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

In the matter of an Appeal made under 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.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANAT

Court of Appeal No:

CA/HCC/0030-031/2017

High Court of Puttalam

Case No: HC/53/2007

1. Wijesinghe Mudiyanselage Rohana Samansiri
2. Munasinghe Janitha Kithsiri
3. Munasinghe Appuhamilage Aruna Priyanjith

ACCUSED

AND NOW BETWEEN

1. Wijesinghe Mudiyanselage Rohana Samansiri

2. Munasinghe Appuhamilage Aruna Priyanjith

ACCUSED-APPELLANTS

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Anil Silva, P.C. with S. Wadugedera for the Appellants.** **Madawa Tennakoon, DSG for the Respondent.**
ARGUED ON	:	**06/08/2024**
DECIDED ON	:	**10/12/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) along with the 2nd Accused were indicted jointly in the High Court of Puttalam under Section 296 of the Penal Code for committing the murder of Jayasundara Mudiyanselage Nimal Dayaratna on or about 06th May 2006. As the 2nd Accused passed away during the pendency of the trial, the indictment was amended accordingly.

The trial commenced before the High Court Judge of Puttalam as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellants had given evidence from the witness box and had been subjected to lengthy cross examination by the prosecution. Additionally, the Appellants had called two witnesses on their behalf. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced them to death on 06/04/2017.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence. Also, at the time of argument the Appellants were connected via Zoom platform from prison.

Background of the Case.

The prosecution case rest mainly on the testimony of an eye witness and circumstantial evidence.

PW1 Chandrasena is the eye witness in this case. According to him on the date of the incident at about 11:00 a.m. while he was returning from Palugaswewa along with the deceased in his motor bike, he had seen a lorry following him. When he gave space to the lorry to overtake, the lorry had hit the motor bike from behind and as a result the deceased had fallen down. Immediately, the deceased had shouted for the witness to flee the scene. When he was running away, he had seen the Appellants and the 2nd Accused attacking the deceased with two swords and a knife. The witness had identified the Appellants clearly at that time. As he shouted after seeing the deceased being assaulted, people had gathered and the Appellants have fled the scene in the lorry. No animosity has been reported between the deceased and the Appellants. He had made his statement to the police on the same day at 1.30 p.m.

Dr. Saman De Silva who had conducted the postmortem examination had noted serious injuries on the neck region. According to the doctor the death had been caused due to damage caused to major blood vessels in the neck region of the deceased.

The Appellants had jointly canvassed the Appeal grounds through the learned President's Counsel.

The First Appellant had filed the following grounds of appeal.

1. Has the prosecution proved their case beyond reasonable doubt.
2. Has the learned Trial Judge misdirected himself in considering the omission referred in the trial.

3. The alibi taken by the accused have not been adequately considered by the Learned Trial Judge.

The Learned President's Counsel for the Appellants had contended under the 1st ground of appeal that the infirmities in the evidence of the main eye witness have not been given due consideration.

The Learned President's Counsel strenuously argued that the Learned Trial Judge had failed to consider all the circumstances whether PW1, Chandrasena had witnessed the incident as claimed by him in his testimony. As stated above, PW1 Chandrasena who is an eye witness had vividly explained how this gruesome incident had happened. He had clearly seen the attack on the deceased before he could call for help.

In **Wijepala v AG** [2001] 1 SLR 46 the Court held that:

> *" …Evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances with suspicion in the testimony of such witness, then corroboration may be necessary".*

The Learned High Court Judge in his judgment had considered the evidence given by PW1 extensively and properly analyzed his evidence in its correct perspective. He has reasonably considered all direct and circumstantial evidence to arrive at his decision.

Further, the eye witness PW1 had given evidence in the High Court nearly 08 years after the incident. I consider his evidence to be clear and cogent and it had not shaken his credibility or testimonial trustworthiness.

As the Learned High Court had Judge had considered all these evidences in his judgment, it is incorrect to say that the Learned High Court Judge had failed to give due consideration to the evidence of PW1 and the prosecution

had failed their duty to prove their case beyond a reasonable doubt. Hence, I conclude that this ground has no merit.

Under the 2nd ground of appeal, the Learned President's Counsel contended that the Learned High Court Judge did not give due consideration regarding the omission highlighted by the Appellant.

Owing to many different reasons, contradictions and omissions between the testimonies presented by different witnesses of the same case are more or less common in criminal trials. It is the duty of the Courts as well as the professional legal representatives to accurately distinguish between minor and major discrepancies, the latter of which would only stand to affect the case.

Further, in a criminal trial it is not always possible for a trial judge to observe all the witnesses who had testified before a court. This is due to various factors including the transfers and retirement of judicial officers.

In **State of Uttar Pradesh v. M. K. Anthony [AIR 1985 SC 48]** the court held that:

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn*

> *out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the: root of the matter would not ordinarily permit rejection of the evidence as a whole. …Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."*

In **The Attorney General v Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are true material to the facts in issue".*

In this case although the highlighted omission was not brought to the attention of the learned High Court Judge who wrote the judgment, he had given due consideration to it in his judgment and given plausible reason as to why he disregarded the same.

Considering the circumstances under which the eye witness had witnessed the incident and the time period in which he had given evidence after the incident before the High Court, I consider the omission highlighted under this ground of appeal has no significance to this case as it is not forceful enough to affect the root of the case.

In the final ground appeal put forth by the Appellants, the Learned President's Counsel contended that the *alibi* taken by the accused have not been adequately considered by the Learned Trial Judge.

It is trite law that no burden is cast upon the accused to prove his alibi, as an alibi is not a defense. It is the duty of the Learned High Court Judge to consider the *alibi* and if doubt arises in the mind of the Learned Trial Judge, the benefit of the doubt must be awarded to the accused.

The Learned High Court Judge in his judgment at pages 242 to 243 of the brief had considered the evidence given by the Appellants and given reasons as to why he rejects the defense evidence. Hence, this ground also has no merit.

In this case the Learned High Court Judge had considered and analyzed the evidence accurately even though he did not have the advantage of seeing the demeanour and deportment of the witnesses who had given evidence before his predecessor.

Further, the Appellants had given evidence under oath and had been subjected to cross-examination by the State Counsel.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of the trial.

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He has properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the learned High Court Judge in this case cannot be faulted.

As discussed under the grounds of appeal advanced by the Appellants, the prosecution had adduced strong and incriminating evidence against the Appellants. The Learned High Court Judge had very correctly analyzed all the evidence presented by all the parties and arrived at a correct finding that the Appellants were guilty of committing the murder of the deceased in this case.

Therefore, I affirm the conviction and dismiss the Appeal of the Appellants.

The Registrar of this Court is directed to send this judgement to the High Court of Puttalam along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL