even to her youngest daughter Ranjinie, who was dispatched to the police station to report the murder.

Understanding the state of mind of this first witness is not complex. As testified by her, she had to bear this secret without fail in order to safeguard the life of the only family that she had been left, her daughter Ranjinie and her 9 year old grandson. Under the circumstances she perceived them to be potential victims and in imminent danger, being driven and motivated by pure human instincts to protect herself, her grandson and daughter.

The potency of their bald fear was apparent when the family abandoned their family properties, and fled the village, due to the palpable fear that had been instilled in them through this incident. Given the circumstances any reasonable person would have acted in a similar manner as this witness, and it is reasonably conceivable that the deep fear and the sheer trauma and shock of the event would justifiably motivate her not to disclose the name of the appellant at the first given opportunity, when she recorded her first statement to the police. At the time the Appellant was

not in custody.

It is important that in evaluating the extent of the fear instilled and apprehended in the 1st witness, the cumulative effect of all the attenuate circumstances described by her be considered, realistically.The finding can only be concluded as a plausible and justifiable fear, which reasonably precluded her from mentioning the identity of the Appellant, who had made a directed and concerted threat to her life in the immediate aftermath of the incident. Although she knew the identity of the appellant, she would not compromise the safety of her family and could not dispel her own fear.

Therefore the cause of the belatedness in testifying to the Appellant's identity, which according to her, was the palpable and petrifying fear instilled into the witnesses by the 1st Appellant, when he threatened her with a gun to her head, directing her not to disclose his identity is accepted as a plausible and a reasonable ground for the initial non-disclosure by this witness. It is significant that this witness, in her first statement, named the others who accompanied the Appellant.

The witness revealed in her testimony at the trial that the Appellant had fired the second shot at the deceased and proceeded to unfold a clear and consistent narrative of the events. No material contradictions were marked and an evaluation of the events proves beyond a reasonable doubt the presence of the eye witness, at the incident.

In the case of Surendra Pal &Ors v State of U.P & ANR, Judgment held on 16thSeptemeber 2010, Supreme Court of India states the following:

> *"Merely because eye-witnesses did not give out the names of the accused persons while describing the cause of death in the inquest report did not render the presence of the eye-witnesses on the spot doubtful."*

In addition to the reasons given above no material omissions or contradictions had been marked by the counsel for the defense at the trial, and the testimony of the 1st and 2nd witnesses, corroborated each other on all material aspects of the case. This evidence was also corroborated by the independent, scientific forensic evidence and the Post Mortem Report.

Therefore, this Court holds that the mere belatedness and failure of the 1st witness to name the appellant in the first statement, under the given circumstances does not render the witness's evidence unreliable or lacking in testimonial creditworthiness; or the presence at the incident of the 1st and 2ndeyewitness doubtful.

This court also concurs with the opinion of the Honourable Judge of the High Court and Their Lordships of the Court of Appeal that the evidence of the witnesses corroborates each other on all material aspects disclosing the consistency, reliability and credibility of their testimony.

Therefore, the opinion of this Court is that the delay of disclosing the Appellant is understandable under the circumstances and agrees with the conclusions on this matter which is contained in the judgments of the High Court and Court of Appeal.

The Appellant stressed on the fact that even the 2nd eye witness (the son of the deceased) Maduranga's statement was belated and was as a consequence a fabrication and concoction. Whilst it is desirable for prompt statements to be made after an incident, the relevance is that this would pre-empt or forestall the likelihood of the opportunity for fabrication of the facts. It was held in the case of Sumanasena v. Attorney- General [1999] 3 Sri.L.R 137 at 140;

> "*just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a 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 a belated witness".

This court must also in considering the testimony of the 2nd eyewitness determine two critical tests before considering belated evidence as reliable evidence: firstly, reasons for delay? And secondly, are those reasons justifiable?

The first witness's evidence states that Maduranga was nine years old when he witnessed his mother being murdered and after the incident he kept his ears closed until 8 a.m the following day. Maduranga claims in his evidence that he lost his speech for 5-10 minutes soon after the incident due to shock. The Court must necessarily take into account the level of trauma a child of such tender age would have undergone. To witness his mother, the only living parent being shot, would have without doubt petrified the child and in all probability caused irreversible trauma. The 1st witness alleged in her evidence that soon after the funeral of his father, her grandson Maduranga was sent to Colombo to live with his uncle Chandradasa, where he received psychiatric treatment and commenced his studies at a new school. There is no evidence to evince that there was any contact between this witness and any other members of his immediate family, either directly or indirectly.

Maduranga stated in his evidence that he did not discuss the incident with anyone until 3 weeks later; he first told his uncle Chandradasa what he witnessed, after which he made a formal statement to the police. This primary fact, has not been assailed or disbelieved, or challenged by any evidence. There was no evidence that this witness was tutored or coached or that he gave falsified evidence or that his evidence was a product of a rehearsed recital.

At the trial ,the learned High Court Judge, after hearing the evidence and reasons for belated statement by the first witness and Maduranga, had determined that delay did not assail the credibility of the witness. This Court holds that the reasons given to explain the delay in this witness making a statement, on the facts elicited at the trial, is reasonably plausible, conceivable and justifiable.

Furthermore, this court unlike the trial courts does not have the benefit of observing the demeanor and the deportment of a witness in order to determine the credibility of the witness. As Justice Collin Thome stated in the case of Jagathsena v Bandaranayake [1984] 2 Sri L.R.397-

> *"Deportment and demeanor as the all important factor when it relates to the arriving at of findings in regard to credibility even in a case where there were contradictions inter se in the evidence of the prosecution witnesses".*

In this context, the learned trial High Court Judge had the privilege to witness, assess and understand the level of credibility that the 2nd witnesses possessed. As a result, the findings of the learned trial judge cannot easily be dismissed, especially in the absence of any plausible evidence that could be adverted to by the counsel for the Appellant. This court therefore finds the testimonial creditworthiness of this witness too has not been assailed.

As the second question of law the Appellant has averred that the Court of Appeal had failed to peruse and read the contents of the statements recorded in the information book of the police officers. More specifically, the Appellant aver that 1) the omissions in the High Court evidence that was first brought to light in appeal were vital and serious omissions in the interest of justice 2) the Court of Appeal was in error to hold that the omissions need to be 'marked' at trial and 3) therefore the Court of Appeal erred in failing to use its wider power to peruse the information books as a result erred in affirming the Appellants conviction.

To authenticate this position, the Appellant refer this Court to the two following cases: Keerthi Bandara V. The Attorney General [2000] 2 Sri.L.R 245 and Banda and Others V The Attorney General [1999] 3 Sri. L.R, 168-174

In Keerthi Bandara's case the Court of Appeal held that;

"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 defense counsel spots 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 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 defense 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" (at page 258).

Indeed it is pertinent to note that in the present case the defense counsel did not spotlight a vital omission, and no omission was marked. Under the circumstances there was no burden for the trial judge to peruse the statements recorded in the information book.

In Banda and Others case, His Lordship Justice Jayasuriya states the following;

"[t]he right to mark omissions and proof of omissions to the right of the judge to use the Information Book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. Thus, the rule in regard to consistency and inconsistency is not strictly applicable to omissions... [t]he judge who

has the use of the Information book, ought to use this book to elicit any material and prove any flagrant omissions between the testimony of the witness at the trial and his police statement in the discharge of his judicial duty and function" (at pages 172-173).

To demonstrate the Court of Appeals error further, the Appellant directed this Court to Article 139 (1) & (2) of the Constitution:

"the Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence according to law or it may give directions to such court of first instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit".
"The Court of Appeal may further receive and admit new evidence additional to or supplementary of the evidence already taken in the Court of First Instance touching the matter at issue in any original case, suit, prosecution or action as the justice of the case may require".

While this Court considers the Appellants suggestions and of his Lordships reasoned judgments, this Court logically will have to explore the answers to the following questions: 1) did the Appellant bring to the trial Judges notice the material in contradiction? Or 2) did the trial Judge discover discrepancies in the evidence that requires him to view the Information Book? 3) Did the trial Judge execute his duties adequately and provide a judgment in the interest of justice?4) Did the Court of Appeal error in failing to scrutinize the Information Book to determine omissions?

The Appellant could not bring to the notice of the trial Judge any material in contradictions in the evidence which assailed, in any manner, the credibility of the witnesses. Nevertheless, in the event the Appellant fails to mark out discrepancies and if the trial Judge perceives contradiction in evidence that is likely to hinder the interest of justice he may inspect the Information Books.

This Court accepts the presumption made by the Court of Appeal that the learned trial Judge certainly had the benefit of determining the witnesses' credibility both under examination-in-chief and under cross-examination and has arrived at a reasonable finding that in the interest of justice, the Courts had overlooked the inconsistencies in the witness statements and evidence at the trial due to various reasonable circumstances in the aforementioned.

In Fattal v Wallbrook Trustee (Jersey) Ltd, CA [2008] EWCA Civ 427 the Court of Appeal of England and Wales observed the following:

> *"An appellate court should not interfere with case Management decisions by the Judge who had applied the correct principles and who had taken in to account matters which should be taken into account and left out of account matters which are irrelevant".*

Accordingly, the opinion of this Court is that the Court of Appeal was in the right not to interfere with the trial Judges case decisions as the learned trial Judge had applied correct principles. As a result there was no necessity for the Court of Appeal to *"reverse, correct or modify any order, judgment, decree or sentence according to law" or "receive and admit new evidence additional to or supplementary of the evidence already taken in the Court of First Instance touching the matter at issue in any original case, suit, prosecution or action as the justice of the case may require"* as directed in Article 139 (1) & (2) of the Constitution.

"A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties."[Ambika Prasad and Another v State (Delhi Administration) 2000 SCC Crl.522]

For the aforesaid reasons, the Appeal is refused and the Judgment of the Court of Appeal is affirmed. No Costs.

JUDGE OF THE SUPREME COURT

MARSOOF J.

I agree.

JUDGE OF THE SUPREME COURT

IMAM J.

I agree.

JUDGE OF THE SUPREME COURT