IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

1. Bilingahawatte Gedara Karunaratne
   Alias Raja,
2. Bilingahawatte Gedara Ariyaratne

Accused - Appellants

V.

Court of Appeal Case No.
CA HCC 104-2012

High Court of Kandy Case
No. 248-2004

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

Complainant- Respondent

BEFORE : **ACHALA WENGAPPULI, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Gayan Perera with Panchali Ekanayake for the 1st Accused-Appellant.

Dharshana Kuruppu with Thanuja Dissanayake and B. Thilakarathna for the 2nd Accused-Appellant.

Haripriya Jayasundara SDSG for the Complainant - Respondent.

ARGUED ON : 20.10.2020

WRITTEN SUBMISSIONS

FILED ON : 24. 05. 2018 by the 1st Accused-Appellant.
03. 05. 2018 by the 2nd Accused-Appellant.
09. 09. 2016 by the Complainant-Respondent.

JUDGMENT ON : 16.11.2020

K. PRIYANTHA FERNANDO, J.

01. The 1st and the 2nd appellants were indicted in the High Court of Kandy on one count of murder punishable in terms of section 296 of the Penal Code. Both appellants were sentenced to death having been convicted after trial. The instant appeal was preferred by the appellants against the said conviction.

02. As the 1st appellant passed away pending appeal, the appeal preferred by the 2nd appellant was taken up for hearing.

Facts in brief

03. The prosecution had called two eye witnesses to the incident. They were, *Bilingedara Soma* who is the mother of the deceased (PW1) and *Dewategedara Premadasa* who is the father of the deceased (PW2). According to PW1, at about 7.45 pm upon hearing someone calling her, she had gone to the front to see who it was, with a torch. Her son, the deceased had followed her. The 1st and the 2nd appellants who are brothers had been there near the gate (*kadulla*). The 1st appellant had assaulted the deceased with a pole similar to an iron rod and the 2nd appellant had done so with a pestle. Deceased had fallen on the ground and with the help of the neighbors, deceased was taken to hospital.

04. The following grounds of appeal were urged by the learned Counsel for the 2nd appellant (hereinafter referred to as the appellant) at the hearing;
    i. The learned High Court Judge has failed to consider that the identification of the appellant is wholly unsatisfactory and unreliable.
    ii. The learned High Court Judge has failed to consider the inter-say and per-se contradictions of the prosecution witnesses.

iii. The learned Trial Judge erred when he shifted the burden on the appellant to prove his innocence.

iv. Learned Trial Judge made a serious misdirection on section 27 regarding recovery evidence.

v. The learned High Court Judge has failed to consider that the failure of the prosecution to produce evidence favorable to the defence casts a serious doubt on prosecution's case.

05. The learned Counsel for the appellant argued that there was no sufficient light for the witnesses to identify the appellant, as it was dark and there was a power cut at that time. The learned Senior Deputy Solicitor General appearing for the respondent submitted that as villagers their eyes are accustomed to the darkness outside and that the appellant is a villager well known to the witnesses.

06. It was evident that there was an electricity power cut at the time of the incident. Court has to be mindful of the *Turnbull* guidelines laid down in ***Turnbull* [1977] QB 224**, on identification where it is disputed. It is evident that PW1 and the deceased carried a torch when they went near the gate (*kadulla*) where the appellants were calling from. Appellant was well known to the PW1 and PW2 as they are all from the same village. PW1 and PW2 had the opportunity to see the appellants from the torch light. Further, PW2 had said in evidence that the two appellants came near the kadulla and called them. PW1 had said that the deceased after going to the kadulla asked the appellants "**ai aiya**" ("why brother") from the appellants before they assaulted him. Hence, there cannot be of any mistaken identity of the appellant by the PW1 and PW2 as a person who assaulted the deceased.

07. However, at the trial, appellants have taken up the position that they were present at the crime scene where the deceased was assaulted and that the 1st appellant also received injuries at that time. It was clearly suggested to PW1 by the counsel who appeared for both the accused at the trial, that the 1st appellant also got injured at the same time when the deceased was attacked. Hence, there was sufficient evidence to prove beyond reasonable doubt that it was the 1st and the 2nd appellants who assaulted the deceased inflicting fatal injuries on him and the learned High Court Judge was entitled to conclude that the appellants assaulted the deceased. Therefore, the 1st ground of appeal has no merit.

08. The learned Counsel for the appellant submitted that the learned Trial Judge had failed to give due consideration to the contradictions in the evidence of witnesses, especially the contradiction marked as V2. The learned High Court judge concluded that the contradictions marked do not go to the root of the case. At the trial PW1 has said that there were some other people including children at the crime scene when the appellants assaulted the deceased. However, in her evidence at the non-summary inquiry in the Magistrate's Court she said that she did not see any one other than the two appellants. This contradiction had been marked as V2.

09. PW1 and PW2 had given clear evidence as to how the appellants assaulted the deceased. They had recognized the appellants with the aid of the torch light and also the voices. It was natural for both witnesses to pay attention to the appellants who assaulted the deceased. PW2 said in evidence at the trial that the place got crowded after the assault but she could not remember or identify. It is quite natural in a village setup for people to gather when this kind of an incident occurs, and also for the witnesses to not to identify each one of them as their attention would be on the assailants. Hence, as rightly concluded by the learned High Court Judge the contradictions marked V2 would not create any doubt in the testimony of PW1 and thus, ground of appeal No. 2 should fail.

10. The learned Counsel for the appellant submitted that the learned High Court Judge had shifted the burden on to the accused appellant to prove his innocence. It is the submission of the learned Senior Deputy Solicitor General that the learned Trial Judge had not shifted the burden to the appellant, but had considered the general exceptions suggested by the appellant.

11. The appellants in their statements from the dock had taken up the position that the 1st appellant was assaulted and as a result of that assault his tooth was broken in a separate incident, Counsel for the appellants made a different suggestion to the PW1 in cross examination. The position taken up by the defence when cross examining the PW1 was that the 1st appellant was assaulted during the incident that the deceased was assaulted. However, there was no suggestion made or statement made by the appellants in their statements from the dock that the deceased was involved in such assault. Therefore, the learned Trial Judge rightly found that the appellants could not rely on the exception of grave and sudden provocation.

12. Evidence taken holistically; prosecution has proved beyond reasonable doubt that the appellants assaulted the deceased causing the death of the deceased. Hence, a minor misdirection if any by the learned High Court Judge would not support to vitiate the conviction of the appellants.

13. The learned Counsel for the appellant submitted that the learned High Court Judge had misdirected himself on the section 27 recovery of the club. The learned High Court Judge in her judgment has once mentioned the club as the club that was used to assault the deceased. That was a mere narration of the police witnesses' evidence. However, as submitted by the learned SDSG, the appellant never denied the recovery of the club in terms of section 27 of the Evidence Ordinance, even in their unsworn statements from the dock. Even without taking into consideration the section 27 recovery of the club, there is sufficient direct evidence of eye witnesses that it was the appellants who assaulted the deceased causing his death.

14. Learned Counsel for the appellant argued that the learned Trial Judge failed to consider that the prosecution had failed to produce evidence favorable to the defence. In that, Counsel submitted that the prosecution has failed to produce evidence as to when or how the 1st appellant got injured. Learned Counsel relied upon the judgment in case of ***Anil Jayantha V. The Attorney General [2002] 3 Sri L.R. 375.***

15. In case of ***Anil Jayantha (supra),*** referring to what was said by Sirimanna J. in ***Fernando V. The Queen 76 NLR 265*** that;

> *"Though the prosecutor is not bound to expose every infirmity and weakness in his case yet when a person is brought up on a capital charge and there is some item of evidence which casts serious doubts on his guilt, it is the duty of the prosecutor to draw the attention of the trial Judge to such evidence"*

16. It was clearly suggested to PW1 in cross examination by the defence counsel that the 1st appellant got injured during the same incident that the deceased was assaulted. However, in their statements from the dock, appellants have taken up a different position as to how the 1st appellant got injured. PW1 and PW2 were unaware as to how the 1st appellant got injured. This would not create any doubt on the evidence of PW1 and PW2 on the assault by the appellants on the deceased. This would not cast any serious doubt on the appellants guilt as stated in '***Anil Jayantha***'.

17. In the above premise, I find that the grounds of appeal urged by the appellant are devoid of merit and learned High Court Judge has rightly concluded that the appellant is guilty as charged.

Conviction and sentence affirmed; Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL