SUMANASENA
v.
ATTORNEY-GENERAL

COURT OF APPEAL.
JAYASURIYA, J.,
KULATILAKE, J.
C.A. NO. 61/97.
H.C. MATARA NO. 129/94.
FEBRUARY 09, 1999.

Murder – Evidence Ordinance s. 33, s. 134 – Testimonial trustworthiness and credibility – Belated witness – Motive – Failure of accused to give evidence.

Held:

1. Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law.

2. 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 evidence of a belated witness.

3. Though the prosecution is not required to establish a motive once a cogent and intelligible motive has been established that fact considerably advances and strengthens the prosecution case.

4. When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him.

APPEAL from the judgment of the High Court of Matara.

Cases referred to:

1. *Mulluwa v. The State of Madhya Pradesh* – 1976 AIR SC 989.
2. *Walimunige John v. State* – 76 NLR 488, 495-496.
3. *King v. N. A. Fernando* – 46 NLR 254 at 255.

4. *Jagathsena v. Bandara* – [1984] 2 Sri L.R. 397.
5. *Q v. Pauline de Croos* – 71 NLR 169 at 180.
6. *K v. Haramanis* – 46 NLR 403.
7. *K v. Appuhamy* – 46 NLR 128 at 132.
8. *K v. Kularatne* – 71 NLR 529 at 534.
9. *Geekiyanage John Singho v. K* – 46 NLR 73.
10. *R v. Cockraine* – Guruneys Report page 479.
11. *Rex v. Burdette* – 18204 Band Alderman Report 95.
12. *K v. Seedar de Silva* – 41 NLR 337 at 344.
13. *Q v Seetin* – 68 NLR 316 at 321.
14. *Chandradasa v. Q* – 72 NLR 160 at 162.
15. *A. G. v. Baddewitarana* – [1991] 1 Sri L.R. 245.
16. *Republic v. Illangatilaka* – [1984] 2 Sri L.R. 38.
17. *Republic v. Gunawardena* – [1981] 2 Sri L.R. 315 at 329.
18. *R v. Gunaratne* – 47 NLR 15.
19. *Arendtsz v. Wilfred Peiris* – 10 CLW 121.
20. *R v. Naylor* – 23 CAR 177.
21. *R v. Rhodes* – 1899 1 QB 77.
22. *R v. Jane Blatherwick* – 6 CAR 281.
23. *R v Bernard* – 1 CAL 218.
24. *R v. Jackson* – 37 CAR 43 at 50.
25. *R v. Volsin* – 13 CAR 89 at 93.
26. *Kops v. Q* – 1894 AC 650.
27. *R v. Sparrow* – 1973 2 ALL ER 129.
28. *Republic v. Gunawardena* – 78 NLR 209 at 212.
29. *Republic v. Lionel* – SC 165/75 SCM 20.12.76.

Ranjith Abeysuriya, PC with *Harshika de Silva* for accused-appellant.

P. G. Dep, DSG for Attorney-General.

Cur. adv. vult.

February 09, 1999.

JAYASURIYA, J.

Learned President's Counsel strenuously urged that the evidence against the accused in regard to identity in particular, rests on the evidence of the solitary witness Nandasena.

In our law of evidence the salutary principle is enunciated that evidence must not be counted, but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law. Section 134 of the Evidence Ordinance sets out that "no particular number of witnesses shall in any case be required for the proof of any fact". In an Indian case the conviction for murder was affirmed on the mere circumstantial evidence given by a solitary witness and a pointed reference was made to the principle which we have adumbrated above vide *Mulluwa v. The State of Maddhya Pradesh*[1]. Testimony must always be weighed and not counted and these principles have been followed by Justice *G. P. A. De Silva in Walimunige John v. State*[2]; *King v. N. A. Fernando*[3]. Thus, the Court could have acted on the evidence of the solitary witness Nandasena provided the trial Judge was convinced that he was giving cogent, inspiring and truthful testimony in Court. The learned trial Judge has come to such a favourable finding in favour of witness Nandasena as regards his testimonial trustworthiness and credibility. He has had the benefit of the demeanour and deportment of this witness who was subjected to a very long and protracted cross-examination. This Court does not have such benefit and Justice Collin Thomé regarded deportment and demeanour 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 he remarked in weighing evidence the Judge must take into consideration the demeanour and deportment of the witnesses in witness box and treat it as all important factor when assessing the contradictions which have been proved – *Jagathsena v. Bandaranayake*[4]. In this instance the trial Judge at page 114 of the judgment has stated that despite the long drawn cross-examination the defence counsel was unable to make a dent on the credibility of the witness and establish to the Court that the witness ought not to be believed. He proceeds to state thus in Sinhala. 'මේ නිසා ඔහුගේ සාක්ෂිය පිළිනොගෙන සිටීමට හේතුවක් නැත. එමනිසා මම මොහුගේ සාක්ෂිය පිළිගනිමි.' There is a strong finding favourable to witness Nandasena in regard to his testimonial trustworthiness on the part of the trial Judge who had the benefit of the demeanour and deportment of the witness over a long drawn and protracted cross-examination of the witness.

It is manifest that this witness has come out with the version, that he later volunteered in the trial Court, to the Magistrate as well one month after the happening of the incident. Learned counsel laid stress on this fact and described the witness as a belated witness and that in the circumstances there was opportunity for fabrication and concoction. Justice T. S. Fernando in *Queen v. Pauline De Croos*[5] at 180 had to consider a similar issue and his Lordship observed that "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. Witness Nandasena has stated before the trial Judge that he had known both accused before this incident. He has stated that they have known the accused and they had slept with Sumanasena on the verandah of several houses and he has also stated that the first accused who was alleged to have committed this offence with Haramanis Kuragama who was a powerful businessman described as Rajjuruwo in the village and who was feared by all. He has stated that in view of the fact they knew these persons and because of the fear generated in his mind he delayed to make his statement for a period of one month. Trial Judge looked into these reasons and has accepted the grounds adduced by the witness for the delay and decided to act on his testimony.

The learned trial Judge has also stated that the evidence of Nandasena is supported by the evidence adduced at the trial emanating from another witness. The evidence given by Kithsiri Nihal Rohan Fernando at the non-summary Magisterial inquiry was produced without objection in terms of section 33 of the Evidence Ordinance as the conditions set out therein were satisfied and marked as P1. In the course of his testimony this witness Kithsiri Nihal Rohan Fernando has stated that he recovered a match box from the accused's house and had also recovered a sarong from the accused's house which was smelling of kerosene oil. He has stated thus: "එයින් ඇම්තෙල් වැනි ගඳක් වහනය වූ බවක් කියා සිටියා". Thereafter, he has proceeded to the house of Haramanis Kuragama and recovered certain articles;

the items recovered after the commission of the alleged crime in Kuragama's house has been described by him as follows: "සුදු පැහැති ගැලුම් එකකුත්, පෙට්‍රල් බෝතල් හතරක් පමණ ඇති ප්ලාස්ටික් කෑන් එකකුත් හිස් සුදුපාට ගැලුම් එකකුත්, ගැලුම් හතරේ කෑන් එකකුත්, කලු පැහැති පෙට්‍රල් ගැලුමක් ඇති කෑන් එකයි."

The eye-witness Nandasena has testified to the fact that the two accused acting in concert had thrown some substance on the boutique occupied by the two deceased which led to a conflagration of the boutique. The medical evidence adduced by Prof. C. Niriella establishes beyond all doubt that the death of the two deceased was caused due to severe burning of their bodies in their entirety; the entire skin was burnt from the entire bodies exposing the wasted muscles due to the conflagration that took place inside that boutique. The learned trial Judge has referred extensively at pages 112 and 113 to the medical evidence. Hence, we do not propose to recapitulate that evidence. Cause of death has been established beyond all reasonable doubt as being due to death resulting from extensive burn injuries received by the deceased. In these circumstances the learned trial Judge was not in error when he stated that having regard to the discovery of the sarong which was smelling of kerosene oil and the recovery of certain specific articles from Kuragama's house that Nandasena's evidence is supported and strengthened by the evidence of the Police officer who carried out the investigation.

Though the prosecution is not bound to prove a motive against the accused, in the instant case the prosecution has established by convicing and intelligible evidence a motive against both accused. The second accused in the Magisterial inquiry was dead at the trial. It is in evidence that Kuragama carried on a lucrative business in the collection and sale of cinnamon and spice and he was the only collector of such spices in the village till such time as the deceased's father set up a competing business. Thereafter, Kuragama's feelings were strained towards the deceased's father. The prosecution case presented before the trial Judge was to the effect that the setting fire to the business establishment of the deceased was due to business rivalry and competition. There is evidence led in the case that people

in the vicinity were aware that both deceased lived in this boutique and slept in the boutique and only went to their homes to partake of their meals. In the circumstances the prosecution version has been that Kuragama being a person who set up a business about 100 yards away, ought to have been aware of this fact and the setting fire to the boutiques was with the intention of killing both deceased and putting an end to the rival business. Though the prosecution is not required to establish a motive, once a cogent and intelligible motive has been established, that fact considerably advances and strengthens the prosecution case. See *King v. Haramanis*[6], *King v. Appuhamy*[7] at 132 *per* Justice Keuneman; *King v. Kularatne*[8] at 534.

The prosecution has established a strong and incriminating cogent evidence against the accused and the accused, in these circumstances, was required in law to offer an explanation of the highly incriminating circumstances established against him. The accused has failed to give evidence or to make any statement from the dock. In these circumstances, the learned trial Judge was entitled to draw certain inferences which he deemed proper from the failure of the accused to give evidence in explanation of such circumstances. See the Rule in *Geekiyanage John Singho v. King*[9]. Equally, the principles laid down by Lord Ellenborough in *Rex v. Cockraine*[10] and by Justice Baron Pollock and Justice Abbott in *Rex v. Burdett*[11] are applicable to the facts of the instant case. These dicta have been followed with approval and applied in Sri Lanka in *King v. Seedar de Silva*[12] at 344; *Queen v. Seetin*[13] at 321 *per* Justice T. S. Fernando; *Chandradasa v. Queen*[14] at 162 *per* Justice Samarawickrema and in *Attorney-General v. Baddewitarane*[15]; *Republic v. Illangatileke*[16]; *Republic v. Gunawardena*[17] at 329 (*per* Justice Collin Thome); *Rex v. Gunaratne*[18]; *Arendtsz v. Wilfred Pieris*[19] (*per* Justice Moseley).

We hold that the learned Judge, in these circumstances, was entitled to draw the necessary inferences and compelling inferences from the circumstance, that is from the failure of the accused to offer an explanation of the highly incriminating circumstances established

and in the face of the strong case established against him by the prosecution. Equally, we hold that the dictum of Lord Ellenborough is equally applicable to the facts of the instant case. In addition though, generally there is a Right to Silence conferred on an accused person at law – *R v. Naylor*[20] – in view of the highly cogent and incriminating facts established by the prosecution against the accused-appellant, the exceptions to that general rule, were applicable in that instant case – vide for the exception to this general rule – *Rex v. Rhodes*[21], *Rex v. Jane Blatherwick*[22], *Rex v. Bernard*[23], *Rex v. Jackson*[24] at 50; *Rex v. Voisin*[25] at 93; *Kops v. Queen*[26]; *R v. Sparrow*[27]. Vide also the judgments of Justice Tennekoon in *Republic v. Gunawardene*[28] at 212 and *Republic v. Lionel*[29]. In the circumstances, we see no merit in the contentions advanced on behalf of the accused-appellant and we proceed to dismiss the appeal after careful consideration.

KULATILAKE, J. – I agree.

Appeal dismissed.