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

The Democratic Socialist Republic of Sri Lanka
Complainant

CA 180-182/2006
HC Galle 1875

Vs

1. Luwis Hemnatha alias Mangala
2. Agampodi Jayalias alias Jayalie
3. Arumadura Sunil alias Malu Sunil
4. Wellage Nandasena alias Adul
5. Kukundura Ranjith
6. Wellage Nandasiri
7. Wellage Wipulasena
8. Wellage Padmasiri
9. Themmadura Prabath Kumara
10. Agampodi Kapila Kumara alias Ajith
11. Themmadura Ranil Krishantha
12. Agampodi Somawathi
13. Agampodi Nalani alias Navaliashamy

Accused

And now between

1. Arumadura Sunil alias Malu Sunil (3rd accused)
2. Kukundura Ranjith (5th accused)
3. Wellage Nandasiri (6th accused)
4. Wellage Wipulasena (7th accused)
5. Wellage Padmasiri (8th accused)

Accused-Appellants

Vs

The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

Before : Sisira J de Abrew J &
Sunil Rajapakshe J

Counsel : DP Kumarasinghe President's Counsel with Neville Abeyrathne and Mahendra Kumarasinghe for the 1st appellant (3rd accused)
G Wijemanne for the 2nd appellant (5th accused)
Indika Mallawaarchchi for the 3rd and 5th appellant (6th and 8th accused)
Neville Abeyrathne with S Gamage for the 4th appellant (7th accused)
Roshantha Abeysuriya DSG for the Respondent.

Argued on : 17th, 18th, 19th, 22nd and 23rd of January 2013
Decided on : 3.4.2013

Sisira J de Abrew J.

The above named thirteen accused were indicted on nine counts. The 1st count was that they were members of an unlawful assembly common object of which was to cause injuries to Uragaha Siripala who is one of the deceased persons in this case. The 2nd count was causing the death of said Siripala whilst being members of the said unlawful assembly which is an offence punishable under section 296/146 of the Penal Code. The 3rd count was causing the death of Uragaha Nandika Thushara whilst being members of the said unlawful assembly which is an offence punishable under section 296/146 of the Penal Code. The 4th count was causing mischief to one Chnadrawathi's house whilst being members of the said unlawful assembly which is an offence punishable under section 410/146 of the Penal Code. The 5th count was robbery of Rs.75,400/- from the possession of Chandrawathi whilst being members of the said unlawful assembly which is an offence under section 380/146 of the Penal Code. The 6th,7th,8th and 9th counts were respectively for causing the death of Uragaha Nandika Thushara, Uragaha Siripala, causing mischief to Chandrawathi's house and robbery of Rs.75,400/- from the

possession Chandrawathi on the basis of common intention. The charges had indicated that the accused persons have committed the above offences with those who are unknown to the prosecution and with Wellage Sirisena and Prabath Kumara who are dead.

After trial, the learned trial judge, by his judgment dated 13.10.2006, convicted 3rd, 5th,6th, 7th and 8th accused of the 1st and the 2nd counts. He also convicted 3rd and 5th accused of the 6th count. The convictions were only on 1st,2nd and 6th counts. No conviction on the other counts. On the 1st count 3rd, 5th, 6th, 7th and 8th accused were sentenced to a term of six months rigorous imprisonment and to pay a fine of Rs.1500/- carrying a default sentence of six months simple imprisonment. On the 2nd count they were sentenced to death. On the 6th count the 3rd and the 5th accused were sentenced to death. Being aggrieved by the said convictions and the sentences the accused appellants have appealed to this court. The 5th accused was tried in absentia. After the learned trial judge made an order to try the 5th accused in absentia. Mr. B. Mendis Attorney-at-Law appeared for him. This was on 30.1.2001. When the case commenced on 8.7.2003, the learned trial judge noted that the 5th accused had legal assistance and further observed that court had not permitted the Attorney-at-law to appear for the 5th accused. This appears to be a mistake since the court had, on an earlier occasion, permitted Mr. Mendis to appear for the 5th accused.

The Superintendant of Prisons by his letter dated 15.6.2010 informed this court that the 8th accused had died on 10.1.2010 (pending the appeal).

Facts of this case may be briefly summarized as follows:

Urgaha Siripala who was one of the deceased persons in this case was the father of the 2nd deceased person Thushara. Chandrawathi is the wife of Siripala. They were living in their house which was in a coconut estate which was adjoining to IDH estate in which the accused persons' houses were located. Chandrawathi's mother

Roslyn, brother Nanadasiri and sister were living in a house in the same coconut estate where Chandraathi's house was located. The distance between the two houses, according to IP Sumanasiri, was about 150 to 200 meters. According to Nanadasiri this distance is about 100 meters. In the morning of the unfortunate day (16.8.93) the 2nd deceased person Thushara was alleged to have shot a person living in IDH estate and the people living in this estate were angry over the shooting incident. Around 1.00 p.m. on 16.8.93, about 14-15 people including 3rd, 5th, 6th, 7th and 8th accused from IDH estate came to the house of Siripala. They were armed with various weapons such as knives, swords and clubs. On seeing the crowd Siripala with two daughters, son Thushara and wife Chandrawathi came to Nandasiri's house and Chandrawathi went to the road and boarded a Matara bound bus. On the request of Siripala, Nandasiri put two daughters into a bus and within a minute he came back to his house. Thereafter the said group came towards Nandasiri's house. Roslyn the mother of Nandasiri too was at home. When the said group came to Nandasiri's house, Nandasiri and Roslyn were in the compound of this house. The group started pelting stones at Siripala. He, at this stage, started grappling with the 2nd accused. This happened in the compound of Nandasiri's house. At this stage the members of the said group started attacking Siripala with their weapons. Nandasiri identified 3rd, 5th, 6th, 7th and 8th accused. When members of the group started attacking Siripala, Nandasiri ran away from the scene and stopped at a place where village fish stall was located. He came back to the scene only after 1 ½ hours later with the arrival of the police.

Roslyn also identified the 3rd, 5th, 6th. 7th and 8th accused persons. She says that the members of the group including the above named accused persons attacked Siripala with their weapons and thereafter the 3rd and 5th accused went inside the house carrying knives and attacked Thushara who was under the bed. She claims that it was she who put Thushara under the bed when the group was

coming to her compound. Thereafter she went to the police station. Chandrawathi says when she was at the police station her mother came to the police station.

Chandrawathi whilst travelling in the bus saw her house being surrounded by several people including 3rd, 5th, 6th, 7th and 8th accused.

The 3rd accused in his evidence stated that in the morning of 16.8.93 he left his house to engage in his business (selling fish) and returned home only around 4.30 p.m. When he came home, he came to know that Siripala and his son had been killed. In fear of being attacked by Siripala's people he went to his ancestral house and stayed there. He says that there were 51 houses in the IDH estate and all inmates of these houses had left the area. However he admits that he was on friendly terms with Siripala and that he did not have any animosity with Siripala. If this was his association with Siripala why did he entertain fear and stayed in his ancestral house? When I consider these facts, I am unable to accept the evidence of the 3rd accused. In my view his evidence does not even create a reasonable doubt in the prosecution case.

Although Chadrawathi says in her evidence that she identified 3rd,5th,6th,7th and 8th accused and others who were surrounding her house she failed to mention names of 3rd and 7th accused in her statement made to the police. This was brought to the notice of trial court by way of omission. When I consider this omission, I feel that she had not identified 3rd and the 7th accused as those who surrounded her house. The learned trial judge failed to give adequate consideration to this aspect. But there is no reason to disbelieve her claim that she saw her house being surrounded by a group of people.

Learned counsel for all the accused appellants submitted that Nandasiri and Roslyn did not see the deceased persons being attacked as they ran away from their house when the gang came to their compound. Although Nandasiri claims that he saw Siripala being attacked, in his statement made to the police he had

stated that he did not see Siripala being attacked. This omission was marked as 3V1. Further in his statement made to the police he failed to state that he saw anybody attacking Siripala. This omission was marked as 10V3. These omissions are, in my view, vital omissions although the learned trial judge, in his judgment, had concluded that they were not vital. When I consider the said omission I feel that Nandasiri had not seen Siripala being attacked. Thus his evidence with regard to the attack on Siripala cannot be accepted as true. Does this mean his entire evidence is untrue? Can't the court accept his evidence up to the point where Siripala grappled with the 2nd accused. If his evidence up to the point of grappling is accepted then 3rd,5th,6th,7th and 8th accused and other members of the group armed with weapons came to his compound pelting stones can be accepted. Then the question is whether part of his evidence could be accepted as true when part of his evidence is rejected as untrue. There is no omission to the effect that Nandasiri failed to mention the names of 3rd,5th,6th,7th and 8th accused as those who came to his compound pelting stones at Siripala. In deciding whether part of his evidence could be accepted as true when part of his evidence is rejected as untrue, I would like to consider certain judicial decisions. In Queen Vs VP Julis 65 NLR 505 Court of Criminal Appeal observed thus: "In a prosecution for robbery and certain other offences, the only evidence against the 1st,4th and 5th accused was that of two alleged eye witnesses who stated that the three accused took part in the robbery. At the conclusion of the evidence of the first eye witness, and before the second eye witness was called, Crown Counsel applied under section 217(3) of the Criminal Procedure code to withdraw the indictment against the 1st accused on the ground that the evidence of these two witnesses (father and son) as to what the 1st accused did could not be accepted as true because they failed to mention his name to any of the neighbours who turned up after the robbery as one of those who took part in the robbery, and also because the first witness had a motive for falsely implicating the

1st accused. The application of Crown Counsel was allowed by the trial judge and the 1st accused was discharged.

Held, that, by falsely implicating the 1st accused, the two witnesses gave false evidence on a material point. Applying the maxim *falsus in uno, falsus in omnibus* (He who speaks falsely on one point will speak falsely upon all), their evidence implicating 4th and the 5th accused should also be rejected. When such evidence given by witnesses, the question whether other portions of their evidence can be accepted as true should not be resolved in their favour unless there is some compelling reason for doing so."

In Siriwardene and another Vs The Attorney General [1998] 2 SLR 222 GPS de Silva J (as he then was) held: "The principle is that the testimony of a witness which is identical and which is exactly of the same weight as against two or more accused persons, cannot be found to be unacceptable against one accused and acceptable against others."

In Francis Appuhamy Vs The Queen 68 NLR 437 Court of Criminal Appeal held thus: "The remarks contained in the judgment of the Privy Council in *Mohamad Fiaz Baksh Vs The Queen* (1958) AC 167 that the credibility of witnesses cannot be treated as divisible and accepted against one accused and rejected against another (a) was inapplicable in the circumstances of the present case (b) cannot be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. His Lordship Justice TS Fernando in the above judgment at page 443 remarked thus: "We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the

judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

Justice PRP Perera in Samaraweera Vs The Attorney General [1990] 1 SLR 256 observed thus: "Four accused were indicted for murder on charges under sections 296, 315, 314 of the Penal Code. At the end of the prosecution case the 1st and 4th accused were acquitted on the directions of the judge to the jury. At the conclusion of the trial the 2nd accused was acquitted by the unanimous verdict of the jury while the 3rd accused appellant was found guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation on the count of murder and acquitted on the other counts. The main challenge to the verdict was on the ground that it was unreasonable having regard to the fact that same two witnesses who testified against the 3rd accused had testified against the 2nd accused who was acquitted. Having disbelieved the two witnesses as against the second accused, the jury should not have accepted their evidence against the 3rd accused appellant. The maxim *falsus in uno falsus in omnibus* should have been applied.
Held: The verdict was supportable in that the acquittal of the 2nd accused could be attributable to the fact that vicarious liability on the basis of common intention could not be imputed to him on the evidence even if the two witnesses were believed. The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When

such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or the judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely separated from the true".

After considering the above legal literature I would like to express the following view. When court is invited to decide whether a portion of evidence of a witness can be accepted as true when the other portion has been rejected as untrue, court can do so when there are some compelling reasons. In the present case are there compelling reasons to accept Nandasiri's evidence up to the point of Siripala grappling with the 2nd accused? I now advert to this question. Nandasiri says that he saw 3rd, 5th, 6th, 7th and 8th accused and others going towards Siripala's house. The investigating officer says in his evidence that Siripala's house had been damaged. Then Nandasiri's evidence on this point has been corroborated by police evidence. Did Nandasiri have any reason to be at the place where Siripala was killed? This was Nandasiri's house. Thus he had reasons to be at this place. Nandasiri says that the above named accused with others came to his house pelting stones at Siripala and in the compound, Siripala had a grapple with the 2nd accused. According to police officer Nandasiri's house was damaged and the body of Siripala was found in the compound of Nandasiri's house. Here too Nandasiri's evidence has been corroborated by police evidence. For the above reasons, I hold that there are compelling reasons to accept portion of Nandasiri's evidence as true when the other portion of his evidence is rejected as untrue. In my view Nandasiri's evidence that 3rd, 5th, 6th, 7th and 8th accused and others came to Siripala's house and subsequent events up to the point where they came to Nandasiri's compound and Siripala grappled with the 2nd accused could be

accepted as true although his evidence regarding the attack on Siripala could not be accepted as true. When the above portion of Nandasiri's evidence is accepted as true, it can be concluded that the following matters are established beyond reasonable doubt.

1. The 3rd, 5th, 6th, 7th and 8th accused and others armed with weapons pelted stones at Siripala and they came to the compound of Nnadasiri.
2. Siripala had a grapple with the 2nd accused when the others stated above were present in the compound of Nandasiri.
3. When they, carrying weapons, went to Siripal's house, they formed an unlawful assembly common object of which was to cause injuries to Siripala. This contention is further strengthened by the fact that they, carrying weapons, came to Nandasiri's compound pelting stones at Siripala.

When IP Sumanasiri came to the compound of Nandasiri in the same evening, he found the dead body of Siripala with bleeding injuries in this compound. According to medical evidence there were several cut injuries, contusions and abrasions in the body of the deceased. Some ribs were also broken. The death of Siripala was due to shock and hemorrhage following multiple cut injuries. What is the inference that could be drawn from the above circumstances? The one and only irresistible and inescapable inference is that 3rd,5th,6th,7th, 8th accused and others formed unlawful assembly common object of which was to cause injuries to Siripala and that they whilst being members of the said unlawful assembly killed Siripala in the compound of Nandasiri. When I consider all these matters I hold the view that convictions of 3rd,5th,6th,7th and 8th accused on the first count and the 2nd count can be affirmed.

Learned trial judge convicted 3rd and 5th accused for the murder of Thushara. He has come to this conclusion on the basis that 3rd and 5th accused went inside the house of Roslyn and attacked Thushara. Roslyn gave evidence about the

above attack. But it is difficult to think that Roslyn continued to wait at this place after the said group came to her compound. She may have seen the above group coming to the compound but not the attack on Tushara. In my view there is no basis only to convict 3rd and 5th accused for the murder of Thushara. When I consider all these matters I am unable to permit the conviction of 3rd and 5th accused on the count of murder on Thushara (6th count). I therefore set aside the conviction and death sentence of 3rd and 5th accused on count No.6

For the above reasons, I affirm the conviction and the sentence of six months RI and the fine of Rs.1500/- of 3rd, 5th, 6th and 7th accused on count No.1 and their conviction and the death sentence on the 2nd count (count of murder of Siripala). The default sentence of six months simple imprisonment on count No.1 for non payment of the fine of Rs.1500/- is illegal as it offends Section 291 of the Criminal Procedure Code. I therefore set aside the default sentence of six months simple imprisonment and impose a one month simple imprisonment in default of the fine of Rs.1500/-. I make order abetting the appeal of the 8th accused who is dead. Subject to the above variation, the appeals of the appellants are dismissed.

Appeal dismissed.

Judge of the Court of Appeal.

Sunil Rajapakshe J

I agree.

Judge of the Court of Appeal.