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

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant

V.

Court of Appeal Case No. HCC 228/2012

High Court of Badulla Case No. HC 150/2004

Magistrate Court of Mahiyanganaya No. NS 39222

1. Dissanayake Mudiyanselage Nimal Dissanayake
2. Weerasinghe Acharige Weeraratne alias Chaminda
3. Senanayake Mudiyanselage Ariyaratne alias Chuti
4. Bopage Karunadasa alias Kolaba Karune
5. Senanayake Mudiyanselage Ananda Premasiri
6. Rathnayake Mudiyanselage Piyadasa
7. Rathnayake Mudiyanselage Udaya Kumara
8. Rathnayake Mudiyanselage Ranjith Sumana Kumara

Accused

AND BETWEEN

Dissanayake Mudiyanselage Nimal Dissanayake
No.7, Ulpathwewa,
Ruhunugama,
Weheragala.

1st Accused Appellant

V.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Neranjan Jayasinghe for the 1st Accused Appellant.

Thusith Mudalige DSG for the Respondent.

ARGUED ON : 12.12.2019

WRITTEN SUBMISSIONS

FILED ON : 14.08.2015 & 12.12.2019 by the 1st Accused Appellant.

20.01.2017 by the Respondent.

JUDGMENT ON : 25.02.2020

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted with another 7 Accused persons in the High Court of Badulla on the following counts.

    1. Being members of an unlawful assembly, punishable in terms of section 140 of the Penal Code.

2. Committed the offence of murder of G. Vijitha Kumara, punishable in terms of section 296 to be read with section 146 of the Penal Code.

3. Committed the offence of attempted murder of K.G. Thilakaratne, punishable in terms of section 300 to be read with section 146 of the Penal Code.

4. Caused injury to one W.M. Abeyratane, punishable in terms of section 315 to be read with section 146 of the Penal Code.

5. Committed murder of G. Vijitha Kumara, punishable in terms of section 296 of the Penal Code.

6. Committed attempted murder of K.G. Thilakaratne, punishable in terms of section 300 of the Penal Code.

7. Caused injury to W.M. Abeyratne, punishable under section 315 of the Penal Code.

02. After trial the learned High Court Judge convicted the Appellant (1st Accused) for 5th and 7th counts and sentenced accordingly. Being aggrieved by the said conviction and sentence the Appellant preferred the instant appeal. The grounds of appeal urged by the learned counsel for the Appellant are;

1. The learned High Court Judge had believed the evidence of the prosecution without a proper evaluation of the evidence.

2. The learned High Court Judge had failed to take into consideration the contradictory evidence of the prosecution witnesses.

3. The learned High Court Judge had failed to evaluate the evidence of the defence.

4. The learned High Court Judge had failed to give reasons to reject the defence evidence.

5. The learned High Court Judge had failed to take into consideration the evidence of the defence regarding grave and sudden provocation and sudden fight.

03. I carefully considered the evidence adduced at the trial, judgment of the learned High Court Judge, written submissions of counsel for the Appellant and the Respondent and the submissions made by counsel for both parties at the argument.

Facts in brief

04. Prosecution called three eye witnesses to give evidence. They are W.M. Gunasekera (PW1), W.M. Abeyratne (PW3) and G.K.G. Thilakaratne (PW6). PW3 is the injured in counts No. 4 and 7 and PW6 is the injured in counts No. 3 and 6.

05. According to the evidence of PW1, six of them including the deceased had come to the bus halt for 3 of them to get a bus. Then the Appellant and other Accused persons had come and assaulted them. In that the Appellant had stabbed the deceased. PW3 in his evidence testified that the Appellant after stabbing the deceased also stabbed him twice. Although the deceased was taken to the hospital in a bus he had succumbed to his injuries.

Grounds of Appeal No. 1 and 2

06. It is the contention of the learned counsel for the Appellant that the learned Trial Judge has not evaluated the evidence adequately in believing the version of the prosecution witnesses. Further, it is submitted that the contradictions in the evidence of the prosecution witnesses were not considered by the learned Trial Judge.

07. On perusing the judgment, it is clear that the learned Trial Judge has sufficiently analyzed the evidence of the prosecution as well as the defence in arriving at his conclusion. He has considered all aspects including the possible defences available to the defence to consider

lesser culpability on the evidence adduced at the trial. There was only one contradiction marked as V1 in the evidence of PW1. That was on the person who lit the cigarette. The evidence was that one of them went to the boutique and bought the cigarettes. The discrepancy on the evidence as to who lit the cigarette first will not affect the credibility of the witness.

08. Miner contradictions *per se* or *inter se*, those do not go to the root of the issue would not affect the credibility of a witness or the case for the prosecution as a whole. A witness cannot be expected to remember every minute detail of what happened. Further, it is not possible for a witness to give evidence on all minor details of an incident at the trial that is conducted after a lapse of many years as if replaying a recorded video. Evidence of witnesses has to be considered as a whole when deciding on the credibility of a witness.

09. In case of ***State of Uttar Pradesh V. M. K. Anthony [1984] SCJ 236/ [1985] CRI. LJ. 493 at 498/499*** it was held;

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks 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 and there from 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. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the*

evidence on the ground of minor variations or infirmities in the matter of trivial details."

10. As I stated before, the inconsistencies found in the evidence of the witnesses for the prosecution are of trivial in nature and would not go into the root of the issue.

11. The learned High Court Judge has sufficiently analyzed the evidence of all witnesses and carefully considered the same. Hence, grounds of appeal No. 1 and 2 should necessarily fail.

Grounds of Appeal No. 3 and 4

12. Counsel for the Appellant contended that the learned Trial Judge has not considered the evidence of the defence. Upon the conclusion of the case for the prosecution, the Appellant has made a statement from the dock. No other witnesses were called to testify on his behalf. All other Accused persons made statements from the dock.

13. The position taken up by the Appellant was that when he was on the way to the police station, he was assaulted by the other party (prosecution witnesses) and he complained to the police. The deceased and two other witnesses for the prosecution have received stab injuries, and the prosecution witnesses have given clear evidence as to how they got injured. The evidence makes it clear that it was the Appellant who stabbed the deceased and that the dock statement denying the same cannot be accepted. The learned Trial Judge was right in accepting the evidence of the prosecution against the Appellant and rejecting the version of the defence.

14. In case of ***Don Shamantha Jude Anthony Jayamaha V. The Attorney General C.A. 303/2006*** *and* ***C.A.L.A. 321/06***, it was held;

"...Finally having considered the case for the prosecution as well as the dock statement it is only then the learned Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the

prosecution. One cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether the dock statement is sufficient to create a doubt provided it is so obvious, that the dock statement is only a bear denial or is irrational or palpably false, in which case it could be rejected without even considering the evidence for the prosecution."

Further, the court held;

"Failure to evaluate a dock statement in the proper perspective shall not ipso facto vitiate a conviction if the dock statement is

a) A bare denial

b) Palpably false and unbelievable."

15. On the evidence placed before the learned Trial Judge, there is no other conclusion that the Trial Judge could have come to other than that the Appellant inflicted the injuries to the deceased causing his death.

Hence the grounds of appeal No. 3 and 4 are without merit.

Ground of Appeal No.5

16. Learned counsel for the Appellant submitted that if the learned Trial Judge considered the defence (dock statement of the 5th Accused) version, he could have convicted the Appellant for a lesser offence of culpable homicide not amounting to murder, on the basis of a sudden fight. The learned Trial Judge has sufficiently discussed and considered this aspect in his judgment. In pages 19 to 24 (pages 304 to 319 of the brief) of the judgment, the learned Trial Judge has extensively considered this aspect, and rightly concluded that the culpability cannot be brought down to an offence under section 297 of the Penal Code. Therefore, this ground of appeal also should fail.

17. In the above premise, this court has no reason to interfere with the judgment of the learned High Court Judge and I affirm the conviction and the sentences imposed on the Appellant by the learned High Court Judge.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL