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 Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

Court of Appeal No:

CA/HCC/65-67/2022

High Court of Kalutara

Case No. HC 216/2010

1. Kahawalage Ravindra
2. Kahawalage Iresh Indunil
3. Kodithuwakku Arachchige Tharanga Dilhan

ACCUSED-APPELLANTS

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL	:	**Neranjan Jayasinghe with Randunu Heelllage and Imangsi Senerath 1st and 2nd Appellants.** **Palitha Fernando, PC with Harshana Ananda for the 3rd Appellant.** **Shanil Kularatne, SDSG for the Respondent.**
ARGUED ON	:	**29/07/2024**
DECIDED ON	:	**25/11/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named 1st, 2nd, and 3rd Accused-Appellants (hereinafter referred to as the Appellants) were indicted by the Attorney General for the murder of Loku Gamage Jayantha Victor and thereby committing an offence punishable under Section 296 read with Section 32 of the Penal Code on 15.04.2007.

They were also charged with the attempted murder of one Kathriarachchilage Don Rohitha during the course of the same transaction and thereby committing an offence punishable under Section 300 read with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Kalutara as the Appellants opted for a non-jury trial. The prosecution had led 08 witnesses and marked productions P1-P3 and closed the case.

The learned High Court Judge being satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the Accused. The 1st Appellant had given evidence from the witness box and called two witnesses on his behalf and marked 1V1. The 2nd and 3rd Appellants had provided dock statements and closed their case.

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 the 1st count and had imposed a sentence of 05-years rigorous imprisonment with a fine of Rs.25000/- for the second count and a default sentence of 01-year simple imprisonment on each Appellant on 13/12/2021. Additionally, each Appellant was ordered to pay Rs.100,000/-as compensation to PW2 with a default sentence of 01-year simple imprisonment.

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

The learned Counsel for the Appellants informed this court that the Appellants had given their consent to argue this matter in their absence. At the hearing, the Appellants were connected via Zoom platform from prison.

The background of the case *albeit* briefly is as follows:

PW1, Prabath Victor, nephew of the deceased is the only eyewitness to the incident in which the deceased was allegedly attacked by the Appellants. On the day of the incident, 15.04.2007, he had attended the New Year festival which had been organised near the restaurant of the deceased in Egaluoya. After attending the festival, he had arrived at Galhena Junction and had set

off in a three-wheeler. At that time, he had seen the deceased and PW2 travelling on a motor bike in front of him. When the duo on the motor bike reached the playground, the witness had first seen the 3rd Appellant jump to the road, and stop the motorbike. When the deceased got down from the motor bike and walked away, the 3rd Appellant had dealt a blow on the deceased from behind. Thereafter the 1st Appellant had attacked the deceased on the head with a sword. According to PW1, the 2nd Appellant had only kept a sword across the chest of the deceased in a threatening manner.

PW2, Don Rohitha, who was travelling with the deceased at the time of the incident stated that the 3rd Appellant waved a club in front of the motorbike to stop it and assaulted PW2 with the club. He had further stated that he had seen the 1st and 2nd Appellants among the crowd, but had failed to mention what they had been doing at that time.

The 1st Appellant had given evidence from the witness box and called a witness on his behalf. The 2nd and the 3rd Appellants had made statements from the dock. But in the judgment the learned High Court Judge had wrongly stated that the 3rd Appellant had given evidence from the witness box and the 1st and 2nd had made dock statements.

The learned High Court Judge after evaluating the evidence of PW1, PW2 and other witnesses called by the prosecution, had come to the conclusion that the evidence presented by the prosecution is convincing and had acted upon the said evidence to convict the Appellants.

<u>The 1st and 2nd Appellants had raised the following grounds of appeal.</u>

1. The evidence of PW1 and PW2 fails the test of credibility, probability and consistency.
2. The learned High Court Judge rejected the defence on unreasonable grounds.

The 3rd Appellant had raised the following grounds of appeal.

1. There has been totally inadequate analysis of the case for the prosecution in the light of the many infirmities.
2. The learned Trial Judge has laid much emphasis on the fact that the accused had absconded after the incident in concluding on their culpability without considering the circumstances under which they had to surrender to Court.
3. The learned Trial Judge has relied upon the demeanour of the first witness for the prosecution when in fact he did not testify before the learned Judge.
4. The learned Trial Judge has imposed liability on the basis of common intention without considering the law pertaining to common intention as laid down in decided cases.
5. There has been total inadequacy in the case for the defence, thereby causing much prejudice to the Accused Appellant.
6. Due to one or more of the reasons, the Accused Appellants had had been denied a fair trial, a Fundamental Right Constitutionally guaranteed.

As the Appeal grounds raised by the Appellants are interconnected, all grounds will be considered together hereinafter.

In this case according to the prosecution, PW1 is the sole eyewitness of the murder incident. PW2 had only witnessed the 3rd Appellant blocking their way and assaulting him. PW2 had further stated that he saw the 1st and 2nd Appellants among the crowd. Therefore, the Counsels appearing for the Appellants mainly argued that the evidence of the sole eyewitness does not inspire the confidence of the Court as it fails the test of credibility and probability. Hence, it is very important to consider the evidence given by PW1 who had been the sole eyewitness in this case.

The learned High Court Judge in his judgment had come to the conclusion that the evidence of PW1 is convincing and that it proved the charge beyond reasonable doubt.

Eyewitness testimony is one of the most salient types of criminal evidence. In criminal cases, the judges regularly face the difficult but crucial task of evaluating eyewitness testimony. This sometimes means checking whether the witness's story fits with other established facts of the case. However, the veracity of such a story cannot always be verified or falsified directly. In such cases the judges have to look at whether the statement comes from a reliable source.

Further, an eyewitness's testimony is probably the most persuasive form of evidence presented in court, but in many cases, its accuracy is dubious. There is also evidence that mistaken eyewitness evidence can lead to wrongful conviction—sending people to prison for years or decades, even to death row, for crimes they did not commit.

In considering the evidence of an eye witness, the Court should look at the demeanour of the witness, the inherent probability of the account of the days events, any internal inconsistencies in the account, whether the account is consistent with previous statements by the witness, whether the witness has any bias against the accused or any family or group to which the accused belongs to, whether the evidence at the crime scene supports the account of events as narrated by the eyewitness, and whether the witness's testimony is supported by the testimony of other witnesses. These factors are very important as the burden of proof is on the prosecution in all criminal cases.

In **The Queen v. K. A. Santin Singho 65 NLR 447** the court held that:

> *"It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.*

PW1 is a close relation of the deceased. The deceased is the brother of PW1's father. There were two new year celebrations happening on that day. One was held near the deceased's restaurant. Having been informed that the deceased's house was attacked, the deceased had gone there in a motor bike with PW2. Although PW2 went with the deceased he had failed to see any of the Appellants attacking the deceased as claimed by PW1.

Although PW1 said that the 3rd Appellant blocked their way by crossing a pole, he had failed to mention the same in his statement to the police and in the NS Inquiry. Subsequently, PW1 had admitted that his statement about the 3rd Appellant was wrong. The relevant portion is re-produced below:

Page 248 of the brief.

ප්‍ර : තමන් දැන් එතකොට තරංගට පොල්ලක් දාලා පාර හරස් කළා කියන එක වැරදියි ?

උ : වැරදියි.

In the inquest PW1 had admitted that the 1st Appellant had blocked the road. When giving evidence at the High Court he admitted that the 3rd Appellant had blocked the road. When he was questioned about this discrepancy, PW1 had admitted what he said in the High Court is not true. The relevant portion is re-produced below:

Pages 261-262 of the brief.

ප්‍ර : මම අහන්නේ ඒ දවසේ තමන් ගරු මහේස්ත්‍රාත්තුමාට කියපු කාරණය මේ විදිහට සටහන් වෙලා තිබෙනවා, රවින්ද්‍ර පාරට පැන්නාට පසුව මෝටර් බයිසිකලය නතර කළා, ඒක මතකය හොඳින් තිබෙන අවස්ථාවේ තමන් කිව්වා කියලා මහේස්ත්‍රාත්තුමා සටහන් කරලා තිබෙන එක වැරදි ද ?

උ : නිවැරදියි.

ප්‍ර : ඔබම මේ අධිකරණයේ මම ගිය වතාවේ අවසානයට අහපු ප්‍රශ්නයේ දී මෙහෙම කියලා තිබෙනවා, දැන් තමා මේ විත්තිකරුවන් 03 දෙනා පාර හරස් කළ බවට කිව්වා, උත්තරය එහෙමයි කියලා තිබෙනවා. තුන්දෙනා පාර හරස් කරපු එක ද හරි, රවින්ද්‍ර පාර හරස් කරපු එක ද හරි ?

උ : තුන්දෙනා පාර හරස් කළා.

ප්‍ර : තමන් එදා ගරු මහේස්ත්‍රාත්තුමා ඉදිරියේ කිව්වේ බොරුවක් කියලා එතකොට තමන් පිළිගන්නවා ද ? දෙකම ඇත්ත වෙන්න බැහැ නේද ?

උ : ඔව්.

Although PW1 had given evidence as an eye witness, PW2 who had gone with the deceased had not seen PW1 at that time. PW2 had only said that when the motor bike was stooped, there were 10-12 people. No mention about any involvement of the Appellants. The relevant portion is re-produced below:

Page 345 of the brief.

ප්‍ර : එතකොට තමන් ඔය දවසේ සුමින් ප්‍රභාත් කියන අයව දැක්කේ නෑ ?

උ : මම දැක්කේ නෑ.

ප්‍ර : එතකොට තමන් ඔය වික්ටර් සමඟ මෝටර් සයිකලයෙන් යන කොටවත්, ඔය සිද්ධිය වෙන වෙලාවෙවත් මේ සුමිත් කියන අයව දැක්කේ නෑ ?

උ : නෑ ස්වාමීනි.

ප්‍ර : තමුන්ට හමු වුනෙත් නෑ ?

උ : මට හමු වුනේ නෑ.

Page 331 of the brief.

ප්‍ර : තරංග පොල්ලක් දාලා වට්ටලා, තරංග දෙවන වරටත් පොල්ලෙන් ගැහුවා කිව්වානේ ?

උ : එහෙමයි.

ප්‍ර : එතන තව කට්ටිය හිටියා ද ?

උ : 10ක් 12ක් හිටියා.

ප්‍ර : එතන සිටි අනෙක් අය අද අධිකරණයේ ඉන්නවා ද ?

උ : අනෙක් චූදිතයෝ දෙන්නම එතන හිටියා.

Although it was the stance of PW1 that the 1st Appellant had attacked the deceased on his head after which the deceased fell on the ground, it was revealed during cross examination that PW1 had not mentioned the same in his statement to the police, in the inquest or in the non-summary inquiry. The relevant portions are re-produced below:

Pages 282-286 of the brief.

ප්‍ර : දැන් ඔය තුවාල සිදුකිරීම යන කාරණය තමන් පිළිගත්තා මේ නඩුවේ බොහොම වැදගත් සුවිශේෂීම කාරණය කියලා ?

උ : ඔව් ස්වාමීනි.

ප්‍ර : එතකොට සාක්ෂිකරු තමන් ඔය වැදගත්ම කාරණය කකුල් දෙක දෙපැත්තට දාලා හිස මුදුනට රවීන්ද්‍ර කඩුවෙන් ගැහුවා කියන කාරණය අඩුම වශයෙන් මුල් අවස්ථාවේ දී පැමිණිල්ල කරන විට පොලිසියට කිව්ව ද අද මේ කිව්ව දේ ?

උ : මතක නෑ ස්වාමීනි.

ප්‍ර : මම සාක්ෂිකරු තමුන්ට කියනවා තමුන් එහෙම පොලිසියට කියලා නෑ කියලා. මම තමුන්ට යෝජනා කරනවා තමුන් ඒක පිළි ගන්නවාද ? එහෙම කිව්වා කියලා සටහන් වෙලා නැත්නම් කියලා නෑ කියලා ?

උ : ඔව් ස්වාමීනි.

මම එම කාරණය ගරු උතුමාණනි ඉතාමත් වැදගත් ඥාණතාවයක් හැටියට ගරු අධිකරණයේ අවධානයට යොමු කරනවා.

ප්‍ර : තමන් පොලීසියට ඒක කියලා නැහැ කියලා කටඋත්තරය අනුව පෙනී යනවා, තමන් දන්නවා එදා මරණ පරීක්ෂණයට නඩුකාරතුමා ආවා කියලා ?

උ : ඔව්.

ප්‍ර : ඒ අවස්ථාවේ දී ආවහම තමන්ගේ මහප්පාට කඩුවෙන් ගහපු විදිහ කියන්න ඕන කියලා දැනගෙන සිටියා ද ?

උ : එහෙම තේරුමක් නැහැ.

ප්‍ර : වෙච්ච සිද්ධිය කියන්න ඕන කියලා දැනගෙන සිටියා ද ?

උ : ඔව්.

ප්‍ර : දැන් එතකොට තමන් එහෙම නම් තමන්ගෙන් මම කලින් ඇහුවානේ වෙච්ච සිද්ධිය පිළිවෙලට ?

උ : ඔව්.

ප්‍ර : දැන් මහප්ප උඩුබැලි අතට පාරේ වැටුණු විට කකුල් දෙක දෙපැත්තට දාලා හිස මුදුනට කඩුවෙන් ගහපු කතාව නඩුකාරතුමාට කිව්වා ද ?

උ : මතක නැහැ.

ප්‍ර : තමන්ට වැදගත් කිසිදෙයක් මතක නැහැනේ. තුවාල වෙච්ච එක ගැන වැදගත් කාරණයක් මතක නැහැනේ ?

උ : (උත්තරයක් නැත.)

සාක්ෂිකරු එවැනි ප්‍රකාශයක් කිරීම පිළිබඳව මතක නැති බව ප්‍රකාශ කිරීම පිළිබඳව ගරු අධිකරණයේ අවධානයට යොමු කර සිටිනවා.

ප්‍ර : තමන්ට මතකද අධිකරණයේ දී පසුව නඩුවට සාක්ෂි දුන්නා කියලා ?

උ : ඔව්.

ප්‍ර : එතකොට පොලීසියට දීපු ප්‍රකාශයේ වැරදි තියෙනවා නම් නිවැරදි කරන්න සහ, එකතු කිරීමක් කරන්න තියෙනවා නම් ඒ ගැන අහපු බව මතකයි නේද ?

උ : ඔව්.

ප්‍ර : ඒ අවස්ථාවේ දී තමන්ගේ ප්‍රකාශයේ තියෙන සමහර කොටස් වැරදියි කියලා නිවැරදි කරන්න ගරු අධිකරණයෙන් ඉල්ලා සිටියා නේද ?

උ : ඔව්.

ප්‍ර : එතකොට ඒ අවස්ථාවේදීවත් තමන් ප්‍රකාශ කලේ නැහැ මෙහෙම තමන්ගේ මහප්පා වැටිලා ඉන්න කොට කකුල් දෙක දෙපැත්තට දාලා හිස මුදුනට කඩුවෙන් ගැහුවා කියන කාරණය ඇතුලත් වෙන්න ඕන කියලා උසාවියට කිව්වේ නැහැ ? එහෙම කියලා නැහැනේ ?

උ : (උත්තරයක් නැත.)

එම කාරණාවත් වැදගත් ඌනතාවයක් ලෙසට ගරු අධිකරණයේ අවධානයට යොමු කර සිටිනවා.

PW2 who had been with the deceased had not witnessed the 1st and the 2nd Appellants attacking the deceased. He had only witnessed their presence. Further he had failed to identify the 3rd Appellant properly and has identified him as the 2nd Appellant in Court. It was brought to the notice of the Court that PW2 had not mentioned the name of the 3rd Appellant in his statement to the police.

The learned President's Counsel submitted to Court that in the history to the doctor PW2 had stated that he hit his head on the road when he fell down.

The facts as set out by the prosecution may not be accurate and they can even be crooked, but in this background the tool of contradiction and omission are very effective to shake or shatter the credibility of the prosecution evidence. Proof of contradiction and omissions though quite useful in criminal trials, has to be used with circumspection and within a legal framework. The credibility of the witness does not stand impeached merely by proving contradictions on record. It is required for the defence side to show that prosecution witnesses may deliberately depose change or improve their original statement in order to cause prejudice to the accused. Similarly, minor omissions or discrepancies in evidence is not enough to hold

the accused not guilty. Thus, by striking a balance and by evaluating evidence in proper perspective justice can be delivered. The following cases are very important in this regard.

1. **State Rep. by Inspector of Police v. Saravanan** AIR 2009 SC 152
2. **Acharaparambath Pradeepan & Anr. v. State of Kerala** 2006 13 SCC 643
3. **Kehar Singh & Ors v. State (Delhi Admn.) [3]** AIR 1988 SC 1883

Although the afore-mentioned omissions and contradictions are quite important when considering the evidence given by PW1 and PW2, the learned High Court Judge had failed to take into consideration the said contradictions and omissions when he assessed the evidence of PW1 with the evidence of PW2 as it affects the root of the case.

As correctly pointed out by the learned President's Counsel who appeared for the 3rd Appellant, the learned High Court Judge had imposed common intention on the Appellants without considering the facts of the case in the light of previous judicial pronouncements. When considering whether the Appellants acted in furtherance of common intention, it is vital that the judge decides whether the Appellants entertained a common murderous intention amongst them.

It is settled law that it is incumbent upon the Trial Judge to take into consideration all matters which in favour of the Appellants before arriving at an adverse conclusion against them.

Due to afore-said reasons, I do not think that the evidence given by PW1 and PW2 could be considered as convincing, reliable, and strong to be considered under the Evidence Ordinance to convict the Appellants in this case.

As the evidence given by the prosecution witnesses contains serious doubt and ambiguity over the prosecution version, the grounds raised by the Appellants are enough to succeed the appeal in favour of the Appellants.

As the prosecution had failed in its duty to prove this case beyond a reasonable doubt, I set aside the conviction and sentence imposed by the learned High Court Judge of Kalutara dated 13/12/2021 on the Appellants. Therefore, they are acquitted from this case.

Accordingly, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL