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

Court of Appeal No:

CA/HCC/196/17

High Court of Panadura

Case No.HC 2396/2007

1. Mohamad Lebbe Mohamad Zakaria
2. Mohamad Jamaldeen Mohamad Cassim
3. Mohamad Farook Mohamad Iqbal
4. Mohamad Zakaria Mohamad Safran
5. Mohamad Rahim Mohamad Irshad
6. Mohamad Nazeer Mohamad Rizwan
7. Mohamad Rahim Mohamad Nowshad

ACCUSED

AND NOW BETWEEN

1. Mohamad Lebbe Mohamad Zakaria
2. Mohamad Jamaldeen Mohamad Cassim
3. Mohamad Farook Mohamad Iqbal

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Neranjan Jayasinghe with Harshana Ananda for the 2nd Appellant.**
Indica Mallawarachchi for the 3rd Appellant.
Dileepa Peeris, SDSG for the Respondent.

ARGUED ON : **06/10/2023**

DECIDED ON : **29/01/2024**

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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 along with 4th ,5th ,6th , and 7th Accused by the Attorney General for committing the offences as mentioned below.

1. On or about the 17th of November 2005, at Bandaragama, by being of an unlawful assembly with common object of causing injuries to Mohammed Maharoof Mohammed Izadeen the accused committed an offence punishable under Section 140 of the Penal Code.
2. In the course of the same transaction, one or several of them caused the death of said Mohammed Maharoof Mohammed Izadeeen, and said death was caused in furtherance of the said common object or knowingly that said death be caused, the Accused, by being members of the said unlawful assembly, committed an offence punishable under Section 296 read with Section 146 of the Penal Code.
3. In the course of the same transaction, by causing death of Mohammed Maharoof Mohammed Izadeen committed an offence punishable under Section 296 read with Section 32 of the Penal Code.

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

At the conclusion of the prosecution's case, an application was made under Section 200 of the Code of Criminal Procedure Act No.15 of 1979 on behalf of 4th ,5th ,6th and 7th Accused.

The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. All Accused had made dock statements and closed their case after marking 1V2-1V7 and V6-V8.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants on 3rd count only and sentenced them to death on 12/07/2017. In the meantime, the Learned High Court Judge had acquitted 4th ,5th ,6th,and 7th accused from all the charges.

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

While the Appeal was pending, the 1st Appellant who was detained at the Welikada Prison had died on 16.09.2021 at the Prison Hospital. Hence, now this appeal is only considered in respect of 2nd and 3rd Appellants.

The Learned Counsel for the Appellant informed this court that the Appellants had given their consent to argue this matter in their absence due to the Covid 19 pandemic. At the hearing, the Appellants were connected via Zoom platform from prison.

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

PW1, Mohammed Maharoof, father of the deceased is the only eye witness to the incident in which his deceased son was allegedly killed by the Appellants. On the day of the incident, 17.11.2005, the deceased had come to PW1's house in the night to enquire into an incident which had sparked off with the deceased 1st Appellant in the evening. After a discussion when the deceased had left his house at about 9.30 pm, PW1 also accompanied and they took a forested route to go to deceased's wife's house. When they were

walking, the Appellants including the 1st Appellant suddenly appeared from the forest and attacked deceased on his back and the deceased fell down as a result. About 4 minutes later, four others also appeared and he could identify them as the 4th,5th,6th, and 7th Accused by the torch light he carried and along with the moon light. As the 5th Accused shouted "hit hit " PW1 had ran from the scene shouting that his son was cut and fainted in the courtyard and slept thereafter.

PW2, Azmul Shiffa, sister of the deceased stated that her deceased brother had made a dying declaration implicating all three Appellants. The Learned High Court Judge after evaluating the evidence of PW2 and the medical evidence, excluded the evidence pertaining to the dying declaration of the deceased as accepting said evidence would have prejudicial effect on the Appellants.

Hence, the Learned High Court Judge had come to the conclusion that the evidence given by PW1 is convincing and acted upon the said evidence under Section 134 of the Evidence Ordinance to convict the Appellants.

The 2nd Appellant had raised following grounds of appeal.

1. The evidence of sole eye witness fails the test of credibility and probability.
2. The principle governing on common murderous intention is not properly applied by the Learned High Court Judge.
3. The Learned High Court Judge has failed to consider the 2nd limb of Section 293 of the Penal Code.
4. The Dock statement of the 2nd Appellant has been rejected on unreasonable grounds.

The 3rd Appellant had raised following grounds of appeal.

1. Evidence of sole eye witness does not inspire the confidence of the Court.
2. The Learned High Court Judge flawed in the evaluation of the evidence by firstly evaluating the defence and rejecting same and thereafter proceeding to evaluate the prosecution evidence.
3. The Learned High Court Judge flawed relating to the principles of burden of proof.
4. Contradictory evidence between police evidence and PW1 creates a serious doubt with regard to the veracity of the prosecution version as narrated by PW1.

The Counsels appearing for the Appellants mainly argued that the evidence of sole eye witness 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 eye witness to this case.

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

Eyewitness testimony is one of the most important kinds 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 judges will 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, 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, whether the evidence at the crime scene supports the account, 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 the father of the deceased. According to him when he was on his way to deceased's house with the deceased, 1st Appellant (dead),2nd Appellant and 3rd Appellant had come from the forest and attacked his son from behind and his son had fallen down. Further, when he was shouting and in ten minutes of the initial attack, more persons had appeared. He had come home running shouting "son was cut" and fainted in the courtyards and slept thereafter.

At his examination-in-chief, PW1 had stated that 5th Accused shouted "hit hit" but at the cross examination stated that it was 3rd Appellant who shouted "hit hit". PW1 had omitted to mention this fact either in his statement made to police or at the inquest held in the Magistrate Court of Horana four days after the incident. This omission was brought to the attention of the Court during the trial.

Although at the non-summary inquiry PW1 had said that Farook's son hit his son on his head, but he had not mentioned it in his statement to the police. This also brought to the attention as an omission.

PW1, in his statement to police had stated that his son was attacked by 1st Appellant and one Nazim with swords and the others hit him when the deceased fell down. At his cross examination PW1 had stated that he did not see whether the others hit son. This contradiction was marked as 1V2.

Further, the evidence given by PW1 contradicts with the evidence given by PW2, Shiffa, the sister of the deceased on material points. Contradictory to PW1 that he fell in the courtyard, PW2 stated that PW1 had fell inside the house. This contradiction was marked as 1V4. PW2 went on to say that she did not know that her father fainted which is also contradictory to the evidence of PW1.

PW3, Sameen, in his evidence stated that the deceased was resting on the lap of his aunt till the vehicle arrived to take him to hospital but at the cross-examination states that the deceased was resting on his sister's lap. This contradiction was marked as V6.

In the contradiction marked V7, PW3 had stated that he was the only person in the van when the deceased was taken to hospital. But his evidence he had said that several people were in the van when the deceased was taken to the Bandaragama Hospital. Further, he had contradicted his position that 4 people went in the ambulance that took the deceased to the Panadura Hospital from the Bandaragama Hospital in cross examination by saying that there were only 3 people including the driver, himself, and another person. This contradiction was marked as V8.

The facts set out by the prosecution may not be accurate or even they can be crooked, but in this background the tool of contradiction and omission are very effective to shake or shatter the credibility of prosecution evidence. Proof of contradiction and omissions though is very useful in criminal trials,

it 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 omission or discrepancy in evidence is not enough to hold the accused not guilty. Thus, by striking out balance and by evaluating evidence in proper perspective justice can be done. 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

As the afore mentioned omissions and contradictions are very important when considering the evidence given by PW1, PW2 and PW3, the Learned High Court Judge had failed to take into consideration the said contradictions and omissions when she assessed the evidence of PW1 with the evidence of PW2 and PW3 as it affect the root of the case. Further, the Learned High Court Judge erred in coming to the following conclusion.

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The Learned Senior Deputy Solicitor General who represented the Honourable Attorney General conceded that fault in the judgment.

Due to afore said reasons, I do not think the evidence given by the PW1 could be considered as convincing, reliable, and strong to act under Section 134 of the Evidence Ordinance to convict the Appellants in this case.

As the evidence given by the sole eye witness contains serious doubt and ambiguity over the prosecution version, this ground itself enough to succeed the appeal in favour of the Appellants. As such, consideration of other grounds raised by the Counsels are not necessary.

As the prosecution had failed on its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Panadura dated 12/07/2017 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 Panadura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL