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

In the matter of an Appeal in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1975/15 and Section 11 of the Provincial High Court(Special Provisions) Act No. 1990/19.

Court of Appeal No:

CA/HCC/0424-429/2017

High Court of Kandy

Case No: HC/202/2002

The Republic of Sri Lanka.

Complainant

Vs.

1. Idam Gedara Dharmasiri
2. Pahala Gedara Sisira Rathnayake (Now deseased)
3. Pujagoda Gedara Sarath Samaranayake
4. Edirimunne Gedara Premasiri
5. Idam Gedara Jayalath Dharmasena
6. Idam Gedara Ilankoon
7. Idam Gedara Gilisinghe

Accused

AND NOW BETWEEN

5. Idam Gedara Jayalath Dharmasena
6. Idam Gedara Ilankoon

Accused – Appellants

Vs.

Hon. Attorney General,

Attorney General Department,

Colombo 12.

Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Saliya Pieris, P.C. with Susil Wanigapura fir the 1st, 3rd and 7th Accused-Appellant.
Nalin Ladduwahetty, P.C. with Kavithri Ubeysekara for the 5th and 6th Accused-Appellant.
Sudharshana de Silva, S.D.S.G. for the State.

Argued on : 16.05.2024
Decided on : 19.06.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 13.12.2017 of the High Court of Kandy.

The accused appellants had been indicted for committing murder while being members of an unlawful assembly under the provisions of the Penal Code. The appellants had pleaded not guilty and upon the conclusion of the trial in the High Court, the trial judge had found the appellants guilty for the charges in the indictment and had sentenced them accordingly.

The instant appeal has been lodged against the said sentence and the conviction by the 1st3rd 5th6th and the 7the accused appellants because the 2nd had died during the trial and the 4th after trial and all appellants have lodged their written submissions.

The main grounds of appeal raised by the 1st 3rd and the 7th appellants were as below,

1) PW1 being the sole eye witness for the prosecution is not a credible witness and the learned trial judge had failed to consider the same,

2) The trial judge had failed to consider the defense properly,

The grounds of appeal raised by the 5th and the 6th appellants are as below,

1) PW1 being wrongly considered by the trial judge,

2) The defense being cast with an undue burden,

3) The identification of the 5th and the 6th appellants being wrongly concluded.

The prosecution had heavily relied on the evidence of PW1 according to whom the deceased had been his uncle and on the day of the incident there had been some religious activities and the witness had gone there to organize the event and a lot of the villagers had been patronizing the temple on that day.

According to the witness, during the activities in the temple the deceased has had an argument with the appellants and the witness had settled the matter and had sent the deceased out of the temple and he had continued with his work and after a lapse of about an hour he had seen the appellants breaking off branches from nearby trees and running towards the paddy field nearby.

The time had been around midnight and the witness having in mind of the previous argument had run towards the paddy field and he says that he saw the appellants assaulting the deceased with clubs and when he tried to stop he also had been assaulted with a club by the 2nd appellant.

Thereafter, the appellants had run off and the witness had taken the deceased to the hospital.

The witness had admitted that there was a break of about an hour between the 1st argument and the subsequent assaulting and he has also admitted that he does not know as to what happened during this time.

But upon cross-examination he had admitted that near the temple there is an illicit liquor place and the owner of the place had admitted to the witness that the deceased has had an argument with him. But the prosecution has failed to call the said witness during the trial and during the cross-examination of the police officers, the investigating officer had admitted that during the inquest the Magistrate had been shown the illicit liquor place and some blood stains had been observed at the place. Hence, the prosecution's failure to call the witness who owns this place of illicit liquor and failure to show how some blood stains came to the said illicit liquor place, creates a lacuna in the story of the prosecution that whether the deceased was assaulted by some others also other than the appellants.

This is further substantiated by the evidence that the deceased having several cases pending and concluded and his habit of quarrelling with the villagers.

Hence, the PW1 being the sole eye witness to the incident, if he is to be believed and acted upon has to give cogent and consistent evidence without any lapses and gaps in the story for the prosecution.

The witness had been very lengthily cross-examined and he had on many occasions had vacillated from his earlier stance, but upon being subjected to re-examination he had reverted to the position that all the appellants assaulted the deceased in the paddy-field, but this does not do away with the doubt whether it was the appellants who assaulted him or any other person for the above mentioned reasons.

This laps had been very graciously admitted by the learned Counsel for the respondents.

The medical evidence is that the deceased had suffered several contusions but the one on the head had caused his death and the doctor had said that it had been necessarily fatal and could have been caused by a club.

But as said before upon considering the evidence of the sole eye witness of the prosecution there is no evidence to say beyond a reasonable doubt that it was caused in the paddy field by the appellants, and not before.

PW 2, 4, and 6 has reiterated the position that the appellants and the deceased were at the temple for the event at the temple.

The appellants upon being called to place their defense had made dock statements and had denied the incident but had admitted that they were all at the temple and when the priest announced around midnight that there was an incident involving the deceased they had all gone home but the PW1 due to political reasons have falsely implicated the appellants.

The wife of the 7the appellant had given evidence and had reiterated the position that the 7th appellant was with the family at the time during the events in the temple.

But, I observe with dismay that the trial judge had rejected the dock statements on the basis that the appellants that it had not been corroborated by independent witnesses. The learned judge has failed to realize that an accused need not prove his case but creating a reasonable doubt on the prosecution case is sufficient. (Pages 553,554).

The trial judge also had rejected the evidence of the wife of the 7th appellant on the basis that she is an partial witness towards the defense, but he had whole heartedly admitted the evidence of the sole eye-witness overlooking the above mentioned infirmities. We also note that the trial judge had failed to consider the principle of common object which is absolutely necessary when considering charges based on unlawful evidence. The trial judge had totally overlooked as to how all the appellants were liable for the acts committee during the altercation, which amounts to an inadequate and deficient conclusion.

Hence, it is the opinion of this Court that upon evaluating the entirety of the case for the prosecution, we are unable to rule out the participation of a person other than the appellants with regard to the assault of the deceased and also we observe that the trial judge had given an undue burden to the appellants in putting forward their defense which has denied them a fair trial.

As such, this Court is of the opinion that there is much merit in the grounds of appeal raised by the learned Counsel for the appellant and we appreciate that the learned Counsel for the respondents was gracious enough to admit the lacunas in the case for the prosecution.

Hence, the appeals from 424-429 are hereby allowed, convictions and sentences are set aside and the appellants in the said appeals are hereby acquitted of the charges leveled against them.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal