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, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0336/2017

High Court of Kurunegala

Case No: HC/151/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Tikiri Appuge Mahinda Jayaratne

ACCUSED

AND NOW BETWEEN

Tikiri Appuge Mahinda Jayaratne

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Dharshana Kuruppu with Sajini Elvitigala, Dineru Bandara, Chinthaka Udadeniya, Buddhika Thilakaratne, Thanuja Dissanayake and Sudharsha Silva for the Accused Appellant
	: Haripriya Jayasundara, P.C., ASG for the Respondent
Argued on	: 06-09-2022
Written Submissions	: 01-06-2018 (By the Accused-Appellant)
	: 07-11-2018 (By the Respondent)
Decided on	: 12-10-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Kurunegala.

The appellant was indicted before the High Court of Kurunegala on the following counts.

1. That he caused the death of Yapa Mudiyanselage Ramani Dissanayake on or about 11th March 2007 at Kirindigalla, and thereby committed the offence of murder, punishable in terms of Section 296 of the Penal Code.
2. At the same time and at the same transaction, he caused injuries to Ekanayaka Mudiyanselage Loku Manike, and thereby committed the offence of attempted murder, punishable in terms of Section 300 of the Penal Code.

After trial, by the judgement dated 07-09-2017 the learned High Court Judge of Kurunegala, found the appellant guilty on the charge of murder and he was acquitted for the charge of attempted murder due to lack of evidence as the injured Loku Manike was dead when the case was taken up for trial, and since her deposition was disallowed to be led in terms of Section 33 of the Evidence Ordinance.

Facts in Brief

PW-01 Kaushalya Dissanayake was 17 years of age when she testified before the High Court on 30th October 2017, and was 11 years old when the incident happened. The deceased Ramani Dissanayke was her father's younger sister, whom she has referred to as *'Sudu Amma',* and the injured Loku Manike was her grandmother. The appellant was the husband of the deceased. The deceased, her husband the appellant, Loku Manike, and the daughter of the deceased were living in a house situated in a close proximity to the house of the witness.

This incident has happened around 4.35 in the evening of 11th March 2007. The witness, while playing outside of her house has heard a commotion from the direction of the house where her grandmother lived, which was on a higher alleviation to their house. Upon hearing the noise, the deceased, who was also near her, and the witness has gone towards the house of the grandmother and she has seen the grandmother holding onto her head and crying while seated in the room which was near the kitchen. When she reached the door of the room, she has seen the appellant attacking the deceased onto her neck using a mamoty. She has seen her fallen onto the bed in the room. Upon seeing this, the witness has rushed out of the house and has given a call to her father's elder sister who was living in Gokarella area as to what was happening. Later the villagers who gathered after hearing the cries of the inmates of the house had taken steps to admit both the injured to hospital. Subsequently, she has come to know that her father's sister had succumbed to her injuries.

It has been her evidence that this incident happened a week after the deceased returned home from Kuwait where she worked for two years. It was also her evidence that on the day of the incident, the appellant kept on threatening the deceased that she would be killed and the deceased went to Gokarella police station and returned around 11 a.m. after lodging a complaint in that regard. The deceased had gone to the police after the appellant left home to attend a funeral.

At the time of the incident, the witness has seen the appellant who returned from the funeral house looking for something under the fireplace of the house and has also seen her grandmother attempting to call the police. When this incident happened, the witness has been about 8-10 feet away from the deceased and she has stated that she can identify the mamoty used as it was the mamoty that had been in use for some time in the house of the deceased.

Under cross-examination, the learned Counsel for the appellant had marked five contradictions from the statement made by the witness to the police. It has been suggested to her that she was not there when the incident happened and she was lying before the Court, which she has denied.

PW-10 PS 28871 Rathnayake Bandara was the police officer who has recorded the first statement made by PW-01 on 11-03-2007 at 19.50 hours at the Gokarella police station.

The Judicial Medical Officer who conducted the postmortem has given evidence marking the postmortem report as P-01. He has observed 9 injuries in total on the body of the deceased. He has observed injury number 1, 2, and 3 on the back of the head that may have been caused using a blunt weapon which has fractured the skull into the brain. Injury number 4 and 5 had also been to the head, but those two injuries had not resulted in a fracture. Apart from the above, he has observed 2 contusions on the back shoulder, and another contusion on the left hand. He has opined that all these injuries are injuries caused using a blunt weapon.

At the conclusion of the prosecution evidence and when the appellant was called upon for his defence, he has made a statement from the dock. It has been his position that he never mistreated his wife, although she had not been faithful to him. It was his position that on the date of the incident, he went to Galewala to attend a funeral house, and on his return, he found his wife and mother-in-law fallen in the room with bleeding injuries. It was his position that he was arrested by the police later, while in a paddy field, and he was innocent of the charges.

A witness too has been called on behalf of the appellant. The witness Nayana Nandani was the younger sister of the appellant and her evidence had been that there were no issues between the appellant and the deceased and she was informed that her brother had come to know that his wife was dead when he returned after attending a funeral.

The Grounds of Appeal

At the hearing of this appeal, the following grounds of appeal were urged by the learned Counsel for the appellant for the consideration of the Court.

1. The Trial Court was in error when it has failed to consider the serious contradictions and omissions in the evidence of the sole eye witness Kaushalya Dissanayke and thereby has caused a miscarriage of justice to the accused appellant.
2. The Trial Court was in error when it has failed to consider that the evidence of the sole eye witness is negated and contradicted by medical evidence.
3. The Trial Court was in error when it has failed to consider the existence of many reasonable doubts in the case of the prosecution and thereby causing a miscarriage of justice towards the appellant.

The learned Counsel for the appellant contended that according to the evidence of the JMO, the deceased has had 9 injuries in total but it had been the evidence of PW-01 that only one blow was dealt and that was to the neck of the deceased. It was the position of the learned Counsel that the JMO has not observed any

injuries to the neck. It was also her position that witness PW-01 has failed to explain the reasons as to why she did not see the other injuries being caused to the deceased, if she really saw what happened.

In the contradiction marked V-05, the witness had stated to the police that the appellant attacked the deceased and her grandmother over her head using a mamoty, although she denied stating so in giving evidence before the High Court. It was the position of the learned Counsel for the appellant that this was a contradiction that goes onto the root of the matter.

It was the contention that when considered together, a doubt would invariably be created as to whether PW-01 who was the sole eyewitness to the incident has actually seen what happened or whether she has narrated in her evidence something she never actually witnessed. It was the view of the learned Counsel for the appellant that this doubt should have been considered in the favour of the appellant by the learned High Court Judge.

However, it needs to be said that it was admitted by the learned Counsel that the appellant failed to put forward his defence to the relevant witnesses when they were giving evidence, but only had taken up that in his dock statement. The learned Counsel also admitted that when the appellant was arrested a day after the incident in a paddy field and taken to the hospital, it has been discovered that he has consumed poison for which the appellant has failed to provide an explanation.

It was the position of the learned Additional Solicitor General (ASG) that the reason for the PW-01's failure to see all the injuries caused to the deceased was obvious as she has fled the scene of crime as soon as she saw the deceased being attacked and fell onto the bed in the room where she was attacked. The learned ASG pointed out the fact that the sole eye witness was just 11 years old when she saw her grandmother and the father's sister being attacked. It was the position of the learned ASG that given her age and the time gap before she could give evidence in Court, there can be inevitable contradictions and omissions in

such evidence. However, it was her position that the mentioned contradictions do not affect the credibility of the witness and the learned High Court Judge has correctly analyzed the evidence and had come to a correct finding in convicting the appellant for the charge of murder.

The learned ASG pointed out further that the medical evidence was very much consistent with the evidence of PW-01 since the main injuries caused to the deceased had been to the back of the head. She also brought to the attention of the Court that the position taken up by the appellant when he was called upon for a defence has not been put to any of the witnesses and the evidence given by PW-01 as to the fact that the appellant came home after attending a funeral and he was looking for something under the fireplace had not been contradicted.

Under the circumstances, the learned ASG moved for the dismissal of the appeal as it was devoid of any merit.

The Consideration of The Grounds of Appeal

All the grounds of appeal will be considered together as they are integrated. It was the contention of the learned Counsel for the appellant that the evidence of PW-01 was not reliable as it carried several contradictions and omissions.

As mentioned earlier, PW-01 was a 11-year-old child at that time. When the incident happened, she was playing in the garden and it is obvious that the event where the PW-01 has seen her grandmother being injured and her aunt being attacked by her husband has overwhelmed the witness.

The incident has happened on 11th March 2007 and PW-01 has given evidence more than 6 years after the incident. Evidence shows that the witness has made her 1st statement to the police soon after the incident happened. She has been the 1st informant of the incident. Therefore, no reasonably prudent person can expect a witness who has observed an event under such conditions to bear a photographic memory of the events unfolded before the witness. The evidence clearly shows that soon after seeing her grandmother with a head injury, and

her aunt being attacked, the witness has run away from the scene of crime, and had informed the others as to what was happening.

I find it appropriate to refer to the Indian Supreme Court Case of **Bhoginbhai Hitijibhai Vs. State of Gujarat (AIR) 1983-SC 753 at Page 756,** where it was observed;

1. By and large, a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen.
2. Ordinarily so happens that, a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
3. The powers of observation differ from person to person what one may notice and other may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

I am in no position to agree with learned Counsel's contention that, among the five contradictions marked, the contradiction marked V-05 was a contradiction that goes into the root of the matter. The said contradiction reads as follows: "අතේ තිබුණු උදැල්ලෙන් මගේ ඔලුවට උඩින් සුදු අම්මටයි කිරි අම්මටයි උදැල්ලෙන් ගැහුවා."

The only difference in the above statement to her evidence given in Court where she says when she saw the appellant attacking her aunt, she was about 8-10 feet away was that the appellant attacked her grandmother and aunt using a mamoty over her head (මගේ ඔලුවට උඩින්). Although what she meant by saying over my head was not clear, the fact remains even in V-05, she has been consistent with her evidence that the appellant attacked the deceased and the grandmother of the witness using a mamoty.

It is well settled law that contradictions that do not go into the core of the matter cannot have the effect of vitiating the evidence of a witness. Therefore, I do not

find any material discrepancies in the evidence of PW-01 who was the sole eyewitness to the incident. I do not find any basis for not to rely on the evidence of PW-01. I find that when taken as a whole, her evidence was cogent and truthful as to what she saw on that fateful day.

To prove a criminal case, it is not the number of witnesses relied on by the prosecution that matters but the quality of the witnesses.

The relevant section 134 of the Evidence Ordinance reads as follows;

> **134. No particular number of witnesses shall in any case be required for the proof of any act.**

In the case of **Mulluwa Vs. The State of Madhya Predesh 1976 AIR 989** it was stated that,

> *"Testimony must always be weighed and not counted."*

After considering the relevant principles, Jayasuriya, J. in the case of **Sumanasena Vs. Attorney General (1999), 3 SLR 137** stated thus;

> *"The Court could have acted on the evidence of 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 to his testimonial trustworthiness and credibility."*

For the reasons stated as above, I find no merit in the first ground of appeal.

I find no basis in the argument that the evidence of the sole eye witness has been negated and contradicted by the medical evidence either.

As pointed out rightly by the learned ASG, as soon as PW-01 saw her aunt being attacked by the appellant using a mamoty, she has fled from the scene of the crime. Therefore, her evidence that she saw only one blow being dealt to the appellant was truthful as to what she saw. In her evidence, PW-01 has stated that the blow was dealt to the neck of the deceased. The evidence of the JMO has

established that injury number 1, 2, and 3 had been to the lower back of the head inflicted with a blunt force which is very much consistent with the evidence of PW-01. The JMO has observed four other injuries to the back shoulders and back left hand, which are also consistent with the evidence of PW-01where she has stated that the deceased fell onto the bed when she was first attacked on the back of the neck.

As discussed earlier, I am unable to find any plausible, reasonable doubts in the case of the prosecution as contended by the learned Counsel for the appellant.

The appellant has spoken about an alibi only when he was called upon to present his defence at the conclusion of the prosecution case. He has failed to put across this when the relevant witnesses gave evidence or to cross-examine them on that line. PW-01 in her evidence clearly states that in fact the appellant came home after attending a funeral and was looking for something just before the attack on the deceased and her mother. It was also her evidence that the deceased went to the police and made a complaint with regard to the threats made by him to the deceased that he would kill her, after the appellant went to attend the funeral. None of these pieces of evidence had been confronted and challenged by the appellant when he had the chance to challenge such evidence.

It is settled law that any position taken up by an accused person in a criminal trial, must be put to the relevant witnesses when they give evidence in a trial, which the appellant has failed to avail of. I find that the position taken up by the appellant was an afterthought and nothing else.

It is trite law that any stand taken by an accused in a case must be put to the witnesses for them to respond to that position.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655, 3656** it was stated 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."*

His Lordship **Sisira de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

> *"….I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

The Indian Supreme Court observed in the case of **Motilal Vs. State of Madya Pradesh (1990) (CLJ NOC 125 MP);**

> *"Absence of cross-examination of prosecution witnesses of certain facts leads to inference of admission of that fact."*

I am of the view that this is a matter where the Ellenborough Dictum which our Courts often consider in criminal cases can be applied based on the facts and the circumstances unique to this case.

> *"No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which is attached to him; but nevertheless if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence if such exist, in explanation of such suspicious appearances which would show him to be fallacious and explicable consistently with his innocence, it is reasonable and justifiable conclusion that he refrains from doing so only from the*

conviction that the evidence so suppressed or adduced would operate adversely to his interest." – **Rex Vs. Lord Cochrane and Others (1814) Gurney's Report 479**

It was the position of the appellant that when he came home from the funeral, he found his wife and mother-in-law fallen with injuries. If that was the case, it would have the normal reaction of a reasonably prudent person to assist others or to act by himself to take the injured to the hospital for medical attention.

According to the evidence of the police officers who conducted the investigation, they have managed to arrest the appellant only a day after the incident while he was in a paddy field in a state where he could not get up, whereupon he was admitted to the hospital. According to the evidence of the police officer who arrested the appellant, he has come to know that the appellant has consumed poison after the incident. The appellant has never denied that he consumed poison and was admitted to the hospital by the police after his arrest. Under the circumstances, the reasons for the appellant to consume poison was a matter that only the appellant can explain. The appellant should have explained to Court the reasons, which has not been done.

For the reasons considered above, I find no merit in any of the grounds of appeal advanced by the learned Counsel for the appellant.

The appeal, therefore, is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal