

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

In the matter of application for appeal
under and in terms of section 331 of
the Criminal Procedure Code.

**CA Case No:
HCC 264/2016**

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

**HC Panadura
Case No: 1629/2002**

Complainant

Vs

1. Ponnampemumage Ananda Sarath
2. Adambarage Priyantha Ramyasiri
Alwis
3. Illiyas Abdul Rahuman Nazar
4. Abdul Kareem Mohomad Thayubu
5. Weththamuni Udaya Priyankara
Silva alias Sujith
6. Brahakmanage Sampath alias
Kaluwa

Accused

And Now

Ponnampemumage Ananda Sarath
No. 85,
Rividewgama,
Paraththa,
Keselwatta,
Panadura.

1stAccused-Appellant

Vs

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

Complainant- Respondent

Before : **Devika Abeyratne,J**
P.Kumararatnam,J

Counsel : Darshana Kuruppu with Sajini Elvitigala for
the Accused-Appellant

C.Goonasekara, SDSG for the AG

Written

Submissions on : 27.08.2018 (by the Accused- Appellant)
13.11.2018 (by the Respondent)

Argued On : 25.01.2021

Decided On : 25.02.2021

Devika Abeyratne,J

The 1st accused appellant has preferred the instant appeal seeking to set aside the judgment dated 29.11.2016 of the learned High Court Judge of *Panadura* convicting him for Murder in Case No:HC 1629/2002 in the High Court of *Panadura*.

1. The 1st Accused-Appellant (hereinafter sometimes referred to as the Appellant) along with five other Accused were indicted before the High Court of *Panadura* for the following charges.

I. That on or about 29.06.1997 at *Horethuduwa* within the jurisdiction of this court the Accused being members of an unlawful assembly the common object of which was to cause hurt to one *Rukmal Wasantha* thereby committed an offence punishable under section 140 of the Penal Code.

II. That in the aforementioned time, place and during the course of the same transaction whilst being members of said unlawful assembly the accused committed murder of one *Rukmal Wasantha* and thereby committed an offence punishable under section 296 of the Penal Code read with section 146 of the Penal Code.

III. That in the aforementioned time, place and during the course of the same transaction whilst being members of the said unlawful assembly the accused committed the murder of one *Rukmal Wasantha* and thereby committed an offence punishable under section 296 of the Penal Code read with section 32 of the Penal Code.

At the conclusion of the trial, the 1st accused appellant was convicted for murder on count 3 and sentenced to death and acquitted on counts 1 and 2. The 2nd to the 6th accused were acquitted on all counts.

Being aggrieved by the conviction and sentence the appellant has preferred the instant appeal. The grounds of appeal advanced by the appellant are as follows;

- i. The Trial court was in error when it failed to give due consideration to the failure of the prosecution to prove the date of offence beyond reasonable doubt.
- ii. The Trial Court was in error when it has accepted and relied on the evidence with regard to the identification parade despite its doubtful nature and the existence of many inherent weaknesses.
- iii. The Trial court was in error when it has failed to consider the glaring contradictions and the omissions of the prosecution witnesses.
- iv. The Trial Court was in error when it has failed to consider the explanation provided by the accused in their dock statements.
- v. The trial court was in error when it has not properly considered the failure of the prosecution to prove beyond a reasonable doubt the recovery and identification of the productions.

The prosecution has led the evidence of 08 witnesses of whom, PW 1, PW 3, PW 20, the JMO and PW 10 police officer *Kodithuwakku* the investigating officer's evidence is the most vital and deciding evidence.

The factual circumstances *albeit* briefly are as follows.

On 29.06.1997 around 10.00 pm, the deceased together with PW 1, PW 3, and *Shantha* had gone for a musical show at *Chandrasekera* Ground in *Horethuduwa*. Around midnight PW 1 and PW 3 have left the grounds to have a drink while the other two have stayed back. When they returned after about 45 minutes, they have learnt that the deceased and *Shantha* have had an argument with some others on the ground for knocking against them while dancing.

Thereafter, according to the prosecution witnesses PW 1 and PW 3 they have left the ground when the musical event was still in progress with the 4th accused who is known to PW 1. It was stated that the 4th accused had indicated that his friends with whom the altercation took place must be around waiting for them but, that he will “shape up” the matter.

When they were passing the timber mill, the 4th accused has whistled, which was interpreted as giving a signal and about 10 to 15 people have come out from the opposite side of the road and followed the deceased who had by this time started to run towards the timber mill, while the witnesses PW 1 and PW 3 have tried to catch hold of the 4th accused. After a while the persons who followed the deceased in to the mill have come out and fled away in a three wheeler and the deceased was found fallen and bleeding inside the timber mill. On admission to hospital he has been pronounced dead.

The defense version is that the appellant was at the musical show with friends and returned home around 2.00 am. A couple of days later

on an invitation by *Roy Rajaratne* PW 20 he had attended a party in an abandoned house about 200 meters from PW 20's house where the 2nd and 3rd accused were also present. Thereafter, the police had come and taken them in to custody. At the Police Station, they were pointed out to several people including the witnesses in this case and later indicted.

At the hearing, the appeal was argued on many grounds, and it was submitted that the prosecution has not proved the case against the appellant beyond reasonable doubt.

PW 1 and PW 3 who have been with the deceased before he was injured, are eye witnesses to certain incidents. However, they have not witnessed the actual incident, neither the altercation of the purported knocking into each other with the 1st accused while dancing, nor getting injured inside the mill.

The learned counsel for the appellant has drawn the attention of this Court to certain inconsistencies and contradictions *inter se* of the evidence of PW 1 and PW 3. There are also certain discrepancies with regard to the identification of the accused by PW 1 and PW 3 at the identification parade, and their evidence in the Magistrates' Court and at the trial which were referred to by the Counsel for the appellant.

The identification parades had been held on 21.07.1997 and 25.05.1998 approximately a month and 11 months after the incident. PW 1 had identified the 3rd, to the 5th accused and PW 3 has identified the 1st to the 5th accused.

The following are some relevant discrepancies in the evidence.

1. PW 01 in evidence has stated that he saw the appellant holding a blood stained knife with a blade of about 4 or 5 inches in length in his right hand, but has failed to identify the appellant at the identification parade.
2. PW 01 in evidence has stated he had identified the 1st, 2nd and the 3rd accused at the identification parade but the learned trial judge has stated it was the 3rd, 4th and the 5th accused that had been identified.
3. PW 01 has stated that he and PW 3 gave statements to the police at the same time when factually the statement of PW 3 is a few days after the incident.

It is apparent that one can expect the recollection of a witness to be more accurate and fresher near the date of identification parade if done soon after the date of the incident, as in this case. However, surprisingly PW 01 has failed to identify the appellant at the identification parade. It is accepted that there may be instances where witnesses may be forgetful of certain incidents after the passage of time. But in the instant case when a very descriptive explanation is given of the accused a few years later after the incident, it is questionable why and how PW 1 failed to identify the accused a few months after the incident at the identification parade. Therefore, this fact has to be taken cognizance of.

It is also important to note that the counsel for the appellant has objected to the holding of the identification parade on the basis that the accused were pointed out to the witnesses at the police station.

This fact is borne out by the evidence of PW 20 where he has emphatically stated that at the police station the 1st accused appellant was pointed out to him. Thereafter, he had seen the other accused being brought to the police station. (pages 494-498 of the brief) Furthermore, the relatives of the deceased had also been at the police station at that time. Thus, it appears that the suspects produced at the identification parade were not provided the safeguards they were entitled to by law. Thus, a reasonable doubt is created whether the identification parade was held in a fair manner.

It was established that the statement of PW 3 had been recorded a few days later after the incident. In evidence when questioned about certain statements regarding the identification of the accused and their whereabouts, he has answered stating that he may have got the information from PW 1 *Samantha*. This creates a doubt whether the information given to the police by PW 3 is from his personal knowledge or from facts gathered from a third party. Thus, the credibility of the evidence of PW 3 is also questionable.

PW 20 *Roy Rajaratne* is the driver in whose three wheeler the accused are said to have got away after injuring the deceased. According to the appellant the police have taken the three accused in to custody from an abandoned house belonging to PW 20 and the accused have gone there on an invitation for a party by PW20 who was leaving the country on employment abroad. The main police investigating officer has described PW 20 as a police informant for about 3 years, which fact PW 20 has vehemently denied. It was the position of the defense at the trial that the suspects were apprehended on information provided by PW 20.

The evidence of PW 20 finding a knife underneath the carpet of the three wheeler which he came across when cleaning the three wheeler in the morning after dropping off the 6 people at *Paraththa*, and keeping the knife in the same place for a couple of days (page 421 of the brief) and leaving the vehicle in the night in the premises of the owner of the vehicle is not probable.

With regard to the three wheeler being brought to the police station his evidence is unclear. At one point he has stated that the three wheeler was already at the police station when he gave the statement. (page 436) But, in his statement he has stated that he can show where the three wheeler is parked.

In such a circumstance, the purported recovery of the knife on a section 27 statement by the appellant also does not add up. There are several other such inconsistencies in the evidence of PW 20. So much so, that at one time one of the predecessor High Court Judges has recorded an observation in page 429 about the contradictory evidence given by PW 20. When the evidence of PW 20 is considered as a whole, it is apparent PW 20 was not consistent and when he is confronted that his evidence is contradictory he has stated he cannot remember.

A person who has gone to the length of getting the three accused to his place under the guise of having a party, then to go missing and the police evidence being that an informant divulged where the accused were, it is difficult to comprehend the motive of PW 20 to be constantly changing the evidence. The doubt created about the evidentiary value

of PW 20, by his inconsistent evidence must inure to the benefit of the appellant.

The chief investigation officer *Kodithuwakku* in page 557 of the brief, has stated that on information from a private informer he arrested the three suspects. Further, that the knife was recovered from under the carpet of the three wheeler driven by PW 20 on the statement of the 1st accused.

He has also admitted that the statement of PW 20 was recorded before he took the suspects in to custody and in page 586 of the brief he has reluctantly admitted that PW 20 has informed him about a knife being inside the three wheeler when making the statement. Thus, it is abundantly clear that the evidence that the knife was recovered on a section 27 statement is incorrect. There is also other contradictory evidence by PW 20 and the Investigating officer which is not sufficiently addressed by the learned trial judge.

The learned Deputy Solicitor General appearing for the State, following the best traditions of the Attorney General's Department submitted that for several reasons he cannot support the conviction.

One ground being that, according to the evidence of the Prosecution witnesses the incident has occurred around 2.00-2.30 in the morning and that the culprits fled away in a three wheeler thereafter.

However, according to PW 20, he has picked up the hire around 4.30 in the morning. Thus, there is a glaring discrepancy of a lapse of two hours to connect the accused to the alleged incident.

Further, whether the evidence of PW 20 is probable when he testified that after seeing a knife in the vehicle and not divulging that evidence and going ahead with his day to day business; the Police evidence which is contrary to the evidence of PW 20 in that the investigating officer admitting that the weapon was discovered on a section 27 recovery however, later admitting that PW 20 informed about the knife being in the vehicle, when considered in totality, is not probable evidence.

It is important to consider that according to PW 11, a police witness, the incident has been reported to the Police at 5.00 am on 29.06.1997. Thus, it is apparent that there is clear contradicting evidence with regard to the time of the incident.

On a perusal of the evidence, the contradictions *inter se* of the prosecution witnesses is very obvious in this case. It is apparent that the learned trial judge has failed to evaluate and analyse this evidence in his judgment.

Thus, in the instant case it is not established that the only irresistible and inescapable inference is that the appellant has committed the crime.

When considering the totality of the evidence, it appears that the learned trial judge has failed to evaluate the evidence in the correct perspective and has disregarded the principles governing the reception and evaluation of circumstantial evidence.

When an overall view of the evidence is taken, the only conclusion that this Court can arrive at is, that the prosecution has failed to establish the case beyond reasonable doubt.

Accordingly, I set aside the conviction and sentence imposed by the learned High Court Judge of *Panadura* and acquit the accused appellant. The appeal is therefore, allowed. The registrar is directed to send a copy of this order with the original case record to the High Court of *Panadura*.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL