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

In the matter of an application for Special Leave to appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent-Petitioner

SC Appeal 14/2016

SC (SPL) LA 232/14
Court of Appeal No. 38/06

Vs,

Bimbirigodage Sujith Lal,
Yahaladuwa Road,
Baddegama.

Accused-Appellant

And Now Between

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent- Appellant

Vs,

Bimbirigodage Sujith Lal,
Yahaladuwa Road,
Baddegama.

Accused-Appellant-Respondent

Before: Eva Wanasundera PC J

B.P. Aluwihare PC J

Vijith K. Malalgoda PC J

Counsel: Chethiya Gunasekara Deputy Solicitor General for Complainant-Respondent-Appellant,

R. Arsecularatne PC, with Namal Karunaratne, Udara Muhamdiramge, Ganeshan Premakumar and Thilina Punchihewa for Accused-Appellant-Respondent,

Argued on: 21.07.2017

Decided on: **20.02.2018**

Vijith K. Malalgoda PC J

The accused-appellant-Respondent (here-in-after referred to as the Respondent) namely Bimbirigodage Sujith Lal was indicted before the High Court of Galle for the murder of one Udumalagala Gamage Punyawathy on or a about 20th July 1997 at Baddegama, an offence punishable under section 296 of the Penal Code.

The trial against the Respondent was commenced before High Court Judge of Galle without a jury and at the conclusion of the said trial, the Learned High Court Judge had convicted the Respondent, and sentenced to death.

Being dissatisfied with the said conviction and sentence, the Respondent had preferred an appeal to the Court of Appeal. When the said appeal was taken up for argument before the Court of Appeal, it had transpired that the Learned trial Judge had failed to follow the provisions of section 195 (ee) of the Code of Criminal Procedure Act.

As revealed before us, both the learned President's Counsel who represented the Respondent and the learned Deputy Solicitor General who represented the Attorney General had accepted the position that the journal entry and proceedings dated 04.11.2004 demonstrate, the compliance with subsection 195 (ee) of the Code of Criminal Procedure Act.

In this regard this court is mindful of the decision by this court in the case of ***Attorney General V. Segulebbe and Another 2008 1 Sri LR 225***, where the Supreme Court considered the Provisions in section 195 (ee) of the Code of Criminal Procedure Act as follows;

> "This amendment necessitated an introduction of a further amendment i.e. section 195 (ee) imposing a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused can elects to be tried by a jury. This is in recognition of the basic right of an accused to be tried by his peers. It is left to the discretion of the accused to decide as to who should try him.
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> As pointed out earlier for nearly two hundred long years the jury system has been in existence in Sri Lanka with whatever the faults it had. I do not make an endeavour to discuss the merits and the demerits of the jury system. As long as it is in the statute book that the accused can elect to be tried by a jury, the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non observance of this procedure is an illegality and not a mere irregularity and proceeded to quash the conviction and sentence imposed on the accused."

However in the said case the parties agreed before the Supreme Court for a retrial before the High Court on the same Indictment.

After both parties accepted the above position, the learned Deputy Solicitor General moved court to set aside the conviction and to send the case back to the High Court of Galle for a retrial on the same indictment. At that stage, the learned President's Counsel who represented the accused-appellant in the Court of Appeal, without agreeing for the said request by the state, took a further step by addressing court and pursing his case on the footing that, justice to his client would be denied due to a long laps of time, if a fresh trial is to be held and moved that the accused-appellant should acquitted and the appeal be allowed accordingly.

As revealed before us, both parties contested their respective cases before the Court of Appeal and the Court of Appeal by its decision dated 20.10.2014 allowed the appeal by acquitting the Respondent. Being dissatisfied with the said acquittal, the Attorney General preferred the present appeal before the Supreme Court.

When the matter was supported for special leave, this court had decided to grant special leave on the question of law referred to in paragraph 18 (c) of the Petition, which reads as follows;

18 (c) "Did the Court of Appeal err in law by failing to order a retrial in this case"

As observed by this court when this matter was taken up before the Court of Appeal, the court had very correctly observed that, the material available before court clearly demonstrate that there is non-compliance with the subsection 195 (ee) of the Code of Criminal Procedure Act, the court has no option but to set aside the conviction and the sentence and send the case back to the High Court for due compliance with the said section and to commence a fresh trail (trial do novo), but finally concluded after giving consideration to a series of cases decided both by the Court of Appeal and the Supreme Court, to acquit the accused-appellant (Respondent) instead of sending the case back to the High Court for due compliance and to commence a fresh trial.

In the said decision the Court of Appeal after considering the decisions both by the Court of Appeal and Supreme Court which I will also consider at a later stage of this judgment, had finally concluded as follows;

> "A long delay to finally conclude the matter is a relevant factor to be taken in to consideration. The conviction and sentence may be so deserving. But court cannot forget the fact that when a fresh trial is ordered by the Appellate Court the accused is tried for the second time, and the process has to be undertaken all over again. The second trial if at all would be after a long lapse of time of over 17 years and after the accused by law was incarcerated and spent 8 years in prison custody. One cannot forget the fact that all this happened due to no fault of the accused party but for a procedural irregularity in the Administration of Justice itself. Good part of the blame goes to the system and not the accused who is called upon to be tried one more.
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> A fair trial is a worldwide recognized concept to an accused and could never be denied, in our country.
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> In this instance long delay would result in serious consequences and disorganization to the accused as well as the prosecution party and witnesses. My view as above would apply to the case in hand, and I should not be understood or misunderstood to state that this is the rule. This is a decision to be taken, having regard to all the circumstances and

consequences, and such decision can be taken only on a case by case basis. In all the above facts and circumstances we set aside the conviction and sentence, and acquit the accused-appellant."

In the said decision the Court of Appeal when decided to acquit the Respondent after setting aside the conviction and sentence, was of the view that, the long delay in the instant case would result in serious consequences and disorganization to the accused as well as the prosecution party and the witnesses but, emphasized that, it should not be understood or misunderstood to state that this is the rule and the decision to be taken having regard to all the circumstances and consequences, and such decision can be taken only on a case by case basis.

However during the argument before us, the learned Deputy Solicitor General who represented the Attorney General took up the position that, when deciding to acquit the Respondent, the Court of Appeal failed to consider the circumstances in favour of the ordering of a retrial but had only considered the circumstance in favour of acquitting the Respondent even though it was observed by Court of Appeal that the said decision to be taken having regard to all the circumstances on a case basis.

The learned Deputy Solicitor General whilst agreeing with the observation in the Court of Appeal Judgment that " it should not be understood or misunderstood to state that this is the rule and the decision to be taken having regard to all the circumstances and consequence and such decision can be taken only on a case by case basis", further submitted that the circumstances in the case in hand are as such, it warrants a decision by the court to order a retrial insted of acquitting the Respondent.

In the above context, it is important to consider the evidence led at the said trial, in order to consider whether the circumstances warrants an acquittal as against ordering a retrial as required by the provisions of the Code of Criminal Procedure Act No. 15 of 1979.

As revealed from the evidence led before the trial court, the deceased was at home with her eldest daughter who was 16 years and was studying for her G.C.E. Ordinary Level Examination. The deceased's husband had gone on an office trip with their other two children and the deceased's father had come to stay with them in the absence of the husband from home. Around 7.00 p.m. on the day in question, whilst the daughter of the deceased was studying, she had heard the front

door being opened. The lights in the house were on and somebody had opened her room door and when she looked, she had seen the Respondent peeping into her room. When she called out to her mother, she had seen the accused walking towards the kitchen.

In few seconds she heard the Respondent talking to her mother. According to the evidence of Kumudu Rasangika the daughter of the deceased, she had known the accused for a long time and also knew that he was interested in her.

The witness had been listing to the conversation between her mother and the Respondent. The witness had narrated what she heard at that time as follows (Page 29 of the High Court Brief)

ප්‍ර: තමන්ට මොනවද ඇහුනේ?

උ: "මොකද කියන්නේ " කියලා ඇහුවා. "මම මොනවා කරන්නද? තාත්ත අනික් කට්ටිය කියන්නේ නැතුව උත්තරයක් දෙන්න බැහැ කිව්වා

ප්‍ර: වෙන මොනවද කිව්වේ?

උ: අම්මා කිව්වා මම ඔය පිහියට බය නැහැ කියා කියනව ඇහුනා එහෙම කියනකොට, මම එලියට බැහැලා එනවත් එක්කම පිහියෙන් ඇනලා දිව්වා

ප්‍ර: පිහියෙන් අනිනව දැක්කද තමන්?

උ: පිහියෙන් අනිනව දැක්කේ නැහැ පිහිය අතේ තියා ගෙන දිව්වා

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ප්‍ර: තමන් මොනවද දැක්කේ?

උ: මම දැක්කා පිහියෙන් ඇනලා දුවනවා

ප්‍ර: තමන් දොරකඩගාවට ගියා නේද?

උ: ඔව්

ප්‍ර: එවිට විත්තිකරු කොහෙද හිටියෙ?

උ: කුස්සයේ දොරකඩගාව ඉඳලා දිව්වා

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ප්‍ර: තමන් පිහියක් තියෙනවා දැක්කද?

උ: පිහිය අතේ තිබුනා

ප්‍ර: සාක්ෂිකාරිය, ඔහු දුවන විට තමන් අම්මා දිහා බැලුවද?

උ: අම්මා (පපුව හා උදරය පෙදෙස පෙන්වා සිටී) අල්ලා ගෙන අමාරුවෙන් කිව්වා පිහියෙන් ඇන්නා කියා. මම ඇහුවා මොකද උනේ කියලා සූටික්කා පිහියෙන් ඇන්නා කියා කිව්වා

ප්‍ර: සූටික්කා කියන්නේ කවුද?

උ: මෙයාට ගමේ කියන්නේ සූටික්කා කියලා

ප්‍ර: කවුද සූටික්කා කියන්නේ?

උ: විත්තිකරු පෙන්වා සිටී

From the above evidence it transpires that the witness Kumudu Rasangka had not seen the stubbing but had given strong evidence with regard to the following facts,

a) That she had seen the accused few second prior to the stubbing, going towards the kitchen
b) That she overheard the conversation between her mother and the accused where she heard her mother saying that “she is not afraid of the knife”
c) That she saw the accused running away from the kitchen where her mother was, with a knife in hand
d) At that time she saw her mother holding to her chest and told her that she was stubbed
e) When inquired, mother made a dying deposition to the effect, “සූටික්කා පිහියෙන් ඇන්නා”

When the above evidence is considered along with the evidence of the father of the deceased who rushed home without going to buy some betel after hearing the cries of his grand-daughter to the effect “අම්මාට පිහියෙන් ඇන්නා සූටික්කා” saw the accused running away from the kitchen, it appears that there is a strong case based on circumstantial evidence against the Respondent for the brutal killing of the mother of witness Kumudu Rasangika.

With regard to the identify, witness Rasangika had clearly identified the Respondent (who is a neighbor) with the help of the lights burning inside the house and the kitchen. Deceased’s father

too had no difficulty in identifying the Respondent with the help of the lights burning in the kitchen since he had met the Respondent, once in the morning on the same day.

As further submitted by the learned Deputy Solicitor General the above positions taken by the two witnesses were also corroborated by the medical evidence and from the evidence of the police officers who conducted the investigations. In addition to the strong items of circumstantial evidence referred to above there is clear evidence of motive for the Respondent to commit the offence, even though there is no requirement to establish the motive in a criminal trial.

The importance in establishing motive in a criminal trial was discussed by the Supreme Court of India in the case of ***Chandra Prakash Shahi V. State of the U.P. (2000) 5SCC 152; AIR 2000 SC 1706*** as follows;

> "Motive is the moving power which impels action for a definite results or which incites or stimulates a person do an act"

and the extent to which the motive can be established in a criminal trial as discussed by the Indian Supreme Court in the case of ***Nathuni Yadav V. State of Bihar (1998) 9SCC 288 AIR 1997 AC 1808*** as follows;

> "Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many murders have been committed without known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Through, it is a second proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved."

However as submitted by the learned Deputy Solicitor General, the evidence led on behalf of the prosecution clearly established the motive for committing the offence and when the strong circumstantial evidence including the clear evidence of motive is taken together there is over whelming evidence to establish the case beyond reasonable doubt.

When considering the evidence placed before the trial court as discussed above, I agree with the Learned Deputy Solicitor General when he submitted that there was a strong *prima facia* case against the Respondent for the murder of the deceased Udumalagala Gamage Punyawathy.

Whilst referring to some of the decisions relied upon by the Court of Appeal, in coming to the conclusion of acquitting the Respondent, the learned Deputy Solicitor General submitted that the decisions in those cases cannot influenced the decision in the case in hand, since the decisions in those cases were influenced due to the nature of the evidence available in those cases. In the regard the Learned Deputy Solicitor General heavily relied on the following decision considered by the Court of Appeal in the impugned order,

> ***Seenithamby V. Jansz 47 NLR 496***
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> Judicial notice will not be taken that a "Food Control Guard" is a public servant within the meaning of section 183 of the Penal Code or that he was duly appointed under Regulation 6 of the Defence (purchase of foodstuffs) Regulations, 1942
>
> The Court of Appeal will not order a new trial where the proceedings are so irregular that the court by according to a request for a new trial will merely encourage slackness, negligence and inexactitude on the part of prosecutions.
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> At page 499….
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> I have been asked to send back the case as against the first to the sixth accused on count 2 for a new trial. I do not think I shall be justified in so doing. To accede to such a request will merely encourage slackness, negligence and inexactitude on the part of prosecutors. (Mendis V. Kaithan Appu; Rosemalecocq V. Kaluwa)
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> ***The Queen V. Jayasinghe 69 NLR at 328***
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> It is always necessary to bear in mind that the power given to a trial judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice. Although at the commencement of the summing the learned Commissioner made some preliminary observations which were extremely appropriate to a case of this nature, and which correctly directed the jury on their proper function a judges of fact, we cannot escape the feeling that the total effect of

> his later strong expressions of opinion obliterated the good effect of the preliminary observations.
>
> Finally, we quote the following words from that judgment as they express our view of the learned Commissioner's summing-up. "The summing-up as a whole cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant(s) (have) thus been deprived of the substance of a fair trial."
>
> For these reasons we allow the appeals and quash the conviction of the appellants. We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution rests. We accordingly direct that a judgment of acquittal be entered.

However when going through the impugned judgment, this court observes that, the Court of Appeal was not only mindful of decisions where re-trials were not ordered due to lack of evidence but also mindful of decisions where re-trial was not ordered for delay only (CA 146/2010) and also directing a re-trial with specific directions to conclude the re-trial early since there was a laps over 9 years (CA 128-130/91).

I too had the opportunity of going through several other judgments, both by the Supreme Court and the Court of Appeal, where re-trials have been ordered for similar reasons ***R.M. Ranbanda V. The State SC. SPL LA 65/09***, ***Nimal Banda V. The State 1996 1 SLR 214, Rajah and Another V. Republic of Sri Lanka 1996 2 SLR 403 CA 93/2007, CA 24/2004*** but, I could not find a single case where the date of offence goes far back as 1997 for nearly 20 years. After 20 years what this court will have to now consider is not a delay but a 'long delay' in ordering a fresh trial.

As discussed above there is strong evidence against the Respondent which warrants a conviction and sentence but this court cannot simply ignore the fact that he had gone through a full trial, convicted and was in remand custody pending the appeal nearly 8 years for no fault of him but merely for a procedural irregularity in the Administration of Justice itself. Now after 20 years can this court order a fresh trial to begin against him.

As rightly observed by the Court of Appeal, it is not only the Respondent (accused in the original indictment) is disturbed from the said order, witness No 1 the daughter of the deceased who witnessed the said incident when she was only 16 years; too will be prejudiced, if she was asked to give evidence once again after 20 years. Whether she could remember everything happened 20 years before, to give evidence in a fresh trial where she will be subject to cross examination by the opponents, is also a matter to be mindful by court.

In these circumstances I observe that the Court of Appeal when deciding to acquit the Respondent has considered all the circumstances and consequences relevant to the case in hand.

In the said circumstances I answer the question of law raised by the appellant in negative and dismiss this appeal.

Judge of the Supreme Court

Eva Wanasundera PC J

I agree,

Judge of the Supreme Court

B.P. Aluwihare PC J

I agree,

Judge of the Supreme Court