UPALI SARATHCHANDRA & OTHERS
VS
REPUBLIC OF SRI LANKA

COURT OF APPEAL
BALAPATABENDI, J.
IMAM, J.
C. A. 63-64/2001
HIGH COURT NEGOMBO No. 61/95
JULY 19, 2004
AUGUST 5, 2005
SEPTEMBER 24, 2004
OCTOBER 19, 2004

Penal Code - Sections 32, 296 - Murder - Conviction - Evidence Ordinance - Section 134 - Proof of any fact? - Numberf of witnesses required?- Evidence of a child admissibility? - Criminal Procedure Code Section 203, 279, 283 (1), 283(5), 436 - Applicable section? - Old Criminal Procedure Code - Sections 304, 425 - Compared.

The 2nd and 3rd accused appellants along with the 1st accused (since dead) were indicted for committing murders of five persons and after trial they were sentenced to death.

It was contended that (1) the High Court Judge has failed to assess the credibility of the only eye witness who was only 12 years old at that time (2) the High Court Judge has failed to evaluate and consider evidence of the 2nd accused appellant (3) that High Court Judge failed to comply with the provisions of section 279, 283 (1) and 283 the code of Criminal Procedure.

HELD

(I) The Court had carefully analyzed and evaluated and weighed the evidence of the 12 year old eye witness and was convinced that he had given cogent and truthful testimony in court, also by observing the demeanour and deportment of this witness. No particular number of witnesses shall in any case be required for proof of any fact. Evidence must not be counted but weighed.

(2) The evidence of the 12 year old witness was trustworthy and credible.

(3) The judgment in every trial under the Code should be pronounced in open court immediately after the verdict is recorded or save as provided in section 203 and at some subsequent time of which due notice shall be given to the parties/pleaders.

(4) Section 203 deals with trial by Judges of the High Court without a Jury.

On an examination of section 283 (1) and 283 (5) it appears that these two provisions are mandatroy for Primary Court Procedure.– S. 279 and S. 283 will apply to every Primary Court Judgment.

Section 279 and 436 of the present Code could be construed and equated to section 304 and section 425 of the old Code.

(5) In the circumstances the relevant section which should be complied with is section 203 of the Code, the High Court Judge had correctly complied with the section.

(6) Upon the facts and circumstances in the instant case, even if there had been an irregularity, such irregularity is not fatal to the conviction and is cured by section 436 and it has also not caused any prejudice to the accused appellants.

APPEAL from the judgment of the High Court of Negombo.

Cases referred to :

1. *Palaniyandi vs. State,* 76 NLR 145
2. *Fatusontal Vs Emperor 1921 22 Cr. LJ 417*
3. *Walimunige John vs. State,* 76 NLR 488
4. *Sumanasena vs. Attorney General (1999)* 3 Sri LR 137
5. *K vs. Davodulebbe, 50* NLR 274

Ranjith Abeysuriya, P. C., with Thanuja Rodrigo for 1st accued appellant.
Dr. Ranjit Fernando with H. Kularatne for 2nd accused appellant.
Sarath Jayamanne, Senior State Counsel for the Attorney - General

Cur. adv. vult.

13 December 2004,
JAGATH BALAPATABENDI, J.

The 2nd and 3rd accused appellants along with the 1st accused (Since dead) were indicted for committing murders of five persons (as per indictment) under section 296 read with section 32 of the Penal Code, and were sentenced to death by the High Court Judge of Negombo after trial on 01. 06. 2001.

The following facts were established at the trial by the prosecution:- The deceased No. 1 Somapala, the Deceased No.2 Nandawathie (Wife of Somapala) the deceased No.3 Nadeeka Shiromi (daughter of 1st and 2nd deceased), the deceased No. 4 Anil Jayasinhe, the deceased No. 5 Chandra (wife of 4th deceased) were killed on 3rd September 1987. The 1st 2nd and 3rd deceased were living in the same house; the 4th and 5th were running a boutique in the close vicinity, and used to stay at the residence of the 1st 2nd and 3rd deceased. The 4th ceceased Anil was a disabled person having a difficulty in walking. The only eye - witness to the incident had been 12 year old Nadeera Somananda son of the 1st and 2nd deceased, (Somapala and Nandawathie), and the brother of the 3rd deceased Shiromi.

The 2nd and 3rd accused appellants are brothers and were living very close to the residence of the 1st, 2nd and 3rd deceased. The 1st accused was an uncle of the 2nd and 3rd accused appellants who died before the commencement of the trial.

At the trial the only eye witness to the incident Nadeera Somananda (24 years at the time of giving evidence and 12 years old at the time of the incident), in giving evidence had stated that, on the previous day of the incident he with his sister Shiromi (3rd deceased, 10 years old) after school went for a tuition class by bicycle held in a house in the village, while they were in the tuition class their mother and father (1st ande 2nd deceased) had come and informed them not to return home as there had been some trouble to their neighbour Anil (4th deceased), thus they had spent the night at the tuition - house, and had returned home next day early morning around 5.30 a. m. by bicycle. When he was relaxing on the bed at home around 6.00 a. m. he had heard some stones being pelted at the house; had walked towards the kitchen and seen his father (1st deceased) walking out from the kitchen - door carrying a pointed weapon ('මඟුබාවා') and his mother 2nd deceased) was standing near the kitchen door. At that stage the 1st accused (now dead) who was in the garden near the Thambili tree had fired a shot from a pistol, then his father the (1st deceased) ran back home and fell on the floor in the room near the kitchen, wheras his mother (2nd deased) followed the father and fell on the floor near the place where his father fell. The witness due to fear hid himself under the table which was placed near the wall close to a bed in

the adjoining room of the hall. Chandra (the 5th deceased) also came and hid herself under the same table, Anil (the 4th deceased) hid himself under the bed. The witness had seen the three accused entering the house after breaking the kitchen door. The 1st accused was armed with a pistol, the 2nd accused appellant was armed with manna knife (මඤ්ඤය) and the 3rd accused appellant was armed with a gun. The 1st accused having seen the father who was fallen on the floor and screaming had told the 2nd accused appellant to cut him as he was not dead, then the 2nd accused appelllant had cut both father and mother to death. On seeing Chandra who was hinding under the table she was dragged out and cut to death by the 2nd accused appellant. The 1st accused had seen Anil the 4th deceased who was hiding under the bed had said that he likes to see the face of Anil and shifted the bed, then the 3rd accused appellant had shot Anil at close range with his gun. The witness had heard his sister Shiromi (10 year old) pleading "not to kill her and she would do anything she was asked to do" (මාව මරන්න එපා කියලා කියන ඕනෑම දෙයක් කරන්නම්) despite her appeal the 1st accused had told "if she was left, she would give evidence, kill her" (මේකි හිටියොත් සාක්ෂි කියනවා මේකිව මරන්න) then the 2nd accused appellant had cut her to death. The witness had stated that he felt accused were looking out for him, as they failed to track him, they left the house from the rear - door.

Immediately thereafter, the witness had gone to the Co - operative stores where his mother (2nd deceased) had been employed left the bicycle in the Co-operative stores and gone to his aunt's place (Mother's sister's place) in Seeduwa and immediately narrated the whole incident to his aunt Premawathie.

Later, Premawathie and the said witness had first gone to Seeduwa Police, and on the direction of Seeduwa Police they had gone to Divulapitiya Police to lodge the complaint. (as the incident had taken place in Divulapitiya Police area)

In addition to the eye witness Nadeera Somananda, the evidence of the witness Premawathie, the medical evidence and the evidence of the Police officers, had been led by the Prosecution.

The 2nd accused appellant in giving evidence had stated that on the day of the incident he with his brother the 3rd accused appellant, went to

work early in the morning to their Brick Clink about one and a half miles away from their home, when they were informed that the Police was searching for them they stopped the work and went to their Aunt's place. Later, they surrendered to the Police. In cross examination he had admitted that it takes only 10 to 15 minutes to go to the Brick Clink from home, In addition to the alibi, he had denied any involvement in the incident and they were not aware of the deaths of these five deceased though they were neighbours.

At the hearing of the Appeal the counsel for the accused appellants assaled the Judgment on the following grounds:-

(1) The Learned High Court Judge had failed to assess the credibility of the only eye - witness Nadeera Somananda

(2) The Learned High Court Judge had failed to evaluate and consider the evidence of the 2nd accused appellant.

(3) Failure of the High Court Judge to comply with the provisions of section 279, 283 (1) and 283 (5) of the Criminal Procedure Code, have deprived the accused - appellants of a fair trial.

The evidence of the eye - witness Nadeera Somananda revealed that he had come home with his sister Shiromi from the tuition house around 5.30 a. m. in the morning on the day of the incident. The dead body of Shiromi was found inside the house with cut injuries, established that the version of the witness that he came home with his sister Shiromi. There was no doubt as to the identity of the assailants as the incident had occurred around 6 a. m. According to the witness there was enough light to identify the assailants, and the witness knew the accused - appellants well as they are neighbours. The State Counsel contended the fact that there was enough light inside the house had been established as the assailants, had directly attacked all the deceased without any support of artificial illumination. Soon after the incident the witness had gone to his aunt's place (mother's sister) and immediately narrated the whole incident, which had been corroborated by Premawathie (Aunt of the witness). The learned Hight Court Judge had observed and commented on the spontaneity of the witness. The medical evidence of the Doctor who conducted the post - mortems of the five deceased had corroboratd the evidence of the eye - witness Nadeera as to the injuries found on the dead bodies. (cut injuries and gun - shot injuries) The Police officer who investigated had corroborated the evidence of the eye witness Nadeera as to the positions

of the five dead bodies found inside the house, and recovery of empty cartridges outside the house and inside. On a perusal of the judgement it is obviously clear that the Learned High Court Judge had evaluated the evidence with reference to spontaneity, consistency, probability and demeanour of the eye - witness.

The Counsel for the accused - appellants strongly contended that it is impossible to belive the witness Nadeera, who had been hinding under the table, where the 5th deceased Chandra also took shelter under the same table was dragged out by the 2nd accused - appellant and cut to death, the said table was 1 1/2 ft long and 2 ft wide which could give little cover to two people, as such the version of the eye witness was improbable, as to how the witness escaped from seeing by the assailants.

The State Counsel contended that, the eye - witness Nadeera in his evidence had shown the size of the table was similar to the table that was there inside Court, which was 3 ft long and 2 1/2 ft wide (as observed by Court). The Police officer in answering a question had stated the table was 1 1/2 ft long and 2 ft wide may be a typing error, further he contended there the defence counsel had not even suggested to the eye - witness or to the Police Officer whether there was enough space for two people to hide under it. His contention also was the 5th deceased Chandra came and hid under the same table as there was enough space to hide her - self under it, and the table was placed inside the room near the wall close to the bed, so that a small boy of 12 years old (the witness) could have hid himself without being seen by the assailants.

The Section 134 of the Evidence Ordinance sets out that "no particular number of witnesses shall in any case be required for proof of any fact". In *Planiyandi Vs State*[1] *Alles J* had quoted the observation made in *Fatusantal Vs Emperor* [2] the Patna High Court held that "The mere fact that the evidence of the only eye - witness of a crime is that of a child of 6 years of age, is not a ground for not relying upon it, especially when the evidence is given without hesitation and without the slightest suggestion of tutoring or anyting of that sort, and there is corroboration of the evidence in so far as narrates the actual facts, and of the child's subsequent conduct immediately afterwards."

In *Walimunige John Vs State* [3] G. P. A. de Silva (S. P. J) observed that " no particular number of witnesses shall be required for the proof of any

fact. The adequacy of one witness to prove a fact in terms of the section 134 of the Evidence Ordinance will hold good in a case where only one witness is available to the party desiring to establish a fact, and where only one witness is called even though others are also avilable." In the instant case the only eye witness available for the prosecution to prove the case was the witness nadeera Somananda 12 years old son of the 1st and 2nd deceased. The offence had been committed not in a public place within the sight of many. Sothat, his testimony should be truthful and trustworthy. The learned trial Judge could act on the evidence of this solitary witness Nadeera Somananda provided the trial Judge was convinced as regard to his testamonial trustworthiness and credibility.

in the case of *Sumanasena Vs Attorney General* (4) it was held " 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."

It is appearent that the learned High Court Judge had carefully analyzed, evaluated and weighed the evidence of the eye witness Nadeera Somananda, and was convinced that the eye - witness had given cogent, and truthful testimony in Court, also by observing the demeanour and deportment of this witness who was subjected to very long and protracted cross - examination, had arrived at findings in regard to credibility and trustworthiness of the testimony of this witness. in view of those circumstances he had belived the evidence given by the witness without any hesitation or doubt. (at page 513, 526, 527 and 535 of the Brief)

On a perusal of the evidence, we are also of the opinion that the evidence given by only eye - witness Nadeera Somananda was trustworthy and credible.

It appears that the learned High Court Judge was of the view that as the prosecution had established a strong case with incriminating and cogent evidence against the Accused - appellants, in the circumstances the evidence of the 2nd accused - appellant (the alibi and the denial of any involvement in the incident) had failed to create any reasonable doubt on the prosecution version.

Having considered all the evidence led in the case we are also of the view that the learned Hight Court Judge had come to a correct conclusion that the prosecution had proved the case against both accused appellants beyond reasonable doubt, and the evidence given by the 2nd accused appellant had failed to raise any reasonable doubt or even a suspicion on

the prosecution case, and no reliance could be placed on the evidence of the 2nd accused appellant.

In regard to the third ground alleged, that the learned Hight Court Judge had failed to comply with section 279, 283 (1) and 283 (5) of the Criminal Procedure Code:-

(1) Section 279 of the Criminal Procedure Code states as follows:-

The Judgment in every trial under this Code shall be pronounced in open Court immediately after the verdict is recorded or **save as provided in section** 203 at some subsequent time of which due notice shall be given to the parties or their pleaders, and the accused shall if in custody be brought up or if not in custody shall be required to attend to hear judgment delivered except when his personal attendance during the trial has been dispensed with and the sentenced is one of fine only or when he has been absent at the trial.

Section 203 of the Criminal Procedure Code, (which deals with the trial by Judge of the High Court without jury) states as follows:- "When the cases for the prosecution and defence are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefore and if the verdict is one of conviction pass sentence on the accused according to law."

Thus I am of the opinion that the relevant section which should be complied with, by the Judge of the High Court is section 203 of the Criminal Procedure Code. And it appears that the Learned High Court Judge had correctly complied with the Section.

On examination of the provisions of the Section 283 (1) and 283 (5) it appears that these two provisions are mandatory for Primary Court procedure.

(Foot note under Provisions of Section 283 indicate that "Section 279 and 283 shall apply to every Judgment of a Primary Court")

In the case of *King Vs Davodulebbe*[5] - the accused - appllants had urged that, the failure of the Judge to observe the provisions of section 304 of the Criminal Procedure Code amounted to an irregularity which could not be cured. Wijewardena, CJ held that " failure to comply with section 304 is an irregularity curable under section 425 of the Criminal Procedure Code."

Section 304 and section 425 of our Old Criminal Procedure Code could be construed and equated to the sections 279 and 436 respectively of the present Criminal Procedure Code (Chapter 26).

Thus, I am of the opinion that upon the facts and circumstances in the instant case, even if there had been an irregularity, such irregularity is not fatal to the conviction, and is cured by section 436 of the Criminal Procedure Code also it had not caused any prejudice to the accused - appellants.

Futher, on a persual of the proceedings at the trial it is apparent that the Learned High Court Judge on 01. 06. 2001 after conclusion of the submissions of both counsel, had commenced to deliver the Judgement around 3.20 p.m. in Court, intially he had dealt with the ingredients necessary for the charge of muder, common intention, presumption of innocence of the accused, burden of proof by the prosecution, proof beyond reasonable doubt, benefit of the doubt, and the evidence available to establish the above mentioned legal principles with reference to the evidence of the witness Nadeera Somananda and other evidence led in the case, thereafter he had proceeded to convict the 2nd and 3rd accused applleants the charges mentioned in the indictment, and the allocutus were recorded. The Learned High Court Judge had mentiond in the judgment as it would take about six hours to evaluate all the evidence giving reasons for conviction, he had continued to dictate the Judgement to the stenographer in chambers, and passed the death sentence on both accused appellant on the same day in Court (as reflected in the case record).

Thus, the argument of the counsel that it was practically impossible to deliver page type written Judgment on the same day, do not hold water, as the normal practice in the Hight Court is to dictate the Judgement to the stenographer, and if convicted pass the sentence, typing of the Judgment is done by the stenographer thereafter.

Having considered all the grounds of appeal urged by the accused appellants, I find no reason whatever to set aside the conviction.

For the reasons aforesaid, I uphold the conviction and sentences passed on the accused - appellants. The appeal is dismissed.

Immam, J. - I agree.

appeal dismissed.