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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/73-74/2010

H/C Negombo case No.24/97

Vs,

1. Ambawalage Gunadasa Silva
2. Ambawalage Rupananda Silva alias Ruparatne
3. Kadupiti Chandraratna Silva alias Wanda
4. Ambawalage Kusumananda alias Nevil
5. Hasthimini Rony Sudath Priyankara alias Sudu Mahaththaya

ACCUSEDS

And,

1. Ambawalage Gunadasa Silva
2. Ambawalage Rupananda Silva alias Ruparatne
3. Ambawalage Kusumananda alias Nevil

ACCUSED-APPELLANTS

Vs,

Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT- RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: A.S.M. Perera PC for the 1st Accused-Appellant

Saliya Pieris with Gayan Maduwage for the 2nd Accused-Appellant

Neranjan Jayasinghe for the 3rd Accused-Appellant

Jayantha Jayasooriya PC, Senior Additional Solicitor General for the AG

Argued on: 07.05.2015, 13.05.2015, 26.06.2015, 28.06.2015, 05.10.2015

Written Submissions on: 18.12.2015, 11.01.2016

Judgment on: 27.05.2016

Order

Vijith K. Malalgoda PC J

The three accused-appellants namely, Ambawalage Gunadasa Silva (1st accused), Ambawalage Rupananda Silva alias Ruparatne (2nd accused) and Ambawalage Kusumananda alias Nevil (4th accused) along with two other accused were indicted before the High Court of Negombo on three counts for,

a) Being members of an unlawful assembly with the common object to cause the death of Maggonage Chandrasena Silva an offence punishable under section 140 of the Penal Code

b) Being members of the said unlawful assembly committed the murder of Maggonage Chandrasena Silva an offence punishable under section 296 read with section 146 of the Penal Code

c) Committing the murder of Maggonage Chandrasena Silva an offence punishable under section 296 read with section 32 of the Penal Code

The indictment against all 5 accused was served in the High Court of Negombo and the accused elected to be tried before a Judge without a jury. The 3rd accused to the above indictment had died whilst the trial was pending. The 5th accused to the indictment who was present at the beginning of the trial had absconded halfway through and the trial proceeded against him in absentia. The Learned High Court Judge of Negombo, after trial, before him without a jury had acquitted the 5th accused of all the charges against him and convicted the 1st, 2nd and 4th accused of the 3rd count in the indictment after acquitting them from counts 1 and 2 of the indictment. After the conviction, the said 3 accused, were sentenced to death by the Learned High Court Judge. Being dissatisfied with the said conviction and sentence the 1st, 2nd and the 4th accused have preferred the present appeal before this court.

Prosecution in the present case had mainly relied on the evidence of two eye witnesses, namely Douglas Silva (Brother in Law of the deceased) and Indrani Silva (Wife of the deceased).

According to the evidence of Douglas Silva at the High Court Trial, the deceased and the witness were living in the same compound in separate houses. Around 2.00 pm on the day in question (08.03.1987) when the witness was at home, one Rampala who is the younger brother of the 1st , 2nd and 3rd accused to the indictment had come in front of their houses and shouted challenging "if there are thugs, to come forward" and went away after some time. This witness had referred to an animosity between the deceased and the accused family, since the deceased was to give evidence with regard to setting fire to a house by brother in law of the 1st to 3rd accused.

About half an hour to 45 minutes later, 1st to 4th accused came near their houses armed with swords and pestles. The 2nd accused who came first was armed with a sword and shouted saying "we will give works to those who are giving evidence relating to the setting fire to the house." the other three accused came almost behind the 2nd accused and the 1st accused was also armed with a sword while the other two were armed with pestles.

When this happened the deceased was not at home. At some point the witness had seen the deceased coming towards his house from the direction of the temple on his bicycle with a bundle of fire wood on the handle of the bicycle. Since the 4 accused were still on the road shouting at them, the witness too had come to the road thinking that something might happen on the road.

At that time the witness had seen the 2nd accused attacking the deceased with the sword, followed by the 1st accused. 3rd accused and the 4th accused who were shouting "මරපියව් මරපියව්..." had chased the witness away when he came towards the place where the attack took place.

According to the evidence of Indrani Silva, her husband who is a conductor of a private bus had gone to a garage in Raddoluwa on that day, since the bus was undergoing a repair. While her husband was away, between 1-2 pm one Rampala had come near their house and challenged them in abusive language saying "ඕනෑ ගනන්කාරයෙක් වරෙව්."

She ignored the above and remained inside the house, but after some time she heard the 2nd accused abusing somebody. Since her husband was not in good terms with the 2nd accused she looked out from her house and saw Gunarathne (most probably Gunadasa the 1st accused) and Ruparathne (2nd accused) armed with swards and 3rd and 4th accused armed with pestles.

Around 3.00-3.30 pm her brother Douglas had informed her that her husband is coming home and when she came up to the doorstep she had seen her husband coming on the bicycle from the direction of the temple with a bundle of fire wood. At that stage she saw the 2nd accused attacking the deceased with a sword, which was followed by the 1st accused attacking the deceased with a sward after he had fallen from the bicycle after the first attack.

The three accused-appellants who were represented by different counsel before this court raised several grounds of appeal before this court. The main grounds raised by the counsel can be summarized as follows,

The main prosecution witnesses cannot be considered as credible witnesses since there are infirmities in the evidence of the said witnesses.

Learned Trial Judge had failed to consider the matters which are infavour of the accused-appellant

Prosecution has failed to lead the evidence of witness Jayasena who is a material witness for the prosecution

Whether it is safe to convict the 3rd accused-appellant on the basis of common intention

As observed by this court the two main prosecution witnesses, namely Douglas and Indrani whose evidence I have already summarized were subject to extensive cross examination. Witness Douglas was in the witness box for nearly 3 years and Indrani for nearly 5 months.

Even though the counsel had made comments on the evidence of these two witnesses, the defence had not been able to mark any significant contradiction or omissions during their evidence. However it was brought to the notice of court by the counsel that witness Douglas in his statement to police had stated that no other relatives of him were present when attack took place but under cross examination he said that when saying so he only ment the male relations.

As observed by this court, the two eye witnesses have observed the attack from their respective houses which were situated in the same compound and therefore one cannot expect both witnesses to see each other or observe every detail of an incident which took place with no prior notice. However it is also important to note at this stage that witness Indrani had made a prompt statement to police when the investigators visited the scene of crime within few hours from the incident and in her evidence no significant contradictions or omissions were marked by the defence. In her evidence before the High Court witness Indrani had specifically said that it is her brother Douglas who informed her that the deceased is coming home around 3.00-3.30 pm.

Credibility of witness Indrani's evidence was further attacked by the counsel for the accused-appellant by referring to her evidence with regard to the attack on her husband.

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ප්‍ර:- ඒ කඩු පාර වැදුනද ස්වාමිපුරුෂයට?

උ:- ඔව්

ප්‍ර:- කොහොමද වැදුනේ?

උ:- ඒක දැක්කේ නැහැ මම ඇත හිටියේ

Based on the answer given by the witness, the counsel for the accused-appellant argued that Indrani has not witnessed the incident and therefore she cannot be considered as a credible witness.

As observed in this judgment earlier, Indrani had witnessed the attack on her husband from her house which was more than 100 feet away but made a prompt statement to police when they visited the scene of crime.

The defence had marked two contradictions in the evidence of witness Indrani. The 1st contradiction which was marked as 1වි 1 'අ' referred to the fact that the presence of her brother with her when Rampala was shouting from the road, witness denied this fact in her evidence before the High Court. The next contradiction marked in her evidence was with regard to the fact whether the witness had exactly seen each blow struck on the deceased by the 2nd and the 1st accused at that time.

Since the Learned Trial Judge had concluded that those contradictions do not go to the root of the case, the counsel argued that the Learned Trial Judge had failed to consider those matters which are infavour of the accused-appellant.

As revealed in the evidence, the incident taken place around 2.00 pm when Rampala came in front of the house of the deceased and shouted at them and the next incident which took place 45 minutes later are two different incidents. Both witnesses have witnessed these incidents and as observed by this court the witnesses were living in the same compound but in two different houses and therefore one cannot expect witnesses to keep everything in mind and answer that they saw each other at every point of time.

As observed by me in this judgment, witness Indrani had witnessed the attack on her husband at a distance and therefore she is not expected to witness as to how each blow struck on her husband.

Therefore I see no merit in the above argument and conclude that the Learned Trial Judge was correct when he concluded that the said contradiction does not go to the root of the case.

In the case of ***The Attorney General V. Mary Theresa SC Appeal 79/2008 SC minutes dated 06.05.2010*** Thilakawardena J observed, "..... Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (***Vide, Boghin Bhai Hirji Bhai v. State of Gujarat, AIR 1993 SC 753).***

Witness should not be disbelieved on account of trifling discrepancies and omissions (***Vide, Dashiraj V. the State AIR (1964) Tri 54***) when contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining the matter (***Vide, State U.P. v. Anothony AIR 1985 SC 48; Attorney General V. Visuvalingam 47 NLR 286***)

Witness Douglas's evidence was further challenged by the Learned Counsel for the accused-appellant whilst referring to an attack and subsequent police complaint said to have been made by the brother of the accused -appellant one Rampala.

As observed by this court both these witnesses in their evidence referred to a previous incident took place around 2.00 pm, where Rampala had come and challenged the neighborhood, but does not refer to any fight between them.

When witness Douglas was under cross examination it was suggested to him by producing a document purported to be a complaint made by Rampala to the police of an attack on him by Douglas which was denied by the witness.

However the admissibility of the said document which was produced marked V-1 was challenged by the Learned Senior Additional Solicitor General who represented the Attorney General before this court, in the absence of any evidence to establish the authenticity of V-1. It was the position taken up by the Learned Senior Additional Solicitor General that the said document V-1 was neither shown to any of the police witnesses who testified before the High Court nor it was found in the I. B. extracts filed before the court.

In the said circumstances it was argued by the Learned Senior Additional Solicitor General that, V-1 has no legal basis to admit as it was neither produced through proper custody nor any evidence was presented to establish its authenticity.

The evidence given by the two eye witnesses were again challenged whilst referring to another incident said to have taken place between the complainant party and the accused party where injury had caused to the mouth of one Edin who is the father of the three accused appellants.

In this regard the Learned Counsel for the accused- appellant brought to our notice the following questions and answers from the evidence of witness Douglas,

Page 73,

ප්‍ර:- එඩින්ගේ කට කැපුවා මෙහෙම

උ:- මම දන්නේ නැහැ

Page 76,

ප්‍ර:- කට කපපු එක දන්නවාද?

උ:- මතකයක් නැහැ

ප්‍ර:- අදටත් දන්නවාද?

උ:- මම තවම දැක්කේ නැහැ

However when his evidence at the Magistrate's Court was confronted with the witness he had answered as follows;

ප්‍ර:- සටහන් වෙලා තිබෙනවා නම් මහේස්ත්‍රාත් උසාවියෙ නඩුවේදී සාක්ෂි දෙමින් තමා මේ විධියට කිව්වා කියා තමා දැන් දන්නවා සිද්ධිය වෙනකොට එදාම 1 වන විත්තිකරුගේ පියාගේ කට කපලා තිබෙනවා. උත්තරය ඔව් කියා තිබෙනවා.

උ:- එහෙම කියා තිබෙනවා නම් පිලිගන්නවා.

Even though no contradiction was marked, whilst referring to the above portion of evidence from witness Douglas it was argued by the Learned Counsel for the accused-appellant that witness Douglas is not a truthful witness and therefore it is unsafe to act on his evidence.

However, when Inspector of Police Jayakody Arachchilage Gunathilake was questioned by the defence with regard to causing injury to the father of the 1st accused-appellant; witness had admitted of such incident which took place on 13.03.1988, five days after the alleged offence of murder.

When considering the above evidence given by the investigating officer, the incident said to have happened with regard to causing injury to the father of the accused have taken place 5 days after the death of the deceased and, therefore the evidence of Douglas cannot be rejected for the mere fact that he denied his knowledge of the said incident.

The counsel for the accused-appellant address us on a discrepancy with regard to a name appeared in the complaint made by M. Jayasena Silva a brother of the deceased who made the first complaint. The counsel drew our attention to the said complaint which was available for perusal at page 643 of the appeal brief. However the Learned Senior Additional Solicitor General whilst objecting to the above attempt submitted that the said statement which was not marked at the proper stage of the trial had been smuggled in to the case record through the written submissions of the accused-appellant. As observed by this court the said statement had not been marked at the trial and therefore the submission made with regard to the said statement cannot be looked into by this court.

It was further argued by the Learned Counsel for the accused- appellant that the prosecution has failed to lead the evidence of witness Jayasena who is a material witness for the prosecution.

In the case of ***Walimunige John V. The State 76 NLR 488*** it was held that, "the prosecution is not bound to call all the witnesses whose name appear on the back of the indictment or to tender them for cross examination."

In the said case Justice G.P.A. de Silva SPJ observed, "the question of presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitute a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called not have supported the prosecution. But where one witness' evidence is cumulative of the other and would be mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness given rise to presumption under section 114 (f) of the Evidence Ordinance."

In the case in hand two prosecution witnesses who had witnessed the incident had given evidence before the trial judge and we see no requirement to call a third and in such circumstances the discretion is solely with the prosecutor to decide the number of witness he should call in order to establish his case.

Whilst referring to the case of ***Chandrasena and others V. Munaweera 1999 (3) Sri LR 401*** where Jayasuriya J had observed "the mere out line of prosecution and defence without reasons being given for the decision is an insufficient discharge of duty cast upon a judge by the provision of section 306 (1), and argued that the Learned Trial Judge had just narrated the evidence in her judgment without analyzing them.

This court cannot agree with the said argument of the Learned Counsel for the accused-appellant since this court has observed that the Learned Trial Judge had carefully analyzed the evidence when acquitting the 5th accused who was absconding at the trial and convicted the 1st, 2nd and 4th accused only on 3rd count in the indictment after acquitting them on 1st and 2nd counts in the indictment.

As observed by this court the conduct of the 1st and the 2nd accused clearly indicates that the said two accused were acting in furtherance of common intention to commit the murder of the deceased Chandrasena Silva. The 1st accused, who followed the 2nd accused to the scene of crime were present in front of the houses of the two witnesses, both armed with swards for considerable time. After seeing the deceased coming towards the house both of them had attacked the deceased with swards. While they were waiting in front of the house the 2nd accused had made certain utterance which indicates the intention shared by the two accused at that time. As observed in the case of ***Fernado V. de. Silva 68 NLR 166*** the presence of the 1st accused with the 2nd accused is clearly identified as 'Participating Presence" where the 1st and 2nd accused –appellants shared the common intention among them.

It was further argued before us by the counsel for the 3rd accused-appellant, whether the evidence available in the case in hand is sufficient to convict the 3rd accused-appellant on the basis of common

intention. When considering the argument raised on behalf of the 3rd accused-appellant it is important to consider at this stage whether the presence of the 3rd accused-appellant along with the 4th accused at the scene of crime was only a "mere presence" as against "participatory presence".

Our courts have consistently held that mere presence at the scene of crime does not by itself support an inference of common intention. In the case of ***Queen V. Vincent Fernando (1963) 65 NLR 265*** this position was clarified further by stating that this principle does not extend to a person whose act of standing and waiting is itself in a series of criminal acts done in furtherance of the common intention of all.

In the said case Basnayake J observed, that, "A person who merely share the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under section 32 a mental sharing of the common intention is not sufficient the sharing must be evidenced by Criminal Act."

In this regard the Learned Counsel further submitted that the star witness Douglas who said in his evidence that he heard the 3rd and 4th accused (to the indictment) shouting saying "මරපියව්, මරපියව්" but admitted that he did not tell it to police or at the Magistrate's Court. Even though we observe it as a vital omission in this case, we see no reason for the two accused (3rd and 4th to the Indictment) to be present armed with pestles along with the 1st and 2nd accused who were armed with swards. According to the evidence of both eye witnesses all four accused were in the road armed with weapons, until the deceased came home after some time. During that time, the witness heard the 2nd accused saying "we will give works to those who are giving evidence relating to the setting fire to the house."

The said utterance by the 2nd accused is a clear indication that they were waiting for the deceased since the deceased has given evidence in a case where the accused's brother in law was charged for setting fire to a house.

In addition to the above, both witnesses in their evidence confirmed that they saw the 3rd and 4th accused chasing away Douglas when he went towards the deceased at the time he was attacked by the 1st and the 2nd accused-appellants.

The said evidence revealed during the trial is more than sufficient to conclude that the conduct of the 3rd accused-appellant as participatory presence where the 3rd accused-appellant had shared the common intention with the other accused and therefore. we see no prejudice caused to the 3rd accused-appellant when the Learned Trial Judge considered the utterances said to have made by the 3rd accused-appellant as evidence against him.

In the case of ***Lurdu Nelso Fernando and others V. Attorney General 1998 (II) Sri LR 329*** Mark Fernando J observed that "Even though point raised on behalf of the appellants might be decided in their favour, yet no miscarriage of justice has actually occurred, hence the appeal should be dismissed.

This court is further mindful of the decision in the case of ***Gunasiri and the two others V. Republic of Sri Lanka 2009 (1) Sri LR 39*** where Sisira de Abrew J observed, that "Although the 3rd accused-appellant took up the position that he was at the temple at the relevant time with the priest, he never asked for summons on the priest nor did he file a list of witnesses indicating the name of the priest. The trial commenced on 29.11.2001 and the defence case was concluded on 19.9.2003. Thus during a period of 2 years he failed to move court to get summons on the priest. Although the 3rd accused appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused-appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of ***Sarwan Singh V. State of Panjab 2002 AIR SC iii 3652 at 3656*** Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue

ought to be accepted." This judgment was cited with approval in ***Bobby Mathew V. State of Karnataka, 2004 Cr. LJ 3003***. Applying the principles laid down in the above judicial decision. I may express the following view. **Failure to suggest the defence of alibi to the prosecution witnesses, who implicated the accused, indicates that it was a false one**. Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused appellant is an afterthought.

In the present case the Learned Trial Judge having considered the dock statement observed that the 1st accused-appellant had failed to confront the prosecution witnesses with the position he had taken up in the dock statement and correctly concluded that it fails to raise a doubt on the prosecution case. We see no reason to reject the above findings of the Learned Trial Judge.

For the reasons discussed above, we see no merit in the argument raised by the counsel for the accused-appellants before us. We therefore dismiss the appeal and confirm the conviction and sentence imposed by the Learned High Court Judge, Negombo.

Appeal is dismissed Conviction and the Sentence is Affirmed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL